

SUPPLEMENT

TO

McCLAIN'S ANNOTATED STATUTES

OF THE

STATE OF IOWA.

CONTAINING ALL AMENDMENTS TO THE CODE, AND OTHER PUBLIC,
GENERAL, AND PERMANENT ACTS PASSED BY THE NINE-
TEENTH AND TWENTIETH GENERAL ASSEMBLIES OF
SAID STATE, AND NOTES OF DECISIONS UPON
STATUTORY LAW, MADE BY THE SUPREME
COURT OF SAID STATE FROM JUNE,
1880, TO JUNE, 1884,
INCLUSIVE.

BY

EMLIN McCLAIN.

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SUPPLEMENT.

TO VOL. 1.

[The numbers down the middle of the page show the pages to which the matter thereunder pertains. An index will be found at the end of the supplement to Vol. II.]

2.

SEC. 12.

[19 G. A., ch. 52, repeals so much of the substitute (18 G. A., ch. 38) as relates to compensation of officers and employes, and enacts in lieu thereof the following:]

SEC. 2. The compensation of the officers and employes of the general assembly shall be: To the secretary of the senate and chief clerk of the house, seven dollars per day each; to the assistant secretaries of the senate and clerks of the house, six dollars per day each; to the enrolling and engrossing clerks, five dollars per day each; to the sergeant-at-arms, door-keepers, janitors and postmasters, four dollars per day each, and mail-carrier five dollars per diem; to clerks of committees, three dollars per day each, and the necessary stationery for each of the clerks, secretaries, and their assistants aforesaid; to the paper-folders two dollars and fifty cents per day each; to the messengers two dollars per day each. And no other or greater compensation shall be allowed such officers and employes, nor shall there be any allowance of or for stationery except as above provided, postage, newspapers or other perquisites in any form or manner or under any name or designation. And this act shall apply to the officers and employes so named of the nineteenth general assembly for their full term of office.

Compensation
of officers and
employes.

6.

SEC. 31.

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

10.

SEC. 45, ¶ 11.

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

20.

SEC. 93.

[19 G. A., ch. 123, amends the substitute enacted by 18 G. A., ch. 167, by striking out the words "the grantee" in the ninth line of the section as it

stands, and inserting in lieu thereof the words, "*such person or company, or on the application of a party claiming title to any land through such person or company*"; and further, by striking out the word "grantee," where it occurs in the tenth and fifteenth lines, and inserting in lieu thereof the word "applicant."]

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

25.

SEC. 120.

[20 G. A., ch. 119, amends this section by inserting after the word "clerk" in the sixth line thereof, the words "*and reporter.*"]

28.

16 G. A., Ch. 159.

Reports of
State Board of
Health.

[19 G. A., ch. 27, amends section 3 of this act by inserting after the word "copies," in the seventh line thereof, the following words: "*Of the report of the state board of health, five thousand copies, of which number five hundred copies bound in cloth, and twenty-eight hundred copies in double-thick paper covers, shall be delivered to the state board of health, and the state board of health shall send one copy to the clerk of each local board of health, and such clerk shall deliver the same to his successor in office, as the property of the state.*"]

[19 G. A., ch. 175, amends sections 1, 2 and 3 of the same act, to read as follows:]

Reports of officers, commissioners and institutions; when to be made.

SEC. 1. The adjutant-general, the superintendent of public instruction, the state librarian, the wardens of the penitentiaries, the visiting committee to the hospitals for the insane, the fish commissioner, the superintendent of the weather service, the state board of health, the commissioner of pharmacy, the state mine inspector, *except* all boards of commissioners having charge of the erections of public buildings, the board of curators of the state historical society, and all boards of trustees of state institutions, except the state agricultural college, shall, on or before the fifteenth day of August, preceding the regular sessions of the general assembly, make to the governor of the state a report of the condition and needs of the officers, institutions, and matters severally intrusted to their care, as well as of all other subjects upon which reports are now by law required of such officers, boards or commissions; and also a statement, showing in detail the expenditure of all public moneys placed or coming into their hands, with each voucher or duplicate voucher for such expenditures, except where such voucher or duplicate is required to be furnished some state officer at more frequent intervals.

Statement of expenditures.

Provided, that the reports hereby contemplated, shall take the place of the various annual and biennial reports now required to be made by such officers, boards or commissions, except the annual report on insurance.

Fiscal term ends when.

SEC. 2. The biennial fiscal term of the state shall end on the 30th day of June, in 1883, and each odd numbered year there-

after, and the succeeding term shall begin on the day following; and the reports of officers and institutions shall cover the period thus indicated, and shall show the condition of their offices and institutions respectively on that day: *Provided*, that this section shall not apply to the state agricultural college and farm.

The governor shall cause to be printed, of the various public documents, as follows: Of the biennial message, twelve thousand copies; of the governor's inaugural address, six thousand copies; of the report of the auditor of state, ten thousand copies; of the report of the superintendent of public instruction, six thousand copies; of the report of the state agricultural college, six thousand copies; and of each of the other reports, five thousand copies. The secretary of the state shall make distribution thereof as follows: To the members of the general assembly, eight thousand copies of the message, two thousand each of the inaugural address, the report of the auditor of state, and the report of the superintendent of public instruction, and two thousand copies each of the other reports; fifteen hundred copies of the message, and five hundred copies of each of the other documents, to remain with the state, for the use of future general assemblies and special calls therefor; fifteen hundred copies to be stitched and bound in boards in books containing a copy of each report, to be distributed as follows: one copy to each officer and member of the general assembly; one to each state officer; one to each state office to remain therein; one copy to each state institution to remain therein; one to each member of the several boards, and one to each officer of the institutions who is required by law to make report; one copy to each district judge, each circuit judge, and each district attorney; one to the office of the county auditor in every county to belong to said office; one copy to each newspaper in the state; eighty copies to the state historical society; a sufficient number to the secretary of state to enable that officer to make the distribution provided for in section 1898 of the code; and the remainder to be placed under the control of the executive council. The remaining unbound copies of the documents shall be distributed to the officers and institutions respectively making report.

Number to be printed.

Distribution.

29.

16 G. A., Ch. 159, § 4.

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

35.

18 G. A., Ch. 60, § 1.

[20 G. A., ch. 125, repeals this section and enacts in lieu thereof the following:]

SECTION 1. As soon as practicable after sufficient opinions are announced to make a volume, as herein provided, the supreme court reporter shall furnish and deliver at his office at Des Moines, Iowa, to the person, persons or corporation having the contract with the state for publishing the same, copies of such Reporter shall prepare opinions as soon as sufficient are announced to make a volume.

opinions, and with each opinion a syllabus, a brief statement of the facts involved, and, in all cases where he may deem it of sufficient importance, the legal propositions made by counsel in the argument, with the authorities cited, when the same have been prepared and furnished by counsel in a brief form and in a manner suitable for publication; but the argument shall not be reported at length, and within twenty days after the proof sheets for a volume have been furnished to him by the publishers at his office in Des Moines, Iowa, he shall furnish to such publishers an index and table of cases to such volume. The publishers shall furnish to the reporter without delay, as soon as they shall be issued, two copies of the revised proof sheets of the opinions, head notes, index and table of cases of each volume, for correction and approval by the reporter and judges of the supreme court, and shall cause such corrections to be made therein as shall be indicated by the reporter or said judges. Each of said volumes shall contain not less than 750, nor more than 800, pages, exclusive of the table of cases and index, and the workmanship and quality of material shall in every particular be equal to the first issue of volume forty of the Iowa supreme court reports, and shall be approved and accepted by a majority of the judges of the supreme court.

Furnish an index within twenty days.

Publishers furnish revised.

Number of pages for each volume.

Equal to volume 40.

38.

SEC. 162.

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

Where a circuit court has, under

this section, exclusive jurisdiction, and a change of place of trial is granted, the case should be sent to some other circuit court, and not to the district court: *Schuchart v. Lamme*, 17 N. W. Rep. 467.

AFTER SEC. 163.

[A list of the judicial districts and circuits, as at present constituted, will be found in the supplement to page 1166. 17 G. A., ch. 51, divided the first, fifth and seventh judicial districts into two circuits each, and provided for the election of a circuit judge in each of said circuits. (See § 9 of that act, in supplement to page 157.) The same act contained the following:]

Jurisdiction and powers of circuit judges.

SEC. 10. The judges of the several first and second circuits by this act created, shall have and exercise within the counties constituting their said respective circuits, all the rights, powers and jurisdiction which are at this date possessed and exercised by the several circuit judges within said counties, and all provisions of law now applicable to the circuit court or to the judge thereof shall apply, and are hereby made to apply, with same force and effect, to said courts within said first and second circuits, and to the judges whose appointment and election are herein provided for, except so far as the same may be inconsistent with the provisions of this act.

Records.

SEC. 11. The records and books heretofore kept for the business of the circuit courts within and for said counties, shall be continued and used within said respective counties for the same purposes, under the provisions of this act.

Repealing clause.

SEC. 12. All acts and parts of acts inconsistent with the provisions of this act, are hereby repealed.

[20 G. A., ch. 19, § 1, divides the sixth judicial district into two circuits, as shown in the supplement to page 1166. It also provides for the election of circuit judges in said circuits; see § 5 of the act inserted in supplement to page 157. Sections 2, 3 and 4 are temporary in character, providing for appointment of judge to 2d circuit until one can be duly elected, and for his performance of duties during that time. The other sections of the act are as follows:]

SEC. 6. The judges of said first and second circuits by this act, created shall have and exercise within the counties constituting their said circuits, all the rights powers and jurisdiction which are possessed and exercised at this date by the circuit judge within said counties, and all provisions of law now applicable to the circuit court or to the judge thereof shall apply, and are hereby made to apply, with the same force and effect, to said court within said first and second circuits and to the judges whose appointment and election are herein provided for, except so far as the same may be inconsistent with the provisions of this act.

Powers of Judges.

SEC. 7. The records and books heretofore kept for the business of the circuit court within and for said counties shall be continued and used within and for said respective counties for the same purposes and under the provisions of this act.

Records.

SEC. 8. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Repealing clause.

[20 G. A., ch. 181, § 1, divides the fourth judicial district into two circuits, as shown in the supplement to page 1166. It also provides for the election of circuit judges in said circuits; see §§ 2 and 5 of the act inserted in supplement to page 157. The other sections of the act are as follows:]

SEC. 3. The present circuit judge of the said fourth judicial circuit, as constituted prior to the passage of this act, shall continue to be, and to exercise the powers and discharge the duties of, circuit judge and hold the circuit court in each and all of the counties above named until the first day of January, A. D. 1885, and until his successors shall be duly qualified, after which the judges elected for the said circuits respectively shall each have and exercise, within the counties constituting their respective circuits, all the rights, powers, jurisdiction and authority, which now are, or by law shall be, conferred upon the circuit court and circuit judges of the state, and all provisions of law now applicable to the circuit court and circuit judges, shall apply to the said circuit courts and judges of said first and second circuits of said fourth judicial district.

Present judge to continue in office until January, 1885.

SEC. 4. The records and books heretofore kept and used for the business of the circuit court in the respective counties within said circuits, shall be continued and used in the respective counties for the same purpose under the provisions of this act.

Records continued.

ADDITIONAL CIRCUIT JUDGES.

[19 G. A., ch. 56, §§ 1 and 2, provide for the election of two circuit judges in certain circuits: See those sections inserted in supplement to page 157. Other sections of the act are as follows:]

SEC. 3. In circuits having two judges, the judges shall not sit together in the transaction of the same business, but may together hold the same term, making an apportionment of the business.

Transaction of business in circuit court in circuits having two judges.

ness of said term between them; and they may hold terms in different counties at the same time.

Times of holding court in districts containing circuits having two judges.

SEC. 4. Immediately after the election and qualification of the additional judges provided for by this act, the circuit judges, and district judges for the districts embracing circuits having two circuit judges, as provided for by this act, shall together designate and fix, by an order under their hands, the times of holding the terms of said courts in each county in their districts for the years 1883 and 1884, and a similar order shall by them be made every two years thereafter.

[20 G. A., ch. 18, §§ 1 and 2, provide for the election of an additional circuit judge in the second judicial district: See those sections inserted in the supplement to page 157. Other sections of the act are as follows:]

Judges shall not sit together.

SEC. 3. The judges of the circuit court in said circuit shall not sit together in the transaction of the same business, but may together hold the same term making an apportionment of the business of said term between them; and they may hold terms in different counties at the same time.

Fix terms of court.

SEC. 4. Immediately after the election and qualification of the additional judge provided for by this act, the circuit judges and the district judge for said district shall together designate and fix by an order under their hand, the times of holding the terms of said court in each county in said district for the years 1885 and 1886, and a similar order shall be by them made every two years thereafter.

39.

SEC. 169.

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

40.

SEC. 177.

A decree signed by the judge and entered in vacation is valid, and not void, though it contain provisions not contained in the memorandum made in the judge's calendar at the trial; nor does the fact that it improperly provides for a sale of real property without redemption render a sale thereunder absolutely void: *Traer v. Whitman*, 56-443.

as contemplated in section 2897, may be made by the clerk in vacation and approved, under this section, at the next term: *Kendig v. Marble*, 58-529. A judgment cannot exist merely in the memory of the officers of the court or in memoranda entered upon books not intended to preserve the records of judgment. *Balm v. Nunn*, 19 N. W. Rep. 810.

Entry of judgment on confession,

SEC. 178.

A court may, on its own motion, correct its record; and may, upon discovering mistake or error in its rulings, expunge the first ruling from the record and make a different one: *Wolmenstadt v. Jacobs*, 61-372.

43.

SEC. 190.

A judgment rendered by a judge who has previously been an attorney in the case, is not to be deemed absolutely void where it does not appear that defendant has ever questioned or objected to such judgment: *County of Floyd v. Cheney*, 57-160.

SEC. 192.

This section must be construed as applying to courts other than those of probate, which are expressly authorized by § 2313 to appoint the time

and place for the hearing of matters requiring notice: *Casey v. Stewart*, 60-160.

44.

SEC. 196.

The judge's calendar is not a record of the court, and an entry thereon as to a decree cannot, in itself, be regarded as a decree; and where a subsequent decree was entered in vacation, containing provisions not found in the memorandum on judge's docket, *held*, that such provisions would not, therefore, be void: *Traer v. Whitman*, 56-443. And see *Case v. Plato*, 54-64.

The entry in a judge's calendar is for the guidance of the clerk, and such entry is evidence tending to show a decree was ordered: *In re Estate of Edwards*, 58-431.

Where an indictment is lost, the court may, upon motion, substitute a copy, and proceed thereon as upon the original: *State v. Rivers*, 58-102; *State v. Stevisiger*, 61-623.

The judge's calendar is in the nature of a private memorandum book, designed merely to promote the convenience of the judge and clerk. It is not a record provided by law, and the entries made therein constitute the mere announcement of the judge's mental conclusion, and not the court's action: *State v. Manley*, 19 N. W. Rep., 211; *Miller v. Wolf*, 18 *Id.*, 889.

The judge's minutes upon his calendar do not constitute a judgment. Where it was sought, in an action on an injunction bond, to prove the dismissal of the action for injunction by proof of the entry on the judge's calendar "dismissed as per stipulation," and a stipulation was not shown, the evidence was held not sufficient: *Towle v. Leacox*, 59-42.

SEC. 197.

It is essential to the validity of the judgment that it appear upon the record book. This is approved by the judge, and constitutes the only proof of his acts. The judgment docket is intended to show merely an abstract of the judgment, and it is contemplated that it shall be made up from a judgment previously entered in the record book. Where the entry of judgment in the record book was blank as to amount of recovery, except the amount of costs, *held*, that it was only an entry of judgment to the amount of such costs, although the judge's calendar contained an entry directing the clerk to assess the amount of recovery, and the judgment docket contained an entry of an amount so assessed by the clerk: *Case v. Plato*, 54-64.

The only legal evidence of a judgment is the clerk's entry in the record provided by law, and the abstract of the same in the judgment docket. It cannot be proved by a memorandum in the judge's calendar: *Miller v. Wolf*, 18 N. W. Rep. 889.

Where the abstract of the judgment, as contained in the judgment docket, is introduced in evidence without objection, it should be regarded as evidence, even without proof of the loss or destruction of the original: *Moore v. McKinley*, 60-367.

Where the entry of a judgment upon the judgment docket did not show that it was entered against the proper party, by reason of a mistake of initials, and it did not appear whether there was a mistake in the judgment record or not; *held*, that it would be presumed, for the purpose of supporting an attachment proceeding, that judgment was properly entered upon the record, and therefore that the mistake in the entry upon the docket would not invalidate the judgment: *Preston v. Wright*, 60-351. A bar docket constitutes no part of the records of the court: *Gifford v. Cole*, 57-272.

As to sufficiency of indexing to impart notice, see notes to § 1944.

45.

SEC. 200.

Where a pleading is marked filed by the clerk, but no entry of such filing is made on the appearance docket, it cannot be considered as having been filed: *Padden v. Moore*, 58-703. And where the petition in an attachment proceeding was marked "filed" by the clerk, but not entered on the appearance docket, *held*, that the

action was properly dismissed upon motion, as the court was bound to consider the petition as not filed: *Nickson v. Bair*, 59-531.

This section does not apply in respect to the filing of depositions: *Byington v. Moore*, 19 N.W. Rep. 644. Nor to the filing of bills of exceptions: *Royer v. Foster*, 17 *id.* 516.

46.

SEC. 205.

A county has undoubted authority, through its board of supervisors, to employ counsel, and will be bound by a contract made for that purpose, even though it be not entered on the records of the board. Such contract may be proved by parol. *Jordan v. Osceola County*, 59-388.

A county can be made liable to pay for additional counsel, only as

the board or supervisors has determined such counsel to be necessary. The court cannot, at the request of the district attorney, appoint assistant counsel and thereby bind the county to pay therefor, at least, unless on account of the absence of the district attorney, and in order to prevent the failure of justice: *Seaton v. Polk County*, 59-626.

47.

SECS. 208, 209 and 210.

[These sections are repealed by the following act:]

[Twentieth General Assembly, Chapter 168.]

Power to
admit, vested
in supreme
court.

SECTION 1. The power to admit persons to practice as attorneys and counselors in the courts of this state, or any of them, is hereby vested exclusively in the supreme court.

Qualification
of applicants.

SEC. 2. Every applicant for such admission must be at least twenty-one years of age, of good moral character, and an inhabitant of this state, and must have actually and in good faith pursued a regular course of study of the law for at least two full years, either in the office of a member of the bar of this state, residing therein, and in regular practice, or in some reputable law school in the United States, or partly in such office and partly in such law school: *provided* that in reckoning such period of study, the school year of any such law school consisting of not less than thirty-six weeks, exclusive of vacations, shall be considered equivalent to a full year.

Examination.

SEC. 3. Every such applicant shall also be examined by the court, or by a committee of not less than three members of the bar, appointed by the court, as to his learning and skill in the law; and the court must be satisfied, before admitting to practice, that the applicant has actually and in good faith devoted the time hereinbefore required to the study of law, and possesses the requisite learning and skill therein.

How examined
Provide:
Graduates of
State University.

SEC. 4. Such examination shall be held in open court: *provided*, that the graduates of the law department of the state university may be examined at the university, in Iowa City, by a committee of not less than three members of the bar, ap-

pointed by the supreme court for that purpose; and on production of his diploma from said law department, and a certificate by such committee that they have examined such applicant, and are of opinion that he possesses the learning and skill requisite for practice of the law, any such graduate may be exempted by the court from any further examination.

SEC. 5. Any person becoming a resident of this state, after having been admitted to the bar of any other of the United States, in which he has previously resided, may, in the discretion of the court, be admitted to practice in this state without examination or proof of period of study as hereinbefore provided, on proof of the other qualifications by this act required, and on satisfactory proof that he has practiced law regularly for not less than one year, in the state from which he comes, after having been duly admitted to the bar according to the laws of such state. Attorneys from other states.

SEC. 6. All persons on being admitted to the bar, shall take an oath, or affirmation, to support the constitution of the United States and of the state of Iowa, and to faithfully discharge the duties of an attorney and counselor of this state, according to the best of their ability. Oath of persons admitted.

SEC. 7. The supreme court may, by general rules, prescribe the mode in which examinations under this act shall be conducted, and in which the qualifications required as to age, residence, character, and term of study shall be proved, and may make any further rules, not inconsistent with this act, for the purpose of carrying out its object and intent. Supreme court may prescribe rules.

SEC. 8. Any member of the bar of another state, actually engaged in any cause or matter pending in any court of this state, may be permitted by such court to appear in and conduct such cause or matter while retaining his residence in another state, without being subject to the foregoing provisions of this act. Attorneys from other states may appear and conduct trial.

SEC. 9. Sections 208, 209, and 210, of the code, are hereby repealed, but nothing herein contained shall affect or impair the right of any person heretofore admitted to practice in any of the courts of this state to continue so to practice. Code, §§ 208, 209 and 210, repealed.

48.

SEC. 212.

See *Stemmer v. Wright*, 54-164.

SEC. 215.

A notice of the claim for a lien is sufficient if inserted in the original notice of the action (at least if signed by the attorney in his individual capacity as well as in his capacity as attorney for his client): *Smith v. C., R. I. & P. R. Co.* 56-720.

While service of notice of attorney's lien, in an action against a corporation, might not be sufficient if made upon one of the class of agents upon whom service of original notice

is authorized, yet if such service of notice of lien is upon one of such agents in connection with the service of the original notice, such service of notice of lien is sufficient, the service of the original notice being sufficient to charge such agent with a duty in relation to the matter: *Ibid.*

An attorney's lien may properly be claimed, not only in all actions on contract, but also in actions for damages arising from tort, and it will not

be defeated by the fact that the case is settled without judgment having been rendered: *Ibid.*

The lien attaches, after proper notice, not only for services then rendered, but for those thereafter rendered: *Ibid.*

An attorney can not have a lien upon any greater amount than shall actually be found to be owing by the opposite party to his client. And

where an attorney took an assignment of a judgment to secure his fees, *held*, that he stood in the shoes of his client, and must take the judgment with all the burdens, such as costs, taxed in favor of the opposite party, etc., attaching by the course of the litigation: *Tiffany v. Stewart*, 60-207; *Watson v. Smith*, 18 N. W. Rep. 916.

51.

SEC. 227.

A judgment rendered upon a verdict by a jury, some members of which are disqualified, is erroneous, but not void; it might be reversed

upon appeal, but it can not be disregarded as a nullity: *Foreman v. Hunter*, 59-550.

52.

SEC. 232.

The fact that vacancies in the jury panel are filled by talesmen instead of by the additional drawing herein provided for, is not a ground of chal-

lenge to the panel under § 2767, and can be raised, if at all, only by challenge to such talesmen when drawn: *Buford v. McGetchie*, 60-298.

61.

SEC. 282.

Where jurats to the affidavits, required under this section, were imperfect in that they did not show the official title of the officer, or were entirely without signature, *held*, the board might allow them to be

amended: *Stone v. Miller*, 60-243.

It is a compliance with the statute to show by affidavit that the signers of the petition were legal voters at the time of signing: *Ibid.*

SEC. 283.

While the board, in passing upon the sufficiency of the petition and remonstrance, acts in a judicial capacity, it is not authorized to consider

any evidence not specified, and can not, therefore, consider counter-affidavits: *Herrick v. Carpenter*, 54-340.

62.

SEC. 286.

If the ballot expresses the intention of the voter beyond a reasonable doubt, it should be counted, without regard to technical inaccuracies, or

the form adopted. The language of the ballot is to be construed in the light of all facts connected with the election: *Hawes v. Miller*, 56-395.

SEC. 287.

While the action of the board in canvassing the vote is ministerial, its action in ordering a removal in accordance with the count made is

judicial, and may be reviewed on *certiorari*: *Herrick v. Carpenter*, 54-340.

63.

SEC. 289.

[19 G. A., ch. 147, amends 18 G. A., ch. 183, so as to insert "1882" in the place of "1880" in the second line of this section, and also the word "six" in place of "seven," in the eighth line, and 20 G. A., ch. 80, amends 19 G. A., ch. 147, so as to insert "1884" in place of "1882."]

64.

SEC. 290.

[19 G. A., ch. 147, amends 18 G. A., ch. 183, so as to insert "1882" in place of "1880" in the eighth line of this section, and 20 G. A., ch. 80, amends 19 G. A., ch. 147, by inserting "1884" in place of "1882."]

65.

17 G. A., Ch. 58, § 1.

[20 G. A., ch. 175, amends this section by striking out of the fifth and sixth lines the words "heretofore issued and outstanding at the time of the passage of this act," and inserting in lieu thereof, the words "now outstanding," and striking out the word "eight" in the twelfth line and inserting in lieu thereof the word "six."]

70.

SEC. 303.

The board of supervisors has power to compromise a judgment: *Collins v. Welch*, 58-72.

As incident to the care and management of the county property, the board may, in a proper case, employ an agent to aid them; and therefore, held, an agent employed by the county to find a purchaser for indemnity swamp lands, might maintain action for the value of his services: *Call v. Hamilton Co.*, 17 N. W. Rep. 667.

A county may be liable for injuries received from the falling of a bridge, which, though properly constructed, has become unsafe by decay of the timbers, if it has failed to exercise care and diligence in inspecting and repairing the same, whether the need of such repairs is open and obvious or not: *Huff v. Poweshiek Co.*, 60-529.

Whether any obligation rests upon the road supervisor to make small repairs for the purpose of keeping the county bridge in order, the county is not thereby relieved from its liability as to such bridges: *Roby v. Appanoose Co.*, 18 N. W. Rep. 711.

While it has been held in this state, against the decided weight of authority in other states, that counties

are liable for damages caused by reason of the negligent construction and maintenance of county bridges, the court is not disposed to extend the rule which has been held applicable to bridges so as to make the county liable for damages resulting from the negligent construction of a county ditch, or from negligence in allowing the same to become obstructed: *Green v. Harrison Co.*, 61-311; *Nutt v. Mills Co.*, 61-754.

A county is not liable in damages for injuries received by reason of negligence in the construction of a court house. The principle holding a county liable for the defective construction of a county bridge is not to be extended further, or made to apply to public buildings. In such cases there is a difference between the liability of quasi corporations, such as counties, and that of municipal corporations: *Kincaid v. Hardin Co.*, 53-430.

Since the earliest decisions as to the liability of the county in relation to county bridges were made, the obligation to construct and repair such bridges has been expressly imposed upon the county by statute: See § 527.

73

REBUILDING PUBLIC BUILDINGS WITH INSURANCE MONEY.

[Nineteenth General Assembly, Chapter 54.]

SEC. 1. In any county in this state, where the public buildings thereof, or any of them, have been or may hereafter be destroyed by fire, wind, or lightning, the board of supervisors of such county, for the purpose of reconstructing the same, may

appropriate, in addition to the amount now authorized by law, the amount received by way of insurance on such building or buildings so destroyed.

AID BY TOWNSHIPS, CITIES, OR TOWNS IN ERECTION OF COUNTY BRIDGES.

[Nineteenth General Assembly, Chapter 63.]

When cost not less than \$10,000.

SEC. 1. It shall be lawful for any township, incorporated town, or city, including cities acting under special charters, to aid in the construction of county bridges when the estimated cost of the same is not less than \$10,000, as fixed by the board of supervisors, as hereinafter provided.

Petition; notice, election.

SEC. 2. Whenever a petition shall be presented to the council or trustees of any incorporated town or city, or trustees of any township, signed by a majority of the resident property tax-payers of such township, incorporated town, or city, asking that the question of aiding the construction of a county bridge, to be situated in whole or in part within such township, incorporated town, or city, or within the township in which such incorporated town or city is situated, be submitted to the voters thereof, it shall be the duty of the trustees or council of such incorporated town or city, or trustees of such township, to immediately give notice of a special election, by publication in some newspaper published in the county, if any be published therein, and also by posting such notice in five public places in such township, incorporated town or city, at least ten days before such election, which notice shall specify the time and place of holding said election, the proposed location of the bridge to be aided, the rate per centum of tax to be levied, and whether the entire per centum voted is to be collected in one year, or one-half collected the first year, and all the conditions in the petition. At such election the question of taxation shall be submitted, and if a majority of the votes polled be for taxation, then the recorder of the incorporated town, the clerk of the city or township, or clerk of said election shall forthwith certify to the county auditor the rate per centum of tax then voted by said township, city, or incorporated town, the year or years during which the same is to be collected, and the time and terms upon which the same, when collected, is to be paid as hereinafter provided under the stipulation contained in the notice under which such election was held, which said certificate shall be recorded in the office of the recorder of deeds of the county, and filed in the office of the county auditor. When such certificate shall have been filed and recorded as aforesaid, the board of supervisors of the county shall, at the time of levying the ordinary taxes next following, levy the tax certified as above, under the provisions of this act, and cause the same to be placed on the tax list of the proper township, incorporated town, or city, indicating in their order, when and in what proportion the same is to be collected; and these facts shall be noted upon the tax list by the auditor. Said tax shall be collected at the time or times specified in said order in the same manner, and be subject to the same penalties for non-payment after the same becomes due and delinquent, as other taxes.

Rate of tax to be certified. —

Levy and collection of tax.

SEC. 3. The aggregate amount of tax to be voted or levied under the provisions of this act in any township, incorporated town, or city, shall not exceed five per centum of the assessed value of the property therein, respectively, nor shall it exceed one-half the estimated cost of the bridge sought to be aided as fixed by the board of supervisors. Aggregate amount.

SEC. 4. The moneys collected under the provisions of this act shall be paid out by the county treasurer, on the order of the board of supervisors of the county, and such order shall specify that it is on the special bridge fund belonging to the township, incorporated town, or city from which such tax has been collected, but in no case shall the said board make such order until the conditions specified in the petition and notice have been complied with. How paid out.

SEC. 5. The petitioners may provide, by stipulations contained in the petition for the tax, the conditions upon which the board of supervisors may order the money, when collected, paid out. Conditions.

SEC. 6. The expense of giving notice and holding the election provided for herein, shall be audited and paid out of the county fund like other claims against the county. Expenses.

MONUMENTS TO DECEASED SOLDIERS.

[Twentieth General Assembly, Chapter 162.]

SECTION 1. The board of supervisors of any county in this state are hereby authorized to appropriate from the county funds, any sum of money not to exceed three thousand dollars, for the purpose of erecting on the court house square, public park at the county seat, or elsewhere in the county as the grand army posts of said county may direct, a soldiers' monument, on which shall be inscribed the names of all deceased soldiers and all who may hereafter die, who enlisted or entered the service from the county where such appropriation may be made, and also the names of such other deceased soldiers as the grand army posts of said county shall direct. Board of supervisors authorized to appropriate \$3,000 for a soldiers monument.

BURIAL OF SOLDIERS AND SAILORS.

[Twentieth General Assembly, Chapter 178.]

SECTION 1. It shall be the duty of the board of supervisors in each of the counties of this state, to designate some suitable person in each township, whose duty it shall be to cause to be decently interred the body of any honorably discharged soldier, sailor, or marine, who served in the army or navy of the United States during the late war, who may hereafter die without leaving sufficient means to defray funeral expenses. Such burial shall not be made in any cemetery or burial ground used exclusively for the burial of the pauper dead. *Provided*, The expenses of such burial shall not exceed the sum of thirty-five dollars, and *provided further*, that in case surviving relatives of the deceased shall desire to conduct the funeral, and are unable or unwilling to pay the charges therefor, they shall be permitted so to do, and the expenses shall be paid as herein provided. Boards of supervisors to designate person to attend to burial of honorably discharged soldiers or sailors. Not to be in pauper cemetery. *Provided*: not to exceed \$35 each. Surviving relatives.

Head-stone for grave. SEC. 2. The grave of any such deceased soldier, sailor, or marine, shall be marked by a head-stone containing the name of the deceased and the organization to which he belonged or in which he served. *Provided*, Such head-stone shall not cost more than the sum of fifteen dollars, and shall be of such design and material as may be approved by the board of supervisors.

Proviso: cost not to exceed \$15. SEC. 3. The expenses of such burial and head-stone shall be paid by the county in which such soldier, sailor, or marine shall have died. And the board of supervisors of such county is hereby authorized and directed to audit the account and pay the said expenses, in similar manner as other accounts against such county are audited and paid.

74.

SEC. 304.

[This section is repealed by 20 G. A., ch. 197, § 1.]

SEC. 307.

[20 G. A., ch. 197, § 2, amends this section so as to read as follows:]

Newspapers selected to publish proceedings. SEC. 307. The board of supervisors shall, at its January session of each year, select two newspapers published within the county, or one, if there be but one published therein, having the largest number of *bona fide* yearly subscribers within the county, which circulation shall be determined as follows: in case of contest the applicants shall each deposit with the county auditor on or before a day named by the board of supervisors, a certified statement subscribed and sworn to before some competent officer, giving the names of the several post-offices and the number and the names of the *bona fide* yearly subscribers receiving their papers through each of said offices living within the county, such statements to be in sealed envelopes and opened by the county auditor upon direction by the board of supervisors to do so, and the two applicants thus showing the greatest number of *bona fide* yearly subscribers living within the county shall be the county official papers in which all the proceedings of the county board of supervisors, the schedule of bills allowed, and the reports of the county treasurer including a schedule of the receipts and expenditure shall be published at the expense of the county during the ensuing year, and the cost of such publication shall not exceed one-third the rate allowed by law for legal advertisements, and *provided*, that in counties having ten thousand inhabitants or more, a newspaper printed in each foreign language if published within the county may also be selected in which such proceedings shall be published under the same limitation as to compensation, and the county auditor shall furnish all such papers selected a copy of such proceedings for that purpose; and furthermore *provided*, that in counties having two county seats each district shall be regarded as a county for that purpose. In case charges of fraud are made by an aggrieved publisher, the board shall seek other evidence of circulation and the aggrieved publisher shall have the right of appeal to the circuit court for redress of grievance. Said appeal shall be taken as in ordinary actions, and in case of appeal, neither publisher to the contest

What published.

Proviso: counties of 10,000 inhabitants shall publish also in papers printed in foreign languages.

Proviso: two county seats.

Right of appeal. How aken.

shall receive pay for publishing such proceedings until the case is disposed of in the circuit court.

<p>[Decisions under the original section:] The treasurer's semi-annual report is not part of the proceedings of the board within the meaning of this section: <i>Haislett v. County of Howard</i>, 58-377.</p>	<p>no such interest as to be entitled, upon <i>certiorari</i>, to question the legality of the proceedings of the board of supervisors in selecting other newspapers as the official papers of the county: <i>Iowa News Co. v. Harris</i>, 17 N. W. Rep., 745.</p>
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The publisher of a newspaper has

80.

PAYMENT OF OUTSTANDING WARRANTS BY COUNTY TREASURER

[Nineteenth General Assembly, Chapter 103.]

SEC. 1. County treasurers are hereby authorized to issue calls Issue calls. for outstanding warrants at any time he may have sufficient funds on hand for which such warrant was issued; and from and after such calls have been made, public interest shall cease on all warrants included in said call.

SEC. 2. County treasurers shall publish said notice twice in Notice. the newspaper having the largest circulation in the county in which such publication is made, and each notice shall designate the warrants called.

86.

SEC. 368.

[20 G. A., ch. 64, amends this section so as to read as follows:]

SEC. 368. In the above inquisition by a coroner, when he or Coroner may the jury deem it requisite, he may summon one or more physi- summons phy- cians or surgeons to make a scientific examination, who, instead sicians. of witness fees, shall receive such reasonable compensation as Fees of physi- may be allowed by the county board of supervisors. cians.

88.

SEC. 382.

[20 G. A., ch. 106, amends this section by inserting after the words "city or town," in the second line thereof, the words "with a population exceeding fifteen hundred inhabitants." The same act contains also the following:]

Remonstrances signed by such legal voters may also be present- Remonstrances. ed at the hearing before the board of supervisors hereinafter provided for, and, if the same persons petition and remonstrate, they shall be counted on the remonstrance only.

SEC. 384.

Where the application is properly | to make the division: *Henry v.*
made, the board has no discretion, | *Taylor*, 57-72.
and may be compelled by mandamus |

89.

AFTER SEC. 389.

EMPLOYMENT OF ATTORNEYS BY TOWNSHIP TRUSTEES.

[Twentieth General Assembly, Chapter 120.]

SECTION 1. Whenever litigation shall arise involving the

When made parties to certain suits.

May levy tax to pay for legal service.

right or duty of township trustees to certify or levy taxes which have been authorized upon expressed conditions, then, in such cases, if the trustees are made parties to said litigation, they shall have authority to employ attorneys in behalf of said township, and are further authorized to levy the necessary tax to pay for said legal services, and to defray the unavoidable expenses of said litigation.

SEC. 390.

[19 G. A., ch. 110, repeals this section, as re-enacted by 16 G. A., ch. 6, and amended by 18 G. A., ch. 201, and enacts in lieu thereof, the following:]

Assessor in townships containing city or town.

Assessor in cities or towns.

SEC. 390. At the general election in the year 1882, and biennially thereafter, there shall be elected in each township a part of which is included within the incorporate limits of any incorporated city or town, by the qualified voters of such township residing without the corporate limits of such city or town, one assessor in the same manner as provided by law for the election of township assessors, and at the regular municipal election of each incorporated town or city in the year 1882, and biennially thereafter, whether such city or town embraces one or more townships or parts of townships, there shall be elected by the qualified voters of such city or town one or more assessors for such city or town, and such assessors shall be restricted in the discharge of their official duties to the limits within which they are elected, and shall hold their offices for the term of two years from the first day of January next ensuing. The city council of any incorporated city having a population of ten thousand or over may, by a resolution to be adopted at least five weeks before the time for any regular municipal election, determine whether it shall be necessary to elect more than one assessor, and fix the number thereof, not exceeding three, and thereupon the mayor of such city shall make proclamation of such determination in like manner, and at the same time that he shall proclaim the election of other city officers to be elected at the municipal election next ensuing, and such resolution shall also divide such city into districts for assessment purposes; and the county auditor of the county in which such city is situated, upon being notified of such division, shall provide a separate assessment book for each of said assessment districts. Said assessors, when so elected, shall give bond and qualify, receive the same compensation, be under like penalties, and perform the same duties in like manner as township assessors, except as herein provided. In case there should be a failure to elect, [or] a vacancy shall occur in the office of assessor within such incorporated city, the city council may elect some suitable person to perform the duties of such office for the unexpired term. It shall be the duty of such assessors, if more than one shall have been elected, to meet at least once a week, and oftener if they shall deem it necessary, and carefully compare valuations in order to secure a uniform assessment of all the property of such city, and when so met they shall constitute a board of assessment, a majority of whom shall determine the value of any property as to which difference may arise in such board: *Provided*, that the city council of any city or town, having a population as aforesaid

shall have power in the year 1882 by resolution to increase the number of assessors not exceeding three, and to appoint the additional number provided for; and each assessor so appointed shall qualify and act and hold *their* [his] office for the term as provided for in this act.

90.

SEC. 391.

No provision is made for the payment by the county of compensation for the place thus designated, and it is not liable therefor: *P. H. Turner & Co. v. Woodbury County*, 57-440; *McBride v. Hardin Co.*, 58-219.

SEC. 392.

Written orders for the relief of poor persons, given by the township trustees under § 1365, are valid, without being otherwise made of record under this section, or § 395; *Bremer County v. Buchanan Co.*, 61-624.

95.

SEC. 418.

The provisions of this section are superseded by the act establishing a state board of health (18 G. A., ch. 151, § 13), to be found on page 451: *Staples v. Plymouth Co.*, 17 N. W. Rep. 569.

98.

SEC. 424.

A court will take judicial notice in what county a given incorporated town is situated: *State v. Reader*, 80-527.

102.

16 G. A., Ch. 47, § 4.

[20 G. A., ch. 158, amends this section by striking out the following words: "Provided, that the provisions of this act shall not apply to cities organized under special charter," and inserting in lieu thereof the following: "The provisions of this chapter shall apply to cities organized and acting under special charters."]

103.

SEC. 438.

[19 G. A., ch. 164, amends this section by inserting after the word "town," in the eleventh line, the following:]

Except in cities of the first class, where such special election is, or shall have been, held on the first Monday of March of an even year, when they shall hold their offices for the term of two years thereafter. All ordinances of such city or town in force at the time of the abandonment of such special charter, not inconsistent or in conflict with the general incorporation laws of the state, shall be and remain in force until otherwise altered, amended, or repealed by the council or trustees of such new organization. Exception
Ordinances remain in force.

106.

CHANGING NAMES OF CITIES AND TOWNS.

[Nineteenth General Assembly, Chapter 16.]

SEC. 1. The corporate name of any city of the first or second class or incorporated towns in this state may be changed in the manner prescribed by this act. By city or town.

SEC. 2. The council of any city of the first or second class, or any incorporated town may, by resolution, propose a change of

Resolution proposing name. the corporate name of such city or incorporated town setting forth therein the proposed new name, which shall not be the same as that of any city of either the first or second class or incorporated town or post-office existing in this state at the time of the passage of such resolution.

Question submitted to vote. SEC. 3. The question of making such change shall then be submitted to a vote of the qualified electors of such city or incorporated town at the next following annual election, or at a special election, as the council may provide. Notice that a change of name is to be voted on at any election shall be published in a newspaper published in said city or incorporated town at least ten days before the election.

Notice. Manner of voting. Record of change. SEC. 4. The manner of voting on the question of change shall be by having printed or written on the ballots, "Shall the name be changed as proposed?" followed by the word "yes," or "no." If a majority of the votes cast for and against are in favor of the proposed change, the clerk of the city or incorporated town shall enter upon the records of the city or incorporated town the result of such election, and set forth in such record the new name adopted for such city or incorporated town, as well as the original name thereof, and shall cause to be filed a certified copy of the entry so made in the office of the recorder of deeds of the county in which such city or incorporated town is situated and in the office of the secretary of state.

Change deemed complete. SEC. 5. When certified copies are made and filed, as required by the preceding section, the change of name shall be deemed complete, and the new name thus adopted shall be judicially recognized in all subsequent proceedings wherein said city may be interested.

Not to affect rights or liabilities. SEC. 6. Nothing herein contained shall in any manner affect the rights or liabilities of said city or incorporated town, nor invalidate any contract to which the said city or incorporated town may be a party before such change.

SEC. 456.

This section does not confer power to punish any one, or prescribe penalties for permitting gambling, or engaging therein: *Incorporated Town of New Hampton v. Conroy*, 56-498.

Nor does the power given to suppress and restrain houses of ill fame carry with it the power to punish as an offense the keeping of such houses: *City of Chariton v. Barber*, 54-360.

But a municipal corporation does have authority, under this section, to provide by ordinance for the punishment of intoxication: *Town of Bloomfield v. Trimble*, 54-399; and an ordinance providing that the keeping, etc., of any house, etc., within the city limits where loud or unusual noises are permitted, or where persons are permitted to congregate and engage in the use of profane and vulgar language to the disturbance of others, shall be considered and punished as a common nuisance, *held*,

within the authority of the city to pass, under this section: *City of Centerville v. Miller*, 57-56 and *same v. same*, 57-225.

The power given by this section in relation to nuisances is to abate them, and in the exercise of this power a municipal corporation can not provide for the punishment by fine of one who maintains a nuisance: *Incorporated Town of Nevada v. Hutchins*, 59-506. The power of the city council to abate nuisances does not enable it to determine conclusively that a particular thing constitutes a nuisance, and if it orders the removal of a thing, which is in fact not a nuisance, the person causing its removal will be individually liable in damages: *Cole v. Kegler*, 19 N. W. Rep., 843. The owner of property would not in such cases be limited to his remedy by *certiorari* to annul the illegal action of the council. *Ibid*.

ENLARGING THE POWERS OF CITIES.

[Nineteenth General Assembly, Chapter 89.]

SEC. 1. Cities organized under the general incorporation laws of the state, in addition to the powers now granted them, shall have power: To regulate, license and tax itinerant doctors, physicians and surgeons, junk dealers, and to prohibit pawnbrokers and junk or second-hand dealers purchasing or receiving from minors without the written consent of their parents or guardians.

May regulate, &c., itinerant doctors, junk dealers, pawnbrokers, &c.

SEC. 2. To require all buildings to be numbered; and in case of the failure of the owners to comply with such requirement, to cause the same to be done, and to assess the cost thereof against the property or premises numbered.

Numbering of buildings.

SEC. 3. To deepen, widen, cover, wall, alter or change the channel of water-courses within their corporate limits.

Channels of water courses.

SEC. 4. To regulate and control the construction of chimneys, stacks, flues, fire-places; hearths, stove-pipes, ovens, boilers, and heating apparatus used in or about buildings, and to require and regulate the construction of fire-escapes, and to cause any or all of them to be removed, or placed in a safe condition, when considered dangerous, and to assess the cost thereof on the property and against the owners thereof.

Chimneys and heating apparatus.

SEC. 5. To regulate manufactories which are dangerous in causing or promoting fires; to prevent the deposit of ashes and combustible matter in unsafe places; and to cause all such buildings and enclosures as may be in a dangerous or unsafe state to be put in a safe condition.

Manufactories; deposit of ashes unsafe buildings.

SEC. 6. To regulate the use of lights in stables, shops and other places, and the building of bonfires, and to regulate or prohibit the use of fire-works, fire-crackers, torpedoes, roman candles, sky-rockets and other pyrotechnic displays.

Lights; bonfires; fireworks.

SEC. 7. To provide for the inspection of steam-boilers, and all places used for storage of explosive or inflammable substances or materials, and to prescribe the necessary means and regulations to secure the public against accidents and injuries therefrom, and to assess the costs and expense of such proceedings against the property and owners thereof.

Inspection of steam boilers and magazines for combustibles.

SEC. 8. To require the connection from gas-pipes, water-pipes, and sewers to the curb-lines of adjoining property to be made before the permanent improvement of the street whereon they are located, and to regulate the making of such connections on streets already improved, and to enforce such requirement as provided by law.

Connections with gas and water pipes.

SEC. 9. To establish all needful regulations as to the management of packing and slaughter houses, renderies, tallow-chandleries and soap-factories, bone-factories, tanneries, and manufactories of fertilizing and chemicals within the limits of such cities, and the deposit and removal of all offensive material and substances, and the engendering of offensive odors and sights therefrom, as will protect the public against the same.

Packing and rendering houses, soap factories and tanneries.

SEC. 462.

An ordinance discriminating in favor of resident merchants of the city as against other merchants of the state or non-resident merchants, or in favor of those selling goods of domestic manufacture and against those

selling goods of foreign make, by imposing a license tax upon the latter, which is not required of the former, is unconstitutional: *City of Mar-*

shalltown v. Blum, 53-184; *Town of Pacific Junction v. Dyar*, 19 N. W. Rep., 862.

103.

SEC. 463.

[19 G. A., ch. 136, amends this section by adding after the words, "wine saloons," in the seventh line the following words, "but no license issued therefor shall extend beyond the first day of May following the grant thereof."]

A city or town has no authority to regulate or provide a penalty for the sale of intoxicating liquors, other than vinous or malt: *Incorporated Town of New Hampton v. Conroy*, 56-498; *Town of Cantril v. Sainer*, 59-26.

Where an ordinance prohibiting the sale of malt and vinous liquors, also prohibited the sale of other intoxicating liquors, which the town had no power to prohibit, *held*, that the ordinance would be supported and enforced so far as within the lawful authority of the town: *Town of Eldora v. Burlingame*, 17 N. W.

SEC. 464.

A railway having been located over the streets of a city at a time when it was not required to compensate adjacent property owners for such use, *held* that after the amendment of § 1262 which, in connection with this section, made it necessary that compensation be made in such cases, new switches and side tracks could not be laid in connection with such railway without such compensation being made: *Drady v. D. M. & Ft. D. R. Co.*, 57-393. So, also, *held* that these provisions for compensation apply to a railroad authorized by ordinance and partly constructed prior to the time that the section containing said provisions went into effect: *Hanson v. C., M. & St. P. R. Co.*, 61-588; *Mulholland v. D. M., A. & W. R. Co.*, 60-740.

Under this section, as amended by 15 G. A., ch. 6, the damages for which compensation is to be made are not limited to damages arising from a change of grade, but extend to all legitimate damages arising under ch. 4, title 10 of the Code: *Drady v. D. M. & Ft. D. R. Co.*, 57-393.

As to liability of railway in damages for laying track nearer to sidewalk than allowed by ordinance, see *Cain v. C., R. I. & P. R. Co.*, 54-255.

As to right to permit use of streets

Rep., 148.¹

Licenses under this section are not contracts between the State and the person licensed, but are merely temporary permits to do what would otherwise be an offense, issued in the exercise of police power, and subject to the direction of government, which may revoke them as it deems fit. Whether in case of a revocation the person licensed would, in a proper proceeding, be entitled to have refunded to him the *pro rata* portion of the license paid, *quære*: *Town of Columbus City v. Cutcomb*, 17 N. W. Rep., 47.

by horse railway, see *O'Neil v. Lamb*, 53-725.

The provisions of this section, as to the manner of assessment of damages resulting from the location of a railway upon the streets of a city, refer exclusively to the company and not to the abutting owner; such owner does not have any interest in the fee of the street, and he can not take steps to have his damages assessed by a sheriff's jury according to the provisions applicable where property is taken for right of way; therefore he may bring action for damages without such proceeding: *Mulholland v. D. M., A. & W. R. Co.*, 60-740.

A city is not clothed with power to permit or forbid railroad companies to acquire private property in a city for right of way, and therefore the city can not be held liable for damages to the property owner from the construction of an embankment upon a right of way through private property: *Callahan v. City of Des Moines*, 17 N. W. Rep., 470.

A city council may vacate an alley for the purpose of allowing it to be devoted to a private use, if the power of vacation is otherwise rightfully exercised and no private rights are injuriously affected: *City of Marshalltown v. Forney*, 61-573.

110.

SEC. 465.

The township trustees can not include an incorporated town in a road district, and the road supervisor has no authority over its streets. For an accident resulting from acts of such supervisor in repairing such streets the town is liable: *Clark v. Independent Town of Epworth*, 56-462.

111.

SEC. 466.

The assessment is to be made upon owners of property abutting upon the part of the street which is improved: *Kendig v. Knight*, 60-29.

A municipal corporation is not liable for failure to provide gutters or culverts adequate to keep the surface water from off adjoining lots which are below grade, even when it raises the street above the natural surface for the purpose of conforming it to grade: *Freberg v. City of Davenport*, 18 N. W. Rep., 705.

While the preparatory work of grading to put a street in condition for paving may be included in the assessment for such paving, it cannot be assessed separately. The section confers no authority to assess for grading alone. Where the city contracted for grading, agreeing to issue in payment therefor certificates of assessment against abutting owners, held, that as such owners were not liable, the contractor might recover from the city: *Becroft v. City of Council Bluffs*, 18 N. W. Rep., 807.

GENERAL PAVING FUND.

[Nineteenth General Assembly, Chapter 38.]

SEC. 1. The cost of paving the intersections of streets and alleys in all cities organized under the general incorporation laws of this State, including cities acting under special charters therein, and which have not commenced to pave the same at the expense of the property fronting on the street or streets paved, shall be paid for out of a general paving fund to be raised or created as hereinafter provided: *Provided*, nothing herein contained shall prevent councils of said cities from requiring railroads and street railways to pave any portion of said intersections.

Paving intersections of streets and alleys.

SEC. 2. In addition to the taxes which they are now empowered to levy, the city council of any such city are hereby authorized to levy a special tax, not exceeding two mills on the dollar on the assessed valuation of all property in such city, for the purpose of creating such general paving fund.

Special tax for paving fund.

SEC. 3. The money raised by the tax hereby authorized to be levied shall not be used for any other purpose than that hereby contemplated.

How used.

SEC. 4. It shall be competent for any city authorized by this act to levy such tax, to anticipate the collection thereof by borrowing money and pledging such tax, whether levied or not, for the payment of the money so borrowed, but such money shall be used or appropriated to no other purpose.

Pledging tax.

SEC. 5. Any city organized or acting as aforesaid, and which shall have paved the intersections of any of its streets and alleys at the expense of the property fronting on said street, may, by ordinance, avail itself of the benefits of this act: *Provided*, such ordinance shall receive the affirmative vote of two-thirds of all the members of the city council thereof.

Applicable to paving already done.

STREET IMPROVEMENTS IN CERTAIN CITIES.

[Twentieth General Assembly, Chapter 20.]

- Grading, paving, etc.** SEC. 1. Cities of the first class, that have been or may be so organized since January first, 1881, shall have power to open, widen, extend, grade, construct permanent side-walks, curb, pave, gravel, macadamize and gutter, or cause the same to be done in any manner they may by ordinance deem proper, any street, highway, avenue, or alley within the limits of such city, and may open, extend, widen, grade, park, pave or otherwise as aforesaid, improve part of any such street, highway, avenue or alley, and levy a special tax as hereinafter provided, on the lots and lands fronting and abutting on such street, highway, avenue or alley, and where said improvements are proposed to be made to pay the expenses of the same. But unless the owners, resident in such city, of a majority of the front feet owned by them, of the property subject to assessment as hereinafter provided, for such improvements, shall petition the council of such city to make the same, such improvements shall not be made until three-fourths of all the members of such council shall by vote, assent to the making of the same: *Provided*, that the construction of permanent side-walks, curbing, paving, graveling or macadamizing of any such street, highway, avenue or alley, shall not be done until after the bed of the same shall have been brought so near to the grade as established by the ordinances of such city, as that said side-walks, curbs, paving or other improvements as aforesaid, when fully completed, will bring said streets, highways, avenues or alleys fully up to said established grade.
- Tax abutting property.**
- Petition.**
- Proviso.**
- Contract.** SEC. 2. It shall be the duty of the council of said city to require all of the work necessary to the making of any improvements authorized by section one hereof, to be done under contract thereof, to be entered into with the lowest responsible bidder, and bonds with good and sufficient surety for the faithful performance of such work, shall be required to be given by the contractors; *provided*, that all bids for such work, or any part thereof, may be rejected by such council, and new bids ordered.
- Proviso.**
- Improvement districts.** SEC. 3. Any such city shall, for the purpose of effectuating the objects enumerated in section one hereof, have power, by ordinance, to create improvement districts, which shall be consecutively numbered. The cost of opening, extending, widening, grading, constructing permanent side-walks, curbing, paving, graveling, macadamizing and guttering any street, highway, avenue or alley, within any improvement district, except spaces in front of city property, and any other property exempt from special taxes except the intersections of streets, highways or avenues and space opposite alleys, and except as to paving, graveling or macadamizing between and outside the rails of railways and street railways, shall be assessed upon the lots and lands abutting the same, in proportion to the front feet so abutting upon such street, highway, avenue or alley, where said improvements are proposed to be made, the assessment of the special taxes herein provided for shall be made as follows: The total cost of the im-
- Tax abutting property.**

provement, except spaces in front of city property and any other property exempt from special taxation, and except as to intersections of streets, highways or avenues, and space opposite alleys, and except as aforesaid, as to the paving, graveling or macadamizing between and outside the rails of any railway or street railway, shall be levied upon the property as aforesaid, and become delinquent as herein provided; one fifth shall become delinquent in ninety days after such levy, one fifth in two years, one fifth in four years, one fifth in six years, and one fifth in eight years, after the levy is made. Such special taxes shall be payable by the owners of the property upon which they are levied as aforesaid, at or before the times they become delinquent, as hereinbefore provided and in the installments herein mentioned; and shall also be a lien upon the lots and lands so assessed, and shall draw interest at the rate of six per cent per annum from the time of the levy aforesaid, until the same shall be paid or become delinquent, whichever shall first happen, said interest to be payable semi-annually, or annually as the council of such city may deem best. The property so assessed may be sold for the payment of any installment of said tax or interest as aforesaid, which is payable and delinquent at the time in the same manner, at any regular or adjourned sale or special sale called therefor, with the same forfeitures, penalties and right of redemption, and certificates and deeds on such sales shall be made in the same manner and with like effect as in case of sales for non-payment of the ordinary taxes of such city, as now or hereafter provided by law in respect thereto: *Provided* however, that the sale of any property for the non-payment of any installment as aforesaid, either of tax or interest, shall not be taken or construed as in any manner affecting the validity of the lien on the same for any installment thereof, with interest as aforesaid, which may subsequently become delinquent and payable, such city council may provide by ordinance for the mode of making and returning the assessment hereinbefore authorized; and payment of such assessment after they become delinquent, and if interest as aforesaid, may, if so directed by said council, be enforced by suit in court, in the manner and by the proceedings provided by sections 478 and 481 of the code. In case of omissions, errors, or mistakes in making such assessment or levy, in respect of the total cost of the improvement, or in case of deficiencies or otherwise, it shall be competent for the council to make a supplemental assessment and levy to support such deficiencies, omissions, errors or mistakes; said supplemental assessment and levy shall be a lien on the lots and lands as aforesaid, shall be payable in the same manner and in the same installments, shall draw interest at the same rate, and shall be capable of enforcement in the same manner as hereinbefore provided, with respect to the original assessment and levy. Said taxes shall constitute a sinking fund for the payment of the costs of the opening, extending, widening, grading, or any other improvements herein specified, of the street, highway, avenue or alley, on which the property abuts, upon which the same are levied, and shall be used and appropriated to no other purpose than the payment of the costs of said improvements, and any

Tax system.

Lien; interest.

Sale of property for delinquent taxes.

Proviso.

Supplemental assessment.

Tax lien.

Same: how
used

bonds which may be issued as hereinafter provided, until the whole cost of said improvement, and all of said bonds, with interest, shall be fully paid and satisfied.

Tax bonds.

Same: matur-
ity of.

Same: provi-
sion for pay-
ment of.

Same: to be
sold at par.

Same: use of
proceeds.

City bonds, ac-
count exempt
property, etc.

Same: to be
sold at par.

SEC. 4. For the purpose of paying the costs of the improvements mentioned and specified in section three hereof, and which costs are to be assessed and levied as aforesaid, upon the lots and lands as aforesaid, the council of any such city shall have power and may by ordinance cause to be issued bonds of such city, to be called "Improvement Bonds of District No. —," said bonds to be issued in four series, the first series in the aggregate to be for an amount not exceeding one fifth of the total cost of the expense of the opening, extending, widening, grading or other improvement as aforesaid of the particular street, highway, avenue or alley, to defray the cost at which said bonds are issued, and to be payable in not exceeding two years from date thereof; the second series to be for a like aggregate amount and payable in not exceeding four years from date thereof; the third series to be for a like aggregate amount and payable in not exceeding six years from date thereof, and the fourth series to be for a like aggregate amount and to be payable in not exceeding eight years from date thereof; all of said bonds to bear not exceeding six per cent. per annum interest, payable annually or semi-annually as said council may provide, with interest coupons attached, to express on their face the name of the street, highway, avenue or alley to defray the cost for which they are issued, and also that the last four installments of the special taxes and assessments assessed and levied or to be assessed and levied as aforesaid on the lots and lands abutting on the street, highway, avenue or alley so as aforesaid opened, extended, graded, or in any other manner as aforesaid improved, shall be and constitute a sinking fund for the payment of said bonds and interest thereon, and to be used and appropriated to no other purpose until the whole of said bonds with interest thereon shall have been paid and fully discharged. Said bonds shall not be negotiated or sold for less than their par value and may be respectively for amounts ranging from one hundred dollars to one thousand dollars as said council may provide by ordinance. The proceeds arising from said bonds shall be applied exclusively to and appropriated and used for no other purpose than the liquidation of the costs of the improvements as aforesaid to and upon the particular street, highway, avenue or alley, to defray the cost of which said bonds are issued.

SEC. 5. Whenever the council of any such city shall deem it expedient they shall have power for the purpose of paying the costs of opening, extending, widening, grading, paving, curbing, guttering, graveling or macadamizing spaces in front of city property and of other property exempt from special taxation, the intersections of any streets, highways, avenues or alleys and the space opposite alleys, to issue bonds of the city to run for not exceeding twenty years and to bear interest payable semi-annually at a rate not exceeding six per cent. per annum, with coupons attached, to be called "City Improvement Bonds," and which shall not be sold for less than par, and the proceeds of which shall

be used for no other purpose than paying for the cost of the improvements aforesaid and upon the particular streets, highways, avenues or alleys, the intersections of which and spaces opposite which are improved as aforesaid; *provided*, that no bonds can be issued to pay for any such improvements as aforesaid except when the same become a part of and are necessary to fully complete the improvements as aforesaid of any street, highway, avenue or alley undertaken to be made or made under section 3 hereof. Proviso.

SEC. 6. All railway companies and street railway companies in cities of the first class as provided in section one of this act, shall be required to pave, or repave between rails and one foot outside of their rails, at their own expense and cost. Railways to pave between rails. Whenever any street, highway, avenue or alley shall be ordered paved or repaved by the council of any such city, such paving or repaving between and outside of the rails, shall be done at the same time and shall be of the same material and character as the paving or repaving of the street, highway, avenue or alley upon which said railway track is located, or of such other material as said council may order, and when said paving or repaving is done said companies shall lay in the best approved manner the strap or flat rail, Railway companies to use flat rails, and keep road bed at grade. such railway companies shall keep that portion of the streets, highways, avenues or alleys between and one foot outside of their rails, up to grade and in good repair, using for such purpose the same material with which the street, highway, avenue or alley is paved upon which the track is laid, or such other material as said council may order. In the event of the neglect or refusal of such railway companies to pave, or repave, or repair as aforesaid, when so ordered and directed as aforesaid by the council of such city, such city shall have power to pave, repave or repair between and outside of said rails as herein required of such railway companies, and the cost and expenses of the same to assess and levy as a special tax upon any of the real estate or personal property of such railway company, within the corporate limits of said city, which tax shall be a lien upon said property, shall become delinquent in sixty days after it is levied, shall draw interest at the rate of seven per cent. per annum, and said city shall have power to enforce the payment of the same in the same manner and by the same means and with and under the same penalties as is provided herein with reference to special taxes upon the abutting property on the streets, highways, avenues or alleys, ordered to be improved as aforesaid, as hereinbefore provided. Where railway companies refuse to pave; proceedings, penalties, etc.

112.

SEC. 469.

Action of the city or town in changing the grade, without taking the steps here provided for determining the compensation to be paid, is unlawful, and the owner of property injured thereby may maintain action at law to recover damages sustained: *Noyes v. Town of Mason City*, 53-418.

It is not the passage of an ordinance

changing the grade which gives right of action to the property owner, but it is the actual making of the physical changes which are therein contemplated; and where the street is cut down from curb to curb, the right of action for change in grade of sidewalk as well as for change in grade of street accrues, and a subsequent and separate action for injuries for the

grading of the sidewalk can not be maintained: *Hemstead v. City of Des Moines*, 18 N. W. Rep., 676.

If the value of the property has been increased by the change of grade after the lot is made to correspond therewith, the cost of filling the lot and raising the house should be taken into account in determining the damage. *Thompson v. City of Keokuk*, 61-187.

The grade of a street can only be established by ordinance. It is not dependent upon the actual lowering or raising of the surface. If the property owner erects buildings or otherwise improves his lots before such action is taken by the city council he can not recover for any changes in the surface of the street made after such improvement pursuant to grade lines established by the council, provided such changing of the surface be not negligently done: *Kepple v. City of Keokuk*, 61-653.

Where a city is proceeding to alter the grade of a street without assessment and tender of damages as here provided, a property owner who would be entitled to damages in case the alteration were made, may enjoin the same until proper proceedings have been taken: *Scott v. Council Bluffs*, 19 N. W. Rep., 672.

By the provisions of § 479, this section is applicable to cities under special charter, and while 16 G. A., ch. 116, refers especially to such cities, yet that statute does not repeal this section, and §§ 8, 9 and 10 of that act, relating to the same subject, are to be construed in connection herewith. Therefore the provision of this section requiring the damages assessed, to be paid or tendered before the alteration is made, is still applicable to such cities, although not contained in the later enactment: *Phillips v. Council Bluffs*, 19 N. W. Rep., 672.

114.

AFTER SEC. 470.

DONATION OF DEPOT GROUNDS TO RAILWAYS.

[Nineteenth General Assembly, Chapter 133.]

SEC. 1. It shall be lawful for any incorporate town or city to procure for the purpose of donating, and to donate, to any railway company owning a line of railroad in operation or in process of construction in such incorporated town or city, sufficient land for depot-grounds, engine-houses, and machine-shops for the construction and repair of engines, cars, and other machinery necessary to the convenient use and operation of said railroad.

SEC. 2. Before such donation shall be made or appropriation of funds to procure land for such purpose, a petition shall be presented to the trustees or council of such incorporated town or city, signed by a majority of the resident freehold tax-payers of such incorporated town or city, asking that such donation be made and limiting the sum to be appropriated for that purpose.

Upon the presentation of such petition, a special election of such city or town shall be called. On the ballots used at such election shall be printed the words, "for the donation" and "against the donation," and if a two-thirds majority of the qualified electors voting at such election shall vote for the donation, said trustees or council shall determine the site to be donated, designating the boundaries thereof, and the amount to be appropriated in procuring said site, not exceeding the amount named in said petition; and may in the name of such incorporated town or city procure said land by purchase, or by payment of the estimated damages in case said land or any part thereof shall be taken in the name of such railway company by process of condemnation for railroad purposes, and may also vacate any streets and alleys within the boundaries of said site and may prescribe the terms,

May procure and donate to railway sites for depots, shops, etc.

Petition therefor.

Election.

Action of council.

conditions, and limitations upon which such grant shall be made, which shall be binding upon the railway company accepting such donation: *Provided* that land set apart as a park, public square, or levee shall not be appropriated or donated under the provisions of this act, and no land occupied with buildings used for business purposes or as private residences shall be appropriated or donated under the provisions of this act, unless the consent of the owners thereof shall first be obtained.

RELATING TO PARKS.

[Twentieth General Assembly, Chapter 151.]

SECTION 1. Cities acting under special charters and cities and incorporated towns may provide by ordinance for the election of three park commissioners and the terms thereof shall be three, four and five years, respectively, and their successors shall be elected for the full term of five years, and such park commissioners shall reside in such city or town.

SEC. 2. Said park commissioners shall have exclusive control of such parks and shall manage, improve, and supervise the same. Park commissioners.
Powers of

SEC. 3. The councils of such cities and incorporated towns, may by resolution submit to the qualified electors of such city or town, at a regular or special election, the question whether there shall be levied upon the assessed property thereof a tax not exceeding two mills on the dollar, for the purpose of purchasing real estate for parks and the improvement of parks, or for either or both of said purposes. Questions of taxation for purchase of ground submitted to the people.

SEC. 4. Said councils shall, in the resolution ordering such election, specify the rate of taxation proposed and the number of years the same shall be levied, and if a majority of the votes cast at such election shall be in favor of such taxation, said council shall levy the tax so authorized, which shall be collected and paid over to the treasurer of such city as other taxes thereof are collected, which shall be known as "Park Fund," and shall be paid on the order of the commissioners and to be expended for the purposes herein provided and for no other purpose whatever. Council shall specify rate of taxation.
Shall levy tax when authorized.
Paid on order of commissioners.

SEC. 5. Said commissioners may use said fund for improving such parks, or for purchasing additional grounds or laying out and improving avenues thereto, and do all things necessary to preserve such parks, and they may appoint one or more park policemen, and pay such police force out of said fund; said commissioners shall keep a full account of their disbursements, and all orders drawn on said fund shall be signed by at least two of said commissioners. Funds used for purchase of grounds or improvements.
Commissioners shall keep a full account.

SEC. 6. Said commissioners shall each give a bond to the use of such city in the penal sum of five thousand dollars, before they shall be permitted to enter upon such duty, which bonds shall be approved by the auditor, recorder or clerk, of such city or town and by him retained in his office. Commissioners shall give bonds to be approved.

SEC. 7. It shall be deemed a misdemeanor for any person

Cutting, etc., a
misdemeanor.

to cut, break or deface any tree or shrub growing in any such park or parks, or avenues thereto, except by authority of such commissioners.

SEC. 471.

The fact that a water company, which has agreed to furnish water to the city for the extinguishment of fires, fails to do so, will not render it liable to an action by a property-owner for damages for the destruction of his property by reason of such failure, there being no privity of contract between the property owner and the company: *Davis v. Clinton Water Works Co.*, 54-59.

The fact that a city is authorized

to provide for a water supply, will not render it liable for failure to make adequate provision for the extinguishment of fires, nor would the fact that it had a contract with the water works company to protect it against all actions which might be brought against it for malfeasance or neglect on the part of the company, render it liable: *Van Horn v. City of Des Moines*, 19 N. W. Rep., 293.

115.

SEC. 474.

Cities may authorize the construction of such works by foreign corporations, and in such case they may confer upon such foreign corporation

the power to condemn private property: *Dodge v. City of Council Bluffs*, 57-560.

117.

SEC. 478.

[20 G. A., ch. 20, makes special provision for the assessment and collection of taxes for improvements in cities of the first class, organized after January first, 1881; see that act in the supplement to page 111.]

This section makes the charges a lien upon abutting property, and it is not necessary that the ordinance

shall so provide: *Kendig v. Knight*, 60-29.

SEC. 479.

The fact that an improvement is made on two streets, in pursuance of two different resolutions, but that in making the assessment the entire improvement on both streets is taken into consideration, does not render the tax illegal: *Kendig v. Knight*, 60-29.

The irregularity or defect which under this section can be disregarded, must be a mere error or omission to do something which in no manner affects the jurisdiction of the city. Unless jurisdiction has been acquired, the proceedings of the city will be void: *City of Chariton v.*

Holliday, 60-391.

The fact that the cost of the improvement is not assessed on the owner of the property in the manner provided by ordinance, is an informality which should be disregarded where it appears that after the improvement was made the cost was ascertained and the property owner notified of the amount due, and an opportunity was given him to pay it. Under such circumstances the formal assessment made against the property owner is not an essential requisite to a recovery: *Ibid.*

118.

SEC. 481.

[20 G. A., ch. 20, makes special provision for collection of improvement taxes in cities of first class organized subsequent to January first, 1881; see that act in supplement to page 111.]

While special assessments may be thus certified and collected, they are not subject to the penalties provided

for non-payment of other taxes, but only to those provided by § 479: *Ankeny v. Henningsen*, 54-29.

119.

17 G. A., Ch. 162.

The city may create one sewerage district, comprising all its territory. An ordinance having been duly passed providing for the construction of sewers, the city may, by resolution, exercise the authority, and apply it to any particular sewer. A call of yeas and nays is not essential on passage of such resolution: *Grimmel v. City of Des Moines*, 57-144.

Although this statute does not require that notice of the assessment thereunder shall be given to property owners, yet such notice is an indispensable requisite to the exercise of the taxing power, and an ordinance providing for such assessments without notice and opportunity to the party assessed to appear and object

to the assessment on his property, is void: *Gatch v. City of Des Moines*; 18 N. W. Rep., 310.

Where a city had, prior to the passage of this act, levied a tax for, and commenced the construction of a sewer, which constitutes a main artery in the system of sewerage of the city, held, that it could not change the mode of paying for farther improvements, and require the adjacent property to pay the whole expense thereafter to be incurred; and further, held that the legislature could not, by a legalizing act, render valid such improper action of the city: *Independent School Dist. of Burlington v. City of Burlington*, 60-500.

[20 G. A., ch. 25, amends this act by adding thereto the following sections:]

SEC. 9. In case the council of any city of the first class that has been or may be so organized since January first, 1881, shall assess the cost, in whole or in part, of the construction of sewers on the adjacent property, it may, instead of making said special tax payable at the time of such assessment, levy the whole of such special tax on said property at one time, and provide by ordinance that the same shall become payable and delinquent as follows, viz: One-fifth in sixty days, one-fifth in two years, one-fifth in three years, one-fifth in four years, and one-fifth in five years after the levy is made. Said special tax shall be payable by the owners of the property on which it is levied at or before the time it becomes delinquent and in the installments hereinbefore mentioned, and shall be a lien upon the lots and lands so assessed and upon which it is levied, shall draw interest at the rate of seven per cent per annum from the time of the levy thereof until the same shall be paid or become delinquent whichever shall first happen. The payment of each and every installment of such tax may be enforced in the same manner, under the same penalties, and by the same methods as is provided in section three or section four of the act to which this is amendatory: *Provided*, however, that the sale of any property for the non-payment of any installment as aforesaid shall not be taken or construed as in any manner affecting the validity of the lien on the same for any installment thereof which may subsequently become delinquent. Said taxes shall constitute a sewerage fund for the payment of the cost of constructing sewers in front, rear or through the property upon which they are levied, and shall be used for and appropriated to no other purpose than the payment in whole or in part, as the case may be, of the cost of constructing said sewers so located or any ton is which may be issued as hereinafter provided.

Sewer tax, how levied and paid.

Lien.

Interest.

Payment, how enforced.

Proviso.

Sewerage fund

SEC. 10. Whenever any such city exercises the powers granted in section 9 hereof, it may, for the purpose of anticipat-

Bonds. ing the collection of said special taxes, and it may for the purpose of anticipating the collection of any sewerage taxes it has power to levy under section 1 of the act to which this is supplementary, by ordinance cause to be issued its bonds, to be called "sewerage bonds"; said bonds to be issued in four series, each series, in the aggregate respectively, to be for an amount not exceeding the amount of special taxes, as provided in section nine hereof which become delinquent respectively in two, three, four and five years after their levy; and for such further amount as said city may propose to levy and have the power to levy for each of the respective years aforesaid under the provisions of section 1 of the act to which this is amendatory, on the property within the sewerage district in which said sewer or sewers are to be or have been constructed, the first series to be payable in not exceeding two years from the date of their issue; the second series to be payable in not exceeding three years from the date of their issue; the third series to be payable in not exceeding four years from the date of their issue; and the fourth series to be payable in not exceeding five years from the date of their issue; all of said bonds to bear interest not exceeding six per cent per annum, interest payable annually or semi-annually, as said council may provide, with interest coupons attached, to express on their face the name of the street, highway, avenue, or alley, on which the sewer is located, to defray the cost of which they are issued, and also that the last four installments of the special taxes assessed and levied as aforesaid on property abutting on the particular part of the street, highway, avenue or alley on which said sewer or sewers are located, as also the sewerage tax levied, or to be levied, on the property in the sewerage district to defray the cost of the particular sewer or sewers named as aforesaid in said bonds, shall be and constitute a sinking fund for the payment of said bonds and interest; and to be used and appropriated to no other purpose until the whole of said bonds, with interest, shall have been fully paid and discharged. Said bonds shall not be negotiated or sold for less than their par value, and may be respectively for amounts ranging from one hundred dollars to one thousand dollars, as said council may by ordinance provide. The proceeds arising from said bonds shall be applied exclusively to, and appropriated and used for, no other purpose than the liquidation of the costs of constructing the sewer or sewers upon the particular street, highway, avenue or alley, to defray the cost of which said bonds are issued.

Same: maturity.

Same: interest coupons.

Same: sinking fund to pay, how created.

Same: must be sold at par.

Use of proceeds.

120.

SEC. 482.

Where authority is given to a municipal corporation to pass ordinances, the violation of which is punishable by fine, or fine and imprisonment, the proceedings there- under are necessarily criminal: *State v. Vail*, 57-103. As to general power to prescribe punishments, &c., see notes to § 456.

[Nineteenth General Assembly, Chapter 128.]

Published ordinances received in evidence.

SEC. 1. Where any city or town, organized under the general incorporation laws of the state, shall cause, or have heretofore caused its ordinances to be published in book or pamphlet form,

such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, as of the dates mentioned or provided for therein, in all courts and places without further proof.

SEC. 487.

[19 G. A., ch. 32, repeals this section, and enacts the following in lieu thereof:

SEC. 487. All municipal corporations are hereby empowered to provide that all able-bodied male residents of the corporation between the ages of twenty-one and forty-five years shall, between the first day of April and the first day of September each year, either by themselves or satisfactory substitute, perform two days' labor upon the streets, alleys, or highways within such corporations, at such times and places as the proper officer may direct, and upon three days' notice in writing given. They may further provide that, for each day's failure to attend and perform the labor as required at the time and place specified, the delinquent shall forfeit and pay to the corporation any sum not exceeding three dollars for each day's delinquency, and in case of failure to pay such forfeit within ten days the supervisor of highways or street commissioner of said corporation shall recover the same by action in the name of the supervisor of the highways or street commissioner of said corporation; and no property or wages belonging to said person shall be exempt to the defendant on execution; said judgment to be obtained before the mayor of said corporation, or any justice of the peace in the proper township, which money when collected shall be expended upon the streets of the corporation; and that all such sums remaining unpaid on the first day of September in each year may be treated and collected as taxes on property, and the same shall be a lien on all the real property of the delinquent that may be listed for taxation, and assessed and owned by him on the first day of November of the same year.

Labor on highways; penalty.

Action for judgment; exemption.

122.

SEC. 489.

[By 20 G. A., ch. 192, it is provided that in cities of not less than eight thousand inhabitants by the last census report, the mayor shall sign ordinances and resolutions before they shall take effect, except as they may be passed over his veto by vote of not less than two thirds of all the members of the council; see that act in supplement to page 130.]

It is not necessary that the yeas and nays on a vote to suspend the rule requiring reading on three different days be recorded; and where a sufficient number of members to suspend the rule appear to have been present, and such motion is declared adopted, it will be presumed that a sufficient majority voted therefor: *The State v. Vail*, 53-550.

An ordinance making provisions repugnant to a former one will operate to repeal it, though the former one be not contained in the latter: *City of Des Moines v. Hillis*, 55-643.

Where the title of an ordinance

absolutely prohibiting the sale of vinous and malt liquors was "Regulating the use and sale of intoxicating liquors," held, that the subject of the ordinance was not clearly expressed in the title, and that the ordinance was therefore void: *Town of Cantril v. Sainer*, 59-26.

By the expression "three different days," it is not meant that the ordinance must be read at three general meetings. If read on three different days it will be sufficient, although the last two meetings are special meetings by adjournment: *Cutcomp v. Ut*, 60-156.

124.

SEC. 493.

The requirement that the yeas and nays be called and recorded is mandatory, and unless the record affirmatively shows such fact, the ordinance will be invalid: *Town of Olin v. Meyers*, 55-209.

TAXATION OF PROPERTY WITHIN CITY OR TOWN FOR ROAD PURPOSES.

[Nineteenth General Assembly, Chapter 158.]

Property not subject to municipal taxes, liable to taxation for road purposes.

SEC. 1. All property now subject to taxation in any city or town, which by law is not subject to taxation for general municipal purposes, shall, nevertheless, be liable to taxation for road purposes as may be provided by the council of such city or town, but not exceeding the rate of five mills upon the dollar of the assessed valuation thereof.

126.

SEC. 500.

[20 G. A., ch. 20, makes provision for issuance of improvement bonds by cities of first class organized subsequent to January first, 1881; see that act in supplement to page 111.]

A municipal corporation may issue bonds to a judgment creditor in payment of a judgment. Possibly such bonds would be invalid if given in excess of the limitation, even if given for the extinguishment of an antecedent and valid indebtedness; but in an action by the city against a third person who is liable to the city for the indebtedness which it thus attempts to pay, such invalidity of the bonds can not be set up to show that the city has not been compelled to pay such indebtedness: *City of Sioux City v. Weare*, 59-95.

16 G. A., Ch. 95.

[20 G. A., ch. 79, amends this act by striking out the words "four thousand five hundred" in the fifth and sixth lines, and inserting "three thousand five hundred."]

130.

AFTER SEC. 516.

FILLING VACANCIES IN OFFICES OF INCORPORATED TOWNS.

[Nineteenth General Assembly, Chapter 124.]

Council to fill. SEC. 1. Whenever, from death or other cause, a vacancy in the office of mayor, recorder, councilman, trustee, or other officer, in any incorporated town, shall occur, such vacancy shall be filled by the council of such incorporated town at the first regular meeting of such council after such vacancy shall occur, or as soon thereafter as may be.

By ballot. SEC. 2. The manner of filling such vacancy shall be by ballot, and the person receiving a majority of the votes of the whole number of the members elected to the council shall be declared duly elected to fill such vacancy, and, on duly qualifying, shall hold such office until the next annual election, and until his successor is elected and qualified.

SEC. 3. All acts or parts of acts inconsistent herewith are hereby repealed.

SEC. 518.

The action of the mayor in erroneously announcing that a resolution is not adopted, for the reason that it has not received a three-fourths vote, when a majority vote is all that is necessary, is not judicial in its character in such a sense that it can not

be called into question in a collateral proceeding. The erroneous, arbitrary announcement can not have the effect to nullify the act of the majority of the city council: *City of Charlton v. Holliday*, 60-391.

MAYOR TO SIGN ORDINANCES AND RESOLUTIONS.

[Twentieth General Assembly, Chapter 192.]

SECTION 1. The mayor of every city of the first and second class, except of less than eight thousand inhabitants by the last census report in this state, shall sign every ordinance or resolution passed by any city of the first or second class before such ordinance or resolution shall take effect or be in force.

In cities of 8,000 inhabitants a mayor to sign ordinances, etc.

SEC. 2. If the mayor of any city of the first and second class only as above excepted shall refuse to sign any ordinance or resolution after it has been passed by the council of such city he shall call a meeting of such city council within fourteen days after the passage of such ordinance or resolution and shall return the ordinance or resolution to them with his reasons for refusing to sign the same.

In case of refusal to sign, shall call meeting within 14 days.

SEC. 3. Upon the return of the ordinance or resolution by the mayor to the city council they may pass the same upon a call of the yeas and nays by not less than two-thirds vote of all the members of said council over the mayor's veto and the clerk or recorder of such city shall certify on said ordinance that the same was passed by a two-thirds vote of the council and sign it officially as clerk or city recorder.

Council may by two-thirds vote pass same.

SEC. 4. But if any ordinance fails to obtain at least a two-thirds majority of all the council elected of such city after being vetoed by the mayor then such ordinance or resolution shall be void and of no effect.

Failing of two-thirds, void.

131.

SEC. 521.

[19 G. A., ch. 25, repeals all of this section after the word "year" in the twelfth line, and enacts in lieu thereof the following:]

In cities of the first class, the qualified electors of each ward shall, on the first Monday of March of the year 1882, elect by a plurality of votes, one member of the city council who shall at the time be a resident of the ward and a qualified elector thereof. And in the same year the qualified electors of cities of this class shall also elect two members at large of such city council, each of whom shall be a resident and qualified elector of the city in which he shall be elected. But in order that their term of service expire in different years, the council at the first regular meeting shall determine by lot which of the aldermen-at-large shall serve one, and which two years. The term of service of the other aldermen shall be determined in the same way, time, and manner; in cases where the number is uneven the majority shall serve one year. On the first Monday of March of each year there-

Cities of first class.

Aldermen-at-large.

after the qualified electors shall elect for the term of two years one alderman-at-large and one in each ward where the term of their alderman expires: *Provided*, that when any city of the first class embraces within its corporate limits the whole or parts of two or more different townships, two of which townships or parts thereof contain one thousand electors each, that only one of the aldermen-at-large herein provided for shall be elected from any one of such townships or parts of townships.

City embracing
two townships.

133.

SEC. 525.

This section and section 418, so far as they relate to boards of health, are repealed by the act establishing a state board of health (18 G. A., ch. 151, § 13), inserted on page 451: *Staples v. Plymouth Co.*, 17 N. W. Rep., 569.

134.

SEC. 527.

As to the liability of the county for injuries resulting from defects in bridges which it is under obligation to maintain, see notes to section 303, paragraph 18.

136.

AFTER SEC. 533.

[Nineteenth General Assembly, Chapter 154.]

SEC. 1. Any city of the second class shall have the power to erect and maintain a city jail, and to purchase the necessary grounds therefor, and to appropriate out of its general fund the amounts necessary for said purposes.

May erect jail.

137.

AFTER SEC. 535.

[Twentieth General Assembly, Chapter 7.]

SECTION 1. The mayors of cities of the first class organized under the general incorporation laws of the state and having a population of not less than twenty-two thousand and three hundred by the United States census of 1880 shall, subject to the approval of the city council, appoint a marshal who shall be ex-officio chief of police, and shall hold his office at the pleasure of the mayor. The marshal so appointed shall have all the powers conferred by the statutes of the state and ordinances of the city on the chief of police and the marshal, except the appointment of deputy marshals, and shall perform the duties of both offices. He may designate one or more members of the regular police force of the city to act as deputy marshals, and such designated policemen shall have all powers now conferred on deputy marshals.

Mayor to appoint marshal.

Marshal's powers.

May appoint deputies.

Repealing clause.

SEC. 2. All acts or parts of acts in conflict herewith are hereby repealed.

SEC. 536.

Under 17 G. A., ch. 56, held, that a marshal having received salary under an ordinance in pursuance of that act, was estopped from also claiming fees: *Bryan v. City of Des Moines*, 51-690; and that it would make no difference that the officer had collected such fees and paid them into the city treasury under protest: *Christ v. City of Des Moines*, 53-144.

140.

16 G. A., Ch. 143.

The jurisdiction of the superior court over appeals from justices of the peace, as here provided, is not exclusive of that of the circuit court: *Hickox v. Nutting*, 55-403.

Such court has, as to cases originally brought therein, concurrent jurisdiction throughout the county. The limitation of jurisdiction to the township in which the city is located, applies only to appeals and writs of error from justices of the peace: *Winet v. Berryhill*, 55-411.

[This act is amended by the following:]

[Nineteenth General Assembly, Chapter 24.]

Be it enacted by the General Assembly of the State of Iowa.

SECTION 1. That chapter 143, of the acts of the Sixteenth General Assembly, be and the same is hereby amended as follows: By striking out of section 1 thereof the words "five thousand," in the first line of said section, and inserting in lieu thereof the words "eight thousand." Sec. 1 amended.

SEC. 2. That section 2 thereof be and the same is hereby amended by striking out the words "two-thirds," in the ninth line of said section, and inserting in lieu thereof the words "a majority." Sec. 2 amended.

SEC. 3. That section 6, of chapter 143, of the acts of the Sixteenth General Assembly, be and the same is hereby amended by adding to said section the following: "And parties may be committed to the city prison for confinement or punishment instead of the county jail, at the option of the judge: *Provided, however*, that in the absence of the said judge, or in case of his inability to act, then during such time proceedings for the violation of city ordinances may be had before a justice of the peace residing in such city." Sec. 6 amended: commitment to city prison.

SEC. 4. That section 7 thereof be, and the same is hereby repealed, and that in lieu thereof the following be inserted:

SEC. 7. Changes of venue may be had from said court in all civil actions to the circuit court, and in all criminal actions to the district court, in the same manner, for like causes, and with the same effect as the venue is changed from the circuit court, as now or hereafter provided by law, unless it shall then appear upon the showing of either party that objections exist as to the circuit judge, in which latter case the change shall be made to the district court. In criminal actions an appeal will lie to the supreme court, as now or hereafter provided by law for appeal in like cases from the district courts. Sec. 7 amended: changes of venue.

SEC. 5. That section 14 be, and the same is hereby repealed, and that in lieu thereof the following be inserted:

SEC. 14. When causes are assigned for trial, any party desiring a jury shall then make his demand therefor, or the same shall be deemed to have been waived. Causes in which a jury Sec. 14 amended: jury trials.

has been demanded shall be tried first in their order, and when a disposition shall have been made of such causes, the jury shall be discharged from further attendance at that term. No jurymen shall be detained longer than one week, except upon trial commenced within the first week of his attendance.

SEC. 6. That section 16 be, and the same is hereby repealed, and that in lieu thereof the following be inserted:

Sec. 16 amend-
ed: juries; how
constituted;
costs.

SEC. 16. The jury shall consist of six qualified jurors, unless, when a jury is demanded as provided in section 3 of this act, the party at that time shall demand a jury of twelve, and in all civil cases the party requesting a jury of twelve shall at the time of making such demand deposit with the clerk the entire additional expense of the additional jurors, which sum shall be fixed by the court and paid to the clerk at the time of making such demand. If the judge shall deem proper, he shall cause a special venire to issue for said extra jurors, or for any number not exceeding twenty-four, or he may order the marshal to complete the same from the bystanders. The pay for all jurors shall be one dollar per day and mileage, to be taxed with the costs, which in all civil cases shall be paid by the county in the same manner as the circuit and district courts. All such deposits of additional expense for jurors shall be paid into the county treasury at the close of each term of such superior court, and the county treasurer shall give duplicate receipts therefor, one receipt to be held by said clerk, and the other to be presented by him to the county auditor, who shall charge the treasurer with the amount thereof in the proper account.

Sec. 17 amend-
ed.

SEC. 7. That section 17 be and the same is hereby amended as follows: By striking out all after the words "supreme court," in the fifth line.

SEC. 8. That section 18 be, and the same is hereby repealed, and that the following be inserted in lieu thereof:

Sec. 18 amend-
ed: judgments;
liens; trans-
cripts.

SEC. 18. Judgments in said court may be made liens upon real estate in the county in which the city is situated, by filing transcripts of the same in the circuit court, as provided in sections 3567 and 3568 of the code, relating to judgments of justices of the peace and with equal effect, and from the time of such filing it shall be treated in all respects as to its effect and mode of enforcement as a judgment rendered in the circuit court as of that date, and no execution can thereafter be issued from the said superior court on such judgment, and no real property shall be levied on, or sold on process issued out of the court created under the provisions of this act; and judgments of said superior court may be made liens upon real estate in other counties in the same manner as judgments in the circuit and district courts.

Sec. 20 amend-
ed.

SEC. 9. That section 20 be, and the same is hereby amended as follows: By striking out all after the words "district court," in the sixth line of said section.

Not to affect
proceedings
pending.

SEC. 10. This act shall not affect any action, suit or proceeding already begun and pending in any of said superior courts, but such action, suit, or proceeding shall be prosecuted and conducted after the taking effect of this act as nearly in conformity therewith as shall be practicable.

145.

17 G. A., Ch. 56.

This act is not unconstitutional as delegating legislative power to the city council, and the city may recover from the police judge fees received by him in criminal cases prosecuted	in behalf of the state, whether received from defendants in such case or from the county: <i>City of Des Moines v. Hillis</i> , 55-643.
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148.

SEC. 561.

Where a party filing a plat reserved therein the right to construct a mill race across one of the streets, held, that he become bound to erect and	maintain a bridge across the race at his own expense: <i>City of Waterloo v. Union Mill Co.</i> , 59-437.
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149.

SEC. 564.

The fact that the vacation of a portion of a plat will close streets therein, and thus abridge the number of ways of access to the property of the proprietor of another portion of the	plat, will not be ground for objecting to such vacation, if one or more ways are left, reasonably convenient, so that no substantial right is abridged: <i>Lorenzen v. Preston</i> , 53-580.
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156.

SEC. 573.

[19 G. A., ch. 115, repeals this section, and enacts, in lieu thereof, the following:]

SEC. 573. The general election for state, district, county and township officers shall be held throughout the state on the second Tuesday of October in each odd-numbered year, and in each even-numbered year said general election shall be held on the Tuesday next after the first Monday of November. ^{General election.}

157.

AFTER SEC. 586.

[17 G. A., ch. 51, after dividing certain judicial districts into two circuits each (see supplement to page 1166), provides as follows:]

SEC. 9. At the general election to be held in the year 1880, and every fourth year thereafter, there shall be elected a judge of the circuit court for each of the said first and second circuits by this act created, who shall hold his office for the term of four years, and until his successor is elected and qualified. ^{Circuit judges in circuits where the district is divided.}

[Other sections of this act are inserted in supplement to page 38.]

[20th G. A., ch. 19, divides the sixth judicial district into two circuits: See the supplement to page 1166. It further provides as follows:]

SEC. 5. At the general election to be held in the year 1884 there shall be elected in the counties composing said first and second circuits as by this act created, and every fourth year thereafter a judge of the circuit court of each of said first and second circuits, who shall hold his office for the term of four years and until his successor is elected and qualified. The governor shall have the same authority to fill vacancies, and the same provisions shall apply with the same force and effect to any vacancies occurring in said first and second circuits by this act created, as now apply to vacancies in judicial circuits. ^{Election and terms of judges. Vacancies.}

[Other sections of the same act, relating to the duties, etc., of the judges so elected, are inserted in supplement to page 38.]

[20 G. A., ch. 181, divides the fourth judicial district into two circuits: See the supplement to page 1166. It further provides as follows:]

Judge elected
in 1881.

SEC. 2. At the general election to be held in the year A. D. 1884 and every fourth year thereafter, there shall be elected in each of said judicial circuits, as aforesaid, by the qualified electors thereof, a circuit judge for each of said circuits, who shall be a resident of the circuit for which he shall be elected, and notice of the holding of said election shall be included in the proclamation of the governor relating to such general election.

Must be a res-
ident of the
circuit.

Term of office.

SEC. 5. The term of office of each of the circuit judges provided for by this act shall commence on the first day of January, 1885, and continue for four years and until their successors are elected and qualified in accordance with the laws of the State relating to the election and qualification and term of office of circuit judges, who shall hold their office for a like term of four years.

[Other sections of the same act, relating to the duties, etc., of the judges so elected, are inserted in supplement to page 38.]

ADDITIONAL CIRCUIT JUDGES.

[Nineteenth General Assembly, Chapter 56.]

Additional cir-
cuit judge
elected in cer-
tain circuits.

SECTION 1. Each judicial circuit of this state, wherein is situated a city containing a population in excess of twenty-two thousand and three hundred or more, by the United States census of 1880, shall, at the general election in the year 1882, and every four years thereafter, elect one additional circuit judge.

Terms of office
of such judges.

SEC. 2. The term of office of said additional judges provided for by this act shall commence on the first Monday of January, 1883, and continue for four years, or until their successors are elected and qualified.

[The other sections of this act are inserted in supplement to page 38.]

[Twentieth General Assembly, Chapter 18.]

Additional cir-
cuit judge in
second judicial
district.

SECTION 1. The second judicial district of this state shall at the general election in the year 1884, and every four years thereafter, elect one additional circuit judge.

Term.

SEC. 2. The term of office of said additional judge shall commence on the first Monday in January, 1885, and continue for four years, or until his successor is elected and qualified.

[The other sections of this act are inserted in the supplement to page 38.]

158.

SEC. 593.

The ballots for justice of the peace | supervisors under the provisions of
should be canvassed by the board of | § 634. *Lynch v. Vermazen*, 61-76.

165.

SEC. 631.

The board of supervisors and not | the peace. *Lynch v. Vermazen*, 61-
the township trustees have authority | 76.
to canvass the ballots for justice of |

169.

ELECTION OF REPRESENTATIVES IN CONGRESS.

[Nineteenth General Assembly, Chapter 163.]

[Sections 1 to 12 inclusive divide the state into congressional districts, which are given on page 1166 a.]

SEC. 13. Each of the said districts shall be entitled to one representative in Congress, and the first election of members of Congress under this act shall be at the general election in the year one thousand eight hundred and eighty-two. Members of Congress shall be elected at the general election held every two years thereafter.

SEC. 14. The returns of elections for members of Congress under this act shall be made to the secretary of state; and the canvass shall be made by the board of state canvassers; which return and canvass shall be made as required by law for the return and canvass of auditor of state. Returns; canvass.

173.

SEC. 680.

The want of approval of bond of county officer by the board of supervisors does not invalidate the bond. *Moore v. McKinley*, 60-367.

174.

SEC. 690.

An officer when he enters upon a subsequent term, must be presumed, in the absence of evidence to the contrary, to have on hand all the funds with which he is chargeable, and proof of the amount which should have been on hand at that time will be *prima facie* proof that it was on hand. The fact that his bond is approved without his having produced and accounted for all funds and property, as here required, will not exempt his sureties from liability: *Dist. T'p of Fox v. McCord*, 54-346.

While it is held in *Boone Co. v. Jones*, 54-699, that a settlement with the county is conclusive upon the officer and his sureties, although the money produced as county funds is not so in fact but is merely procured for that purpose, and estops the officer and sureties from showing that the defalcation had taken place in the previous term (see note to § 913), yet if the certificate by the supervisors upon the bond, as here provided for, is made merely upon production of certificates of deposit, checks, etc., without any effort to

ascertain whether they really represent money, it is not binding upon the sureties, and they may show that the defalcation had taken place prior to the giving of their bond. But the treasurer himself is estopped from showing that he did not have the money on hand as he represented he had, even though the board knew of his fraud and participated therein: *Webster Co. v. Hutchinson*, 60-721. This estoppel, however, does not apply in a criminal prosecution for embezzlement, and the treasurer may, notwithstanding his statements to the board, show that the embezzlement accrued during a previous term, and at such time as that the prosecution therefor is barred by the statute of limitations: *State v. Hutchinson*, 60-478.

The term for which an incumbent holding over is to occupy the office and qualify, is not a full term, but only until the vacancy can be legally filled by election: *Dyer v. Bagwell*, 54-487; *Boone Co. v. Jones*, 58-373.

Where a holding over officer executed a bond with sureties for the entire period of the term of the per-

son in whose place he held over under a mistaken belief that he was entitled to hold for the entire term of such officer, and at the next election was duly elected to fill the vacancy in such office, and executed a new bond. *Held*, that the sureties on the first named bond were not co-sureties with those on the second bond for the period subsequent to the last election, and could not be compelled to contribute for a defalcation occur-

ring during that time: *Boone Co. v. Jones*, 58-373.

The duty of an officer not to approve the bond until the person qualifying has accounted as required in this section, is a duty to the public only, and neglect thereof will not render such officer liable to the sureties on the new bond: *Held v. Bagwell*, 58-139.

Surety is not liable for defalcation prior to the giving of the bond on which he becomes surety: *Ibid*.

175.

SEC. 692.

A promise by a candidate to pay into the public treasury, if elected, a part or all of the compensation allowed by law to the incumbent of the office for which he is a candidate,

is an offer of a bribe to the electors within ¶ 4 of this section: *Carrothers v. Russell*, 53-346.

To offer a bribe to an elector is a crime. See § 3993 and notes.

183.

SEC. 766.

[19 G. A., ch. 117, amends this section, by inserting after the words "land-office," in the third line, the words "clerk of the supreme court." The same act amends § 3771, which see.]

SEC. 767.

The provision that "in the absence or disability of the principal, the deputy shall perform the duties of the principal pertaining to his office," was designed rather to devolve and make imperative upon the deputy the duties of the principal in the absence or disability of the latter, and was not designed to withhold from the deputy the power to perform such

duties except in the absence or disability of the principal. The fact that such duties are performed by the deputy in the presence of the principal does not render the acts void: *Moore v. McKinley*, 60-367.

The sheriff is not bound by acceptance of service by his deputy: *Chapin v. Pinkerton*, 58-236.

187.

SEC. 784.

An officer who holds over after his term on account of a failure to elect a successor, only holds until the

vacancy in the office can be legally filled by election: *Dyer v. Bagwell*, 54-487.

SEC. 787.

Where an elective officer is appointed by the board of supervisors to fill a vacancy, he is not subject to removal by such board at pleasure, but is entitled under Const., Art. 11,

§ 6, to hold for the residue of the unexpired term unless removed for cause: *State ex rel. v. Chatburn*, 19 N. W. Rep., 816.

189.

15 G. A., Ch. 28.

[20 G. A., ch. 182, amends this act (as already amended by 18 G. A., ch. 13), by adding thereto the following:]

and *provided further* that the board of supervisors in any county to which these provisions do not apply, may at their discretion

order a vote of the electors of said county at any general election, and the electors of such county may by a majority vote thereof authorize the said board of supervisors to levy such tax.

SEC. 797.

[As to taxation of lands granted to railroads by general government or state, s e 20 G. A., ch. 28, in supplement to page 194.]

The exemption of the property of a school district, used for school purposes, from taxation, extends only to general taxes, levied under this title of the Code, and does not exempt it from a special tax assessed by a municipal corporation for building sidewalks: *City of Sioux City v. Ind. Sch. Dist. of Sioux City*, 55-150.

Where a charitable society invested its "widows' and orphans' fund" in real property, which was leased for business purposes, the proceeds being strictly applied to the proper objects of the fund, *held*, that such property was not exempt from taxation: *Fort Des Moines Lodge, etc.*,

v. County of Polk, 56-34.

A printer is a mechanic within ¶ 6 of this section, and the term "tools" there used may properly include the press, types, imposing stones, etc., necessary to carry on his business: *Smith v. Osburn*, 53-474.

The fact that a tract of forty acres is owned by a religious society, and one half acre in one corner thereof is used as a burying ground, while the remainder is used for farming purposes, is not sufficient to entitle the whole tract to exemption from taxation: *Mulroy v. Churchman*, 60-717.

191.

SEC. 798.

The exemption from taxation is not in the nature of a contract between the State and the property owner, and does not prevent subsequent legislation altering the law and removing the exemption. There-

fore, *held* that 18 G. A., ch. 190, limiting the amount of exemption under this section, was applicable to timber land planted before the passage of the act: *Shiner v. Jacobs*, 17 N. W. Rep., 613.

193.

SEC. 802.

Where the owner of a farm had made an executory oral agreement to convey the same at a future time, a part of the consideration being paid, the balance to be paid at the time of conveyance, *held* that the unpaid

purchase money was a credit within the meaning of this section, although a payment could not be demanded until conveyance was tendered. *Per-rine v. Jacobs*, 19 N. W. Rep., 861.

SEC. 803.

Where the administrator is a resident of the same county where decedent died, but of another township, the personal property coming into

possession of the administrator should be assessed in the township where the administrator resides: *Cameron v. City of Burlington*, 56-320.

194.

AFTER SEC. 808.

TAXATION OF LANDS GRANTED TO RAILROADS.

[Twentieth General Assembly, Chapter 28.]

SECTION 1. All lands lying within the state of Iowa, which have been heretofore granted or may be hereafter granted to any railroad company or corporation by the general government or

land earned but not patented, taxed.

Proviso.	by the general government to the state of Iowa and by the state granted to any such railroad company or corporation shall be subject to assessment and taxation within the counties wherein situated from and after the year the same may be earned, to the same extent as though patents had been issued to, and the title of record was in such railroad companies or corporations. The fact that such lands are claimed by more than one such company or corporation shall in no way affect the liability of such lands to assessment and levy, <i>provided</i> , nothing herein contained is intended to subject any lands to taxation for the past that were not taxable prior to the passage of this act.
Evidence.	SEC. 3. [Sec. 2.] Parol evidence shall be admissible to prove when said lands were earned.
Repealing clause.	SEC. 4. [Sec. 3.] All acts or parts of acts inconsistent with this act are hereby repealed.

195.

SEC. 812.

A tax based upon an assessment of personal property to the person owning the same at time of assessment, but who did not own it on January 1st preceding, is illegal, and its collection may be enjoined. Personal property brought into the state after January 1st is not taxable for that year: *Wangler Bros. v. Blackhawk Co.*, 56-384.

An assessment of moneys and cred-

its at any other place than the residence of the owner, is illegal and void: *Barber v. Farr*, 54-57.

The assessor is not required to examine each forty acre tract, but of necessity must arrive at the value from information derived from others, having regard to the elements of value prescribed by statute: *Beeson v. Johns*, 59-166.

SEC. 813.

Although the taxation of the property of a corporation to the corporation, and the shares of its capital stock to its stockholders, may amount

to double taxation, yet such a provision is not unconstitutional: *Cook v. City of Burlington*, 59-251.

197.

SEC. 818.

Although 15 G. A., ch. 60, § 28 (p. 319), provides another method for the taxation of savings banks, yet the difference in such methods of taxation as to savings banks and national banks does not constitute a

discrimination in taxation as against national banks, within the provision of § 5219 of the Revised Statutes of the U. S.: *Davenport National Bank v. Board of Equalization*, 19 N. W. Rep., 889.

198.

SEC. 821.

[By 20 G. A., ch. 70, § 3, the county auditor is to provide suitable columns, properly headed, in the assessor's book, for the listing of dogs: See that act in supplement to page 409.]

A description of property as the "N. W. part of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ containing three acres," is

not sufficient to support a tax title: *Roberts v. Deeds*, 57-320.

199.

SEC. 822.

[By 20 G. A., ch. 70, § 1, the assessor is required to list dogs in the name of the owner thereof, without affixing any value: See that act in supplement to page 409.]

202.

SEC. 831.

Equity will not interfere to correct an over-assessment, and enjoin the collection of taxes thereon: *Powers v. Bowman*, 53-359. But where the assessment is void, as where personal property is assessed at some other place than that of its owner's residence, equity will entertain jurisdiction and enjoin the collection of the tax, and the party injured is not confined to an appeal to the board of equalization: *Barber v. Farr*, 54-57. The same rule applies where taxes are levied upon property exempt from taxation: *Smith v. Osburn*, 53-474.

On the trial of the appeal in the circuit court, the taxpayer is not entitled to a trial by jury, and on appeal

to the supreme court the case is triable *de novo*: *Davis v. City of Clinton*, 55-549; *Dunleith and Dubuque Bridge Co. v. County of Dubuque*, 55-558.

The amendment takes away the right of appeal in cases in which the sixty days had elapsed without any appeal being taken prior to the taking effect of the amendment: *Slocum v. Fayette Co.*, 61-169.

In case of an erroneous assessment, as for instance, where property properly assessable to a firm in one county is erroneously assessed to one of the partners in another county, the only remedy is by a proceeding before the board of equalization: *Harris v. Fremont Co.*, 19 N. W. Rep., 826.

205.

SEC. 839.

[By 20 G. A., ch. 70, § 2, the board is required to levy a tax upon dogs listed by the assessor, of fifty cents on each male and one dollar on each female: See that act in supplement to page 409.]

[By 20 G. A., ch. 200, § 1, the board of supervisors is authorized to levy a road tax of not exceeding one mill: See that act in supplement to page 246.]

SEC. 841.

Where it appeared that the assessment roll had been corrected by some one, and that as so corrected it had remained on file as a record in the auditor's office, and been regarded in subsequent proceedings as correct, held, that a party objecting to the correction as not made by proper au-

thority, had the burden of showing that it was incorrect and that the taxes assessed were inequitable or unjust, it appearing that unless covered by such correction the land had been entirely omitted from assessment: *Beeson v. Johns*, 59-166.

207.

SEC. 846.

[By 20 G. A., ch. 70, the treasurer is required to collect a dog tax at same time as other taxes, and keep the same as a separate fund to be paid out, as therein provided, on warrants issued by the auditor to persons whose claims for damages to domestic animals by dogs have been allowed by the board of supervisors: See the act in supplement to page 409.]

209.

SEC. 857.

[20 G. A., ch. 194, § 1, repeals this section and enacts in lieu thereof the following.]

Taxes; when due.

SEC. 857. No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, unless otherwise provided, at some time between the first Monday in January and the first day of March following, and pay his taxes in full; or, he may pay the one-half thereof before the first day of March succeeding the levy and the remaining half thereof before the first day of September following; *provided*, that in all cases where the half of any taxes has not been paid before the first day of April succeeding the levy thereof, the whole amount of taxes charged against such entry shall become delinquent from the first day of March following such levy; and in case the second installment of any taxes be not paid before the first day of October succeeding its maturity, penalty shall be computed on such installment from the first day of September designating the maturity of such installment; *provided also*, that in all cases where taxes are paid by installment as herein provided, each of such payments, except road taxes, shall be apportioned among the several funds for which taxes have been assessed, in their proper proportions. And if any one neglect to pay his taxes at or before maturity, as herein provided, the treasurer may make the same by distress and sale of his personal property not exempt from taxation, and the tax-list alone shall be sufficient warrant therefor.

Proviso.

First installment.

Second installment.

Proviso.

Apportioned.

Collection by distress and sale.

The purchaser of land upon which the taxes are due and unpaid takes subject to the lien of such taxes but does not become personally liable therefor: *Ritchie v. McDuffie*, 17 N. W. Rep., 167.

SEC. 859.

A person appointed under this section cannot recover from a private person additional fees for services performed under an alleged contract to pay such additional compensation in consideration of his remaining in office and performing the duties thereof: *Fawcett v. Eberly*, 58-544.

211.

SEC. 865.

A party buying at tax sale property covered by a school fund mortgage acquires thereby a lien for the taxes paid and becomes entitled to redeem from the school fund claim: *Ayres v. Adair Co.*, 17 N. W. Rep., 161.

SECS. 865 and 866.

[20 G. A. ch. 194, § 1 repeals these sections and enacts in lieu thereof the following:]

Delinquent taxes: a lien drawing interest.

Personal property, tax on, how collected.

SEC. 865. All taxes due and unpaid on the first day of March or the first day of September, shall become delinquent and draw interest as hereinafter provided; and taxes upon real property are hereby made a perpetual lien thereon against all persons except the United States and this state; and taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title; and the

treasurer is authorized and directed to collect the delinquent taxes by the sale of any property upon which the taxes are levied, or any other personal or real property belonging to the person to whom the taxes are assessed.

SEC. 866. The treasurer shall continue to receive taxes after they become delinquent until collected by distress and sale; and if the one-half of the taxes charged against any entry on the tax-book in the hands of a county treasurer be not paid before the first day of April after the same has been charged; or if the remaining half of such taxes has not been paid before the first day of October after its maturity, he shall collect, in addition to the tax of each tax-payer so delinquent, as penalty for non-payment, interest on such delinquent taxes, at the rate of one per cent per month thereafter until paid; *provided*, that in all cases where the half of any taxes has not been paid before the first day of April after the same has been charged on the tax-books, penalty as above shall be collected on the whole amount of taxes charged against such entry from the first of March succeeding the levy; and *provided also*, that the penalty prescribed by this section shall not apply upon taxes levied by any court to pay judgment on city or county indebtedness, but upon such taxes no other penalty than the interest, which such judgment draws, shall be collected; and *provided further*, nothing in this chapter shall be construed to alter the present rules governing the collection of road taxes, save that all such tax collected by the county treasurer shall be included in the first installment, and *provided further*, that the penalties provided by this section shall not apply to or be collected upon any taxes levied in aid of the construction of any railroad in this state.

Penalty on delinquent taxes.

Proviso.

Proviso.

Proviso.

212.

SEC. 870.

Where property was sold for an amount of tax, part of which was not a lien thereon, *held*, that the owner might recover from the county the amount of such tax, with costs, interest and penalties, which he was compelled to pay in order to redeem: *Brownlee v. Marion Co.*, 53-487.

Where title to land was for a long time in litigation between parties claiming title under conflicting grants, one of them paying the taxes, and it was finally decided that title was in the other, *held*, that the one who paid the taxes might recover the amount so paid from the one adjudged owner of the land (distinguishing the case from *Garraghan v. Knight*, 47-525): *Goodnow v. Moulton*, 51-555; *Same v. Wells*, 54-326; *Same v. Stryker*, 61-261.

And interest on the amount paid by the unsuccessful claimant of the land, at the legal rate of interest, may be recovered, commencing at the

date of payment: *Goodnow v. Litchfield*, 19 N. W. Rep., 226. But where the purchaser of property at execution sale makes redemption from a previous tax sale of the property he cannot recover from the former owner the amount paid; *Barr v. Patrick*, 59-134.

Morris v. County of Sioux, 42-416, followed: *Sears v. Marshall Co.*, 59-603.

It is the tax which has been illegally or erroneously exacted which is to be refunded. The money which is to be returned to the taxpayer is to be taken from the particular fund or funds into which it went when the tax was collected. No judgment can be rendered against a county on account of taxes illegally or erroneously collected for any of the public organizations or corporations for whose benefit the county treasurer collects taxes, without proof that there remains in the treasury, funds belong-

ing to such organization or corporation, which can properly be applied to the satisfaction of such judgment: *Iowa Railroad Land Co. v. County of Woodbury*, 19 N. W. Rep., 915.

Although a special tax cannot be refunded out of other taxes, yet where it was shown that their remained a sufficient amount in the treasury to refund to plaintiff the sum he was entitled to recover from the fund, the recovery was allowed to stand: *Dickey v. County of Polk*, 58-287.

Township road taxes collected and paid over to the township clerk cannot be recovered back from the county even though they have been illegally collected: *Stone v. County of Woodbury*, 51-522. But bridge taxes to

be collected and dispersed by the county constitute a part of the county funds and are not within the foregoing rules: *Dickey v. Polk Co.*, 58-287.

Where taxes are illegal, through erroneous action of the board in raising an assessment, they may be recovered back under this section; failure to pursue remedies to arrest the collection of the taxes will not waive or forfeit such right to recover them: *Ibid.*

This section is not applicable to a case of erroneous assessment made in the exercise of lawful authority; the only relief in such case is by application to the board of equalization under § 831: *Harris v. Fremont Co.*, 19 N. W. Rep., 826.

213.

SEC. 871.

[20 G. A., ch. 194, § 2, amends this section by striking out the word "October" where it occurs in the first line of said section and in lieu thereof inserting the word "December."]

While a mere stranger has not the right to pay taxes, yet if payment be made by such an one, and received by the treasurer, the property can not be afterward sold for such tax: *Iowa R. Land Co. v. Guthrie*, 53-383.

The word taxes in this section must be construed to mean state and county taxes, and not to include railroad taxes, and a second sale for

railroad taxes is legal: *Crowell v. Merrill*, 60-53.

It appearing that there were three bidders at a tax sale, and that they did not bid against each other, and this being the only evidence of a fraudulent combination, held, that it was not sufficient and that fraud could not be presumed: *Beeson v. Johns*, 59-166.

214.

SEC. 873.

[20 G. A., ch. 194, § 3, amends this section by striking out the word "September" wherever it occurs in said section and in serting in lieu thereof, the word "November."]

215.

SEC. 876.

Where the bid was for fourteen acres of a certain tract, and the notice of expiration of redemption and the tax deed followed the same de-

scription, held, that the notice and deed were void for uncertainty: *Poindexter v. Doolittle*, 54-52.

216.

16 G. A., Ch. 79, § 1.

[20 G. A., ch. 194, § 6, amends this section by striking out the word "October" where it occurs in the second line of said section and inserting in lieu thereof, the word "December."]

Under this act the owner in making redemption must pay the amount due on the real estate at the time of sale, and that amount must be re-

garded as the full amount of interest, taxes, penalties and costs as provided by the existing law: *Soper v. Es-peset*, 19 N. W. Rep., 232.

218.

SEC. 883.

[20 G. A., ch. 194, § 4, amends this section by striking out the word "October" where it occurs in the tenth line of said section and inserting in lieu thereof, the word "December."]

219.

SEC. 887.

The owner of the certificate may recover treble damages for waste or trespass: See §§ 3343, 3344.

220.

SEC. 889.

The purchaser cannot pay taxes for years previous to the sale which have not been included in the amount for which the property was sold, and thereby compel the owner, in redeeming, to pay such taxes: *Sheppard v. Clark*, 58-371.

SEC. 890.

[19 G. A., ch. 45, amends this section by striking out the word "twenty" in the sixth and tenth lines and inserting in lieu thereof the word "ten," and contains also the following:]

Provided, that this act shall not affect sales already made, or penalties upon taxes hereafter paid upon sales made before the taking effect of this act.

221.

SEC. 891.

One in possession of property under color of title is entitled to redeem: *Foster v. Bowman*, 55-237.

A tenant in common who desires to redeem may be required to redeem the entire property, and having made such redemption he may recover from his co-tenants the amount paid for such redemption of the co-tenants' share: *Hipp v. Crenshaw*, 17 N. W. Rep., 660.

Where a party buys land at execution sale which has been sold for taxes, he cannot, after making redemption, recover the amount so paid from the former owner: *Barr v. Patrick*, 59-134.

When one seeks to redeem from a tax sale under an equity or a claim not based upon a recorded title, which the law provides shall support the right of redemption, the county offi-

cers must permit the redemption if they are satisfied he in good faith relies upon such equity or claim. They are not to determine whether the law will enforce his claim, but whether in good faith he makes it; such claim, however, or equity, must pertain to an interest in the land, which if enforced, will vest some title, lien or right to the property itself. The county officers cannot exercise judicial functions and cannot determine questions of title of this kind. Moreover, in cases wherein the county officers are authorized and required to permit redemption, the courts will allow and enforce the right. It can not be possible that in a case wherein the officers would be required to permit redemption, the courts would deny the right: *Cummings v. Wilson*, 59-14.

222.

SEC. 892.

Redemption by guardian may be made before the execution of the deed, as provided in § 890, or after the execution of the deed, by equitable

action: *Will v. Mewhirter*, 57-545. This section simply prescribes when the right to bring action shall terminate, but does not provide that the

action can only be brought during the year after the minor comes of age. It may be brought by the guardian or the minor, before the latter attains his majority: *Ibid.*

As to limitation of action by minor to redeem, see § 902 and notes.

SEC. 893.

Corning Town Co. v. Davis, 44-622, followed in a somewhat analogous case: *I. F. & S. C. R. Co. v. Storm Lake Bank*, 55-696.

This section contemplates a full equitable adjustment of the rights of the parties, and rents and profits, as well as claims for improvements, are to be taken into consideration. Where such rents and profits had been more than sufficient to repay all the taxes, interest and penalties which the law imposes, *held*, that the owner was entitled to have his title quieted against the holder of the tax title without further redemption:

SEC. 894.

Knowledge of publication of notice will not obviate the actual service of notice in cases where the latter is required by statute: *Reed v. Thompson*, 56-457. But where the notice and proof of service on their face are regular, and a deed is issued in accordance therewith, the burden of overthrowing this *prima facie* evidence is upon the person attacking the deed: *Wilson v. Crafts*, 56-450.

The deed is at least *prima facie* evidence of the proper giving of notice, and the party attacking a deed for want of service of the notice here required upon the owner, must show that the land was assessed to some owner by name, and not to an unknown owner: *Fuller v. Armstrong*, 53-683.

Where the bid on which a forty acre tract of land was sold was for "fourteen acres" thereof, and the notice under this section so described it, *held*, that the notice was void for uncertainty in the description: *Poindezter v. Doolittle*, 54-52. ♦

A treasurer's deed issued before expiration of ninety days from the filing of an affidavit of service of notice is invalid: *Schneppe v. Prior*, 58-412; *Cummings v. Wilson*, 59-14.

Where a deed is void because prematurely issued, the surrender and cancellation of the certificate is also void, and the certificate has the same force and effect as though it had

Where the rights of a minor in the property sold are acquired after the sale, whether by conveyance or descent, the time for redemption is not extended: *Stevens v. Cassady*, 59-113.

Strang v. Burris, 61-3.

In a particular case where a party claimed the right to redeem in equity from a tax deed on the ground of certain unsuccessful offers to make redemption before the expiration of the time, consisting of visits to the auditor's office, which was found closed, etc., *held*, that the fact that twenty-six days elapsed after the making of such offer, and before the expiration of the time for redemption, without further steps being taken, precluded equitable relief: *Harrison v. Owens*, 57-314.

never been surrendered. If thereafter proper notice is given, or the party is prevented by an injunction at the suit of the owner to whom notice would be given, from giving such notice, the time of redemption will expire ninety days from the giving or attempting to give such notice: *Long v. Smith*, 17 N. W. Rep., 579.

The affidavit herein required to constitute completion of services must be by the holder of the certificate, his agent or attorney. An affidavit by the proprietor of the paper in which the notice was published is not sufficient: *American Missionary Association v. Smith*, 59-704; *Ellsworth v. Cordrey*, 16 N. W. Rep., 211.

An affidavit of the holder of the certificate that publication was made for three consecutive weeks, but which did not state when the publication was made, *held*, not sufficient: *Ellsworth v. Cordrey*, 16 N. W. Rep., 211.

Evidence in a particular case *held* sufficient to justify the court in finding that the tax register showed, when examined by the agent or owner before making redemption, that the affidavit required by statute was filed at such a date as to make his redemption proper: *Ellsworth v. Green*, 59-622.

Where a timber lot not suitable for cultivation is used by a person in

such way as such land is ordinarily used, he is to be deemed in possession, and is to be served with notice: *Ellsworth v. Low*, 17 N. W. Rep., 450.

Where at the time of the service of notice the land was listed and assessed for taxation to a purchaser of the same holding by a deed not recorded, and the assessor's book so showing was in the auditor's office, *held*, that notice must be served upon him

although the land was still in possession of his grantor, upon whom notice was properly served: *Weaton v. Knight*, 16 N. W. Rep., 582.

A party cannot, by assigning possession of the property on which he holds a certificate and then collusively assigning his certificate to another, have valid notice served upon himself which shall entitle the assignee to a deed: *Cummings v. Browne*, 61-385.

225.

SEC. 897.

The sale and deed convey the interest of the state and county in the property, but not the tax itself, and a tax purchaser is not entitled to recover from the owner the tax paid, where the sale and deed, owing to defective description, are void: *Roberts v. Deeds*, 57-320.

The acknowledgment is essential to the validity of the tax deed; and a defect therein is not cured by a general act (such as Code § 1967) legalizing defective acknowledgments of deeds: *Goodykoontz v. Olsen*, 64-174.

The tax deed is not conclusive evidence of the giving of notice of expiration of time of redemption, under § 894. The "notice" of which this section makes the deed conclusive evidence is notice of sale: *Keed v. Thompson*, 56-455. Where such notice and proof of service appear on their face to be regular, and a deed is issued in accordance therewith, any person asserting the invalidity of the deed, upon the ground that the service was not made as the proof shows, or that the person served was not the right person, has the burden of overcoming the *prima facie* evidence furnished by the papers: *Wilson v. Crafts*, 56-450.

A deed for "fourteen acres of" a certain forty acre tract offered for sale, *held*, void for uncertainty of description: *Poindexter v. Doolittle*, 54-52.

Defective description in assessment and tax books, and deed, cannot be cured by extraneous evidence: *Roberts v. Deeds*, 57-320.

A tenant in common cannot, by purchase at tax sale, cut off the interest of his co-tenants: *Shell v. Walker*, 54-386.

Where the treasurer, in pursuance of a proposition made by a party

before the sale opened, to take all lands not sold to others, made out certificates to such party after the sale was completed, there being no bids, such party not being present nor represented, and paying no money, but simply issuing receipts of the railroad company for whose benefit the tax was originally voted, *held*, that there was no sale, and that an innocent purchaser, under a tax deed issued in pursuance of such transaction, would not be protected, the principle decided in *Van Shaack v. Robbins*, 36-201, and *Sibley v. Bullis*, 40-432 not being applicable: *Truesdale v. Green*, 57-215.

A tax deed acquired by a tenant in common is not sufficient in equity to divest the interest of a co-tenant, even though the holder of the deed may have acquired the tax certificate before becoming tenant in common: *Tice v. Derby*, 59-312.

A party charged with the payment of taxes as agent can not acquire a tax title to his principal's land, and under the facts of a particular case, *held*, that the party acquiring tax title was the agent of the owner, and therefore that his title was void: *Ellsworth v. Cordrey*, 16 N. W. Rep., 211. But *held*, that the purchase of such agent at the tax sale was not void, but voidable; that the right and claim of the state and county to the taxes passed to him and his assignee, and that the owner seeking to evade the title, should pay to him the same amount he would have had to pay the treasurer in case the taxes had not been paid by the claimant under the tax title: *Ibid*.

A person who is not in possession of real estate, but who claims title thereto under a void tax deed, can become a purchaser at a subsequent tax sale, procure a treasurer's deed

and thereunder claim title: *Neal v. Frazier*, 19 N. W. Rep., 309.

Where a party seeks relief from a tax title under which the purchaser has procured a deed, and is in possession, such redemption will be allowed only upon payment of a sum sufficient to pay all taxes, if they had not been paid by the purchaser: *Thode v. Spofford*, 17 N. W. Rep., 561.

The rule stated in *Ererett v. Beebe*, 37-452, as to amount to be paid by the party who seeks in an equitable action, to redeem from a tax deed, does not apply to the case where a party seeks, by equitable action, to be allowed to redeem from an illegal sale before the tax deed is issued thereon. The treasurer's certificate of sale does not vest in the purchaser the title and interest of the state and county; the amount which plaintiff should be required to pay in such a case is the taxes which the owner was legally bound to pay, with six per cent interest: *Roberts v. Merrill*, 60-166.

It is a sufficient compliance with the provision of this section, requiring that before a tax deed can be set aside or redemption therefrom allowed, it must appear that the taxes due upon the property have been paid by the person seeking to redeem, that the party acting for the plaintiff made a tender of the amount and offer to pay the taxes due on the

land in controversy to the county auditor after the treasurer's deed was executed, and in his petition offers to pay whatever amount is found due: *Weaton v. Knight*, 16 N. W. Rep., 532.

No objection to the validity of the tax title, can, after the expiration of five years from the time of sale, be made on the ground that the deed shows upon its face that several tracts of land were sold for a gross sum: *Monk v. Corbin*, 58-503.

Where property was sold for a city tax claimed to have been levied fourteen years prior, and it did not appear upon the book of delinquent taxes which the city had adopted as a standard, held, that the city must be considered as having abandoned such taxes, and that the tax title was void: *Bradley v. Hintrager*, 61-337.

One asserting title under a tax deed has but to introduce it in evidence and the law puts upon his adversary the burden of showing its invalidity. He will not be guilty of fraud in asserting title under it, only as he has actual knowledge that it is invalid, or introduces it in evidence with intent to accomplish some unlawful purpose: *Brownell v. Storm Lake Bank*, 19 N. W. Rep., 788.

As to recovery by person whose title, after long litigation, has been declared invalid, of taxes paid by him pending such litigation, see notes to § 870.

230.

Sec. 902.

This limitation applies only as between the tax purchaser and the owner at the time of the sale, or one deriving title from such owner. Where one not the owner, and having mere color of title, goes into possession, there is no reason why the holder of the tax title should not have the same time as the holder of any other valid title to test the right of the occupant. (Supplemental opinion.) *Lockridge v. Daggett*, 54-332.

Where the land sold is and remains unoccupied, the tax title carries with it constructive possession, and after the lapse of five years becomes absolute: *Zent v. Picken*, 54-535.

The grantee of a minor has only five years from his purchase of the property to bring the action: *McCaughan v. Tatman*, 53-508.

The extension of time for bringing the action in favor of the minor, does not operate to the benefit of the purchaser as against such minor, and such purchaser must bring any action on his tax title within five years from the execution and recording of his deed: *Ibid.*

As to redemption by minor, see § 892.

The fact that the deed was executed and recorded more than five years before the commencement of the action, does not constitute a valid objection to the introduction of the deed in evidence. Whether the party gains possession under such deed depends upon whether or not the owner of the patent title was in possession at the date of the expiration of five years from the execution of the deed: *Monk v. Corbin*, 58-503.

Possession of land necessary to bar

an action under a tax title, is not required to be of the adverse, hostile and exclusive character required under the general statute of limitations. Its validity depends not so much on the extent and character of the improvements on the land as on the possession which would enable the holder under a tax title to commence his action for the land: *Griffith v. Carter*, 19 N. W. Rep., 903.

The change in the language of this section from that of the corresponding section of the Revision, as to when the period of limitation commences

to run, was merely the adoption of the judicial construction put upon the law as it was contained in the Revision: *Ibid*.

Although the limitation as against the holder of a tax deed commences to run from the time he became entitled to his deed, the same rule does not apply as against the owner, and if he asserts his right to the land by taking possession within five years from the recording of the deed, the action by the holder of the tax title is barred: *Ibid*; *Cassaday v. Sapp*, 19 N. W. Rep., 909.

231.

SEC. 905.

The stub of a redemption certificate is admissible in evidence under

this section: *Ellsworth v. Low*, 17 N. W. Rep., 450.

234.

SEC. 914.

[20 G. A., ch. 194, § 5, amends this section by striking out the word "March" where it occurs in the seventh and eighth lines thereof, and inserting the word "April"; also, further amends said section by striking out the word "November," where it occurs in the ninth line of said section, and inserting in lieu thereof the word "December"; also by striking out the words "first day of November," where they occur in the tenth line of said section, and in lieu thereof inserting the words "tenth day of December."

By the same act it is provided (§ 7) that "all acts and parts of acts, so far as inconsistent with this act, are hereby repealed." It is further provided (§ 8) that "this act shall take effect and be in force on and after the second Monday of November, A. D. 1884."

236.

SEC. 921.

Although the road is established by the auditor, and is less than sixty-six feet in width, if the record of his action is read over to and approved by the board, such action becomes substantially the action of the board, and is proper: *Slate v. Barlow*, 61-572.

There is no presumption that a highway originating by prescription is of the width here required for a highway laid out by the state. The width of such highway is a question of fact for the jury to determine from the facts and circumstances. The court cannot, as a matter of law, say

what the road acquired by prescription or use is of any particular width beyond such portion as is actually used by the public: *Davis v. City of Clinton*, 58-389.

A road supervisor may be enjoined from erecting a bridge at the side of the highway where it will cause injury to a hedge of an adjoining land owner, and render necessary the destruction of shade trees in front of his premises, when it might, with some additional expense, be constructed in the middle of the highway without causing such damage: *Quinton v. Burton*, 61-471.

SEC. 922.

A petition will not be insufficient to give the board jurisdiction, merely because it runs to the county auditor, who is the clerk of the board, instead of to the board itself, or because it does not expressly ask for the

establishment of the road, when its object is abundantly evident, in that it states that the road is needed and asks for the appointment of a commissioner: *State v. Barlow*, 61-572.

SEC. 923.

If the auditor allows the petition to be filed without a bond, and proceeds to act upon it, his action cannot be said to be without jurisdiction, the provision in regard to a bond being simply directory: *State v. Barlow*, 61-572.

237.

SEC. 927.

A report against a road by the commissioner is an official determination, and the application cannot be considered as longer pending: *Morgan v. Miller*, 59-481.

233.

SEC. 934.

[19 G. A., ch. 80, amends this section by inserting after the word "highway," in the third line, the words "shall report the number of bridges required, if any, and the probable cost thereof on the proposed highway."]

Where an auditor set a day for final hearing one day beyond the limit here fixed, and afterward, in a proceeding to enjoin the road supervisor from opening the road so laid out, there was a trial involving the validity of the road, and the opening of the same was perpetually enjoined, held, that the same was a binding adjudication that no road had ever been established: *Dicken v. Morgan*, 59-157.

SEC. 936.

[19 G. A., ch. 109, amends this section by inserting after the word "thence," in the eleventh line, the following words: "Giving the names of the owners of the land through which the proposed road passes, as they appear upon the transfer books of the auditor's office."]

239.

SEC. 937.

In order to enable the auditor to act, it is not necessary that there be filed formal proof of publication of the notice required by the preceding section; his determination that notice has been duly published, while not conclusive, is sufficient to cast upon any one questioning his action, the burden of proving want of publication: *Pagels v. Oaks*, 19 N. W. Rep., 905.

240.

SEC. 940.

Where, upon failure of one of the appraisers to meet with the others on the day fixed, they adjourned instead of filling his place, held, that in the absence of any proof of prejudice caused thereby, the proceedings would not be treated as erroneous upon a review by certiorari: *Johnson v. Board of Supervisors of Clayton Co.*, 61-89.

SEC. 946.

Upon a writ of certiorari from the proceeding of the board, it is not proper to review its decision upon the question whether the public interests demand a proposed road, or whether it is practicable and expedient to establish it. The circuit court can only determine whether the board is proceeding within its jurisdiction or not: *Teidt v. Carstensen*, 61-334.

Where the highway, as laid out, was the only means of access to the

residence of plaintiff, it was held that it should properly be considered a public highway, even though he were the only person benefited thereby, and himself objected to its establishment as a highway. It is not a citizen's right to render himself inaccessible, and a road which is the only one between a citizen and the public may properly be deemed a public road: *Johnson v. Board of Super-*

visors of Clayton Co., 61-89; *Pagels v. Oaks*, 19 N. W. Rep., 905.

Where a *certiorari* proceeding is instituted against the board of supervisors, calling in question their action in establishing a highway, and such action is held to be illegal, the costs should be taxed, not against the board, but against the petitioners for the highway: *Teidt v. Carstensen*, 19 N. W. Rep., 885.

242.

SEC. 959.

Where the notice is served within twenty days, and the only objection is as to the sufficiency of proof of

such service, an appearance and objection to the service confers jurisdiction: *Libby v. McIntosh*, 60-329.

243.

SEC. 962.

The damages herein referred to must be estimated with reference to the extent of the interest of the claimant in the property from which the ap-

propriation is to be made, and the claimant must therefore allege and prove the extent of his interest: *Cos-tello v. Burke*, 19 N. W. Rep., 247.

244.

SEC. 964.

The board cannot vary the line of road as originally surveyed to conform it to a way acquired by prescription. The alterations referred to in this section have reference to such changes in the road as have occurred by orders or surveys made after the original survey, and which tend to such confusion that the location of the road is not accurately defined or pointed out by the record:

Blair v. Boesch, 59-554. But it is competent for the board to hear evidence as to where the original survey was actually made, and being satisfied from the evidence that the re-survey is upon the line as originally surveyed, to approve and confirm such survey, although it does not conform to the original field notes: *Ibid.*

245.

SIDEWALKS ON HIGHWAYS.

[Twentieth General Assembly, Chapter 147.]

SECTION 1. It shall be lawful for any owner of land adjoining or abutting on a public road or highway outside the limits of any city or town, to build and construct a sidewalk on and along said highway for his own use and for the use of the public traveling on foot; said sidewalk shall not exceed four feet in width and shall be located along the side of the highway and may be constructed of any material suitable for a foot walk, *provided*, that said sidewalk shall not be so constructed as to interfere with the proper use and enjoyment of any lands or premises along which it passes, and *provided further*, that the persons building such walk shall keep the same in repair, and shall be liable for all injuries occasioned by his failure to keep the same in repair.

Landowners may construct sidewalks along any public road.

Proviso: shall not interfere with use of lands.

Persons building liable for injuria.

Penalty for injury of sidewalk.

SEC. 2. Any person who shall destroy, injure, or drive or ride upon a sidewalk, so constructed or heretofore, constructed except at highway crossings, shall be deemed guilty of a misdemeanor and shall be fined not less than five dollars for each offense, and shall be liable to the party who has built or maintained said sidewalk for all damages.

246.

SEC. 969.

As incorporated towns are given power to provide for grading and repair of their streets (§ 465), they must have control over such streets, and the road supervisor and township trustees have no authority over them: *Clark v. Incorporated Town of Epworth*, 56-462.

SEC. 970.

The trustees have no authority to contract indebtedness for the purchase of tools and machinery, until a tax is levied and set apart for that purpose. "Indebtedness previously contracted," in the preceding section, does not refer to such indebtedness for tools and machinery. The trustees may, after the tax is levied and set apart, anticipate the collection of the tax and purchase tools and machinery upon credit: *Wells v. Grubb*, 58-384; *Hanks v. North*, 58-396; *Revolving Scraper Co. v. Tuttle*, 61-423.

The clerk might maintain an action for funds belonging to his township, in the hands of third persons. If he deposits such funds in his individual name, without notice to the banker of their character, such act

amounts to a conversion; the deposit belongs to the clerk individually, and if seized by garnishee process under attachment on his individual debt, without notice of its character, cannot be recovered back as public funds: *Long v. Emsley*, 57-11.

The township clerk is the proper party to bring an action against a road supervisor for monies received by him belonging to the general township fund which he fails to pay over: *Wells v. Stombach*, 59-376.

And it seems that in such case the clerk might sue on the supervisor's bond: *Kellogg v. Bare*, 17 N. W. Rep., 666.

[19 G. A., ch. 158, relating to taxation of property within a city or town, for road purposes, is inserted in supplement to page 124.]

ROAD TAXES.

[Twentieth General Assembly, Chapter 200.]

One-mill tax authorized in each county.

Paid out for work on highways.

Proviso: total tax not to exceed 5 mills.

SECTION 1. The board of supervisors of each county may, at the time of levying taxes for other purposes, levy a tax of not more than one mill on the dollar of the assessed value of the taxable property in their county, which tax shall be collected at the same time and in the same manner as other taxes are collected and shall be known as the county road fund, and shall be paid out only on the order of the board of supervisors for work done on the highways of the county, in such places as the board shall determine, and the county treasurer shall receive the same compensation for collecting this tax as he does for collecting corporation taxes; *Provided*, that the amount levied by the board of township trustees under section 969 of the code together with the amount thus levied shall not be in excess of five mills.

SEC. 2. The board of supervisors shall, at their regular meeting in April of each year, determine from the auditor's and treasurer's books, the amount of money collected and credited to

said road tax fund. They shall, also, determine the manner in which said tax shall be expended, whether by contract or otherwise.

[Sec. 3 provides a substitute for Code § 986, and is inserted in supplement to page 250.]

SEC. 4. The board of township trustees, may, at their regular meeting in April, 1884, or at any regular April meeting thereafter, on petition of a majority of the voters of said township consolidate the several road district[s] in the township into one highway district: *Provided*, however, that nothing herein contained shall be construed to prevent the trustees from again subdividing the township into subdistricts and returning to the present plan of road work, at any regular April meeting, after two years trial of the plan provided by this act.

Township trustees may consolidate road districts

Proviso.

SEC. 5. The trustees may order the township highway tax for the succeeding year paid in money and have the same collected by the county treasurer the same as other taxes.

Tax may be ordered paid in money.

SEC. 6. In all cases where the township shall have organized into one highway district, as contemplated in section 4 of this act, the board of township trustees shall order and direct the expenditure of all the highway funds and labor belonging or owing to the township; and to this end the trustees may let by contract to the lowest responsible bidder (should they deem him competent to the proper performance of such work) any part, or all of the work on the highways for that year, in the township, or they may appoint a township superintendent of highways, with one or more assistants, should they deem it best so to do, to superintend all or any part of such work, subject always to the direction of the township trustees; *provided only*, the said trustees shall not incur any indebtedness for such purposes, unless the same has been, or shall at the time be, provided for by an authorized levy.

When organized into one highway district

Work may be by contract.

Proviso.

SEC. 7. The trustees shall cause both the property and poll road tax belonging to the township, to be equitably and judiciously expended for highway purposes in the township highway district, and shall cause the highways to be kept in as good condition as the means at their command will admit of.

Expenditure of tax.

SEC. 8. The trustees shall cause the noxious weeds growing on the highways in their township, to be cut twice a year, if deemed necessary to exterminate the same, and have them cut at such times as to prevent their growing to seed; and for this purpose, the trustees may allow any land owner a reasonable compensation for destroying such weeds on the highways abutting his lands and have him credited for the same on his road tax for that year.

Noxious weeds to be cut twice a year.

SEC. 9. The trustees shall fix the term of office and per diem of the superintendent of highways and his assistants, should such be employed; *provided*, the superintendent shall not be hired for more than one year at a time and his per diem shall not exceed three dollars; and that the contract shall be conditioned so that the trustees may dispense with his services at any time, when in their judgment it shall be for the best interests of the township so to do.

Trustees to fix term of office and per diem of superintendent. Proviso.

- 75 per cent of tax to be expended. —
- Funds of the several districts to be placed to credit of general township.
- Township clerk, contractor and superintendent, to qualify and give bond.
- Compensation of trustees, of county treasurer, of township clerk.
- Nine hours constitute a day's work. Proviso.
- Law as to highway supervisors shall apply to contractors.
- Trustees to designate when township system takes effect.
- Secs. 4 to 15 hereof apply: when.
- Repealing clause.
- SEC. 10. The trustees shall cause at least seventy-five per cent of the township highway tax to be properly expended for highway purposes by the fifteenth day of July each year.
- SEC. 11. In all cases where the one highway district plan shall be adopted, the highway funds belonging to the several road districts in the township, prior to the change, shall be placed to the credit of the general township highway fund, and all claims for work done or material furnished for road purposes, and unsettled for prior to the change, shall be paid out of such funds.
- SEC. 12. The trustees shall require the township clerk, contractor, and superintendent, contemplated in this act, each to qualify, as other township officers, and to execute a bond with approved sureties, for twice the amount of money likely to come into their hands, respectively, by reason of this act.
- SEC. 13. The trustees shall receive the same compensation per day for time necessarily spent in looking after the highways, as they do for other township business; the county treasurer shall receive the per cent for collecting the highway taxes contemplated in this act that he does for collecting corporation taxes; and the township clerk shall receive two per cent of all the money coming into his hands by reason of this act, and by him paid out for road purposes.
- SEC. 14. Nine hours' faithful service for a man, or man and team, shall be required for a day's work on the road; *provided*, that except on extraordinary occasions no person shall be required to go more than three miles from his place of residence to work on the roads; and for the purposes of this act, the residence of a man with a family shall be construed to be where his family reside[s], and for a single man it shall be at the place where he is at work.
- SEC. 15. The powers, duties, and accountability imposed on highway supervisors, so far as consistent with this act, shall apply with equal force to contractors, superintendents and assistants contemplated in this act.
- SEC. 16. In all cases where the one highway district for the township shall have been adopted, it shall be competent for the township trustees to designate when the same shall take effect as to the working of the roads.
- SEC. 17. Sections four to fifteen inclusive, of this act shall apply and be in force only in such townships as adopt the one highway district plan provided for in this act.
- SEC. 18. All acts and parts of acts so far as inconsistent with this act are hereby repealed.

249.

SEC. 981.

A road supervisor who fails to pay over the proportion of the road taxes collected by him, which has been by the trustees apportioned to the general fund, is liable therefor in an action on his bond, although he may have expended for road purposes all the money collected by him: *Wells v. Stombach*, 59-376.

SEC. 984.

[20 G. A., ch. 200, § 14. supersedes this section to some extent: See that act inserted in supplement to page 246.]

250.

SEC. 986.

[20 G. A., ch. 200, § 3, repeals this section, and enacts the following in lieu thereof:]

SEC. 986. The supervisor shall be allowed the sum of two dollars per day for each day's labor, including the time necessarily spent in notifying the hands and making out his return, which sum shall be paid out of the highway fund, after deducting his two days' work. When there is no money in the hands of the clerk with which to pay the said supervisor, he shall be entitled to receive a certificate for the amount of labor performed, which certificate shall be received in payment of his own highway tax for any succeeding year.

Compensation of road supervisor.
How paid.
Receive a certificate: when.

[Other sections of this act are inserted in supplement to page 246.]

251.

SEC. 989.

Shade trees at the side of the highway, which do not interfere with travel if the road is in the center of the highway, should be permitted to stand: *Quinton v. Burton*, 61-471.

255.

AFTER SEC. 1010.

TOLL-BRIDGES OVER STREAMS DIVIDING COUNTIES.

[Twentieth General Assembly. Chapter 13.]

SECTION 1. Boards of supervisors in adjoining counties each of which contains according to the last census a population exceeding 10,000 inhabitants shall have authority to purchase and acquire any toll-bridge erected across any stream dividing said counties at the place said bridge is erected and keep and maintain the same at joint expense as a free public bridge, provided that the total cost of such bridge shall not exceed the sum of \$10,000.

Board of supervisors may purchase.
Maintain at joint expense—free.
Cost limited.

SEC. 2. If said boards of supervisors are able to agree upon the terms upon which they will purchase such bridge and the proportion each will pay towards the purchase and maintenance of the same, such agreement shall be reduced to writing signed by the respective chairmen and recorded in the records of their proceedings. But if they are unable to thus agree the county desiring to purchase said bridge may institute a special proceeding in the circuit court of either of said counties, and said cause shall be conducted as an equitable cause and the court shall determine whether there is any public necessity for said bridge the relative benefit the same will be to the two counties and based upon such benefit the proportion each county shall bear in the purchase and maintenance of said bridge, and shall enter decree accordingly, either or both parties having the right of appeal to the supreme court. Upon entering of a decree in favor of the purchase of such bridge it shall be the duty of said respective boards of supervisors at once to proceed to complete the purchase

Proceedings where boards of supervisors agree.
Proceedings where boards are unable to agree.
Finding of court.
Right of appeal.
Completion of purchase.

Tax levy for purchase.

upon such terms as are determined on and to forthwith levy the necessary taxes to make the payments and said counties shall thereafter keep and maintain such bridge and be responsible for the safe condition thereof as provided by law.

261.

18 G. A., Ch. 74, § 9.

[20 G. A., ch. 65, § 1, amends this section by striking out the word "nine" and inserting in lieu thereof the word "six."]

SEC. 11.

[19 G. A., ch. 175, § 1, provides that the reports of the adjutant-general shall be made to the governor, biennially, on or before the 15th day of August preceding the regular sessions of the general assembly: See that act in supplement to page 28.]

262.

SEC. 13.

[20 G. A., ch. 65, § 2, amends this section by striking out, in the first sentence, the words "not less than," and the words "nor more than ten."]

264.

SEC. 21.

[20 G. A., ch. 65, § 4, amends this section by inserting after the words "as ordered by the commander-in-chief" the words "and for the time spent in such encampment each soldier and officer shall receive as compensation therefor the sum of \$1.50 per day, to be paid under such provisions as the commander-in-chief may direct."]

267.

SEC. 45.

[20 G. A., ch. 65, § 3, amends this section by striking out all of said section after the words "with a view to disbandment."]

268.

SEC. 51.

[20 G. A., ch. 65, § 5, is as follows:]

\$15,000 additional annual appropriation

SEC. 5. For the purpose of carrying out the provisions of chapter 74, laws of the 18th general assembly as herein amended, there is hereby made the additional appropriation of fifteen thousand dollars per annum, or so much thereof as may be necessary, out of any money in the state treasury not otherwise appropriated, and all warrants against said appropriation shall be drawn by the auditor of state upon the state treasurer upon the certificate of the adjutant general approved by the governor.

270.

SEC. 1061.

[20 G. A., ch. 22, amends this section by adding thereto the following proviso:]

Provided, That the provisions of this section shall not apply to the bonds or other railway securities to be hereafter issued or guaranteed by railway companies of this state, in aid of the location, construction and equipment of railways, to the amount of

not exceeding sixteen thousand dollars per mile of single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway actually constructed and equipped.

SEC. 1063.

Where the articles of incorporation did not state the principal place of business, or the time of commencement of business, held, that the publication of such articles was not	sufficient notice, and that there was such failure to comply with this section as to render the stockholders individually liable under §1068: <i>Clegg v. Grange Co.</i> , 61-121.
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271.

SEC. 1069.

Whether the provisions of this section as to renewal, are applicable to such corporations as are described	in § 1091 <i>quære: Byers v. McCartney</i> , 17 N. W. Rep., 571.
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274.

SEC. 1082.

Although the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, yet this rule can have no application to a case where it is shown that in a transaction, untainted with fraud and without prejudice to creditors, stock has been issued to parties having a valid claim against the company at a small per cent. of its par value, and accepted by them in full payment of their claims, its actual value being less than that at which it is thus accepted: <i>Louisa Co. National Bank v. Traer</i> , 16 N. W. Rep., 120.	The company can not by any arrangement or action upon its part release the subscriber from his liability: <i>Singer v. Given</i> , 61-93.
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The fact that a subscription for stock was to be paid in property instead of money does not relieve the subscriber from liability, if the property was not turned over as agreed.	The subscriber can not, as between himself and the creditor, set up claims for services, or for use of property, for which the corporation is indebted to him: <i>Ibid.</i>
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The fact that a subscription for stock was to be paid in property instead of money does not relieve the subscriber from liability, if the property was not turned over as agreed.	Whether the stockholder can be made liable until judgment has been rendered against the corporation or not, the statute of limitations as affecting the action against such stockholder cannot be enlarged on account of any failure or delay in obtaining judgment against the corporation: <i>First Nat. Bank of Garrettsville, O., v. Greene</i> , 17 N. W. Rep., 86.
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SEC. 1083.

The fact of demand and refusal may be shown by the official return upon the execution. Such return, as between the corporation and the creditor, must be regarded as conclusive. Evidence may be introduced	to show that no such return was made, but it is not competent to dispute it by showing that no demand was made as therein stated: <i>Singer v. Given</i> , 61-93.
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SEC. 1084.

This section contemplates the rendition of a judgment against the stockholder, and not merely the	awarding of an execution against him: <i>Singer v. Given</i> , 61-93.
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275.

SEC. 1089.

The estoppel provided for under this section certainly applies only to a body of men acting as a corporation	for pecuniary profit. Whether the section can be applied to persons acting as a corporation other than for
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pecuniary profit query: *Kirkpatrick v. United Presbyterian Church of Keota*, 19 N. W. Rep., 272.

Among acts which would constitute acting as a corporation herein provided for, would be the adoption and use of a corporate seal, the taking of subscriptions and the issue of certificates of stock; but the acts of persons as members of a religious society in holding business meetings, and acquiring property, receiving and paying out money, appointing agents to make settlements, etc., held, not

sufficient to constitute such "acting as a corporation;" also held, that the passage of by-laws is not an assumption of distinctive corporate powers; nor is the attempt to incorporate: *Ibid.*

When a corporation seeks to enforce the bequest in a will, duly admitted to probate, its claim cannot be resisted on the ground that it has not been legally organized. Such objection can be taken only by a proceeding by *quo warranto*: *Quinn v. Shields*, 17 N. W. Rep., 437.

18 G. A., Ch. 208.

The provisions of the constitution, Art. 8, § 9, rendering stockholders in a banking corporation or institution individually liable to an amount equal to their respective shares, is

held to apply only to banks of issue, and not to banks merely of discount and deposit: *Allen v. Clayton*, 18 N. W. Rep., 663.

276.

SEC. 1091.

Whether the provisions of § 1069, as to renewal of corporations, is applicable to corporations such as here-

in specified, *quere*: *Byers v. McCartney*, 17 N. W. Rep., 571.

277.

SEC. 1097.

The civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters, but will interfere with the action

of such associations when rights of property or civil rights are involved: *Bird v. St. Mark's Church of Waterloo*, 17 N. W. Rep., 747.

278.

SEC. 1101.

The words "such institution" here used refer to the associations named in § 1091; and such associations, whether incorporated or not, cannot

take by will more than one-fourth of the estate of a testator who leaves a wife, child, or parent: *Byers v. McCartney*, 17 N. W. Rep., 571.

280.

SEC. 1109.

Such societies may offer a premium to the winner at a horse-race held on its grounds during its annual fair. Sec. 1114, prohibiting gambling and

horse-racing, does not apply to races controlled by the society: *Delier v. Plymouth Co. Ag'l Soc'y*, 57-431.

282.

SEC. 1121.

[20 G. A., ch. 123 amends this section by striking out of the first line thereof the words "one thousand" and inserting in lieu thereof the words "twenty-five hundred."]

PUBLICATION OF PROCEEDINGS OF IMPROVED STOCK BREEDERS' ASSOCIATION.

[Twentieth General Assembly, Chapter 134.]

SECTION 1. The annual proceedings of the Iowa State Association of Improved Stock Breeders of which C. F. Clarkson is president and Fitch B. Stacy is secretary, including the accepted essays and addresses, together with the report of discussions, is hereby authorized and directed to be printed by the state, under the supervision of the association, as the reports of the state agricultural and horticultural societies are now published.

Annual proceedings to be published by the state.

SEC. 2. The number of copies to be so published shall be limited to five thousand annually, not exceeding three hundred pages each, all of which shall be bound in pamphlet form. They shall be distributed as follows:

5,000 copies. No. of pages and binding.

To the governor, lieutenant governor, secretary of state, auditor of state, state treasurer, each member of the general assembly, the state horticultural society, the state agricultural society, the state library, the Iowa state university and the Iowa state agricultural college, each twenty copies. To each county auditor to be kept in the office, to each public library, to each incorporated college in the state, to each president and secretary of each county and district fair, and to each president and secretary of each dairymen's or stock growers' association, two copies; the remainder to be distributed under the direction of the association.

Distribution.

297.

SEC. 1160.

[20 G. A. ch. 11, amends the substitute, 17 G. A., ch. 104, by inserting after the words "fire or death" in the fourth line, the words "or loss or damage by tornadoes, lightning, hail storms, cyclones or wind storms."]

Mutual aid associations fall within the provisions of this section and not within those of the three following: *State ex rel. Auditor v. Iowa Mutual Aid Association*, 59-125.

301.

SEC. 1161.

This and the following sections do not apply to mutual aid associations organized to afford financial aid and benefit to the families of deceased members, and assistance to members personally in case of sickness or disability. The payment of membership fees, dues and assessments alone being required, and no permanent fund for any other purpose being accumulated, such associations are within the provisions of §1160: *State ex rel. Aud. v. Ia. Mut. Aid Ass'n* 59-125.

306.

SEC. 1172.

In an action under this section, to close the business of a corporation for failure to comply with provision of chapter 5, title 9 of the Code, it must be assumed that the corporation was duly organized: *State ex rel. Auditor v. Iowa Mutual Aid Association*, 59-125.

308.

SEC. 1182.

The proceeds of the life policy are assets of the estate, and only differ from other assets in the manner of their distribution: *Kelley v. Munn*, 56-625.

This section contemplates a case where the policy is payable to deceased, or his legal representative,

and not a case where it is payable to another, for the use and benefit of such other; in this latter case, it cannot be otherwise disposed of by will: *McClure v. Johnson*, 56-620.

Smedley v. Felt, 43-607, followed: *Murray v. Wells*, 53-256.

310.

SEC. 1186.

Hawkeye Benefit, etc., Ass'n v. Blackburn, 48-385, followed: *Bur-*

lington Mutual Loan Ass'n v. Heider, 55-424.

319.

15 G. A., Ch. 60, § 28.

The capital stock to the extent that it is invested in U. S. bonds, is

not taxable: *German Am. Savings Bank v. City of Burlington*, 54-609.

324.

SEC. 1207.

[This section as amended by 16 G. A., ch. 140, § 1, is further amended by 19 G. A., ch. 44, § 1, by inserting the word "levees" after the word "constructed," in the third line.]

SEC. 1208.

[This section is amended by 19 G. A., ch. 44, § 2, by inserting the word "levee" before the word "ditch," in the eleventh line, and also in the twenty-second line.]

325.

SEC. 1209.

[This section is amended by 19 G. A., ch. 44, § 3, by inserting the word "levee" before the word "ditch," wherever the latter occurs in said section.]

SEC. 1210.

[This section as amended by 16 G. A., ch. 140, § 2, is further amended by 19 G. A., ch. 44, § 4, by inserting the word "levee" before the word "ditch," in the second line.]

SEC. 1211.

[This section is amended by 19 G. A., ch. 44, § 5, by inserting the word "levee" before the word "ditch," in the second line.]

SEC. 1212.

[This section, as amended by 16 G. A., ch. 140, § 1, and by 18 G. A., ch. 85, § 8, is further amended by 19 G. A., ch. 44, § 6, by inserting the word "levee" before the word "ditch," where it occurs in the ninth, and also in the fourteenth line, and the words "levee or" before the words "drainage fund," in the seventeenth line.]

326.

SEC. 1214.

[This section, as amended by 16 G. A., ch. 140, § 4, is further amended by 19 G. A., ch. 44, § 7, by inserting the word "levee" before the word "ditch," in the sixth line; by inserting the words "and cause said levees to be repaired" after the words "re-opened and repaired," in the thirteenth line; by inserting the word "levees" before the word "ditches," in the sixteenth line, and by inserting the words "or any interference with such levees" after the word "water-courses," in the twentieth line.]

Vicinity, as used in this section, does not mean adjoining to or abiding on, but near by, close by, or neighboring country. The board being vested with the power to determine what land in the vicinity should be assessed, has a large discretion	as a local tribunal and may assess one parcel of land more, another less, and others not at all, and from the action of the board in this respect, no appeal is provided for: See notes to §1216: <i>Lambert v. Mills Co.</i> , 58-666.
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327.

SEC. 1216.

[This substitute is amended by 19 G. A., ch. 44, § 8, by inserting the word "levee" before the word "ditch," in the fourth line.]

No appeal from an action of the board in assessing the cost of the improvement upon land in the vicinity	is provided for in behalf of the party whose land is assessed: <i>Lambert v. Mills Co.</i> , 58-666.
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17 G. A., Ch. 121.

[Sections 1 and 2 of this act are amended by 19 G. A., ch. 44, §§ 9 and 10 respectively, by inserting the words "levee or" before the word "drain," wherever it occurs.]

18 G. A., Ch. 85.

[This act is amended in each section by 19 G. A., ch. 44, § 11, by inserting the word "levee" before the word "ditch," wherever it occurs; and § 5 thereof is further amended by inserting the words "levee or" before the word "drain," in the fourth line.]

328.

DRAINS, LEVEES AND CHANGES IN WATER COURSES.

(Twentieth General Assembly, Chapter 186.)

SECTION 1. Ditches or drains may be located and constructed within the limits of any public highway, and on either or both sides thereof, and levees or embankments upon and along the same; *provided*, they are so constructed as not to prevent public travel thereon. The engineer or commissioner appointed to locate ditches, drains, levees or embankments, may recommend the establishment of a public highway upon and along the route of the same, and the board of supervisors may establish the same on such recommendation in the same manner as on the report of a highway commissioner. All levees built by taxation under the drainage laws shall be under the control of the board of supervisors of the county in which they are situated, and the board shall have the power to grant the right of way thereon to any railway company that will maintain the same while used for railway purposes: *provided*, the steps for condemnation and payment therefor, contained in chapter 4, title 10, of the code, shall first

Ditches or drains in public highway.	Levees and embankments.	Engineer can recommend public highway, when.	Board of supervisors may establish.	What levees are under control of board of supervisors.	<i>Providor</i> : Chap. 4, Title 10, compiled with.
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Proviso: not kept at expense of county. be taken by said company; *provided further*, that nothing in this section shall be construed so as to require such ditches or levees to be kept up at the expense of the county.

100 voters petition on overflowed lands. SEC. 2. Whenever the petition of one hundred legal voters of the county, setting forth that any body or district of land in said county, described by metes and bounds, or otherwise, is subject to overflow, or too wet for cultivation, and that in the opinion of petitioners the public health, convenience or welfare, will be promoted by draining or leveeing the same, and also a bond, conditioned as required by section 1208 of the code, shall be filed with the county auditor; he shall appoint a competent engineer or commissioner, who shall proceed to examine said district of lands, and if he deem it advisable to survey and locate such ditches, drains, levees, embankments and changes in the direction of water courses as may be necessary for the reclamation of such lands or any part thereof, and he shall make substantially the same report and the same proceedings shall be had as now provided by law for the location and construction of ditches, drains and changes in water courses, and two or more counties may unite in such work of reclamation in the manner now provided by law.

Bond filed with auditor: he shall appoint an engineer. Duty of engineer. Report of proceedings. ———

Board of supervisors to determine amount to be levied each year. SEC. 3. If the board of supervisors shall be of opinion that the estimated cost of reclamation of such district of lands is greater than should be levied and collected in a single year from the lands benefited, they may determine what proportion of the same should be levied and collected each year, and they may issue drainage bonds of the county bearing not more than eight per cent annual interest, and payable in the proportion and at the times when such taxes so apportioned will have been collected, and may devote the same at par to the payment of such work as it progresses, or may sell the same at not less than par, and devote the proceeds to such payment; and should the cost of such work exceed the estimate, a new apportionment of taxes may be made and other bonds issued and used in like manner; but in no case shall any such bonds run longer than fifteen years, and at least ten per cent in amount of those issued on the first estimate shall be payable annually. The board of supervisors may divide the land to be benefited into drainage districts, which shall be accurately described and numbered, and such drainage bonds shall be in sums of not less than fifty dollars each, and shall be numbered consecutively and issued as other county bonds are, and shall specify that *that* they are drainage bonds, and designate by its number the drainage district on account of which they are issued. And in no case shall the amount of bonds issued exceed fifty per cent of the value of the lands in such drainage districts as shown by the last assessment for taxation.

Bonds and rate of interest. Where cost exceeds estimate. No bond to run longer than 15 years. Land may be divided. Denomination of bonds. Not to exceed 50 per cent of value of land.

Tax to pay bonds as herein provided, levied each year. How collected. SEC. 4. It shall be the duty of the board of supervisors to levy each year on the lands benefited a tax sufficient to pay the interest on such bonds and so much of the principal as falls due in the succeeding year, and such tax shall be collected in the same manner as other county taxes, and shall be carried to the credit of the drainage district on account of which the bonds are issued, and shall be used to pay the principal and interest of

said bonds as the same falls due: *provided*, that any surplus may Proviso. be devoted to payment of works of reclamation in said district or repairs thereof.

UNDERGROUND DRAINS.

[Twentieth General Assembly, Chapter 188.]

SECTION 1. Whenever any person shall desire to construct any tile or other underground drain through the land of another, and shall be unable to agree with the owner or owners of such land as to the same, he may file with the clerk of the township where said land is situated an application therefor, giving a description of the land or lands through which he may desire to construct same, and the township clerk shall forthwith notify the township trustees of said township of said application, who shall fix a time and place for the hearing of same, which time shall not be more than twenty days distant, and they shall cause said clerk to notify the applicant and land owner of the time and place of said hearing at least five days before the time fixed for the hearing of same, which notice shall be in writing, signed by said clerk, and shall be served on said applicant and land owner, if within the county, and if not, then upon his agent for said land, if within the county, in the same manner as is now provided by law for the service of original notices, and in case that neither said party nor his agent are residents within said county, then the same shall be served by posting written notices in three public places in said township, one of which shall be upon said land, at least ten days before said hearing.

Application for drain to be filed with township clerk.

Duty of clerk

How served.

SEC. 2. Upon the day fixed for hearing, if said trustees are satisfied that the provisions of the prior section have been complied with, they may proceed to hear and determine the same, and shall have power to adjourn from time to time until same is completed; *provided*, that no adjournment shall be for more than fifteen days.

How tried.

SEC. 3. The said trustees may fix the point or points of entrance and exit or outlet of said tile or other underground drain on said land, the general course of same through said land, the size and depth of same, when the same shall be constructed, how kept in repair, what connections may be made with same, what compensation, if any, shall be made therefor, and any other question arising in connection with same; and they shall reduce their findings to writing, which shall be filed with the clerk of said township, who shall record it in full in his book of records of said township, and said finding and decision shall be final, except as to the amount of damages, if any, which shall be awarded.

Trustees may fix entrance and outlet of drain, etc.

Findings shall be in writing.

Final, except as to damages.

SEC. 4. Wherever any water course or natural drainage line crosses the boundary line between two adjoining land owners and both parties desire to drain the land along such water course or natural drainage line, but are unable to agree upon the conditions as to the juncture or connection of the lines of tile or other drainage at the boundary line aforesaid, then and in such case the township trustees shall have full authority to hear and determine all questions arising relative thereto bo-

Water-courses and natural drainage lines

tween such land owners and to render such judgment thereupon as shall to them seem just.

Can go upon
public high-
ways.

SEC. 5. Any person shall have the right to go upon any public highway to construct an outlet to a drain, provided he shall leave the highway in as good condition as it was before the drain was constructed, to be determined by the supervisor of highways in the district where the work is done.

When railroad
is concerned it
shall be not-
fied.

SEC. 6. Whenever any railroad crosses the land of any person or persons who desire to drain their land for any of the purposes set forth in section 1 of this act, the party or parties desiring such drain or drains shall notify the railroad company by leaving a written notice with the nearest station agent, stating in such notice the starting point, route and termination of such drain or drains, and if the railroad company refuse or neglect for the space of thirty days to dig across their right of way a drain of equal depth and size of the one dug by the party who wishes to drain his land, then the party who desires to drain the land may proceed to dig such drain and the railroad company shall be liable for the cost of the construction of such drain, to be collected in any court having jurisdiction.

Right of ap-
peal.

SEC. 7. Either party may appeal to the circuit court of the county from so much of said finding and order as relates to the amount of damages which may be awarded, within the same time and in the same manner as to bond, conditions of bond and notice of appeal, as is now provided by law in cases of appeal from assessment of damages on location of highways; *provided*, however, that said appeal shall not delay the construction of said tile or other underground drain if the applicant shall in case the land owner appeal[s] deposit with the township clerk for the use of said land owner the amount of damages awarded by the trustees, and in case the applicant appeals that he shall first file the appeal bond provided by law.

In case of ap-
peal, duty of
clerk.

SEC. 8. In case of appeal the township clerk shall certify to the circuit court a transcript of the proceedings before said trustees, which shall be filed in said court with the appeal bond, the party appealing paying for said transcript and the docketing of said appeal as in other cases, and upon appeal the party claiming damages shall be plaintiff and the applicant defendant, and upon appeal the same shall in all respects, as far as applicable be governed by same rules as appeals from assessments for damages for location of highway on appeal.

Applicant to
pay costs and
damages.

SEC. 9. The applicant shall pay the costs of the trustees' clerk and serving of notices on the hearing before the trustees, and in case no appeal is taken, shall pay all damages awarded before entering on the construction of said tile or other drain through the lands of the other.

Dispute as to
repairs.

SEC. 10. In case any dispute shall arise as to the repair of any tile or other underground drain, the same shall be determined by said trustees in same manner as in the original construction of same.

333.

SEC. 1241.

Where right of way is granted to one railway company in consideration of the benefit to be derived from the construction of its line, such right of way cannot be transferred by that company to another which proposes to construct a different line not running the same direction: *Crosbie v. C. I. & D. R. Co.*, 17 N. W. Rep., 481. Where a company has the power to build an additional lateral road auxiliary to the original road, whose construction and maintenance is possible only upon an independent right of way, the right of way statute, limiting the width of right of way to one hundred feet, does not prevent the condemnation of land for such additional road; and the same power may be exercised by another corpora-

tion even though it derives all its means from the first, and builds the road with the express design of leasing it: *Lower v. C., B. & Q. R. Co.*, 59-563. Where the company by parol license enters upon ground to construct its railway the subsequent payment of the damages assessed gives it an easement by contract which, though arising upon parol, cannot be revoked: *Slocumb v. C., B. & Q. R. Co.*, 57-675: In such case a subsequent purchaser takes subject to the right of way whatever it is, if it does not exceed the statutory width, and cannot set up *non user* by the company of a portion, and adverse possession thereof, to defeat its rights: *Ibid.*

DEPOT GROUNDS.

[Twentieth General Assembly, Chapter 190.]

SECTION 1. Any railway corporation owning or operating a completed railway in the state of Iowa, shall have power to condemn lands for necessary additional depot grounds in the same manner as is provided by law for the condemnation of the right of way: *Provided*, that before any proceedings shall be instituted to condemn such additional grounds, the railway company shall apply to the railway commissioners, who shall give notice to the land owner and examine into the matter and report by certificate to the clerk of the circuit court in the city in which the land is situated, the amount and description of the additional lands necessary for the reasonable transaction of the business, present and prospective, of such railway company. Whereupon said railway company shall have power to condemn the lands so certified by the commissioners.

Railway corporations may condemn lands for depot grounds.

Proviso: Shall apply to railway commissioners.

334.

SEC. 1244.

In condemnation proceedings only such damages are compensated as arise from the proper construction of a railroad. For negligent or improper construction additional damages may be recovered: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

The exposure of the property to a destruction by fire or other dangers incident to the operation of a railroad, are legitimate subjects of consideration in determining the damages: *Dreher v. I. S. W. R. Co.*, 59-599.

Evidence in regard to how the railroad affects a farm over which it

passes aside from the mere value of the land taken, is admissible: *Ibid.*

Questions asked witness for the purpose of ascertaining the damages to land in a particular instance, *held*, proper. Also, *held*, that the question whether because of the construction of a road the land was made more wet than it otherwise would have been, was a proper one, it not being sought to show that such damages were a result of the improper construction of the road: *Britton v. D. M., O. & S. R. Co.*, 59-540.

The fact that the road bed is con-

structed in a cut is a proper fact to be shown in estimating damages: *Cummins v. D. M. & St. L. R. Co.*, 19 N. W. Rep., 268.

While the land owner is not entitled to prove the proximity of the depot or the number of tracks as independent elements of damage, yet such evidence may be admissible in determining the extent to which the company would probably use the ground taken in carrying on its business: *Ibid.*

As the company acquires the right to occupy and use the whole of the right of way, it cannot have the damages assessed on the theory that it will in fact use but part, and therefore that occupation of buildings situated upon the right of way will not be disturbed: *Ibid.*

The prices at which other lands in the vicinity of the premises in question had been sold about the time of the commencement of the proceedings, is not receivable, in the absence of evidence that there was any similarity between the lots in question and those which it was claimed had been sold: *Ibid.*

The value of growing crops upon the right of way to be taken, may be considered in assessing the compensation: *Lantz v. C., M. & St. P. R. Co.*, 57-636.

While hazard from fire is a result of the operation of the road and for which the company would not be liable may be considered, yet it is error to take into account the value of specific property, such as a grove or a house, which might thus be destroyed: *Ibid.*

The right to obstruct the passage of water is not presumed to be acquired in a condemnation proceeding, and the damages assessed do not cover damages resulting from such stoppage. The owner is not presumed to have been paid therefor, upon the theory that the company preferred to protect him against this incidental injury and the enjoyment of the easement carries with it from day to day the obligation to furnish this protection: *Drake v. C., R. I. & P. R. Co.*, 19 N. W. Rep., 215.

An inquiry as to damages is not to be confined to the government subdivision upon which the road is located, if separate subdivisions are used together as one form: *Ham v. W., I. & N. R. Co.*, 17 N. W. Rep., 157.

The damages to be taken into consideration in this proceeding may include those already sustained, as well as future damages, and the statutory remedy here provided is therefore exclusive in all such cases, and such damages can not be sued for in an action at law: *Birge v. C., M. & St. P. R. Co.*, 18 N. W. Rep., 878.

By the condemnation proceedings a corporation acquires the right to the exclusive use of the surface of the land, and the condemnation is made on the theory that this use of the surface will be perpetual. Therefore, unless it appears that the reversionary right of the land owner is of some value, as for instance by reason of the land being overlaid by coal or mineral, it is not error to disregard such reversionary interest and assess the damages at the market value of the property taken: *Hollingsworth v. D. M. & St. L. R. Co.*, 19 N. W. Rep., 325; *Cummins v. Same*, 19 Id., 268.

The company may take, remove and use for the construction and repair of its railway and appurtenances any earth, gravel, stone, timber or other material on or from the land condemned, and is not limited as to the quantity of such materials to be used in the construction and repair of its road. The limitation to so much as is necessary implied under this section relates to the quantity of land to be taken: *Winkleman v. D. M. N. W. R. Co.*, 17 N. W. Rep., 82.

Where the compensation for the right of way has not only been agreed upon but also paid to the land owner by the corporation, and he has conveyed the right of way, proceedings to condemn such right of way cannot be instituted, and would be entirely void for want of jurisdiction: *C. B. & St. L. R. Co. v. Bentley*, 17 N. W. Rep., 668.

An action will not lie upon an award of a sheriff's jury for damages for right of way unless the right of way has been entered upon and appropriated. And where a portion of plaintiff's land was included in the right of way condemned, but the road was not actually constructed over any portion of his land, and the same remained fenced and was not entered upon, *held*, that an appropriation did not appear and title to the right of way did not pass to the company until it had made payment. If it enters before pay-

ment it is a trespasser and may be held liable in damages as for a tort: *Dimmick v. C.B. & St. L. R. Co.*, 58-637.

Incidental injury from smoke and dust and the noise of moving trains does not give a cause of action where there is no other injury to which the injury of smoke, etc., is incident: *Ibid.*

By § 464 this method of assessing

damages is made applicable to damages caused to the abutting owner from the construction of a railway through the streets of a city, but such proceeding can be instituted only by the company, not by the property owner, who may have his action for damages without regard to this method of assessment: *Mulholland v. D. M., A. & W. R. Co.*, 60-740.

336.

SEC. 1247.

The notice must name the person whose land has been taken or affected. It is not sufficient that it is directed to all other persons having an inter-

est in the property described: *Birge v. Chicago, M. & St. P. R. Co.*, 18 N. W. Rep., 878.

337.

SEC. 1249.

Applied: *Cummins v. Des Moines &*

St. Louis R. Co., 19 N. W. Rep., 268.

SEC. 1252.

Where the damages allowed on the appeal are less than those awarded in the assessment, in the absence of any showing that either party has

made an offer, the costs should be apportioned: *Noble v. D. M. & St. L. R. Co.*, 17 N. W. Rep., 26.

SEC. 1253.

The recording of the award, if done by mistake, does not pass any title to the company so as to raise an implied contract to pay the amount of the award; certainly not until the fact of

the mistake has become known to the company and it has had a reasonable time to correct it: *Dimmick v. C. B. & St. L. R. Co.*, 58-637.

338.

SEC. 1254.

The provisions allowing changes of venue in civil actions are applicable on the trial of the appeal: *Whitney v. Atlantic Southern R'y Co.*, 53-651.

A person not a party to the proceedings, although interested in the property, cannot appeal. Such person might, perhaps, make himself a party before the commissioners, but he cannot make himself a party merely by appealing. Whether the notice by publication provided for in § 1247, in a proper case, would make all persons interested parties so that any such could appeal, *quære*: *Connable v. C., M. & St. P. R. Co.*, 60-27. *C. R., I. F. & N. W. R. Co. v. C., M. & St. P. R. Co.*, 60-35.

The sheriff is not a party to the condemnation proceeding and is not

disqualified from serving notice of appeal therefrom: *C. R., I. F. & N. W. R. Co. v. C., M. & St. P. R. Co.*, 60-35.

Where the assessment covers the entire damage to two contiguous tracts, used together and owned by the same person, an appeal cannot be taken from the assessment as to one tract only: *Ibid.*

As the party has by this right of appeal an adequate remedy against any irregularities that may occur in the proceeding, or any injustice which may be done him in the award, if he has personal notice of the proceeding, this remedy is exclusive as to all such matters, and he cannot rely upon irregularities as a ground to restrain the construction of the road in accordance with such proceedings:

Phillips v. Watson, 18 N. W. Rep., 659.

Although an appeal from an assessment in favor of joint owners cannot be taken by one without joining the other in the appeal (*C., R. I. & P. R. Co. v. Huse*, 30-73), yet the

owner may take such appeal without joining a mortgagee therein, although an award has been made in favor of the owner and mortgagee jointly: *Lance v. C., M. & St. P. R. Co.*, 57-636.

SEC. 1255.

Interest on the assessment does not begin to run from the time of assessment, but only from the time of tak-

ing possession: *Hays v. C., M. & St. P. R. Co.*, 19 N. W. Rep., 245.

SEC. 1257.

In assessing damages on appeal the court will allow interest from the time of taking possession: *Hays v.*

C., M. & St. P. R. Co., 19 N. W. Rep., 247; *Noble v. D. M. & St. L. R. Co.*, 17 N. W. Rep., 26.

339.

SEC. 1258.

If appeal is taken from the award to the circuit court and the damages awarded are greater than were allowed by the commissioners, a company desiring to appeal to the supreme court must deposit the

amount with the sheriff, and is not relieved from the obligation by giving a *supersedeas* bond: *Downing v. Des Moines Northwestern R. Co.*, 18 N. W. Rep., 862.

18 G. A., Ch. 19A.

This statute, at least in so far as it applies to cases where the right of way is taken, as provided, for the purpose of promoting the safety of the traveling public, is not unconsti-

tutional as authorizing the taking of private property for other than a public purpose: *Reusch v. C., B. & Q. R. Co.*, 57-687.

340.

SEC. 1260.

A portion of a line may become abandoned within the meaning of these provisions; whether it is so or

not, is a question of fact: *Central Iowa R'y Co. v. Moulton and Albia R. Co.*, 57-249.

341.

SEC. 1262.

[19 G. A., ch., 122, strikes from 15 G. A., ch. 47, § 1, the words, "at such place of crossing," which the latter act added to this section.]

As this section gives a railway company the right to raise or lower highways, etc., at crossings, an indictment charging the company with obstructing the public highway with digging, ploughing and scraping such highway, throwing up embankments, and making excavations

across, along, in, or upon the highway at points where the railroad crosses such highway, does not state facts sufficient to constitute the crime of obstructing the highway: *State v. C., B. & P. R. Co.*, 19 N. W. Rep., 299.

342.

SEC. 1268.

The duty of the company to construct a private crossing in a proper case is one which may be enforced by mandamus. Facts held sufficient to justify the owner in requiring a crossing at a particular point: *Boggs v. C., B. & Q. R. Co.*, 54-435.

The company is liable, under § 1239, for injury to animals resulting from defects in gates at private crossings. Such gates are a part of the fences which it is required to

maintain: *Mackie v. Central R. of Iowa*, 54-540.

If, by reason of the act of the landowner in wrongfully removing a gate at a private crossing on his land, stock of a third person gets upon the track and is injured, and the company is held liable therefor, it may recover from such landowner the amount which it has been compelled to pay: *C. & N. W. R. Co. v. Dunn*, 59-619.

344.

15 G. A., Ch. 34.

A road or way established under the provisions of this statute is a public way in the sense that the public may use and enjoy it in the manner in which roads and highways are ordinarily used by it, and that the mine owner who procured it to be established must use the special privilege which the act confers on him in such a way as not to destroy

this right of the public or prevent its enjoyment, and the statute is therefore constitutional. Nor can the construction of the railway in accordance with these provisions be enjoined on the ground that it prevents the owner of the land from constructing a railway thereon for his own use: *Phillips v. Watson*, 18 N. W. Rep., 659.

346.

SEC. 1278.

For similar provisions, see § 1300.

348.

SEC. 1288.

Where a railroad is constructed across unimproved or uninclosed land, and the land is afterwards improved or inclosed, the railway company is under obligation to construct cattle-guards just as it would have been under obligation to do if the land had been inclosed at the time the road was constructed: *Heskett v. W., St. L. & P. R. Co.*, 61-467.

The term cattle-guard as here used imports a guard or protection extending the whole width of the right of way. The owner is under no obligation to construct a fence up to the track upon the right of way: *Ibid.*

Where a railway impinged upon a highway some twenty rods from the place where it finally crossed it, held, that all the intervening highway was not to be deemed a part of the crossing, within the meaning of this section: *Beatty v. Central Iowa R. Co.*, 58-242.

This section is imperative, and the court will not engraft an exception upon it, relieving a company from obligation to put in a cattle-guard on the ground that it is not fit, proper and suitable to do so, in a particular case: *Mundhenk v. C. I. R. Co.*, 57-718.

350.

SEC. 1289.

This section, authorizing the recovery of double damages, is constitutional: *Welsh v. C., B. & Q. R. Co.*, 53-632.

RUNNING AT LARGE.—An animal which had escaped from its owner, with bridle and halter on, held to be "running at large": *Ibid.*

A team of horses hitched to a wagon and which have escaped from the control of their owner, are within the terms of this statute "live stock running at large:" *Inman v. C., M. & St. P. R. Co.*, 60-459.

Contributory negligence on the part of the owner not amounting to willful act, will not defeat his right to recover under this statute: *Ibid.*

A suckling colt may be considered as running at large within the provisions of this section, although its mother is under the control of the owner: *Smith v. K. C., St. J. & C. B. R. Co.*, 58-622.

The mere fact that the owner by a voluntary act exposes the animal to danger, will not necessarily make the act willful. If it was for a lawful purpose and the danger was merely incidental it should not be considered so: *Ibid.*

FAILURE TO FENCE OR REPAIR.—Liability to double damages attaches upon failure to repair as well as failure to fence in the first place: *Bennett v. W., St. L. & P. R. Co.*, 61-355.

It is error to instruct the jury that the company would be liable if it failed to erect and maintain a fence sufficient to keep cattle from its right of way, and the cattle were injured by reason of such failure. The jury must be allowed to consider whether the defect in the fence was occasioned by want of repair, and if so, whether the company had discovered that it was out of repair, or should have discovered it in the exercise of reasonable care, and had had a reasonable time afterward to make the repair: *Brentner v. C., M. & St. P. R. Co.*, 58-625.

An instruction to the effect that defendant was not liable unless there was neglect in failing to repair the fence within a reasonable time after notice of the defective condition, *held*, proper, as the jury must have understood therefrom that the burden of showing neglect rested upon the party seeking to recover: *Dunn v. C. & N. W. R. Co.*, 58-674.

The allegation that the road is unfenced at the time of the accident is supported by proof of the removal or destruction of the fence before the accident: *Fritz v. K. C., St. J. & C. B. R. Co.*, 61-323.

Where the fences are swept away by a flood, failure to rebuild them within two months, or until after the

road was repaired and operated, *held*, sufficient to render the company liable: *Ibid.*

Evidence of the condition of the fence subsequent to the time of the injury, is admissible only where it is shown that there had been no change in the condition: *Brentner v. C., M. & St. P. R. Co.* 58-625.

Under particular facts, *held*, that it was not sufficiently shown that injury to stock resulted from defect in the gate through which they escaped upon the track: *Bothwell v. C., M. & St. P. R. Co.*, 59-192.

The duty to maintain gates at private crossings is a part of the duty to fence, and the company will be liable for damages to stock injured by reason of failure to construct, or keep in repair, such gates: *McKinley v. C., R. I. & P. R. Co.*, 47-76; *Mackie v. Central R. of Iowa*, 54-540.

HIGHWAY CROSSINGS—STATION GROUNDS.—Evidence considered and *held* sufficient to show that the animal killed was struck at a high-way crossing and not in the field where the marks of blood were found: *Sullivan v. W., St. L. & P. R. Co.*, 58-602.

In a particular case *held*, that an instruction that if the animal killed was the property of plaintiff, was running at large, and was injured by defendant outside of the station grounds, plaintiff would be entitled to recover, was erroneous, it not appearing but that the animal might have been killed at some point outside of the station grounds where defendant had no right to fence: *Smith v. K. C., St. J. & C. B. R. Co.*, 58-622.

Where it appeared that stock was killed one and one-fourth miles from a station, *held*, that it might be presumed that the place at which it was killed was not within depot grounds in the absence of any evidence upon the question: *Smith v. C., M. & St. P. R. Co.*, 60-512.

A railroad has the right to fence within the corporate limits of a town so far as it extends through lands situated beyond streets or other high-ways, and it will be liable in double damages for injuries to stock at such places: *Coyle v. C., M. & St. P. R. Co.*, 17 N. W. Rep., 771.

The fact that a party knowingly allows his animals to be upon and to frequent the depot and station grounds where the company is not

required to fence, does not necessarily constitute contributory negligence so as to defeat recovery for such animals: *Miller v. C. & N. W. R. Co.*, 59-707.

Where animals are running at large in violation of a city ordinance, and come upon the track, they are trespassers, and the company owes no duties with reference to them and is not liable for injuries received by them, even though occasioned by a train running at greater speed than eight miles per hour, it not appearing that such improper speed was wanton or reckless: *Van Horn v. B. C. R. & N. R. Co.*, 59-33; *Same v. Same*, 18 N. W. Rep., 679.

Where it was shown that the train at the time of entering upon depot grounds was running faster than eight miles an hour, but that its speed was subsequently reduced so that at the time the stock was injured it had almost stopped, *held*, that the verdict against the defendant company for the injury of the stock was not unsupported by the evidence, as the jury were authorized to find that the train would have been stopped entirely if it had entered the ground at a speed not exceeding the lawful rate: *Miller v. C. & N. W. R. Co.*, 59-707.

AFFIDAVIT AND NOTICE.—Evidence of service of affidavit and notice in a particular case, *held*, not sufficient to support a judgment for double damages: *Keyser v. K. C., St. J. & C. B. R. Co.*, 56-440.

A return, stating the service of the notice here provided for upon a certain person, "being the station agent of said road," &c., *held*, sufficiently to show service upon a station agent "employed in the management of the business of the corporation": *Welsh v. C., B. & Q. R. Co.*, 53-632; *Schlegener v. C., M. & St. P. R. Co.*, 61-235.

The original notice and affidavit of the loss which have been served upon defendant's agent, are not evidence of such service in such sense that notice upon the defendant to produce them must be shown before other evidence thereof can be introduced to show double liability of the company: *Brentner v. C., M. & St. P. R. Co.*, 58-625; *Smith v. K. C., St. J. & C. B. R. Co.*, 58-622.

It is not necessary that the affidavit designate the place of the injury: *Mundhenk v. C. I. R. Co.*, 57-718.

An amendment to the affidavit for

the purpose of perfecting the jurat may be allowed but the company will not become entitled to thirty days after the amendment, in which to pay the claim to escape double damages, where it is clear that there was a *bona fide* attempt on the part of the owner to bring himself within the provisions of the statute and it was so understood by defendant: *Ibid*.

Service of the affidavit may be made by the claimant, or any other person: *Ibid*.

Whether proof of service of notice and affidavit upon the company can be made by an *ex parte* affidavit, *quære*: *Brentner v. C., M. & St. P. R. Co.*, 58-625.

An action for double damages may be maintained in the courts of this State for an injury occurring in another State which has a statute authorizing the recovery of such double damages: *Boice v. Wabash R. Co.*, 18 N. W. Rep., 673.

FIRES.—Whether in an action under this section, for damages caused by fire set out by the company's engines, the defendant is required to show his freedom from contributory negligence, *quære*: *Ormond v. Central Iowa Railway Company*, 58-742.

In an action against the company for damages from fires set out by its engine, it is proper to prove that other fires were set out by the same engine on the same trip: *Slossen v. B., C. R. & N. R. Co.*, 60-215.

Whether in such an action the right to recover would be affected in any manner by proof of plaintiff's contributory negligence, *quære*: *Ibid*.

Whether a failure of the land owner to plough around stacks of grain to protect them from fire would amount to contributory negligence, would be a question for the jury: *Ibid*.

The party from whose land the right of way is taken would not be negligent, as a matter of law, in sowing wheat upon the right of way and allowing the stubble to remain there after the wheat was removed: *Ibid*.

The company whose engine sets out the fire is liable for the damages resulting, although it is operating a line owned and used by another company, and the fire originates on the right of way by reason of combustible matter allowed to ac-

cumulate thereon by such other company: *Ibid.*

The fact of an injury resulting from fire caused by sparks escaping from an engine, is by this section made *prima facie* evidence of negligence. This evidence may, however, be rebutted by the defendant, the effect of the statute being simply to change the burden of proof. As to whether the rebutting evidence by defendant, showing due care, etc., on its part, is sufficient, is a question for the jury and not for the court: *Babcock v. C. & N. W. R. Co.*, 13 N. W. Rep., 740; and on rehearing, 17 *Id.*, 909.

In an action by the tenant to recover value of crop destroyed by a fire set out by the company's engines, it appearing that plaintiff did not pay cash rent, *held*, error to refuse to allow plaintiff to be cross-examined as to whether he was to give a share of the grain for rent: *Ormond v. Central Iowa Railway Co.*, 58-742.

As the body of this section in which the penal provision as to double damages is contained, was enacted in 1862, and the provision re-

specting the speed of trains upon depot grounds was added in 1873, and as it does not clearly appear it was intended that the provision as to penalty contained in the original section should apply to the last named provision, *held*, that the section would not be so construed as to authorize the recovery of double damages for injury to stock on depot grounds caused by negligence in operating trains thereon at an illegal rate of speed: *Miller v. C. & N. W. R. Co.*, 59-707.

MISCELLANEOUS.—Where a company is compelled to pay for injuries to animals of a third person, which have got upon the track through a gate at a private crossing, wrongfully removed by the landowner for whom the gate was constructed, it may recover from such landowner the amount so paid: *C. & N. W. R. Co. v. Dunn*, 59-619.

To entitle a plaintiff to recover for injury to an animal, he must introduce proof of ownership: *Welsh v. C., B. & Q. R. Co.*, 53-632.

357.

SEC. 1307.

Plaintiff's petition stated that he was a detective employed by the agent of a railroad to proceed to a certain point on the track and endeavor to detect parties who had been guilty of placing obstructions on its track, and was directed to proceed along the track of the road to that point and commence his search; that on the way he became prostrated by the heat and was injured by a passing train, through negligence of the engineer. *Held*, that under the averments of the petition, the detective and the engineer were co-employees, and that the plaintiff was engaged in the operation of the railroad in such sense as to be entitled to the benefit of these provisions: *Pyne v. C., B. & Q. R. Co.*, 54-223.

To entitle an employe of a railroad company to recover for personal injuries, inflicted through the negligence of a co-employe, it must be shown that his employment was connected with the operation of the railway; and where it appeared that plaintiff was a section hand and was injured by the negligence of a co-employe while engaged in loading a car, *held*, that it did not sufficiently ap-

pear that his employment was of such character as to entitle him to recover: *Smith v. B., C. R. & N. R. Co.*, 59-73.

The fact that an employe of a railroad company is the foreman of a crew of workmen with power to direct the men under him in their work and to hire and discharge them at will, does not prevent his being a co-employe with such workman, within the meaning of this section, and he may recover for injuries received from the negligence of the men in his employ: *Houser v. C., R. I. & P. R. Co.*, 60-230.

An employe whose duty it is to open and close the double doors across the track at the round house, and do other work about the round house, is not so engaged in the dangerous and hazardous business of operating a railway as to be entitled to recover from the company for injuries received from the falling of such door from its hinges caused by the negligence of a co-employe: *Malone v. B., C. R. & N. R. Co.*, 61-326.

A receiver who is managing a railway under the direction of a court, is

within this section and may be charged, and a recovery obtained against him, as a person operating a railway. And though his liability could not be personal, a judgment against him might be satisfied out of the property in his hands if the court by whom he was appointed should so direct: *Sloan v. Central Iowa R. Co.*, 16 N. W. Rep., 331.

AFTER SEC. 1307.

SIGNALS AT CROSSINGS.

[Twentieth General Assembly, Chapter 104.]

SECTION 1. A bell and a steam whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be twice sharply sounded at least 60 rods before a highway crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, *provided*, that at street crossings within the limits of incorporated cities or towns the sounding of the whistle may be omitted, unless required by the council of any such city or town; and the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect.

Bell and steam whistle on each locomotive. Whistle blown at highway crossings. Proviso as to cities and towns.

SEC. 2. Every officer or employe of any railway company who shall violate any of the provisions of this act shall be punished by fine, not exceeding one hundred dollars, for each offense.

Officers and employes liable.

STOPPING AT RAILWAY CROSSINGS.

[Twentieth General Assembly, Chapter 163.]

SECTION 1. All trains run upon any railroad in this state which intersects or crosses, or is intersected or crossed by any other railroad upon the same level, shall be brought to a full stop, at a distance not less than two hundred feet, nor more than eight hundred feet from the point of intersection or crossing of such road, before such intersection or crossing is passed by any such train.

Trains shall be brought to a full stop at crossings. Distance.

SEC. 2. Every engineer violating the provisions of the preceding section shall for each offense forfeit one hundred dollars to be recovered in an action in the name of the state of Iowa, for the benefit of the school fund, and the corporation on whose road such offense is committed shall forfeit for each offense so committed the sum of two hundred dollars, to be recovered in like manner.

Penalty: \$100 for school fund. Road to forfeit \$200.

363.

15 G. A., Ch. 68.

This statute determines the charges which shall be considered excessive, but the injured party may waive the tort created by statute, and sue upon his implied contract raised by the law whereby the carrier is obligated to repay to the consignee or consignor of the property all sums exacted in excess of reasonable compensation. Plaintiff need not show that he made objection or protest prior to the payment made in excess of reasonable compensation: *Heiserman v. B. & N. R. Co.*, 18 N. W. Rep., 903. In such cases the action would not be barred in two years under the provision relating to suits to recover a statute penalty, but would stand on the same footing as any action on implied contract: *Ibid*.

364.

17 G. A., Ch. 77.

ENFORCEMENT OF ORDERS AND REGULATIONS OF BOARD OF RAIL-
ROAD COMMISSIONERS.

[Twentieth General Assembly, Chapter 133.]

Circuit and District court to enforce decrees of R. R. Commissioners.

Proceedings by equitable action and instituted by atty. gen.

Court shall require issue made up at first term.

Order of court.

Violations of decrees punished by fine and imprisonment.

Decree shall remain in force.

Court shall enter judgment for costs.

SECTION 1. The circuit and district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions and orders, the rulings, orders and regulations affecting public right, made or to be made by the board of railroad commissioners, such as are now, or may hereafter be, authorized to be made by them for the future direction and observance of railroads in this state. The proceedings therefor shall be by equitable action in the name of the state of Iowa and shall be instituted by the attorney general, whenever advised by the board of railroad commissioners that any railway corporation, or person operating a line of road in this state, is violating and refusing to comply with any rule, order or regulation made by such board of railroad commissioners, and applicable to such railroad or person. It shall be the duty of the court in which any such cause shall be pending, to require the issues to be made up at the first term of the court to which such cause is brought, which shall be the trial term, and to give the same precedence over other civil business. If the court shall find that such rule, regulation, or order is reasonable and just, and that in refusing compliance therewith said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction compelling obedience to and compliance with such rule, order, or regulation by said railroad company, or other person, its officers, agents, servants and employes and may grant such other relief as may be deemed just and proper. All violations of such decree shall render the company, persons, officers, agents, servants and employes who are in any manner instrumental in such violations, guilty of contempt of court, and the court may punish such contempt by fine not exceeding one thousand dollars for each offense, and may imprison the person guilty of contempt until he shall sufficiently purge himself therefrom. And such decree shall continue and remain in effect and be enforced until the rule, order or regulation shall be modified or vacated by the board of railroad commissioners.

SEC. 2. Whenever a decree shall be entered against a railroad company or person under section 1, the court shall render judgment for costs, including a reasonable attorney's fee for counsel representing the state in said case, and said judgment shall be enforced by execution.

366.

SEC. 8.

[19 G. A., ch. 146, amends this section by enacting the following:]

SECTION 1. The executive council shall, on or before its annual meeting on the second Monday in July in each year, determine the amount required to be paid by each railroad company to meet

the sum certified to by the board of commissioners, and shall levy the same upon the property of the railroad companies in the state, and shall notify each company of the said levy, and said tax shall be paid by the railroad companies into the state treasury.

SEC. 2. The taxes levied under the provisions of this chapter shall be due and collectible as provided by section 5, chapter 59, acts of 17th general assembly.

367.

SEC. 11.

Under a section somewhat similar to this in its provisions (15 G. A., ch. 68, § 10, now repealed), *held*, that the burden was upon a plaintiff suing under that act for the penalty provided for violation thereof by making discriminations against him in charges, to show not only that the charges were "for a like service from the same place," but also that they were "upon like condition:" *Paxon v. Ill. Cent. R. Co.*, 56-427.

369.

16 G. A., Ch. 123.

[By 20 G. A., ch. 120, township trustees are authorized to employ counsel in litigation to which they are made parties concerning their right or duty to levy taxes, which have been authorized upon express conditions: See that act in supplement to page 89.]

The expenses of township elections to vote aid to railroads are not charge- able to the county: *McBride v. Har- din Co.*, 53-219.

[This act is now repealed by the following:]

TAXES IN AID OF RAILROADS.

[Twentieth General Assembly, Chapter 159.]

SECTION 1. Chapter 123 of laws of the sixteenth general assembly and chapter 87 and 173 of the laws of the seventeenth general assembly and chapter 192 of the laws of the eighteenth general assembly and chapter 102 of the laws of the nineteenth general assembly are hereby repealed and the following is enacted instead thereof.

Chap. 123, 16 G. A.; Chaps. 87 and 173, 17 G. A.; Chap. 192, 18 G. A.; Chap. 102, 19 G. A. amended.

SEC. 2. Taxes not to exceed five per centum on the assessed value of any township, incorporated town or city may be voted to aid any railroad company which is or may become incorporated under the laws of the state of Iowa, to aid in the construction of a projected railroad within this state as hereinafter provided.

Taxes not to exceed 5 per centum may be voted.

SEC. 3. Whenever a petition shall be presented to the council or trustees of any incorporated town or city, or the trustees of any township signed by a majority of the resident freehold taxpayers of such township, incorporated city or town asking that the question of aiding any railroad company incorporated under the laws of the state of Iowa in the construction of a projected railroad within this state be submitted to the voters thereof, it shall be the duty of the trustees or council of such incorporated town or city or trustees of such township to immediately give notice of a special election by publication in some news-

Duties of trustees or council on presentation of petition.

paper published in said incorporated town, city or township if any be published therein, and if not, then in some newspaper published in the county if any such there be and also by posting copies of said notice in five public places in such township, incorporated city or town at least ten days before said election which notice shall specify the time and place of holding said election, the name of the company and the line of the road proposed to be aided, the rate per centum of the tax to be levied, whether one-half of said tax shall be collected the first year and one-half the following year, or the whole thereof to be collected in one year, the amount of work required to be done, and when and where the same shall be done, to what point said railroad shall be fully completed and any other conditions which shall be performed before such tax or any part thereof shall become due, collectible and payable, and in no case shall such tax become due, collectible or payable until such railroad is fully completed according to the conditions in said notice. At such election the question of taxation shall be submitted. The form of the ballots shall be "for taxation" and "against taxation" and if a majority of the votes polled be "for taxation" then the recorder of the incorporated town, city or township clerk or clerk of election shall forthwith certify to the county auditor the result of said election, the rate per centum of tax thus voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms, and conditions upon which the same, when collected, is to be paid to the railroad company under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds of the county; and the expense thereof and of publishing said notices and all the expenses of said election shall be paid by the railroad company to which it is proposed to vote said tax. When such certificates shall have been made and recorded the board of supervisors of the county shall, at the time of levying the ordinary taxes next following, levy such taxes as are voted under the provisions of this act as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, incorporated city or town, indicating in their order thereupon when and in what proportion the same are to be collected and upon what conditions the same are to be paid to the railroad company, a certified copy of which order shall accompany the tax lists. Said taxes shall be collected at the time or times specified in said order in the same manner and subject to the same laws after they are collectible as other taxes, or as may be stated in the petition and notices for the election.

SEC. 4. The stipulations and conditions contained in the said notices must conform to those set forth in the petition asking the election, and the aggregate amount of tax to be voted or levied under the provisions of this act in any township, incorporated town or city shall not exceed five per centum of the assessed value of the property therein respectively.

SEC. 5. The moneys collected under the provisions of this act

Notice shall specify.

Form of ballot.

Duty of recorder or clerk.

Expense to be paid by railroad company.

Duty of board of supervisors.

Collection of taxes.

Notice must conform to petition.

shall be paid out by the county treasurer to the treasurer of the railroad company for whom the same was voted upon the orders of the president or managing director thereof at any time after the trustees of such township, or trustees or council of such incorporated town or city voting said tax, or a majority of them, shall have certified to the county treasurer that the conditions required of the railroad company and set forth in the notice for the special election at which the tax was voted have been complied with, and said township trustees, or trustees or council of such incorporated town or city shall make said certificate when the said conditions have been complied with sufficiently to entitle the said railroad company to the amount of such orders, or when the said conditions are fully complied with and performed on the part of the railroad company; but if the costs and expenses of holding said election and of recording said certificates shall not have been paid by the railroad company, then the county treasurer shall first deduct from the moneys so collected the amount of said costs and expenses and pay the same over to the parties entitled thereto.

Money to be paid out: how and when.

Duties of trustees and council.

Duty of county treasurer.

Sec. 6. It shall be the duty of the county treasurer, when required, in addition to a tax receipt to issue to each tax payer on the payment of any taxes voted under the provisions of this act a certificate showing the amount of tax so paid, the name of the railroad company entitled thereto, and when the same was paid, and the treasurer shall be entitled to charge and receive the sum of twenty-five cents for each certificate so issued. Said certificates are hereby made assignable and when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid as shown by such certificate, in amount showing the sum of one hundred dollars or more of taxes to have been paid for said railroad company, said railroad company shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of said stock, then the holder of said certificates shall be entitled to receive the full number of shares of stock covered by said certificates and may make up and tender in money the balance of any share of said stock when the certificates held by him are not equal in amount to one full share of such stock, the stock for such purpose to be estimated at its par value. Whenever it shall be proposed in the petition and notice calling said election to issue first mortgages, bonds, not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge and not exceeding the sum of sixteen thousand dollars per mile for the ordinary four feet eight and one half inch gauge, in lieu of stock as herein provided, it shall be lawful to issue said bonds of the denomination of one hundred dollars in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal of said bonds.

Treasurer to issue certificate to taxpayer.

Certificates assignable.

Railroad company shall issue shares of stock.

First mortgage bonds.

Board of directors liable to stockholders: when.

SEC. 7. The board of directors of any railroad company receiving taxes voted in aid thereof under the provisions of this act, or those members thereof or either of them who shall vote to bond, mortgage, or in any manner encumber said road to an amount exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, or exceeding the sum of sixteen thousand dollars per mile for the ordinary four feet eight and one half inch gauge, not including in either case any debt for ordinary operating expenses, shall be liable to the stockholders or either of them for double the amount estimated of its par value of the stock by him or her held, if the same should be rendered of less value or lost thereby.

Taxes remaining in county treasury more than one year, forfeited.

SEC. 8. Should the taxes voted in aid of any railroad under the provisions of this act remain in the county treasury for more than one year after the same have been collected, the right to them by the railroad company shall be considered forfeited and the persons who paid the said taxes shall be entitled to receive back from the county treasurer their pro-rata shares thereof remaining, and in all such cases where any taxes have been voted or levied upon the real or personal property in any township, city or town in any county in this state to aid in the construction of any railroad as hereinbefore provided, and the railroad in aid of which said taxes were voted or levied has not been built or completed or operated into or through such township, city or town, it shall be the duty of the board of supervisors of the county where said taxes have been voted and levied and still remain on the tax books, to give the railroad company to which the tax was voted at least thirty days' notice in writing, to be served like original notices, of their intention to abate and cancel such taxes, and thereupon to cause the same to be canceled and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy of said taxes; but the foregoing provisions shall in no manner affect any actions which may now be pending for the recovery of any taxes heretofore voted in aid of any railroads; and in all cases where the railroad company to whom any taxes may have been or may hereafter be voted, neglects or refuses to receive such taxes or to require or permit the same to be collected and certificates therefor to be issued for the period of one year after such taxes become due and collectible, and in all cases where any taxes have been heretofore voted in aid of any railroad and the conditions upon which the same were voted have not in fact been complied with and the time in which said conditions were to be fulfilled has expired, all such taxes are hereby declared forfeited and canceled and the county officers of the county in which any such taxes shall have been levied and entered upon the tax books shall enter cancellation thereof upon the proper county records; and in all cases where any taxes to aid in the construction of any railroad may hereafter be voted upon the inducement or promise offered on the part of said railroad company, or any duly authorized agent thereof, for any rebate or exemption from said tax or any part thereof, or any agreed price to be paid for the stock that may be issued in lieu of said tax, or a division of said

Duty of board of supervisors, when road is not built.

Taxes declared forfeited.

tax or any portion or percentage thereof, with any of the voters or tax payers as an inducement to procure said tax to be voted, all such taxes so procured to be voted are and shall be absolutely void.

SEC. 9. Nothing contained in this act shall preclude any tax payer who may contract with a railroad company for which taxes shall have been or may hereafter be voted under the provisions of this act, to pay his tax thus voted or any part thereof in labor upon the line of said railroad, or in material for its construction, or supplies furnished or money paid for the construction of the road in pursuance of the terms and conditions stipulated in the notices of election in lieu of a payment to the county treasurer, upon presenting to the county treasurer a receipt from said railroad company or its duly authorized agent specifying the amount of such payment, the same shall be credited by the county treasurer on his tax in aid of said railroad, with the effect in all respects as though the same was paid in money to the said county treasurer; and when such receipts have been presented and thus credited by the county treasurer they shall have the same force and validity in his settlement with the board of supervisors as the orders from the railroad company provided for in section four of this act; and *provided*, laborers shall have lien upon said tax so voted in aid of a railroad company for the amount due them for labor performed in the construction of said railroad.

Taxes may be paid in labor or supplies.

SEC. 1.

Where the validity of such a tax has been adjudicated in an action against the treasurer and the board of supervisors, by parties claiming the tax, it cannot, in the absence of collusion or fraud, be again called in question in an action by a taxpayer against the treasurer to enjoin its collection: *Lyman v. Faris*, 53-498. *Lamb v. Anderson*, 54-190, followed: *I. M. & N. P. R. Co. v. Schenck*, 56-623.

370.

SEC. 2.

Where the certificate herein required did not contain the conditions provided for, except by reference to the notice of election attached as exhibit thereto, *held*, that such certificate was insufficient: *M. & I. S. R. Co. v. Hiams*, 53-501. A levy of taxes in different townships is to be considered as distinct, even though such separate levies are made by one resolution: *Woodworth v. Gibbs*, 61-393. The action of the board in making the levy is not judicial but purely ministerial; their action in so doing may be questioned in a collateral proceeding, and held void for want of power to do it at the time it was done: *Scott v. Union Co.*, 19 N. W. Rep., 667.

371.

SEC. 3.

A township, incorporated town, or city, having, under this statute, voted taxes to the amount of five per centum upon its taxable property in aid of one or more railroads, cannot impose another tax upon property for that purpose. The power conferred by the statute ceases upon the levy of taxes to that amount. But this is not to be understood as applicable to cases where taxes duly levied have been abandoned or become uncollectible. An increase in value of taxable property after levy of the five per

centum of taxes, does not confer the power to make an additional levy: *Dumpey v. Supervisors of Humboldt Co.*, 58-273.

A per centum of taxes levied under a prior act, providing for taxation in aid of a railroad, even though such prior act contained the same limita-

tion as to amount contained in this section, cannot be considered in determining whether the limit fixed in this act has been exceeded. This limitation applies only to taxes levied under this act: *Scott v. Union Co.*, 19 N. W. Rep., 667.

372.

SEC. 7.

Under 13 G. A., ch. 102, § 3, containing provisions similar to those of this section, *held*, that the county had no interest in the tax collected; that it was to be paid to the county treasurer, and in proper case should be refunded by him without any warrant or order of the board of supervisors; that in case of misappropria-

tion by the county treasurer, the loss would not fall upon the county; and that the claim of plaintiff for the refunding of his proportion of the tax forfeited was strictly against the fund, and not against the county: *Barnes v. County of Marshall*, 56-20.

SEC. 8.

Such receipts as are herein contemplated are not obligations to pay money, but are in the nature of advance receipts, to be presented to the county treasurer in payment of taxes. No action thereon against the rail-

road company, or an assignor of such instrument, can be maintained thereon, at least until demand has been made on the treasurer that they be received for taxes: *Lisle v. I. M. & N. P. R. Co.*, 54-499.

17 G. A., Ch. 173.

[This act is repealed by 20 G. A., ch. 159: See that act in supplement to page 369.]

373.

18 G. A., Ch. 192.

[This act is repealed by 20 G. A., ch. 159: See that act in supplement to page 369.]

CANCELLATION OF RAILROAD AID TAXES.

[Nineteenth General Assembly, Chapter 102.]

SECTION 1. In all cases where taxes have been or may hereafter be voted and levied upon the property of any township, city, or town in any county in this State, for the purpose of aiding in the construction of any railroad, under and by virtue of the laws authorizing and permitting the voting and levying of such tax, and when the railroad company to whom such taxes have been or may hereafter be voted has complied with the terms and conditions upon which such aid or tax was or may hereafter be voted, and when such railroad company, by reason of the compliance with the terms and conditions on which such tax was voted, is entitled to receive the same and have such tax collected and paid, neglects or refuses to receive such taxes, or to permit the same to be paid and collected and certificates issued, as provided by law, for the period of six months after such tax is due and payable, such railroad company shall forfeit all their right to such aid or tax; and the board of supervisors of the county in which such aid or

For neglect or refusal to receive tax when due, or permit it to be paid.

tax was or may hereafter be voted and levied shall cause such tax to be abated and canceled on the tax-books of such county: *Provided*, that in all cases where taxes have been heretofore voted in aid of the construction of any railway it shall be the duty of the board of supervisors, before causing the cancellation and abatement of such tax, to give the railroad company to whom the tax was voted at least thirty days' notice in writing of their intention to abate and cancel such tax, such notice to be served like original notices.

[This act is repealed by 20 G. A., ch. 159: See that act in supplement to page 369.]

UNION RAILWAY DEPOTS.

[Twentieth General Assembly, Chapter 139.]

SECTION 1. In order to facilitate the public convenience and safety in the transmission of freight and passengers from one railway to another and to prevent unnecessary expense and inconvenience attending the accumulation of a number of stations in one place, authority is hereby given to any number of persons or any number of railway corporations or both persons and railway corporations to form themselves into a body corporate under the general incorporation laws of this state relating to corporations for pecuniary profit for the purpose of acquiring, establishing, constructing and maintaining at any place in this state union station houses or depots for freight or passengers, or for both, with necessary offices for express, baggage and postal rooms in the same or separate buildings, railroad *tracts* [tracks] and other appurtenances of such depots. And for that purpose may make and file for record articles of association in the manner provided for such corporations in this state, and any railroad company operating a road in this state or interested in the operation of a road in this state, whether organized under the laws of this state or elsewhere, may become stockholder in such corporation in the same manner an individual might. Such articles may provide for the business of the corporation being conducted under by-laws to be adopted by the stock-holders, in which case a copy of such by-laws shall be posted in the passenger or waiting rooms of the depot and in the office of the company.

SEC. 2. Every corporation formed under the provisions of this act shall have power to take and hold for the purposes mentioned in section 1, such real estate as may be deemed necessary by the railroad commissioners for the location, erection and construction of their depot and its approaches, which they may acquire by purchase or by condemnation as provided by chapter 4, title 10, code of Iowa, 1873, and when condemned and paid for as thereby provided, such real estate shall belong to the corporation.

SEC. 3. Such corporation, with consent of the city council of any city or town in this state in which said depot is located, shall have the right to lay its tracks to make necessary connection with all railways desiring to use such depot upon the streets or alleys of said city, and by and with the consent of such city

Notice.

Persons and railway corporations may organize for the purpose of establishing union depots.

May file articles.

Business may be conducted under by-laws.

Power of corporations under this act.

With consent of city council may make necessary connections.

council may erect such depot upon or across any such street or alley, but no railroad track can thus be located, nor can such depot be so erected until after due injury to property abutting upon the streets or alleys upon which such railway track is proposed to be located or such depot is proposed to be erected, has been ascertained and compensation made in the manner provided for taking private property for works of internal improvement in chapter four of title ten of the code, subject to the provisions of section 464 of the code.

Railroads not released from liability for damages.

SEC. 4. Nothing in this act contained, or in the articles of incorporation or by-laws, of the corporation herein provided for, shall in any manner release the railroad companies using such union depots, tracks or appurtenances from the same liability for all damages by injuries to persons, stock, baggage or freight, or for the loss of baggage or freight, in or about said union depot grounds as if said depot, tracks and appurtenances wholly belonged to and were operated by said railroad companies using the same.

374.

STATION HOUSES AT INTERSECTIONS.

[Twentieth General Assembly, Chapter 24.]

Erection.

SECTION 1. All railroad corporations shall at all points of connection, crossing, or intersection with the roads of other corporations, unite with such corporations in establishing and maintaining suitable platforms and station houses for the convenience of passengers desiring to transfer from one road to the other, and for the transfer of passengers, baggage or freight, whenever the same shall be ordered by the railroad commission; and such corporation shall, when so ordered by the railroad commission, keep such depot or passenger house warmed, lighted and opened to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; and said railroad companies so connecting, crossing or intersecting, shall stop all trains at said depots at said connections, crossings or intersections, for the transfer of passengers, baggage and freight, when so ordered by the railroad commission, and the expense of constructing and maintaining such station house and platform shall be paid by such corporations in such proportions as may be fixed by the order of the railroad commission. Such corporations, connecting or intersecting as aforesaid, shall also, whenever ordered by the railroad commission, so unite and connect the tracks of said several corporations as to permit the transfer from the track of one corporation to the other of loaded or unloaded cars designed for transportation upon both roads.

Care.

All trains must stop.

Expense apportioned.

Connection of tracks.

Penalty.

SEC. 2. Any railroad corporation or company which, after having received 90 days' notice by the railroad commissioners, shall neglect or refuse to comply with the provisions of section 1 of this act, shall, for every day such corporations or company fails, neglects or refuses to comply therewith, forfeit and pay the sum of

twenty-five dollars, which may be recovered in the name of the State of Iowa, for the use of the school fund of the county wherein such crossing or intersection is situated, and it shall be the duty of the prosecuting attorney of the proper judicial district to prosecute for and recover the same.

District attorney to prosecute. —

SEC. 1324.

[19 G. A., ch. 104, amends this section by inserting after the word "telegraph," in the second line, the words "or telephone."]

375.

SEC. 1328.

This does not excuse an operator from producing the telegrams which have passed between parties, when subpoenaed as a witness in an action between them as to the transaction to which they relate: *Woods v. Miller*, 55-168.

377.

SEC. 1330.

Where one was afflicted with disease and cruelly treated by the members of his family, so that he was driven from home, held, that he was a poor person within the meaning of this section, although he had property which was appropriated and withheld from him by such family; and therefore that the son was liable to an action by the county for support furnished to him, and that the county, although having the right of action against the wife, might waive it and enforce recovery against the son: *Jasper Co. v. Osborn*, 59-208.

379.

SEC. 1350.

The county cannot maintain action against the pauper or his estate for aid furnished: *Bremer Co. v. Curtis*, 54-72.

SEC. 1352.

Facts considered, as showing the residence of a pauper and defendant's liability for her support: *County of Cerro Gordo v. County of Hancock*, 58-114.

A *prima facie* case of settlement is made by proving residence, unless it be proven or conceded that the party is a married woman, in which case it might be necessary to prove either that her husband resides in the same county, or that she is deserted by him: *Scott Co. v. Polk Co.*, 61-616.

This section is applicable to the case of an insane person who becomes a county charge: *Ibid.*

380.

SEC. 1353.

An insane and crippled pauper removed from one county to another, and, supported there by the former county for more than a year, does not thereby obtain a settlement in the county to which he is removed: *Fayette Co. v. Bremer Co.*, 56-516.

SEC. 1357.

It does not follow that because a person is obliged to apply to the county for relief where he has no settlement, he should be removed at once to the county of his settlement, regardless of distance, expense, or other circumstances. The county furnishing relief should have a right of action upon the county of the settlement for relief so furnished, without obligating the supervisors of the latter county to make an order of re-

removal; and it should be allowable in such cases to give notice of such claim for relief furnished without requiring removal. The county auditor may give such notice, but the notice for the order of removal can only be given by the township trustees or county supervisors: *Scott v. Polk Co.*, 61-616.

381.

SEC. 1358.

In the petition in an action by one county to recover from another the expenses of the support of a pauper, it must be averred that the defendant county is the county of the pauper's settlement. An averment that plaintiff is informed that the pauper has a settlement in defendant county, is not sufficient: *Winneshiek Co. v. Allamakee Co.*, 17 N. W. Rep., 753.

SEC. 1359.

The circuit court has exclusive jurisdiction of the proceeding here contemplated, and the district court cannot obtain jurisdiction thereof by change of place of trial, even by consent of parties: *Cerro Gordo Co. v. Wright Co.*, 59-485.

The county applied to for relief may make an order of removal to the county of the pauper's settlement, and give notice thereof, or it may give to the county of the settlement notice that such pauper has become a county charge. In the latter case, the county notified is not under obligation to give notice of its intention to contest the removal; and in case of an action against it by the county furnishing relief, to recover for the relief so furnished, the circuit court has exclusive jurisdiction: *Winneshiek Co. v. Allamakee Co.*, 17 N. W. Rep., 753.

SEC. 1361.

Where a board of supervisors appoints an overseer of the poor for a city of the first or second class, as provided in this section, the power conferred upon such overseer is exclusive of that of the trustees of the township in which such city is located: *Hoyt v. Black Hawk Co.*, 59-184.

382.

SEC. 1365.

Where the board of supervisors, as a matter of precaution and in the interest of economy, employ a convenient and competent physician, in advance, to furnish to all poor persons of the county all medicines and medical aid that they may require, the trustees cannot disregard such employment and render the county liable for services rendered by a physician employed by them: *Mansfield v. Sac Co.*, 59-694; *Gowley v. Jones Co.*, 60-159.

When the trustees authorize aid to be furnished to a poor person, it may be continued, if done in good faith, until the board of supervisors otherwise order, even though the trustees fail to report the case to the board; and the trustees, in such case of failure to report, will be held liable to the county for damages arising from continuance of aid to persons not properly entitled to it: *Mansfield v. Sac Co.*, 60-11.

Recovery cannot be had for aid furnished before application is made to the trustees, and the furnishing of such aid is authorized by them: *Ibid.*

Written orders of the township trustees made under this section and upon which the board of supervisors act, are valid although not made of record under the provisions of sections 392 and 395: *Bremer Co. v. Buchannon Co.*, 61-624.

383.

SEC. 1366.

A recommendation that a bill be paid is not equivalent to the certificate required by this section, and is not sufficient to entitle the claimant to payment from the county: *Mansfield v. Sac Co.*, 60-11.

A certificate signed by the trustees to the effect they had ordered the

services specified in the claimant's bill for medical services to poor persons, *held*, not a sufficient compliance with this section: *Sloan v. Webster Co.*, 17 N. W. Rep., 168.

The board may waive the certificate required by this section: *Bradley v. Delaware Co.*, 57-552.

385.

SEC. 1383.

[20 G. A., ch. 201, provides for the location of another hospital for the insane and erection of buildings therefor, but its provisions are temporary in their nature and it is not here inserted.]

386.

SEC. 1384.

[20 G. A., ch. 66, amends this section by striking out the word "first" in the *sixth* [seventh] line thereof and inserting in lieu thereof the word "second," and by striking out the word "October" in the seventh line [of the section as amended by 17 G. A., ch. 100, § 1] and inserting the word "July," also by changing the eleventh [and twelfth] line[s] [of the section as amended by 17 G. A. ch. 100, § 1] by striking out "first Wednesday in (January, April and July)" and inserting "second Wednesday in (October, January and April)"]

SEC. 1385.

[19 G. A., ch. 175, § 1, provides that the reports of boards of trustees of state institutions shall be made on or before the 15th day of August preceding the regular sessions of the general assembly: See that act, in supplement to page 28.]

390.

SEC. 1401.

The provisions here made for appeal, and the further provisions contained in §§ 1442 and 1444, allowing subsequent investigation of the question of sanity, prevent this section

from being in conflict with the constitutional guarantees against deprivation of personal liberty without due jury trial: *County of Blackhawk v. Springer*, 58-417.

391.

SEC. 1402.

Notice to the debtor county in which the person has a legal settlement, is a condition precedent to the

right of recovery against such county: *Poweshiek Co. v. Cass Co.*, 18 N. W. Rep., 895.

399.

SEC. 1435.

[19 G. A., ch. 175, § 1, provides that the reports [of the committee shall be made biennially, on or before the 15th day of August preceding the regular sessions of the general assembly: See that act, in supplement to page 28.]

A visiting committee has no authority to punish witnesses for con-

tempt in refusing to testify before it: *Brown v. Davidson*, 59-461.

402.

SEC. 1448.

It is only persons whose lands are enclosed by a lawful fence who are authorized to distrain domestic animals injuring their premises. If lands are not so enclosed there is no right to distrain, and possession acquired by such distraint is unlawful. The rightfulness of the distraint may therefore be inquired into in an action of replevin; it is not a matter for the exclusive determination of the fence viewers. But if the distraint is found to be illegal, the property may be remanded to the distrainer and the damages may be assessed by the township trustees subject to the right of appeal as provided for in §§ 1354 and 1355: *Syford v. Schiver*, 61-155.

If animals, though lawfully on adjoining land, escape therefrom and do damage and their escape is not in consequence of the neglect of the person suffering the damage, their owner is liable therefor. It is not necessary that the fence surrounding the land of the person injured is throughout a lawful fence, if it is shown to have been such at the place where the cattle broke through. And this will be true where the owner of the adjoining land and the owner of the cattle are the same person and the fence broken through belongs to him: *Noble v. Chase*, 60-261.

404.

SEC. 1452.

The fact that an eighty acre tract of land is surrounded by a single ploughed furrow, and includes a few acres under cultivation, will not render it all improved or cultivated land within the meaning of this section;

but in such cases the owner of the land may recover damages from the owner of cattle who herds and confines them upon such land: *Otis v. Morgan*, 17 N. W. Rep., 104.

SEC. 1454.

This section does not confer special authority upon the township trustees to inquire into and determine the lawfulness of the fence enclosing the injured premises, and that matter may be determined in an action of

replevin to recover the property from the person making distraint, when it is claimed that his premises are not surrounded by a lawful fence: *Syford v. Schiver*, 61-155.

408.

SEC. 1485.

Aside from the statute a person who has in his charge a vicious dog, knowing his character, and fails to restrain him, is absolutely liable for an injury inflicted. It makes no differ-

ence whether the person has charge of the animal as owner or owner's bailee: *Marsel v. Bowman*, 17 N. W. Rep., 176.

409.

AFTER SEC. 1488.

COMPENSATION FOR DOMESTIC ANIMALS KILLED BY DOGS.

[Twentieth General Assembly, Chapter 70.]

SECTION 1. It shall be the duty of every assessor of this state, at the time of listing the property of his district, to list each dog over three months of age in the name of the owner thereof, without affixing any value thereto. Any person keeping or harboring a dog or dogs shall be deemed the owner thereof within the meaning of this act.

SEC. 2. The board of supervisors of each county shall, at

Assessors to
list dogs.

Owner.

their September session each year, when levying other taxes, levy a tax of fifty cents on each male, and one dollar on each female dog listed by the assessor, which tax shall constitute a special fund, to be disposed of as provided for in this act. Amount taxed.

SEC. 3. It shall be the duty of each county auditor to provide suitable columns, properly headed, in the assessor's book, to carry out the provisions of this act. Duty of auditor.

SEC. 4. The treasurer of each county, on receiving the tax books for the collection of other taxes, shall collect the tax herein provided for as other taxes are collected, and keep the same as a separate fund, to be known as the domestic animal fund. Duty of treasurer.

SEC. 5. Any person damaged by the killing or injury of sheep, or any other domestic animal, by a dog or dogs, may present to the board of supervisors of the county in which such killing or injury occurred, a detailed account of such killing or injury, stating the amount of damage claimed therefor, and verified by affidavit, such claim to be filed with the county auditor at least ten days before some regular session of the board, and within fifteen days from the time such killing or injury occurred. At the first regular session of the board of supervisors after such claim shall have been filed for ten days as herein provided, the same may be established by proof before the board; and upon the hearing thereof, the claimant shall establish his claim for damages by the testimony of at least two competent witnesses, besides himself. It shall also be made to appear to the satisfaction of said board that such damage was not caused, in whole or in part, by a dog or dogs owned or controlled by the claimant, and that claimant does not know whose dog or dogs caused the damage, and that said damage was caused by dogs; or, in case the owner of such dog or dogs is known to the claimant, and that such owner has no property subject to execution, out of which the claim can be made. Damages, how claimed.

The board shall hear and determine said claims in the order in which they are filed unless good cause is shown for continuance, and shall allow the same or such portions thereof as they may deem just, and shall authorize the auditor to issue warrants for the same not to exceed seventy-five per cent. of the amount allowed to be paid out of the domestic animal fund. Proof of loss.

SEC. 6. The treasurer shall, between the first and tenth days of January and the first and tenth days of July of each year, pay the said warrants issued by the auditor as provided for by section five of this act, out of the domestic animal fund. If said fund is insufficient to pay said warrants in full, he shall pay on each *pro rata*. If after paying all warrants at either period above named, there shall remain more than two hundred and fifty dollars of said fund in the treasury, the board of supervisors shall order the excess to be transferred to the county fund. Board of supervisors to allow 75 per cent.

VETERINARY SURGEON.

[Twentieth General Assembly, Chapter 189.]

SECTION 1. The governor shall appoint a state veterinary surgeon who shall hold his office for the term of three years un- Treasurer to pay, when.

Governor to appoint.
Term of office.

	less sooner removed by the governor; he shall be a graduate of some regular and established veterinary college and shall be skilled in veterinary science; he shall be a member of the state board of health, which membership shall be in addition to that now provided by law. When actually engaged in the discharge of his official duties he shall receive from the state treasury as his compensation the sum of five dollars per day and his actual expenses, which shall be presented under oath and covered by written vouchers before receiving the same.
Qualification.	
Compensation.	
Powers of.	SEC. 2. He shall have general supervision of all contagious and infectious diseases among domestic animals within or that may be in transit through the state and he is empowered to establish quarantine against animals thus diseased or that have been exposed to others thus diseased, whether within or without the state, and may, with the concurrence of the state board of health, make rules and regulations such as he may deem necessary for the prevention, against the spread, and for the suppression of said disease or diseases, which rules and regulations, after the concurrence of the governor and executive council, shall be published and enforced, and in doing said things or any of them, he shall have power to call on any one or more peace officers whose duty it shall be to give him all assistance in their power.
Rules to be approved by executive council.	
May call on peace officers.	
Penalty for interfering with.	SEC. 3. Any person who willfully hinders, obstructs or resists said veterinary surgeon or his assistants, or any peace officer acting under him or them when engaged in the duties or exercising the powers herein conferred, shall be guilty of a misdemeanor and punished accordingly.
Annual report.	SEC. 4. Said veterinary surgeon shall, on or before the 30th of June of each year, make a full and detailed report of all and singular his doings since his last report to the governor, including his compensation and expenses, and the report shall not exceed one hundred and fifty pages of printed matter.
Persons who may demand his service.	SEC. 5. Whenever the majority of any board of supervisors, city council, trustees of an incorporated town or township trustees, whether in session or not, shall in writing notify the governor of the prevalence of, or probable danger from, any of said diseases, he shall notify the state veterinary surgeon who shall at once repair to the place designated in said notice and take such action as the exigencies may demand, and the governor may in case of emergency appoint a substitute or assistants with equal powers and compensation.
May order the destruction of stock.	SEC. 6. Whenever in the opinion of the state veterinary surgeon the public safety demands the destruction of any stock under the provisions of this act he shall, unless the owner or owners consent to such destruction, notify the governor, who may appoint two competent veterinary surgeons as advisors, and no stock shall be destroyed except upon the written order of the state veterinary surgeon countersigned by them and approved by the governor and the owners of all stock destroyed under the provisions of this act except as hereinafter provided shall be entitled to receive a reasonable compensation therefor, but not more than its actual value in its condition when condemned, which shall be ascertained and fixed by the state veterinary sur-
Stock killed to be paid for.	

geon and the nearest justice of the peace, who, if unable to agree, shall jointly select another justice of the peace as umpire and their judgment shall be final when the value of the stock does not exceed one hundred dollars, but in all other cases either party shall have the right of appeal to the circuit court, but such appeal shall not delay the destruction of the diseased animals. The state veterinary surgeon shall, as soon thereafter as may be, file his written report thereof with the governor, who shall, if found correct, endorse his finding thereon, whereupon the auditor of state shall issue his warrant therefor upon the treasurer of state who shall pay the same out of any moneys at his disposal under the provisions of this act; *provided*, that no compensation shall be allowed for any stock destroyed while in transit through or across this state, and that the word stock, as herein used, shall be held to include only neat cattle and horses.

Who shall determine its value.

Right of appeal.

Report in writing value of stock

How paid for.

Proviso.

SEC. 7. The governor of the state, with the state veterinary surgeon, may co-operate with the government of the United States for the objects of this act, and the governor is hereby authorized to receive and receipt for any moneys receivable by this state under the provisions of any act of congress which may at any time be in force upon this subject, and to pay the same into the state treasury to be used according to the act of congress and the provisions of this act as nearly as may be.

May co-operate with government of the U. S.

SEC. 8. There is hereby appropriated out of any moneys not otherwise appropriated the sum of ten thousand dollars for use in 1884 and 1885, and three thousand dollars annually thereafter, or so much thereof as may be necessary for the uses and purposes herein set forth.

\$10,000 appropriated.

SEC. 9. Any person, except the veterinary surgeons, called upon under the provisions of this act shall be allowed and receive two dollars per day while actually employed.

Compensation to others when called to act.

410.

17 G. A., Ch. 80, § 4.

[19 G. A., ch. 175, § 1, provides that the biennial reports be made to the governor on or before the 15th day of August preceding the regular sessions of the general assembly: See that act, in supplement to page 28.]

411.

APPROPRIATION FOR FISH COMMISSION.

[Twentieth General Assembly, Chapter 144.]

[Section 1, makes a temporary appropriation for the fish commission.]

SEC. 2. There is hereby appropriated an additional sum of \$300 per annum three hundred dollars per annum to be paid by the executive council as it may become due as rental for the use of the property known as the Spirit Lake hatching house.

for rent on hatching house at Spirit Lake.

412.

18 G. A., Ch. 123.

[This act is repealed by 19 G. A., ch. 17.]

414.

SEC. 1491.

There is no appeal from the action of fence viewers: *McKeever v. Jenks*, 59-350.

The decision of fence viewers upon questions within their jurisdiction is conclusive, and the fact that the statute as to these matters denies to the parties a trial in court, either by an appeal or otherwise, does not

render it unconstitutional: *Ibid.*

The statute does not make the fence viewers sole judges of the sufficiency of the fence in an action brought for damages caused by trespassing cattle. The sufficiency may be proved like any other fact: *Noble v. Chase*, 60-261.

415.

SEC. 1495.

In counties where a herd law is in force, a party desiring to use his ground for purposes not requiring a fence in such county, for instance, for raising crops alone, cannot be compelled to contribute to the erection of a partition fence between his land and that of an owner who desires to use his premises for purposes requiring fencing, as for instance, for the raising of stock; and this is true, notwithstanding the provision of § 1508: *Syds v. Peck*, 58-256.

Land is to be deemed as not used

in common where the use is such that means must be taken to preserve the crops. Where there is no regulation prohibiting stock from running at large, the party desiring to use his land for the raising of crops which must be protected from such stock, must contribute to a partition fence. Where it did not appear that stock was not prohibited from running at large, *h'ld.* that such fact would not be presumed for the purpose of establishing error in the judgment below: *Hewit v. Jewell*, 59-37.

417.

SEC. 1507.

Where stock is prohibited from running at large, the owner is not to be deemed chargeable with negligence in allowing his animals to run at large upon unenclosed land of another; and the owner of unfenced premises who makes an excavation

thereon adjacent to the highway and in a place which he knows to be frequented by stock running at large, will be liable for injuries occurring to animals from such excavation: *Haughey v. Hart*, 17 N. W. Rep., 189.

SEC. 1508.

This section does not prevent the rule as to partition fences being different in counties where stock is pro-

hibited from running at large, from what it is in other counties: See note to § 1495.

418.

16 G. A., Ch. 106, § 2.

The language of this statute is not to be so construed as to defeat recovery by a party on the ground that

on some point on his line a hedge could not be grown for a short distance: *McKeever v. Jenks*, 59-300.

422.

SEC. 1523.

The provisions of this chapter are not repealed by 18 G. A., ch. 73, relating to the practice of pharmacy, except, possibly, so far as is necessary

to allow sales of liquors for medical purposes by registered apothecaries: *State v. Mercer*, 58-182.

423.

SEC. 1525.

[20 G. A., ch. 143, § 1, repeals this section and enacts in lieu thereof the following:]

SEC. 1525. Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor, and upon his first conviction for said offense, shall pay a fine of two hundred dollars and costs of prosecution, or be imprisoned in the county jail not to exceed six months, and on his second and every subsequent conviction for said offense, he shall pay a fine of not less than five hundred dollars nor more than one thousand dollars and costs of prosecution, and be imprisoned in the county jail one year.

Penalty for manufacturing
First offense.

Second and subsequent convictions.

SEC. 1526.

[20 G. A., ch. 143, § 2, amends this section by inserting after the word "to" and before the words "buy and sell intoxicating liquors," the words "manufacture or."]

Even if the pharmacy act (18 G. A., ch. 75) does repeal this section, affecting sales by a registered pharmacist for medicinal purposes, it does not permit such pharmacist to sell intoxicating liquor as a beverage. The pharmacist must act in good faith, and the mere fact that a person says he wants liquor for medicine will not exonerate the pharmacist for the sale, if the circumstances show that the liquor was sold as a beverage: *State v. Knowles*, 57-669.

424.

SEC. 1527.

[A bill passed both houses of 19 G. A., which, among other provisions, contained a section repealing this section of the code. The bill was presented to the governor, and within thirty days after the adjournment of the general assembly, was deposited by him in the office of the secretary of state, without approval or objection. The bill is not numbered with acts of the 19th G. A., but is printed, with the certificate of the secretary of state as to the foregoing facts, on pages 184 and 185 of the acts of that session. 20 G. A., ch. 143, § 3, amends this section of the Code by inserting after the words "desires to" and before the words "sell said liquors" in the third line of said section the words "manufacture or."]

SEC. 1528.

[20 G. A., ch. 143, § 4, amends this section by adding thereto the words following:]

Provided, that in case of a permit to manufacture intoxicating liquors the penalty of the bond shall be five thousand dollars.

Penalty in bond of manufacturer.

SEC. 1529.

[Section 3 of the bill of 19 G. A., referred to under § 1527 above, amends this section by striking out the words, "Upon the presentation of such certificate and bond to the county auditor," at the beginning of the section, and inserting in lieu thereof the following: "*Upon application for a permit, and filing the proper bond with the county auditor.*" Other provisions of this bill are inserted in supplement to pages 426 and 450. The bill contains a section repealing all acts, or parts of acts, in conflict therewith.]

425.

SEC. 1531.

[20 G. A., ch. 143, § 5, amends this section by inserting in the second line thereof, after the words "may be" the words "manufactured or."]

SEC. 1535.

[20 G. A., ch. 143, § 6, amends this section by inserting after the words "record of," in the fourth line, the words "manufacture or."]

426.

SEC. 1537.

[The bill of 19 G. A., referred to in supplement to page 424, under Sec. 1527, also amends this section by striking out the words following, to wit: "No person having a permit to sell intoxicating liquors under this chapter shall sell the same at a greater profit than thirty three per cent. on the cost of the same, including freights, and." For the peculiar situation of this bill, see the note in supplement to page 424, just referred to. 20 G. A., ch. 143, § 7, amends this section of the Code by adding thereto the words:]

Applicable to
manufacturer.

And the provisions of this section shall apply to persons holding a permit to manufacture intoxicating liquors, so far as the same relates to the report; and any such manufacturer shall, within the time specified for parties holding a permit to sell, also report the quantity and kind of liquors by him manufactured since the date of his last report, and also the quantity and kinds of liquors sold by him, and for what purpose and to whom sold.

The provision of the original section as to the time when the report shall be filed is directory, and a failure to file at the time specified will not subject to the penalty provided, if it be in fact filed before action for the penalty is commenced: *Abbott v. Sartori*, 57-656.

SEC. 1538.

[20 G. A., ch. 143, § 8 repeals this section and enacts in lieu thereof the following:]

Penalty for
selling at
greater profit
than here al-
lowed.
Penalty for
failure to make
monthly re-
port.

SEC. 1538. Any person having such permit, who shall sell intoxicating liquors at a greater profit than is herein allowed, shall be liable to treble damages to be recovered by civil action in favor of the party injured. And any person holding a permit, either to manufacture or sell, who shall fail to make monthly returns as herein required, or within five days thereafter, or who shall make a false return, shall forfeit for each offense the sum of one hundred dollars, to be recovered in the name of the state of Iowa, upon the relation of any citizen of the county, by civil action on his bond, with costs, and one half of the sum recovered shall go to the informer and one half shall go to the school fund of the county.

SEC. 1539.

[20 G. A., ch. 143, § 9, amends this section by adding thereto the following:]

One half of the amount so recovered shall go to informer, and the other half shall go to the school fund of the county.

Under this section the seller of liquor to an intoxicated person will be liable although the liquor is bought and paid for by a third person by way of treating such intoxicated person: *State v. Hubbard*, 60-466. Evidence of intoxication at a period subsequent to the sale of the liquor should not be received to prove that the person to whom it was furnished was intoxicated at the time of such sale: *Ibid*.

427.

SEC. 1540.

[20 G. A., ch. 143, § 10 repeals this section and enacts in lieu thereof the following:]

SEC. 1540. If any person not holding such a permit, by himself or his clerk, servant or agent, shall for himself or any person else directly or indirectly, or on any pretense, or by any device, sell, or in consideration of the purchase of any other property, give to any person any intoxicating liquors, he shall, for the first offense be deemed guilty of a misdemeanor, and on conviction for said first offense shall pay a fine of not less than fifty or more than one hundred dollars and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and every subsequent offense he shall pay on conviction thereof a fine of not less than three hundred dollars nor more than five hundred dollars and costs of prosecution and be imprisoned in the county jail, not to exceed six months. All clerks, servants, and agents of whatever kind, engaged or employed in the manufacture, sale, or keeping for sale in violation of this chapter, of any intoxicating liquor, shall be charged and convicted in the same manner as principals may be, and shall be subject to the penalties herein provided. Indictments and information for violations under this section may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate indictments or informations, but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and subsequent convictions mentioned in this section shall be construed to mean convictions on separate indictments or information. And in default of the payment of the fines and cost provided for the first conviction under this section, the person so convicted shall not be entitled to the benefit of chapter forty-seven, title twenty-five, of this code, until he shall have been imprisoned sixty days.

Penalty for selling without a permit.

First offense.

Second and every subsequent offense.

Clerks, agents.

Any number of violations charged in same indictment.

Persons not paying fines, not entitled to benefit of chapter 47, title 25 of code.

428.

SEC. 1542.

[20 G. A., ch. 143, § 11, repeals this section and enacts in lieu thereof the following:]

SEC. 1542. No person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping any intoxicating liquors with intent to sell the same within this state, or to permit the same to be sold therein in violation of the provisions hereof, and any person who shall so own or keep, or be concerned, engaged or employed in owning or keeping such liquors with any such intent, shall be deemed, for the first offense, guilty of a misdemeanor; and on conviction for said first offense shall pay a fine of not less than fifty nor more than one hundred dollars and costs of prosecution, and shall stand committed to the county jail until such fine and costs are paid, and in default of such fine and costs, he shall not be entitled to the benefits of chapter forty-seven, title twenty-five, of the code, until he shall

Owning or keeping with intent to sell.

First offense.

In event of default.

Second and subsequent offense.

have been imprisoned sixty days; for the second and every subsequent offense he shall pay a fine of not less than three hundred dollars nor more than five hundred, or be imprisoned in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court, and upon trial of every indictment or information of violations of the provisions of this section, proof of the finding of the liquor named in the indictment or in the information, in the possession of the accused in any place except his private dwelling house or its dependencies, or in such dwelling house or dependencies, if the same is a tavern, public eating house, grocery or other place of public resort, or in unusual quantities in the private dwelling house or its dependencies of any person keeping a tavern, public eating house, grocery, or other place of public resort in some other place, shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to the provisions hereof.

Presumptive evidence.

429.

SEC. 1543.

[20 G. A., ch. 143, § 12, repeals this section and enacts in lieu thereof the following:]

Building and contents declared a nuisance.

SEC. 1543. In cases of violation of the provisions of either of the three preceding sections or of sections fifteen hundred and twenty-five of this chapter, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, use or give away, of any intoxicating liquor is carried on, or continued, or exists, and the furniture, fixtures, vessels, and contents is hereby declared a nuisance and shall be abated as hereinafter provided. And whoever shall erect or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding one thousand dollars and costs of prosecution, and stand committed until the fine and costs are paid. And the provisions of chapter 47, title 25, of this code, shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt by a fine of not less than five hundred nor more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court.

Penalty for owner.

Chapter 47, title 25, not applicable. Any citizen may maintain action.

Penalty for violating injunction.

433.

SEC. 1549.

An information charging the defendant with selling intoxicating liquors is sufficient: *Foreman v. Hunter*, 59-550.

436.

SEC. 1551.

[20 G. A., ch. 143, § 13 amends this section by adding thereto the following:]

Every peace officer shall give evidence when called upon, of any facts within his knowledge, tending to prove a violation of the provisions of this chapter, but his evidence shall in no case be used against him in any prosecutions against him for a violation of the provisions of this chapter.

Duty of peace officers to give evidence.

SEC. 1553.

[20 G. A., ch. 143, § 14, repeals this section and enacts in lieu thereof the following:]

SEC. 1553. If any express company, railway company, or any agent, or person in the employ of any express company or railroad company, or if any common carrier or any person in the employ of any common carrier, or if any other person shall knowingly bring within this state for any other person, or persons, or corporation, or shall transport between points within the state for any other person or persons or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, certifying that such consignee or person, for or to whom said liquor is to be transported, is authorized to sell such intoxicating liquors in such county, such company, corporation, or persons so offending, and each of them, and any agent of such corporation or company so offending shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars for each offense and shall stand committed to the county jail until such fine and the costs of prosecution are paid, and one-half of the fine shall go to the informer and the other half shall go to the school fund of the county; and provided further, that the offense herein defined shall be held complete, and shall be held to have been committed in any county of the state through or to which said intoxicating liquors are transported, or in which the same are loaded for transportation; provided further, that it shall be the duty of the several county auditors of this state to issue the certificate herein contemplated, to any person having such permit, and the certificate so issued shall be truly dated where issued, and shall specify the date at which the authority or permit expires, as shown by the county records.

Common carriers liable for bringing liquors in the state excepted.

Penalty.

One half the fine to go to the informer.

Proviso: offense held to have been committed in any county through which liquors are transported.

Duty of county auditor.

[The same act contains the following:]

SEC. 15. Every person who shall, directly or indirectly, keep or maintain, by himself, or by associating or combining with others, or who shall in any manner aid, assist, or abet, in keeping or maintaining any club room, or other place in which intoxicating liquors is received or kept for the purpose of use, gift, barter, or sale, or for distribution or division among the members of any club or association by any means whatever, and every person who shall use, barter, sell, or give away, or assist or abet another, in bartering, selling, or giving away any intoxicating liquors as received or kept, shall be deemed guilty of a misde-

Club houses prohibited.

Penalty. meonor, and upon conviction therefor shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months.

Inconsistent statutes repealed. Provisu. SEC. 16. All statutes and acts and parts of acts inconsistent with the provisions of this chapter as hereby amended are hereby repealed; *provided*, however, that this repeal shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time such repeal takes effect, and no offense committed, nor penalty or forfeiture incurred, and no suit or prosecution pending when the repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by this repeal, and the provisions of section 1555, as amended and substituted by the act of this general assembly approved March 4, 1884, shall apply and have relation to the provisions of the code as herein amended, and all penalties as herein provided shall be held to apply to intoxicating liquors as defined in said act March 4, 1884.

Code. § 1555 as passed by 20th G. A. to remain in force.

[The act herein referred to as approved March 4, 1884, is 20 G. A., ch. 8, given under § 1555 below.]

437.

SEC. 1555.

[By 20 G. A., ch. 8, § 1, this section is repealed, and the following enacted in lieu thereof:]

"Intoxicating liquors" construed. Prohibition. Penalty. SEC. 1555. Wherever the words intoxicating liquors occur in this chapter, the same shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatever: and no person shall manufacture for sale, or sell, or keep for sale, as a beverage, any intoxicating liquors whatever including ale, wine and beer. And the same provisions and penalties of law in force relating to intoxicating liquors, shall in like manner be held and construed to apply to violations of this act, and to the manufacture, sale, or keeping for sale, or keeping with intent to sell, or keeping or establishing a place for the sale of ale, wine and beer, and all other intoxicating liquors whatever.

[The same act contains the following:]

Repealing clause. SEC. 2. All acts and parts of acts inconsistent with this act are hereby repealed.

The distinction made in this section, as it stood before repeal, between wine made from native and that from foreign grapes, did not render the regulations as to sale of the latter void, as an improper regulation of inter-state commerce in violation of the federal constitution: *State v. Stucker*, 58-496.

SEC. 1556.

A physician, called to attend a person for an injury received, or for sickness resulting from intoxication, has no claim against the person selling the liquor, as contemplated by this section: *Sansom v. Greenough*, 55-127.

SEC. 1557.

In order that a right of action may exist, the liquor sold must cause or contribute to intoxication, and the wife must sustain some injury by the intoxication: *Welch v. Jugenheim*, 56-11.

Where plaintiff did not rely on or prove any specific act or acts of intoxication, but it appeared that her husband had been in the habit of becoming intoxicated for many years, procuring liquor from any person who would let him have it, *held*, that the several persons who had sold him liquor could not be considered as joint wrong-doers, but that each was severally liable for the damage caused by his own acts: *Richmond v. Shick-*

ler, 57-486.

Under this section before the amendment of § 1555, *held* that there was no right of action for damages caused by the sale of beer, unless sold contrary to the provisions of § 1539: *Myers v. Conway*, 55-166.

Exemplary damages may be awarded in every case brought under this section where there has been a willful violation of the statute, which has occasioned injury, for which a right of action is given. The party injured is entitled to exemplary damages in a proper case, and the awarding of them is not left to the discretion of the jury: *Fox v. Wunderlich*, 20 N. W. Rep., 7.

438.

SEC. 1558.

Both knowledge and assent, on the part of the owner of the premises unlawfully used, must be shown, to render them subject to the lien of a judgment under this section: *Myers v. Kirt*, 57-421.

Facts in a particular case, *held*, to show knowledge and assent on the part of the owner of the building: *Putney v. O'Brien*, 53-117.

A purchaser of the property occupied and used for purposes of illegal sale, as here specified, who purchases pending an action against the seller and the owner, in which it is sought to make any judgment recovered a lien upon the property, takes subject to lien of any such judgment. The doctrine of *lis pendens* applies: *O'Brien v. Putney*, 55-292.

The opinion in *Loan v. Hiney*, a note of which is at the end of the notes under this section, was modified on rehearing, and as printed in 53-89, holds that where the action is brought jointly against the seller and the owner, the action as against the latter is not an equitable proceeding for enforcement of a lien, but is an action at law in which such defendant has the right to a jury trial.

The consent of the owner need not be shown by any positive or affirmative act, but may be inferred from circumstances and knowledge of the illegal sales under such conditions as properly to call forth a protest, and a failure to make any objection: *Loan*

v. Etzel, 17 N. W. Rep., 611.

Where it is sought to subject property alleged to have been fraudulently conveyed for the purpose of evading the lien of a judgment, to the payment of the same, the action against the grantee is equitable in its nature, and the defendant cannot demand a jury trial: *Buckham v. Grape*, 17 N. W. Rep., 755.

In such an action against the holder of the legal title, who was not a party to the original action in which judgment was recovered, the record of the judgment in the former action may be introduced in evidence for the purpose of showing that the plaintiff has recovered judgment against the defendant in such former action, but not as evidence of the amount for which the lien should be established, except that in no event can the lien be established for any greater amount: *Ibid*.

In order to render property liable to a judgment for damages for the illegal sale of beer to an intoxicated person, under § 1539, it must be shown, not only that the owner had knowledge of and consented to such sales, but also that he knew of the fact of the intoxication of the person to whom the beer was sold; that is, he must not only have knowledge of the sales, but also of the facts rendering such sales illegal: *Myers v. Kirt*, 19 N. W. Rep., 846.

442.

BUREAU OF LABOR STATISTICS.

[Twentieth General Assembly, Chapter 132.]

Appointment of commissioner provided for.	SECTION 1. There is hereby created a bureau of labor statistics, to be under the control and management of a commissioner thereof, to be appointed as hereinafter provided by this act.
Governor to appoint within 30 days.	SEC. 2. The governor shall, within 30 days after the taking effect of this act and biennially thereafter, with the advice and consent of the executive council, appoint a commissioner of labor statistics; the term of office of said commissioner to commence on the first day of April in each even-numbered year and continue for two years and until his successor is appointed and qualified. And said commissioner before entering upon the discharge of his duties shall take an oath or affirmation to discharge the same faithfully, and to the best of his ability; and shall give bond in the sum of two thousand dollars with sureties to the approval of the governor, conditioned for the faithful discharge of his official duties.
Term of office.	SEC. 3. Said commissioner shall receive a salary of fifteen hundred dollars per annum, payable monthly, and necessary postage, stationery and office expenses, the said salary and expenses to be paid by the state as the salaries and expenses of other state officers are provided for. He shall have and keep an office in the capitol at Des Moines, in which shall be kept all records, documents, papers, correspondence and property pertaining to his office, and shall deliver them to his successor in office.
Take an oath and give bond.	SEC. 4. Said commissioner may be removed from his office by the governor for neglect of duty or malfeasance in office; and any vacancy occurring at any time may be filled by the governor by and with the consent of the executive council.
Salary \$1,500 per annum.	SEC. 5. The duties of said commissioner shall be to collect, assort, systematize and present in biennial reports to the governor on or before the 15th day of August preceding each regular meeting of the general assembly, statistical details relating to all departments of labor in the state, especially in its relations to the commercial, social, educational and sanitary conditions of the laboring classes, and to the permanent prosperity of the mechanical, manufacturing and productive industries of the state, and shall as fully as practicable collect such information and reliable reports from each county in the state the amount and condition of the mechanical and manufacturing interests, the value and location of the various manufacturing and coal productions of the state, also sites offering natural or acquired advantages for the profitable location and operation of different branches of industry. He shall by correspondence with interested parties in other parts of the United States impart to them such information as may tend to induce the location of mechanical and producing plants within the state, together with such other information as shall tend to increase the productions, and consequent employment of producers; and in said biennial report he shall give a statement of the business of the bureau since the last regular report, and shall compile and publish therein such information as
Keep an office in capitol.	
May be removed by governor.	
Duties of commissioner.	
Statistics to be gathered. —	
Shall collect from each county.	
To correspond with parties throughout the U. S.	
Shall give statement in biennial report.	

may be considered of value to the industrial interests of the state, the number of laborers and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics and apprentices' wages earned, the savings from the same, with age and sex of laborers employed, the number and character of accidents, the sanitary condition of institutions where labor is employed, the restrictions, if any, which are put upon apprentices when indentured, the proportion of married laborers and mechanics who live in rented houses, with the average annual rental and the value of property owned by laborers and mechanics; and he shall include in such report what progress has been made with schools now in operation for the instruction of students in the mechanic arts and what systems have been found most practical with details thereof.

Such report when printed shall not consist of more than six hundred printed pages octavo. Report of not more than 600 pages.

Five thousand copies thereof shall be printed and bound uniformly similar to the reports of other state officers as now authorized by law; said reports when published to be disposed of as follows, viz: To the public libraries in the state, to the various trade organizations, agricultural and mechanical societies, and other places where the commissioner may deem proper and best calculated to accomplish the furtherance of the industrial interests of the state. 5,000 copies of report to be printed. Distribution of reports.

SEC. 6. The commissioner shall have power to issue subpoenas for witnesses and examine them under oath and enforce their attendance to the same extent and in the same manner as a justice of the peace; said witnesses to be paid the same fees as are now allowed witnesses before a justice of the peace, the same to be paid by the state. Power of commissioner.

443.

MINES AND MINING.

[18 G. A., ch. 202 is repealed by the following:]

[Twentieth General Assembly, Chapter 21.]

SECTION 1. There shall be appointed by the governor, with the advice and consent of the senate, one state mine inspector, who shall hold his office for two years; subject, however, to be removed by the governor for neglect of duty or malfeasance in office. Said term of office shall commence on the 1st day of April of each even numbered year. Said inspector shall have a theoretical and practical knowledge of the different systems of working and ventilating coal mines, and of the nature and properties of the noxious and poisonous gases of mines, and of mining engineering; and said inspector, before entering upon the discharge of his duties, shall take an oath or affirmation to discharge the same faithfully and impartially, which oath or affirmation shall be indorsed upon his commission, and his commission so indorsed shall be forthwith recorded in the office of the secretary of state, and such inspector shall give bonds in the sum of two thousand dollars, with sureties to the ap- Inspector's appointment and term. Same: Qualifications. Same: Oath. Same: Bond.

	<p>proval of the governor, conditioned for the faithful discharge of his duty.</p>
Same: Duties.	<p>SEC. 2. Said inspector shall give his whole time and attention to the duties of his office, and shall examine all the mines in the state as often as his duties will permit, to see that the provisions of this act are obeyed; and it shall be lawful for such inspector to enter, inspect and examine any mine in this state, and the works and machinery belonging thereto at all reasonable times by night or by day, but so as not to unnecessarily obstruct or impede the working of the mines; and to make inquiry and examination into the state and condition of the mine as to ventilation and general security as required by the provisions of this act.</p>
Mine owners' duty.	<p>And the owners and agents of such mines are hereby required to furnish the means necessary for such duty and inspection, of which inspection the inspector shall make a record noting the time and all the material circumstances; and it shall be the duty of the person having charge of any mine whenever any loss of life shall occur by accident connected with the workings of such mine, or by explosion, to give notice forthwith by mail or otherwise to the inspector of mines, and to the coroner of the county in which such mine is situated, and the coroner shall hold an inquest on the body of the person or persons whose death has been caused and inquire carefully into the cause thereof, and shall return a copy of the verdict and all testimony to said inspector. No person having a personal interest in, or employed in the management of, or employed in any coal mine shall be qualified to serve on the jury impaneled on the inquest. And the owner or agent of all coal mines shall report to the inspector all accidents to miners, in and around the mines, giving cause of the same; such report to be made in writing, and within ten days from the time any such accidents occur.</p>
Record of inspection.	
Fatalities.	
Inspector not to be interested	<p>SEC. 3. Said inspector while in office shall not act as an agent or as a manager or mining engineer, or be interested in operating any mine, and he shall, biennially, on or before the fifteenth day of August preceding the regular session of the general assembly, make a report to the governor of his proceedings, and the condition and operations of the mines in this state, enumerating all accidents in or about the same, and giving all such information as he may think useful and proper, and making such suggestions as he may deem important as to further legislation on the subject of mining.</p>
Biennial report.	
Salary.	<p>SEC. 4. Said inspector shall receive a salary of seventeen hundred dollars per annum, payable monthly, necessary stationery, and actual traveling expenses, not to exceed \$500 per annum; <i>provided</i>, that he shall file at the end of each quarter of his official year, with the auditor of state, a sworn statement of his actual traveling expenses incurred in the performance of his official duty for such quarter. He shall have and keep an office in the capitol at Des Moines in which shall be kept all records and correspondence, papers, apparatus and property pertaining to his duties, belonging to the state, and which shall be handed over to his successor in office.</p>
Proviso.	
Office in capitol.	
Vacancy.	<p>SEC. 5. Any vacancy occurring when the senate is not in ses-</p>

sion, either by death or resignation, removal by the governor or otherwise, shall be filled by appointment by the governor, which appointment shall be good until the close of the next session of the senate, unless the vacancy is sooner filled as in the first section provided.

SEC. 6. There shall be provided for said inspector all instruments necessary for the discharge of his duties under this act, which shall be paid for by the state, on the certificate of the inspector, and shall be the property of the state. Instruments.

SEC. 7. The agent or owner of every coal mine shall make or cause to be made, an accurate map or plan of the working of such mine on a scale of not less than one hundred feet to the inch, showing the area mined or excavated. Said map or plan shall be kept at the office of such mine. The owner or agent shall, on or before the first day of September of each year, cause to be made a statement and plan of the progress of the workings of such mine up to said date, which statement and plan shall be marked on the map or plan herein required to be made. In case of refusal on the part of said owner or agent for two months after the time designated to make the map or plan, or addition thereto, the inspector is authorized to cause an accurate map or plan of the whole of said mine to be made at the expense of the owner thereof, the cost of which shall be recoverable against the owner in the name of the person or persons making said map or plan. And the owner or agent of all coal mines hereafter wrought out and abandoned, shall deliver a correct map of said mine to the inspector, to be filed in his office. Maps of working of mines.

SEC. 8. It shall be unlawful for the owner or agent of any coal mine worked by a shaft, to employ or permit any person to work therein unless there are to every seam of coal worked in such mine, at least two separate outlets, separated by natural strata of not less than one hundred feet in breadth, by which shafts or outlets distinct means of ingress and egress are always available to the persons employed in the mine; but in no case shall a furnace shaft be used as an escape shaft; and if the mine is a slope or drift opening, the escape shall be separated from the other openings by not less than fifty feet of natural strata, and shall be provided with safe and available traveling ways, and the traveling ways to the escapes in all coal mines shall be kept free from water and falls of roof; and all escape shafts shall be fitted with safe and convenient stairs at an angle of not more than sixty degrees descent, and with landings at easy and convenient distances, so as to furnish easy escape from such mine, and all air shafts used as escapes where fans are employed for ventilation, shall be provided with suitable appliances for hoisting the underground workmen; said appliances to be always kept at the mine ready for immediate use; and in no case shall any combustible material be allowed between any escape shaft and hoisting shaft, except such as is absolutely necessary for operation of the mine; *provided*, that where a furnace shaft is large enough to admit of being divided into an escape shaft and a furnace shaft, there may be a partition placed in said shaft, properly constructed so as to exclude the heated air and smoke from the side Outlets or escapes. Proviso. Partition in furnace shaft.

- of the shaft used as an escape shaft, such partition to be built of incombustible material for a distance of not less than fifteen feet up from the bottom thereof; and *provided*, that where two or more mines are connected underground, each owner may make joint provisions with the other owner for the use of the other's hoisting shaft or slope as an escape, and in that event the owners thereof shall be deemed to have complied with the requirements of this section. And *provided further*, that in any case where the escape shaft is now situated less than one hundred feet from the hoisting shaft there may be provided a properly constructed underground traveling way from the top of the escape shaft, so as to furnish the proper protection from fire, for a distance of one hundred feet from the hoisting shaft; and in that event the owner or agent of any such mine shall be deemed to have complied with the requirements of this section; and *provided further*, that this act shall not apply to mines operated by slopes or drift openings where not more than five persons are employed therein.
- Proviso.**
- Mines connected.**
- Proviso.**
- Escape shafts already constructed.**
- Proviso.**
- Small mines.**
- Time allowed for making outlets.**
- Ventilation.**
- Safety appliances.**
- SEC. 9.** In all mines there shall be allowed one year to make outlets as provided in section eight when such mine is under two hundred feet in depth, and two years when such mine is over two hundred feet in depth; but not more than twenty men shall be employed in such mine at any one time until the provisions of section eight are complied with; and after the expiration of the period above mentioned should said mines not have the outlets aforesaid, they shall not be operated until made to conform to the provisions of section eight.
- SEC. 10.** The owner or agent of every coal mine, whether it be operated by shaft, slope, or drift, shall provide and maintain for every such mine an amount of ventilation of not less than one hundred cubic feet of air per minute for each person employed in such mine, and not less than five hundred cubic feet of air per minute for each mule or horse employed in the same, which shall be distributed and circulated throughout the mine in such manner as to dilute, render harmless, and expel the poisonous and noxious gases from each and every working place in the mine. And all mines governed by the provisions of this act shall be provided with artificial means for producing ventilation, such as exhaust or forcing fans, furnaces, or exhaust steam, or other contrivances of such capacity and power as to produce and maintain an abundant supply of air for all the requirements of the persons employed in the mine; but in case a furnace is used for ventilating purposes it shall be built in such manner as to prevent the communication of fire to any part of the works by lining the upcast with incombustible material for a sufficient distance up from said furnace to ensure safety.
- SEC. 11.** The owner or agent of every coal mine operated by a shaft or slope, in all cases where the human voice cannot be distinctly heard, shall forthwith provide and maintain a metal tube, or other suitable means for communication from the top to the bottom of said shaft or slope, suitably calculated for the free passage of sound therein, so that communication can be held between persons at the bottom and top of the shaft or slope. And there shall be provided a safety catch of approved pattern

and a sufficient cover overhead on all carriages used for lowering and hoisting persons, and on the top of every shaft an approved safety gate, and also approved safety spring on the top of every slope, and an adequate brake shall be attached to every drum or machine used for raising or lowering persons in all shafts or slopes, and a trail shall be attached to every train used on a slope, all of said appliances to be subject to the approval of the inspector.

SEC. 12. No owner or agent of any coal mine operated by shaft or slope shall knowingly place in charge of any engine used for lowering into or hoisting out of such mine persons employed therein, any but experienced, competent and sober engineers, and no engineer in charge of such engine shall allow any person except such as may be deputed for that purpose by the owner or agent, to interfere with it, or any part of the machinery; and no person shall interfere or in any way intimidate the engineer in the discharge of his duties; and the maximum number of persons to ascend out of or descend into any coal mine on one cage shall be determined by the inspector, but in no case shall such number exceed ten, and no person shall ride upon or against any loaded cage or car in any shaft or slope except the conductor in charge of the train.

SEC. 13. No boy under twelve years of age shall be permitted to work in any mine; and parents or guardians of boys shall be required to furnish an affidavit as to the ages of their boys when there is any doubt in regard to their age, and in all cases of minors applying for work the agent or owner of the mines shall see that the provisions of this section *is* [are] not violated.

SEC. 14. In case any coal mine does not, in its appliances for the safety of the persons working therein, conform to the provisions of this act, or the owner or agent disregards the requirements of this act for twenty days after being notified by the inspector, any court of competent jurisdiction, while in session, or the judges in vacation, may, on application of the inspector, by civil action in the name of the state, enjoin or restrain by writ of injunction, the said agent or owner from working or operating such mines with more than ten persons at once, except as provided in sections eight and nine, until it is made to conform with the provisions of this act, and such remedies shall be cumulative, and shall not take the place of, or affect any other proceedings against such owner or agent authorized by law, for the matter complained of in such action; and for any willful failure or neglect to comply with the provisions of this law by any owner, lessee, or operator of any coal mine or opening whereby any one is injured, a right of action shall accrue to the party so injured for any damage he may have sustained thereby; and in case of loss of life by reason of such willful neglect or failure aforesaid, a right of action shall accrue to the widow, if living, and if not living, to the children of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained.

SEC. 15. Any miner, workman or other person who shall knowingly injure or interfere with any air-course or brattice, or

Hoisting
engine:
operation.

Boys.

Penalties.

Injunction.

Damages.

Malicious
mischief.

Roof support. obstruct, or throw open doors, or disturb any part of the machinery, or disobey any order given in carrying out the provisions of this act, or ride upon a loaded car or wagon in a shaft or slope except as provided in section twelve, or do any act whereby the lives and health of the persons, or the security of the mines and machinery is endangered; or if any miner or person employed in any mine governed by the provisions of this act, shall neglect or refuse to securely prop or support the roof and entries under his control, or neglect or refuse to obey any order given by the superintendent in relation to the security of the mine in the part of the mine under his charge or control, every such person shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

Disobedience of orders.

Trial of inspector for malfeasance in office, etc.

SEC. 16. Whenever written charges of gross neglect of duty or malfeasance in office against any inspector shall be made and filed with the governor, signed by not less than fifteen miners, or one or more operators of mines, together with a bond in the sum of five hundred dollars, payable to the state, and signed by two or more responsible freeholders, and conditioned for the payment of all costs and expenses arising from the investigation of such charges, it shall be the duty of the governor to convene a board of examiners, to consist of two practical miners, one mining engineer and two operators, at such time and place as he may deem best, giving ten days' notice to the inspector against whom charges may be made, and also the person whose name appears first in the charges, and said board when so convened, and having first been duly sworn or affirmed truly to try and decide the charges made, shall summon any witness desired by either party and examine them on oath or affirmation, which may be administered by any member of the board, and depositions may be read on such examination as in other cases, and report the result of their investigations to the governor, and if their report shows that said inspector has grossly neglected his duties, or is incompetent, or has been guilty of malfeasance in office, it shall be the duty of the governor forthwith to remove said inspector and appoint a successor, and said board shall award the costs and expenses of such investigation against the inspector or person signing said bond.

Miners' right to examine weights.

SEC. 17. In all coal mines in this state the miners employed and working therein shall at all proper times have right of access and examination of all scales, machinery or apparatus used in or about said mine to determine the quantity of coal mined for the purpose of testing the accuracy and correctness of all such scales, machinery or apparatus, and such miners may designate or appoint a competent person to act for them, who shall at all proper times have full right of access and examination of such scales, machinery or apparatus, and seeing all weights and measures of coal mined, and the accounts kept of the same, provided not more than one person on behalf of the miners collectively shall have such right of access, examination and inspection of scales, weights, measures and accounts at the same time, and that such

person shall make no unnecessary interference with the use of such scales, machinery or apparatus.

Sec. 18. The owner, agent or operator of any coal mine shall keep a sufficient supply of timber to be used as props, so that the workmen may at all times be able to properly secure the workings from caving in, and it shall be the duty of the owner, agent or operator to send down all such props when required.

Sec. 19. Any person willfully neglecting or refusing to comply with the provisions of this act when notified by the mine inspector to comply with such provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, except when different penalties are herein provided.

Sec. 20. Chapter 202 of the acts of the eighteenth general assembly is hereby repealed.

Supply of
Props.

Penalties.

Acts 18th G. A.,
Ch. 202, re-
pealed.

447.

17 G. A., Ch. 172.

[This act is repealed by the following:]

INSPECTION OF COAL OIL.

[Twentieth General Assembly, Chapter 185.]

SECTION 1. The governor, by and with the advice and consent of the senate, shall appoint a suitable person, resident of the state, who is not interested in manufacturing, dealing in, or vending any illuminating oils manufactured from petroleum, as state inspector of oils, whose term of office shall commence on the first day of April of each even-numbered year, and continue for the term of two years and until his successor is appointed and qualified. It shall be the duty of such state inspector, by himself or his deputies, hereinafter provided for, to examine and test the quality of all such oils offered for sale by any manufacturer, vender, or dealer; and if upon such testing or examination the oils shall meet the requirements hereinafter specified, he shall fix his brand or device, "*Approved, flash test—degrees*" (inserting the number of degrees), with the date, over his official signature, upon the package, barrel or cask containing the same. And it shall be lawful for the state inspector, or his deputies, to enter into or upon the premises of any manufacturer, vender or dealer of said oils, and if they shall find or discover any kerosene oil, or any other product of petroleum kept for illuminating purposes, that has not been inspected and branded according to the provisions of this act, they shall proceed to inspect and brand the same. It shall be lawful for any manufacturer, vender or dealer to sell the oil so tested and approved as an illuminator; but if the oil or other product of petroleum so tested shall not meet said requirements, he shall mark in plain letters on said package, barrel or cask, over his official signature, the words, "*Rejected for illuminating purposes; flash test—degrees*," (inserting the number of degrees). And it shall be unlawful for the owner thereof to sell such oil or other product of petroleum for illuminating purposes. And if any person shall sell or offer for sale any of

Governor with
consent of sen-
ate to appoint
state inspector
of oils.

Term.
Duty of in-
spector and
deputies.

May enter
upon premises
of manufact-
urer or dealer.

When rejected.

Unlawful to
sell rejected
oil.

Penalty. — such rejected oil or other product of petroleum for such purpose, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a penalty not exceeding three hundred dollars.

May appoint deputies. SEC. 2. The state inspector provided for in this act, is authorized to appoint a suitable number of deputies, which deputies are

empowered to perform the duties of inspection, and shall be liable to the same penalties as the state inspector; *provided*, that the state inspector may remove any of said deputies for reasonable cause. It shall be the duty of the inspector and his

Duty of inspector. — deputies to provide themselves at their own expense with the necessary instruments and apparatus for testing the quality of said illuminating oils, and when called upon for that purpose to promptly inspect all oils hereinbefore mentioned, and to reject for illuminating purposes, all oils which will emit a combustible vapor at a temperature of one hundred degrees standard Fahrenheit thermometer, closed test, *provided* the quantity of oil used in the flash test shall not be less than one-half pint. The oil

tester adopted and recommended by the Iowa state board of health, shall be used by the inspector and his deputies in all tests made by them. And said board shall prepare rules and regulations as to the manner of inspection in the use of the oil tester adopted, which rules and regulations shall be in effect and binding upon the inspector and deputies appointed under this act.

Board of health to adopt tester. SEC. 3. The state inspector before he enters upon the discharge of the duties of his office shall take the oath or affirmation provided by law, and file the same in the office of the secretary of state, and execute a bond to the state of Iowa in a penal sum not less than twenty thousand dollars with sureties thereto, to be approved by the secretary of state, who shall justify as provided by law, and in addition thereto state under oath that they are not interested, directly or indirectly, in manufacturing, dealing in or vending any illuminating oils manufactured from petroleum; such bond to be conditioned for the faithful performance of the duties imposed upon him by this act, and which shall be for the use of all persons aggrieved by the acts of said inspector, or his

deputies, and the same shall be filed with the secretary of state. Every deputy inspector before entering upon the discharge of his duties, shall take a like oath or affirmation prescribed herein for the state inspector, and execute to the state a bond in the penal sum of five thousand dollars with like conditions and for like purposes, and with sureties thereto who shall justify and have like qualifications as herein provided for the sureties for state inspector, and such sureties shall be approved by the clerk of the district court of the county in which such deputy inspector resides, and said bond and oath shall be filed in the office of such clerk and such deputy inspector shall before entering upon the discharge of his duties forward said clerk's certificate of such filing to the state inspector and to the secretary of state to be placed on file.

Inspector to take oath and give bond. SEC. 4. All inspections herein provided for shall be made within the state of Iowa, and the inspector or deputy inspector shall be entitled to demand and receive for his services from the

Filed with secretary of state. Deputies to give bond to be filed with clerk of district court.

Inspection to be made in the state.

Inspection to be made in the state.

Inspection to be made in the state.

Inspection to be made in the state.

Inspection to be made in the state.

Inspection to be made in the state.

owner or party calling on him, or for whom he shall perform the inspection, the sum of forty cents for a single barrel, package or cask; twenty-five cents each when the lot exceeds one but does not exceed ten in number; fifteen cents each when the lot exceeds ten but does not exceed twenty in number; ten cents each when the lot exceeds twenty but does not exceed one hundred in number, and five cents each for all lots exceeding one hundred barrels; but nothing herein shall preclude the inspection of oil in tanks used for transportation on railroads or in storage, *provided*, the inspector or deputy so inspecting the same shall see and know that the identical oil inspected in such tank is placed in the package, barrel or cask upon which the brand or device herein provided for shall be placed and his fees therefor shall be four dollars for each tank. All fees accruing for inspection shall be a lien upon the oil so inspected.

SEC. 5. It shall be the duty of the state inspector and every deputy inspector to keep a true and accurate record of all oils so inspected and branded by him which record shall state the date of inspection, the number of gallons rejected, the number of gallons approved, the number of gallons inspected, the number and kind of barrels, casks or packages, the name of the person for whom inspected and the amount of money received for such inspection; and such record shall be open to the inspection of all persons interested; and every deputy inspector shall return a true copy of such record at the beginning of each month to the state inspector. It shall be the duty of the state inspector to make and deliver to the state auditor for the fiscal period ending the thirteenth day of June, 1885, and every two years thereafter, a report of the inspections made by himself and deputies for such period, containing the information and items required in this act to be made of record, and the same shall be laid before the general assembly.

SEC. 6. If any person or persons, whether manufacturer, vendee or dealer shall sell or attempt to sell to any person in this state any illuminating oil, the product of petroleum, whether manufactured in this state or not, which has not been inspected as provided in this act, he shall be deemed guilty of a misdemeanor and subject to a penalty in any sum not exceeding three hundred dollars, and if any manufacturer, vendee or dealer in either or any of said illuminating oils shall falsely brand the package, cask or barrel containing the same, as provided in this act, or shall refill packages, casks or barrels having the inspector's brand thereon without erasing such brand, having the oil inspected and such packages, casks or barrels rebranded, he shall be guilty of a misdemeanor and shall be subject to a penalty not exceeding three hundred dollars or be imprisoned in the county jail not exceeding six months or both in the discretion of the court.

SEC. 7. Any person selling or dealing in illuminating oils produced from petroleum who shall sell or dispose of any empty kerosene barrel, cask or package before thoroughly canceling, removing or effacing the inspection brand on the same, shall be guilty of a misdemeanor, and on conviction thereof, shall pay a

- Penalty for using oil not approved of. fine of one dollar for each barrel, cask or package thus sold or disposed of; and any person who shall knowingly use any illuminating oil, the product of petroleum, for illuminating purposes before the same has been approved by the state inspector of oils, or his deputy, shall be guilty of a misdemeanor, and, on conviction thereof, shall pay a fine in any sum not exceeding ten dollars for each offense.
- Adulteration. SEC. 8. No person shall adulterate with paraffine or other substance, for the purpose of sale or for use, any coal or kerosene oils, to be used for lights, in such a manner as to render them dangerous to use; nor shall any person knowingly sell or offer for sale, or knowingly use any coal or kerosene oil, or any products of petroleum for illuminating purposes which by reason of being adulterated or for any other reason, will emit a combustible vapor at a temperature less than one hundred degrees of standard Fahrenheit's thermometer, tested as provided in this act; *provided*, that the gas or vapor from said oils may be used for illuminating purposes when the oils from which said gas or vapor is generated are contained in closed reservoirs outside the building illuminated or lighted by said gas. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment in the discretion of the court; *provided further*, that nothing in this act shall be so construed as to prevent the sale for and use in street lamps of lighter products of petroleum, such as gasoline, benzine, benzole, naphtha, or, to prevent the use of machines or generators constructed on the principle of the "Davy safety lamp."
- Proviso. SEC. 9. It shall be the duty of the state inspector, and of any deputy inspector, who shall know of the violation of any of the provisions of this act, to prosecute before a court of competent jurisdiction any person so offending. And in case the state inspector, or any deputy inspector, having knowledge of the violation of any of the provisions of this act, shall neglect to prosecute as required herein, he shall be deemed guilty of a misdemeanor and punished accordingly, and, upon conviction, shall be removed from office.
- Penalty. Persons offending to be prosecuted. SEC. 10. No oil, nor fluid, whether composed wholly or in part of petroleum, or its products, or of other substances or material, which will ignite and burn at a temperature of three hundred degrees of the standard Fahrenheit thermometer, open test, shall be carried as freight, nor shall the same be burned in any lamp, or vessel, or stationary fixture of any kind, in any passenger, baggage, mail or express car on any railroad, nor on any passenger boat moved by steam-power, nor in any street railway car, stage coach, omnibus or other public conveyance in which passengers are carried, within this state. A violation of any of the provisions of this section shall be deemed a misdemeanor, and the offender shall on conviction thereof be fined not less than one hundred dollars, nor more than one thousand dollars, and shall be liable for all damages resulting therefrom.
- Proviso. Penalty for failure to prosecute. Oil which will ignite at 300 degrees prohibited as freight, etc. Penalty.

SEC. 11. If any inspector or deputy shall falsely brand or mark any barrel, cask or package, or be guilty of any fraud, deceit, misconduct or culpable negligence in the discharge of his official duties, or shall deal in, or have any pecuniary interest, directly or indirectly, in any oils or fluids used or sold for illuminating purposes, while holding such office he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not exceeding one hundred dollars, or imprisoned not exceeding thirty days, and be liable to the party injured for all damages resulting therefrom. Penalty for false branding.

SEC. 12. It shall be the duty of the governor to remove from office, and to appoint a competent person in the place of any inspector who is unfaithful in the duties of his office. Removal from office.

SEC. 13. Any person who shall knowingly or negligently sell, or cause to be sold, any of the oils mentioned in this act, for illuminating purposes, except for the purposes herein authorized, which are below the standard and test required in this act, shall be liable to any one purchasing said oil, or to any person injured thereby, for all damages resulting from any explosion of said oil. Penalty for selling oil below test.

SEC. 14. Within sixty days after the passage of this act, the state board of health shall make and provide the necessary rules and regulations for the inspection of illuminating oil as contemplated in this act, and on application, shall furnish the inspector and his deputies with the same. State board of health to make rules.

SEC. 15. Chapter 172 of the acts of the seventeenth general assembly and section 3901 of the code are hereby repealed. Repeal.

448.

18 G. A., Ch. 75.

This act does not repeal any of the provisions of title 11, ch. 6, of the Code, except possibly so far as necessary to allow sales by the registered apothecaries of intoxicating liquors for medicines: *State v. Mercer*, 58-182; *State v. Knowles*, 57-669.

449.

18 G. A. Ch. 75, § 3.

[19 G. A., ch., 175, § 1, provides that the commissioners of pharmacy shall make biennial reports to the governor, on or before the 15th day of August, preceding the regular sessions of the general assembly: See that act, in supplement to page 28.]

SEC. 4.

[19 G. A., ch. 137, § 1, amends this section by striking out all after the word "thereof," in the fourth line, and enacting in lieu thereof the following:]

Druggists and pharmacists, who were registered without examination, forfeit their registration when they have voluntarily sold, parted with, or severed their connection with the drug business for a period of two years at the place designated in certificate of registration. Should such party who has thus forfeited his registration wish to re-engage in the practice of pharmacy, he is required to be registered by examination as per section 5. Every registered pharmacist, who desires to continue his profession, shall, Forfeiture of registration.
Renewal certificate.

Change in lo-
cation.Posting certifi-
cate.

on or before the 22d day of March of each year, pay to the commission of pharmacy the sum of one dollar, for which he shall receive a renewal of his certificate unless his name has been stricken from the register for violation of law. It shall be the duty of each registered pharmacist, before changing his locality as designated in his certificate of registration, to notify the secretary of the commission of pharmacy of his new place of business, and for recording the same and certification thereto, the secretary shall be entitled to receive fifty cents for each certificate. It shall be the duty of every registered pharmacist to conspicuously post his certificate of registration in his place of business. Any person continuing in business, who shall fail or neglect to procure his annual renewal of registration, or who shall change his place of business without complying with this section, or who shall fail to conspicuously post his certificate of registration in his place of business, shall for each such offense be liable to a fine of ten dollars for each calendar month during which he is so delinquent.

450.

SEC. 8.

[Section 1 of the bill referred to in supplement to page 442 under §§ 1527 and 1529, amends this section by striking out all after the word "provided," in the fifth line, and inserting in lieu thereof, the following:]

That all the provisions of chapter six, title eleven, of the code of 1873, and of any laws that may be hereafter made, amendatory or in addition thereto, regulating the sale of intoxicating liquors for mechanical, culinary, medicinal or sacramental purposes, shall be applicable to persons selling liquors under this act, or the act to which this is amendatory: *Provided, further*, that any registered pharmacist, who shall be convicted of any violation of said chapter six, title eleven, of the code, or of chapter seventy-five of the laws of the eighteenth general assembly, or any law hereafter made amendatory thereto, shall have his name stricken from the register by the commissioners of pharmacy.

[There may be some doubt as to whether this bill became a law. For particulars as to its return by the governor to the office of the secretary of state, etc., see notes in supplement to page 424.]

SEC. 10.

Penalty.

Fines paid to
auditor of stateExpenses of
commission.

[19 G. A., ch. 137, § 2, amends this section by striking out all after the word "paid," in the sixth line, and enacting in lieu thereof the following:] to the treasurer of the commission of pharmacy, whereupon the secretary of said commission shall issue such license for one year. Any person violating this section shall be deemed guilty of a misdemeanor, and shall, upon conviction, pay a fine of not less than twenty-five dollars; all moneys received for licenses to be reported to the auditor of state. The sum of one thousand dollars per year, or as much thereof as may be necessary, is hereby appropriated out of the moneys so received for licenses, for the expenses of said commission, all exceeding said amount to be paid into the state treasury.

SEC. 11.

[19 G. A., ch. 137, § 3, amends this section by adding at the end thereof the following words, "not more than two hundred dollars."]

SEC. 12.

[19 G. A., ch., 137, § 4, amends this section by adding at the end thereof the following words: "*manufactured in the state, when same are sold and distributed by agents from an established place of business.*"]

PRACTICE OF DENTISTRY.

[Nineteenth General Assembly, Chapter 36.]

SECTION. 1. It shall be unlawful for any person who is not at the time of the passage of this act, engaged in the practice of dentistry in this state to commence such practice unless such person shall have received a license from the board of examiners, or some member thereof as hereinafter provided, or a diploma from the faculty of some reputable dental college duly authorized by the laws of this state, or by some other of the United States, or by the laws of some foreign country in which college or colleges there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instructions in dental surgery.

Dentist must have license or diploma.

SEC. 2. A board of examiners is hereby created whose duty it shall be to carry out the purposes and enforce the provisions of this act. The members of said board shall be appointed by the governor, and shall consist of five practicing dentists, who shall have been engaged in the continuous practice of dentistry in the state for five years or over, at the time of, or prior to, the passage of this act. The term for which the members of said board shall hold their office shall be five years, except that the members of the board first to be appointed under this act shall hold their offices for the term of one, two, three, four and five years respectively, and until their successors shall be duly appointed. In case of vacancy occurring in said board, such vacancy shall be filled by the governor.

Board of examiners.

SEC. 3. Said board shall choose one of its members president, and one the secretary thereof; and it shall meet at least once in each year, and as much oftener, and at such times and places, as it may deem necessary. A majority of said board shall at all times constitute a quorum, and the proceedings thereof shall at all reasonable times be open to public inspection.

Organization and meetings of board.

SEC. 4. It shall be the duty of every person who is engaged in the practice of dentistry in this state, within six months from the date of the taking effect of this act, to cause his or her name and residence, or place of business, to be registered with the said board of examiners, who shall keep a book for that purpose; and every person, who shall so register with said board as a practitioner of dentistry, may continue to practice the same as such without incurring any of the liabilities or penalties of this act.

Registry of practitioners.

SEC. 5. No person whose name is not registered on the books of said board as a regular practitioner of dentistry, within the limits prescribed in the preceding section, shall be permitted to practice dentistry in this state until such person shall have been duly examined by said board, and regularly licensed in accordance with the provisions of this act.

Persons not registered must be examined.

Examination
and license.

SEC. 6. Any and all persons, who shall so desire, may appear before said board at any of its regular meetings, and be examined with reference to their knowledge and skill in dental surgery, and if such person shall be found, after having been so examined, to possess the requisite qualifications, said board shall issue a license to such person to practice dentistry in accordance with the provisions of this act. But said board shall at all times issue a license to any regular graduate of any reputable dental college, without examination, upon the payment by such graduate to the said board, of a fee of one dollar. All licenses issued by said board shall be signed by the members thereof and be attested by its president and secretary; and such license shall be *prima facie* evidence of the right of the holder to practice dentistry in the state of Iowa.

Temporary li-
cense.

SEC. 7. Any member of said board shall issue a temporary license to any applicant upon the presentation by such applicant of the evidence of the necessary qualifications to practice dentistry; and such temporary license shall remain in force until the next regular meeting of said board occurring after the date of such temporary license and no longer.

Penalty.

SEC. 8. Any person who shall violate any of the provisions of this act shall be liable to prosecution, before any court of competent jurisdiction, upon information, and upon conviction shall be fined not less than twenty-five dollars, nor more than fifty dollars, for each and every offense.

Fees: Compens-
ation.

SEC. 9. In order to provide the means for carrying out and maintaining the provisions of this act, the said board of examiners may charge each person applying to or appearing before them for examination for license to practice dentistry a fee of two dollars; and out of the funds coming into the possession of the board from the fees so charged, the members of said board may receive as compensation the sum of five dollars for each day actually engaged in the duties of their office. And no part of the salary or other expenses of the board shall ever be paid out of the state treasury. All moneys received in excess of said per diem allowance shall be held by the secretary of said board as a special fund for meeting the expenses of said board, he giving such bond as the board shall from time to time direct. The said board shall make an annual report of its proceedings to the governor, by the fifteenth of November of each year, together with an account of all moneys received and disbursed by them pursuant to this act.

Report.

Registry of li-
censes.

SEC. 10. Any person who shall be licensed by said board to practice dentistry, shall cause his or her license to be registered with the county clerk of any county, or counties, in which such person may desire to engage in the practice of dentistry; and the county clerks of the several counties in this state shall charge for registering such license a fee of twenty-five cents for each registration. Any failure, neglect, or refusal on the part of any person holding such license to register the same with the county clerk, as above directed, for a period of six months, shall work a forfeiture of the license; and no license, when once forfeited, shall be restored, except upon the payment to the said board of exam-

Penalty.

iners of the sum of twenty-five dollars, as a penalty for such neglect, failure, or refusal.

SEC. 11. Nothing in this act shall be construed to prevent persons from extracting teeth. Extracting teeth.

452.

18 G. A., Ch. 151, § 3.

[19 G. A., ch. 140, amends this section by adding thereto the following:]
For which service the clerk shall receive, in addition to the compensation already allowed him by law, the sum of ten cents for each birth, marriage, or death so recorded by him, and the further sum of ten cents for each one hundred words of written matter contained in said report, the same to be paid out of the county fund. Compensation of clerks.

SEC. 5.

This statute, so far as it authorizes the board of health to require a physician to report information as to births and deaths, is not unconstitutional. Its objects are within the authority of the state, and may be attained in the exercise of its police power: *Robinson v. Hamilton*, 60-134.

453.

18 G. A., Ch. 151, § 10.

[20 G. A., ch. 173, amends this section by striking out the word "quarterly" in the eighth line of said section and inserting in lieu thereof the word "monthly."]

SEC. 11.

[19 G. A., ch. 175, § 1. provides that the report be made biennially to the governor, on or before the 15th day of August preceding the regular session of the general assembly: See that act, in supplement to page 28.]

SEC. 12.

[20 G. A., ch. 173, amends this section by inserting after the word "paid," in the sixth line, the word "monthly."]

455.

SEC. 21.

The board of health may, under this section, provide a temporary building to which infected persons may be removed for isolation, and the county will be liable for the expenses thereof in case of the inability of the infected person or persons to pay such charge. Whether the infected persons would be liable for such expenses in any event, doubted: *Staples v. Plymouth Co.*, 17 N. W. Rep., 569.

The sick person is properly chargeable with all the expenses which may be incurred under this and the following section, as including expenses of removal, if that is adopted, or isolation, if that is adopted; and, in the latter case, the expense of food

furnished to the entire family during the period of isolation may be included; also, the supplying of clothing in place of clothing worn by the family which is burned. For all such expenses which the sick person or those liable for his support are unable to pay, the county is ultimately liable: *City of Clinton v. County of Clinton*, 61-205.

It is the imperative duty of the local board of health to provide for a sick person, regardless of his settlement—as where the person is a foreigner, not yet having acquired a settlement. The sick or afflicted person must in such case be deemed to belong to the county where the relief becomes necessary: *Ibid.*

460.

SEC. 1583.

[19 G. A., ch. 175, § 1, provides that the biennial reports be made to the governor on or before the 15th day of August preceding each regular session of the general assembly: See that act, in supplement to page 23.]

STATE EDUCATIONAL BOARD OF EXAMINERS.

[Nineteenth General Assembly, Chapter 167.]

Who constitute board.

SECTION 1. The superintendent of public instruction, the president of the state university, the principal of the state normal school, and two persons, to be appointed by the executive council, one of whom shall be a woman, for terms of four years: *Provided*, that of the two first appointed, one shall be for two years: *and provided further*, that no one shall be his own successor in said appointments: are hereby constituted a state board of examiners, with the superintendent of public instruction as, ex-officio, its president.

Public examination.

SEC. 2. The board shall meet at such times and places as its president shall direct for transaction of business, and shall hold annually at least two public examinations of teachers at each of which examinations one member of the board shall preside, assisted by such well qualified teachers, not to exceed two in number, as the board of examiners may elect. Said board may adopt such rules, not inconsistent herewith and with the statutes of Iowa, as they may deem proper; and said board shall keep a full record of their proceedings, and a complete register of all persons to whom certificates and diplomas are issued.

State certificate and diploma.

SEC. 3. Said board shall have power to issue state certificates and state diplomas to such teachers as are found, upon examination, to possess good moral character, thorough scholarship, clear and comprehensive knowledge of didactics, and successful experience in teaching.

Branches for examination.

SEC. 4. Candidates for state certificates shall be examined upon the following branches: orthography, reading, writing, arithmetic, geography, English grammar, book-keeping, physiology, history of the United States, algebra, botany, natural philosophy, drawing, civil government, constitution and laws of Iowa, and didactics; and candidates for state diplomas shall pass examination upon all branches required by candidates for state certificates and in addition thereto in geometry, trigonometry, chemistry, zoology, geology, astronomy, political economy, rhetoric, English literature and general history, and such other branches as the board of examiners may require.

How long valid: revocation.

SEC. 5. A state certificate shall authorize the person to whom it is issued to teach in any public school of the state for the term of five years from the date of its issue, and a state diploma shall be valid for the life of the person to whom it is issued: *Provided*, that any state certificate, and any state diploma, may be revoked by the board of examiners for any cause of disqualification, on well-founded complaint entered by any county superintendent of schools.

Fee.

SEC. 6. The fee for each state certificate shall be three dollars,

and for each state diploma five dollars, which fee shall be paid before examination to such person as the board of examiners may designate from their own number, and the same shall be paid into the state treasury, when so collected: *Provided*, that if said applicant shall fail in said examination, one-half of the fee shall be returned.

SEC. 7. Every holder of a state certificate, or of a state diploma shall have the same registered by the county superintendent of schools of the county in which he wishes to teach, before entering upon his work, and each county superintendent of schools is required to include in his annual report to the superintendent of public instruction a full account of the registration of state certificates and diplomas. Registration.

SEC. 8. Each member of the state education board of examiners, and each person appointed by said board to assist in conducting examinations as provided for in section two of this act, shall be entitled to receive for the time actually employed in such service his necessary expenses: *And provided further*, that each member of said board, not a salaried officer, shall, in addition to his necessary expenses, receive the sum of three dollars per day he or she is actually employed in said examination, which amounts shall be certified by the superintendent of public instruction; and the auditor of state is hereby authorized to audit and draw his warrant for the same upon the treasurer of state: *Provided*, the aggregate amount for any one year shall not exceed three hundred dollars. Compensation of members of board.

SEC. 9. The board of examiners shall keep a detailed and accurate account of all moneys received and expended by them, which, with a list of the names of persons receiving certificates and diplomas, shall be published by the superintendent of public instruction in his annual report. Accounts of moneys.

464.

SEC. 1601.

[19 G. A., ch. 175, § 1, seems to provide that the biennial reports be made to the governor on or before the 15th of August preceding the regular session of the general assembly: See that act, in supplement to page 28.]

AFTER SEC. 1603.

[Twentieth General Assembly, Chapter 115.]

SECTION 1. There is hereby appropriated out of any money in the state treasury not otherwise appropriated, for the support of the state university in the several departments and chairs, and in aid of the income fund and for the development of the institution, the sum of eight thousand dollars annually. \$8,000 annually, appropriated.

465.

17 G. A., Ch. 45.

[19 G. A., ch. 175, § 1, provides for a biennial report to the governor on or before the 15th of August preceding each regular session of the general assembly. See that act, in supplement to page 28.]

SEC. 1604.

[20 G. A., ch. 76, § 1, amends this section by striking out all that portion thereof after the word "board" in the eleventh line and adding in lieu thereof the following: "*of trustees consisting of one person from each congressional district of the state. But the present board of trustees shall continue as members of the board of trustees from their several congressional districts until their terms of office expire.*"]

SEC. 1605.

[20 G. A., ch. 76, § 2, repeals this section and enacts in lieu thereof the following:]

Election and term of trustees.

Board of trustees to fill vacancies.

Persons not eligible.

SEC. 1605. That of the members of said board representing the different congressional districts there shall be elected by this general assembly one to serve two years, four to serve four years, and three to serve six years from the first day of May, A. D. 1884, and as the term of office of the members of the board expire, the general assembly shall elect their successors whose term of office shall be six years. The board of trustees shall fill all vacancies occurring therein, except when the legislature is in session, and the persons so appointed shall hold their office until the next session of the general assembly after such appointment: but neither the president nor any other officer or employe of the college and farm, nor any member of the general assembly, shall be eligible as trustees.

468.

AFTER SEC. 615.

SALE OR LEASE OF AGRICULTURAL COLLEGE LANDS.

[Twentieth General Assembly, Chapter 72.]

Trustees authorized to sell.

How sold.

Deferred payment.

Failure to pay interest for 60 days, a forfeiture.

Trustees may extend time.

Trustees may lease for ten years at 8 per cent.

Lessee may purchase.

SECTION 1. The trustees of the Iowa state agricultural college and farm are hereby authorized to sell the lands granted to the state of Iowa by an act of congress entitled "An Act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and mechanic arts," approved July 2d, 1862. Such sale shall be for cash, or upon a partial credit not exceeding ten years, at such appraised value as shall be fixed by said trustees. All deferred payments shall draw interest at the rate of eight per cent per annum, payable annually in advance.

Upon a failure to pay the annual interest or principal within sixty days after it becomes due and within sixty days after notice thereof in writing by mail or otherwise from the trustees or land agent of said college to the holder of the lease shall have been given, the purchaser shall forfeit all claim to said land and the improvements made thereon and all sums paid on said contract, unless in the opinion of the trustees an extension should be allowed.

SEC. 2. Said trustees are also authorized to lease the said lands for a term not exceeding ten years at an annual rent equal to eight per cent per annum upon the appraised value of the tract, payable annually in advance, and the said lessee, his heirs or assigns, shall have the privilege of purchasing said tract of land at the expiration of the lease at the appraised value stated

in the lease. The lessee failing to pay the annual interest upon said lease within sixty days after the same becomes due and within sixty days after notice thereof in writing by mail or otherwise from the trustees or land agent of said college to the holders of the lease shall have been given, shall forfeit his lease together with the interest paid thereon and improvements made on said lands.

Lease forfeited for non-payment of interest.

SEC. 3. The said trustees are authorized at their option to cause to be *revived* [reviewed] the purchase price of the land so sold or leased, or which has been heretofore sold or leased before the same becomes due, upon such terms and conditions of payment as said trustees may deem for the best interest of the institution.

Trustees may cause purchase price to be reviewed.

Said trustees may also renew leases as they expire, and when so renewed the leasehold estate shall be subject to taxation as provided in chapter one hundred and sixty-nine of the acts of the nineteenth general assembly entitled, "An Act to provide for taxation of leasehold estates in Agricultural College Lands," approved March 25th, 1882.

May review leases. Subject to taxation.

SEC. 4. Leases heretofore issued by said trustees under the authority of former acts of the general assembly of this state and all renewals of such leases shall be deemed assignable and all transfers of such leases or renewals heretofore made shall be valid, and the owner, whether holding one or more than one such lease or renewal, who has made the annual payments therein required, shall be entitled to all the benefits of such contract or contracts, and shall have the privilege of purchasing the tract or tracts of land so held by him as provided in the lease, and upon payment of the purchase money shall be entitled to a patent for the land described in said lease or leases.

All leases assignable.

Transfers heretofore made valid.

SEC. 5. The said trustees are hereby authorized in like manner to sell or lease the lands belonging to the said Iowa agricultural college acquired by purchase with accumulated interest fund.

Lands acquired by purchase, subject to same conditions.

SEC. 6. Whenever a sale shall be made of any of said lands as hereinbefore provided, the president of the said agricultural college shall issue to the purchaser a certificate, countersigned by the secretary of said board, stating the fact of purchase, the name of the purchaser, description of land and the appraised value thereof. Upon payment of such purchase price to the treasurer of state the purchaser or his assigns shall be entitled to a patent or patents for such tract or tracts of land. And upon presentation of such certificate to the secretary of state with the receipt of the treasurer of state showing full payment of the purchase money and stating the amount thereof, said secretary of state shall issue to the purchaser or to his assignee a patent or patents for the tract or tracts of land therein described, which patents shall be signed by the governor and secretary of state, as other patents or deeds for lands conveyed by the state, and shall vest in the purchaser all the right, title and interest of the state and of said college in and to the lands therein described.

President and secretary to issue certificate to purchaser.

Amount to be paid the treasurer of state.

Secretary of state to issue patent.

Title to vest in purchaser.

SEC. 7. The principal of all moneys collected under the provisions of this act, shall be paid to and held by the treasurer of

Principal to be held by treasurer of state. How drawn out.

Chapter 71
15th G. A.
repealed.

state, and shall be drawn out for the purpose of investment on the order of the board of trustees, only when required to complete a loan. The interest collected shall be paid to the treasurer of the college upon the order of the board of trustees.

SEC. 8. Chapter seventy-one of the acts of the fifteenth general assembly entitled, "An Act to regulate the leasing of the lands belonging to the Iowa State Agricultural College," approved March 19th, 1874, and all acts and parts of acts conflicting with the provisions of this act are hereby repealed.

469.

SEC. 1617.

[This section is evidently superseded by the following:]
[Twentieth General Assembly, Chapter 193.]

Management and investment of endowment fund vested in trustees.

SECTION 1. The board of trustees of the Iowa state agricultural college and farm, are hereby charged and intrusted with the management and investment of the endowment fund of said college, derived from the sale of the lands granted to the state of Iowa by an act of congress entitled, "An Act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and mechanic arts," approved July 2d, 1862. Such investment may be in the stocks of the United States, or of the states, or some other safe stocks yielding not less than five per centum of the par value of said stocks, as provided by act of congress granting said lands. Before the purchase of any such stocks shall be made the proposed investment shall be submitted to and approved by the state executive council.

Approved by executive council.

Funds: how loaned.

SEC. 2. Said board of trustees are also authorized to loan said fund upon approved real estate security in accordance with the following rules and regulations:

First.

FIRST. Each loan shall be for a term not exceeding ten years, at a rate of interest to be fixed by said board not exceeding ten per centum, and not less than six per cent per annum, payable annually.

Second.

SECOND. Each loan shall be secured by a mortgage paramount to all other liens upon improved farm lands in the state of Iowa, and shall not exceed forty per cent of the cash value of the mortgaged premises, exclusive of buildings.

Third.

THIRD. Principal and interest shall be payable to the order of said board at the office of the state treasurer at Des Moines, Iowa, and the notes and mortgages shall provide for the payment, by the borrower, of all expenses, attorneys' fees and costs, which shall be incurred in collecting the principal and interest of such loans, or any part thereof, by reason of the default of such borrower.

Fourth.

FOURTH. A register containing a complete abstract of such loan, and showing its actual condition shall be kept by the secretary of said board, and shall be at all times open to inspection. The attorney general, under the direction of the executive council, shall prepare all blanks, forms and instructions necessary to carry into effect the provisions of this section, and to

keep the funds loaned as herein provided secure and unimpaired.

SEC. 3. For the purpose of carrying into effect the provisions of this act, the said trustees are authorized to appoint a financial agent to receive applications and negotiate loans in accordance with the conditions herein contained. The trustees shall require any agent appointed under this act, before entering upon the discharge of his duties, to give bond with approved sureties in a penal sum to be determined by said board of trustees, which shall be at least double the amount of funds liable to come into his hands at any time, and shall be for the use and benefit of said Iowa state agricultural college and farm, and actions for breach of the conditions hereof may be brought in the name of said board of trustees. The appointment of such agent, and the bond given by him, shall be subject to approval by the state executive council. Such agent shall hold his office during the pleasure of the board of trustees.

Trustees authorized to appoint a financial agent.

To give bond.

Approval by executive council.

SEC. 4. The secretary of the board of trustees shall semi-annually report to the executive council, and to the board of trustees at every meeting, all loans made under this act, giving a description of the security taken and the value thereof, the name of the borrower, length of time, and amount of loan and rate of interest.

Duty of the secretary.

SEC. 5. Foreclosure of mortgages taken under this act may be made in the name of the board of trustees of the Iowa state agricultural college and farm, and in case of sale on execution under such foreclosure the mortgaged premises may be bid off in the name of the state of Iowa, and if deed therefor be made, said premises shall be held by the state in trust for the benefit of said agricultural college. Such land shall be subject to lease or sale the same as other land belonging to the college.

Foreclosure of mortgages.

SEC. 6. The agent provided for by section three of this act shall receive compensation to be fixed by said board of trustees at a rate not exceeding the sum of two thousand dollars per annum, and all necessary expenses while necessarily away from his office, in the discharge of his official duties, to be paid as other officers, out of the treasury of the state.

Compensation of agent.

SEC. 7. Moneys collected from delinquents shall be paid at once into the state treasury. The principal of the fund shall be kept by the treasurer of state and shall be drawn out for the purpose of investment as hereinbefore provided upon the order of the board of trustees subject to such restrictions as may be imposed by the attorney general and the state executive council. The treasurer of state shall make monthly reports to the secretary of the board of trustees showing all payments of principal and interest and shall remit to the treasurer of the college all interest then in his hands, as shown by such reports.

Money to be paid into state treasury and principal kept by treasurer of state.

How drawn out.

Monthly report of treasurer.

SEC. 8. All acts and parts of acts conflicting with the provisions of this act are hereby repealed.

Repealing clause.

TAXATION OF LEASEHOLD ESTATES IN AGRICULTURAL COLLEGE
LANDS.

[Nineteenth General Assembly, Chapter 169.]

Taxable as real
property; val-
ue; assessment
and sale.

SECTION 1. In all cases where leases of lands executed by the trustees of the agricultural college have been, or shall hereafter be, renewed ten years after the date of the original lease has expired, the interest in such lands of the lessee, his heirs, or assigns shall be subject to assessment and taxation as real property. The value of such interest shall be ascertained by deducting from the value of such lands and the improvements thereon the amount required to be paid by the terms of the lease to acquire the title thereto. Such leasehold interest shall be assessed, taxed, and sold for delinquent taxes, and redemption from such sale be made or tax deed be issued, in all respects like other real estate, save as herein otherwise provided, with the same rights, liabilities, and effect, and the treasurer's tax deed shall operate as a full and complete assignment of said leasehold interest to the grantee named in such deed.

Payments after
sale; redemp-
tion.

SEC. 2. At any time after such leasehold interest shall have been sold for delinquent taxes the holder of the certificate of purchase may pay any interest or principal due by the terms of the lease, or do any other act necessary to prevent a forfeiture of such lease by the terms thereof, and the proper voucher for such payment shall be filed with the auditor of the county where the land is situated. No redemption from a sale of such land shall be allowed until the amounts paid by the holder of the certificate of sale by virtue of this act, together with interest thereon at eight per cent. per annum from the dates of payment shall be paid to the auditor, with all other amounts required by law to complete such redemption, to be by him paid to the holder of such certificate, and the certificate of redemption shall show the amounts paid by the party redeeming on account of such lease.

Purchase.

SEC. 3. Where any leasehold interest has been sold for delinquent taxes and a treasurer's deed issued thereon, the grantee in such deed named, his heirs or assigns, shall be entitled to purchase the land conveyed by such deed at the price and on the terms specified in the lease therefor then in force, and to receive a patent therefor. In case such lease shall expire before the holder of the certificate of sale shall be entitled to a treasurer's deed, such holder may pay the amount required by the terms of such lease to acquire the title in fee to said land, and receive a conveyance of the same, and after such conveyance is made, no redemption from the tax sale of the land thereby conveyed shall be allowed.

Certificate of
sale, or tax
deed.

SEC. 4. The right of the tax sale purchaser or his assigns to pay any amount due by virtue of any lease shall be evidenced by a copy of the certificate of sale or treasurer's deed, as the case may be, duly certified by the officer, or officers, executing the same, and in case no tax deed has been issued the auditor of the proper county shall further certify that redemption from the tax sale has not been made. Such copy and certificate shall be filed with the secretary of the board of trustees and become a part of the records of his office.

SEC. 5. The board of trustees shall cause to be certified to the auditor of each county in which leased college lands are situated, on or before the first day of April, A. D. 1882, and on or before the fifth day of January of each year thereafter, a list of such lands held under renewed leases, together with the name of each lessee thereof, the date and terms of each lease, the amounts to be paid thereunder, and the dates when such amounts will become due. Each auditor of a county in which such lands are situated shall deliver to the assessor of each township, which contain any of said lands, on or before the first day of April, A. D. 1882, and on or before the fifteenth day of January for each year thereafter, a list of such land situated in such township, together with a statement showing the lessee of each tract and the amounts to be paid by virtue of the lease thereon, and the dates of payment.

Board to certify to county auditor's lists of lands subject to taxation.

SEC. 6. Nothing in this act shall be so construed as to authorize the taxation of any leasehold interest under and by virtue of this act, for any year prior to 1882.

Act takes effect

SEC. 7. All acts and parts of acts, so far as they conflict with this act, are hereby repealed.

Repealing clause.

470.

SEC. 1621.

[20 G. A., ch. 27, repeals this section and enacts in lieu of it the following:]

SEC. 1621. There shall be adopted and taught at the state agricultural college a broad, liberal and practical course of study in which the leading branches of learning shall relate to agriculture and the mechanic arts, and which shall also embrace such other branches of learning as will most practically and liberally educate the agricultural and industrial classes in the several pursuits and professions of life including military tactics.

Course of study

[Sec. 2 of the same act repeals "all acts and parts of acts inconsistent with this act."]

471.

SEC. 1632.

[19 G. A., ch. 175, § 1, provides that the biennial reports shall be made to the governor on or before the 15th day of August preceding the regular session of the general assembly: See that act, in supplement to page 28.]

475.

INSTITUTION FOR FEEBLE-MINDED CHILDREN.

[Nineteenth General Assembly, Chapter 40.]

SECTION 1. Chapter 152 of the sixteenth general assembly, and chapter 164 of the eighteenth general assembly, are hereby repealed, and the following enacted in lieu thereof:

16 G. A. Ch. 152 and 18. G. A. Ch. 164 repealed.

SEC. 2. The institution located at Glenwood, in Mills county, and heretofore known as the Asylum for Feeble-Minded Children, shall by this act be termed the Institution for Feeble-Minded Children. Said institution shall be under the manage-

Change of name: board of trustees.

ment of a board of trustees, consisting of three persons, two of whom shall constitute a quorum for the transaction of business. Said trustees shall be elected by the general assembly, one of whom shall be elected for two years, one for four years, and one for six years; and at least one of them shall be a resident of Mills county, and each general assembly shall hereafter elect one trustee for six years.

Objects of institution.

SEC. 3. The purposes of this institution are to train, instruct, support and care for feeble-minded children.

Superintendent.

SEC. 4. The board of trustees shall appoint a superintendent, whose duty it shall be, under the direction of the board, to superintend the care, management, training and instruction of the wards of the institution, and the management of its finances. He shall give a bond to the state of Iowa, in such a sum as the board shall require, to be approved by the board, conditioned for the faithful performance of his duties. He shall make quarterly settlements with the treasurer of the board.

Powers and duties of trustees; officers; compensation.

SEC. 5. The board of trustees shall have the general supervision of the institution and all its affairs, and shall adopt such rules and regulations for the management of the same as will carry into effect the provisions and purposes of this act. The trustees shall elect one of their number president; and they shall elect a secretary and treasurer, who may or may not be members of the board. The treasurer shall give bonds, as the board may require, conditioned for the faithful accounting of all moneys that come into his hands. The secretary and treasurer, if not a member of the board, shall receive three dollars per day for the time he is actually employed during the sessions of the board, or under their direction. Said board shall meet at the institution on the first Wednesday in October of each year, and every three months thereafter, and at such other times as two of their number may decide. The full compensation of the members of the board shall be four dollars per day for time actually employed, and mileage, such as is allowed by law to members of the general assembly.

Who entitled to admission.

SEC. 6. Every child and youth residing in the state, between the ages of five and eighteen years, who, by reason of deficient intellect, is rendered unable to acquire an education in the common schools, shall be entitled to receive the physical and mental training and care of this institution at the expense of the state; and it shall be the duty of the county superintendent of common schools in each county to report to the superintendent of the institution, on the first day of October of each year, the name, age, and post-office address of every person in his county between the ages of five and twenty-one, who by reason of feeble mental and physical condition is deprived of a reasonable degree of benefit from the common schools. He shall also state in said report whether or not such person has ever attended school, and how long, if at all; and he shall also give the post-office address of the parent, guardian, or nearest friend of such person.

County superintendent to report.

Method of admission.

SEC. 7. There shall be received into the institution feeble-minded children between the ages of five and eighteen years, whose admission shall be applied for as follows:

First. By the father and mother, or either of them, if the other be adjudged insane.

Second. By the guardian duly appointed.

Third. In all other cases, by the board of supervisors of the county in which the child resides. It shall be the duty of such board of supervisors to make such application for any such child that has no living sane parent or guardian in the state, unless such child is comfortably provided for already.

SEC. 8. The forms for applications for admission into the institution shall be such as the trustees shall prescribe, and each application shall be accompanied by answers to such interrogatories as the trustees shall require propounded. Application.

SEC. 9. For the support of said institution there is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of ten dollars per month for each inmate therein supported by the state, counting the actual time such person is an inmate and supported by the institution; and upon presentation to the auditor of state of a sworn statement of the average number of inmates supported in the institution by the state, for the preceding month, the auditor of state shall draw his warrant upon the treasurer of the state for such sum. For the ordinary expenses of the institution, including furniture, books, school apparatus, and compensation of officers and teachers, there is hereby appropriated the sum of eleven thousand dollars annually, or so much thereof as may be necessary, which may be drawn quarterly upon the order of the trustees. Support: appropriation.

SEC. 10. When the pupils of the institution are not otherwise provided with clothing, the same shall be furnished by the superintendent, who shall make out an account of the cost thereof, in each separate case, together with the cost of transmission of the pupil, when the latter is not otherwise provided for; and said account shall be made against the parent or guardian, if there be such, or otherwise against the inmate; and when said account shall have been certified to by the superintendent, it shall be presumed to be correct in all courts, and shall be transmitted by mail to the county auditor of the county from which said pupil was sent to the institution. The said auditor shall then proceed at once to collect the same, by suit, if necessary, in the name of the county, and pay the same into state treasury. The superintendent shall, at the same time, transmit a duplicate of the same account to the auditor of state, who shall credit the same to the account of the institution, and charge it to the proper county: *Provided*, [if] it shall appear by the affidavit of three disinterested citizens of the county, not kin to the inmate, that the parent or guardian would be unreasonably oppressed by such suit, then such auditor shall not institute such suit, but shall credit the same to the state on his books, and report the amount of such account to the board of supervisors of his county, and the said board shall draw from the county fund the amount claimed, and cause the same to be paid into the state treasury. All accounts for clothing and transportation of pupils on the books of the superintendent of this institution, and not paid at the time of the enactment of this section, hereby are made subject to the same, and shall be collected accordingly. Cost of transmission and clothing.

Return of inmates.

SEC. 11. Any inmate of the institution may be returned to the parents or guardian, whenever the trustees may so direct.

"Feeble-minded" include idiots.

SEC. 12. The term "feeble-minded," as used in connection with this institution, shall be so construed as to include idiotic children, and the institution shall provide a custodial department for the care of such children as cannot be benefited by educational training.

Report of board.

SEC. 13. The board of trustees shall make a full report of the disbursements of the institution, and its condition, financial and otherwise, to the general assembly, at each regular session thereof.

[As to general provisions, regulating reports of boards of trustees of state institutions, see 19 G. A., ch. 175, § 1, in supplement to page 28.]

Appointment of officers, teachers, etc.

SEC. 14. The superintendent may, under the direction of the board of trustees, appoint such subordinate officers, teachers, attendants and other help as may be needed for the efficient working of the institution.

SEC. 1643.

[Twentieth General Assembly, Chapter 153.]

Name of reform schools changed to industrial schools.

SECTION 1. The reform schools of this state shall be hereafter known as industrial schools instead of reform schools and the trustees of said schools shall be known as the board of trustees of the industrial schools.

GIRLS' DEPARTMENT OF STATE REFORM SCHOOL.

[Eighteenth General Assembly, Chapter 171.]

SECTION 1. The executive council is hereby authorized and instructed to purchase for the use and occupancy of the girls' department of the reform school the building, furniture, and grounds of the Mitchell Seminary, located at Mitchellville, Iowa, and twenty acres of land adjoining said grounds on the south, comprising forty acres in all, and in payment therefor the auditor of state is hereby required to draw warrants on the state treasurer for the amount of the purchase money, and the warrants so drawn shall be payable, one half in the year 1882, and the other half in the year 1884: *Provided*, that the cost of the said property shall not exceed the sum of twenty thousand dollars, and *jurther Provided*, That no money shall be paid for said property until a title thereof is furnished to the state free of all liens and incumbrances.

SEC. 2. It shall be the duty of the trustees of the reform school to take possession of said property after the completion of the purchase, and cause the building to be painted and repaired, and erect suitable stables, and out-buildings on the said grounds, at an expense not exceeding the sum of one thousand dollars; and they shall hereafter as soon as practicable remove to said premises the girls' department of the reform school which is now temporarily located at Mt. Pleasant, Iowa.

[Sec. 3 makes a temporary appropriation. In preparing the original edition of this work the whole act was omitted as not containing any general provisions, but it is the only act which relates to the establishment of the girls' department at Mitchellville and is therefore here inserted.]

479.

SECS. 1659, 1660 and 1661.

[19 G. A., ch. 150, amends these sections by striking out the word "majority" wherever it occurs therein and inserting in lieu thereof the words, "twenty-one years."]

480.

SUPPORT OF GIRLS IN STATE REFORM SCHOOL.

[Nineteenth General Assembly, Chapter 92.]

SECTION 1. There is hereby appropriated, out of any money in Appropriation. the state treasury not otherwise appropriated, the sum of ten dollars per month, or so much thereof as may be necessary, for each girl actually supported in the state reform school, counting the average number sustained in the school for the month, and upon the presentation to the auditor of state, each month, of a sworn statement of the superintendent of the average number of girls supported by the school for the preceding month, the auditor of state shall draw his warrant on the treasurer of state in favor of the treasurer of the board of trustees of the state reform school for the sum hereinbefore provided.

SEC. 2. The provisions of section 1 of this act shall apply from and after October 1, 1881.

481.

SEC. 1675.

[19 G. A., ch. 166, § 1, amends this section by striking out the words "eight thousand" in the fourth line and inserting in lieu thereof the words "ten thousand."]

SEC. 1676.

[19 G. A., ch. 166, § 2, repeals this section as amended and enacts the following as a substitute therefor:]

SEC. 1676. For the purpose of meeting current expenses there is appropriated out of the state treasury so much as is necessary, not to exceed forty dollars per quarter for each pupil in said institution except non-residents at the time of their reception.

SEC. 3. All acts and parts of acts inconsistent with this act are hereby repealed.

SEC. 1677.

[19 G. A., ch. 175, § 1, provides that all boards of trustees of state institutions shall make biennial reports to the governor on or before the fifteenth day of August preceding the regular session of the general assembly: See that act in supplement to page 28.]

483.

SEC. 1692.

[19 G. A., ch. 105, amends 18 G. A., ch. 203, so as to insert in this section the word "thirty-five" in place of the word "twenty-eight," with the proviso that such change shall "commence and have effect from the quarter commencing January 1, 1882."]

SEC. 1693.

[The word "eleven" before "thousand" in the fourth line is made "twenty-one" by 20 G. A., ch. 73. The amount had been previously changed by 18 G. A., ch. 203, and 19 G. A., ch. 105.]

SEC. 1694.

[19 G. A., ch. 175, § 1, provides that boards of trustees of state institutions shall make biennial reports to the governor on or before the 15th day of August preceding the regular sessions of the general assembly: See that act in supplement to page 28.]

486.

16 G. A., Ch. 129, § 9.

[19 G. A., ch. 175, § 1, provides that the reports of boards of trustees of state institutions shall be made biennially to the governor on or before the 15th day of August preceding the regular sessions of the general assembly: See that act in supplement to page 28.]

489.

SEC. 1713.

The school district being a public corporation or quasi corporation, is not liable for personal injuries sustained on account of the negligent construction of its school houses, or negligence in failing to keep them in repair: *Lane v. District Township of Woodbury*, 58-462.

490.

SEC. 1715.

A court of equity may, in a proper case, set aside an award by arbitrators chosen under this section. Appeal to the county superintendent, under § 1829, is not the proper remedy: *Dist. Twp of Algona v. Dist. Twp of Lott's Creek*, 54-286.

The arbitration here contemplated is the arbitration provided for by the statute (see Code §§ 3416-3431), and a court cannot enter up judgment for a different amount than that taxed in the award: *Dist. Twp. of Little Sioux*

v. Ind. Dist. of Little Sioux, 60-141.

Where a portion of an independent district is severed and restored to a district township, to which it geographically belongs, it seems that bonds issued by the independent district must be taken into account in apportioning the liabilities between it and the district township, although the district township cannot issue such bonds: *Albin v. Board of Directors of Ind. Dist. of West Branch*, 58-77.

SEC. 1717.

[19 G. A., ch. 51, § 1, amends subdivision 2 of this section by adding thereto the following: "And to authorize the board of directors to obtain, at the expense of the district township, such highways as such board may deem necessary for proper access to the school-houses in their district." And § 2 of the same act amends subdivision 3 by adding thereto the following: "And for obtaining highways for access to school-houses."]

The electors of a district township have no power under this section, or otherwise, to authorize the discharge

of a debtor of the district without consideration: *District Township of Washington v. Thomas*, 59-50.

493.

SEC. 1723.

The board of directors has no authority to bind the district township for insurance of building, furniture, &c.: *Am. Ins. Co. v. Dist. Twp. of Willow*, 55-606.

A board of directors has no author-

ity to employ one of its number for a compensation to oversee the completion of a school-house abandoned by the contractor: *More v. Ind. Dist. of Toledo City*, 55-654.

BARB WIRE FENCE AROUND SCHOOL GROUNDS.

[Twentieth General Assembly, Chapter 103.]

SECTION 1. It is hereby made the duty of the board of directors of every independent district and of every district township to remove before the first day of September, A. D. 1884, any barb wire fence enclosing in whole or part any public school grounds in such district and it is also made the duty of any person owning or controlling any barbed wire fence within ten feet of any public school grounds to remove the same within the time herein above named. To be removed before Sept. 1, 1884.

SEC. 2. Hereafter barb wire shall not be used in enclosing in whole or in part any public school building or the grounds upon which the same may stand; and no barbed wire shall be used for a fence or other purpose within ten feet of any public school ground. Shall not be used within 10 feet of school ground.

SEC. 3. For a failure or neglect on the part of any board of directors of any independent district or of any district township to carry out the provisions of this act any member of such board shall be fined on conviction not exceeding twenty-five dollars, any person violating the provisions of this act shall on conviction thereof be fined not exceeding twenty-five dollars. Penalty.

494.

SEC. 1726.

As to what rules it is competent for the board to make and enforce, | see notes to § 1735.

INSURANCE OF SCHOOL PROPERTY.

[Nineteenth General Assembly, Chapter 149.]

SECTION 1. The board of directors of any independent school district organized under any of the laws of this state may use unappropriated contingent funds for the purpose of effecting an insurance on the school property of their district, but they may contract no debts for this purpose.

SETTING OUT SHADE TREES.

[Nineteenth General Assembly, Chapter 23.]

SECTION 1. The board of directors of each district township and independent district shall cause to be set out, and properly protected, twelve or more shade trees on each school-house site, belonging to the district, where such number of trees are not now growing, and such expense shall be paid from the contingent fund. Setting out shade trees.

SEC. 2. It shall be the duty of the county superintendent, in visiting the several schools in his county, to call the attention of any board of directors neglecting to comply with the requirements of this statute, and the required number of shade trees shall be planted as soon thereafter as the season will admit. County superintendent to call attention to failures.

[Section 3 amends § 1745, which see, in supplement to page 498.]

495.

SEC. 1734.

A teacher, who is aggrieved by being discharged by the board without being permitted to be present or make defense, should appeal, under	§ 1829, to the county superintendent. He cannot treat the action of the board as void: <i>Kirkpatrick v. Ind. Sch. Dist. of Liberty</i> , 53-585.
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SEC. 1735

A rule providing for expulsion of a pupil for failure to pay for damages done by him to school property, when his default is no breach of good order or good morals, is beyond the	authority of school officers to promulgate or enforce: <i>Perkins v. Board of Directors, &c., of West Des Moines</i> , 56-476.
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496.

SEC. 1739.

[19 G. A., ch. 46, repeals this section, and re-enacts it with the insertion of the words "of independent districts" after the word "directors," in the second line, and with the addition at the end of the section of the following words: "and shall be empowered to administer the oath of office to the secretary, treasurer, and members of the board."]

498.

SEC. 1745.

[19 G. A., ch. 23, § 3, amends this section by adding to it the following:]

12. The number of trees set out and in thrifty condition on each school-house grounds.

[The other sections of the same act are inserted following § 1729, in supplement to page 494.]

SEC. 1747.

The treasurer of a district township has no authority to bind the township by his contracts or admis-	sions: <i>Carpenter v. Dist. Twp. of Union</i> , 58-335.
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SEC. 1748.

The payment of money out of the contingent fund to secure a highway to a school-house is not unlawful:	<i>Ind. Dist. of Flint River v. Kelley</i> , 55-568.
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499

SEC. 1753.

It is the duty of the president to determine whether the contract of the sub-director conforms to the provisions of law, and give or withhold his approval accordingly. If he withhold approval, though erroneously, the contract is incomplete. An action, however, may be maintained on the contract if it has been performed without objection on the part of the district, or part payment has been made thereunder for services rendered, or there have been other	acts upon the part of the district evincing an intention to ratify the contract and waive its formal approval. But where the services were rendered after notification by the president that he would not approve the contract, and there is no proof that the services were accepted or the contract ratified, the mere rendering of the services will not entitle plaintiff to recover: <i>Place v. Dist. T'p of Colfax</i> , 56-573.
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501.

SEC. 1767.

[19 G. A., ch. 167, providing for a board of examiners to examine teachers for state certificates and diplomas, is inserted in supplement to page 460.]

503.

SEC. 1774.

[19 G. A., ch. 161, § 2, amends this section by striking out all the words after "directed," in the seventh line, and inserting in lieu thereof the following: "he may, at his discretion, visit the different schools in his county, and shall, at the request of a majority of the directors of a district, visit the school in said district at least once during each term."]

SEC. 1776.

[19 G. A., ch. 161, § 1, amends this section by striking out the word "three" in the second line, and inserting in lieu thereof the word "four."]

508.

SEC. 1796.

This section, as to change of boundaries of sub-districts, does not apply to independent districts, the boundaries of which can be changed, if at all, only in pursuance of §§ 1797 and 1806: *Eason v. Douglass*, 55-290.

Where a restoration of territory is agreed to, and no time fixed therefor,

it will be considered as taking place the first of March following; and taxes collected prior to that time should be paid to the township to which the territory had previously been attached: *District Township of Honey Creek v. Floete*, 59-109.

SEC. 1797.

There is now no provision exempting sub-districts from the requirement that they shall be co-terminous with the district township, except that made by this section: *Large v. Dist. Tp. of Washington*, 53-663.

To warrant the action of the county superintendent in attaching a portion of a district township to another township, the consent of the directors of the township from which the territory is detached, and the existence of natural obstacles, must both appear. Otherwise such action is unauthorized and void. Such action may, however, be legalized by a curative act. But the district township

cannot be deprived, by such curative act, of taxes already levied on the territory at the time the transfer was made: *Ind. Dist. of Union v. Ind. Dist. of Cedar Rapids*, 17 N. W. Rep., 895.

Whether a portion of one district township, which is annexed to another district township for school purposes, is properly so annexed or not, taxes levied and collected upon the certificate of the township to which the territory is attached should be paid to such township, and not to the township to which the territory properly belongs: *District Township of Honey Creek v. Floete*, 59-109.

509.

SEC. 1798.

[19 G. A., ch. 160, amends this substitute (18 G. A., ch. 111) by adding thereto the following:]

Provided, however, that no such restoration shall be made unless there are fifteen or more pupils between the ages of five and twenty-one years actually residing upon said territory sought to be restored and not until there has been a suitable school-house erected and completed within the limits of said territory suitable for school purposes.

Restoration not to be made unless there are 15 pupils and a school house.

The primary object of the amendment of this section seems to have been to place independent districts on the same footing as district townships and sub-districts therein. Upon the change of territory from an independent district to a district township, there must be an apportionment of all assets and liabilities, as provided in §1715, although a part of such liabilities consists of

bonds issued by the independent districts which the district township would have no authority to issue. This section applies as well to territory incorporated into an independent district at the time of its organization, as to such as is subsequently attached thereto: *Albin v. Board of Directors of Ind. Dist. of West Branch*, 58-77.

AFTER SEC. 1800.

BOUNDARIES OF INDEPENDENT DISTRICTS.

[Nineteenth General Assembly, Chapter 118.]

Territory included or afterward attached.

SECTION 1. All the territory of an incorporated city or town, whether included within the original incorporation or afterward attached thereto in accordance with the provisions of law, shall be or become a part of the independent district or districts of said city or town.

Settlement of assets and liabilities.

SEC. 2. When boundaries are changed by the taking effect of this act, the respective boards of directors shall make an equitable settlement of the then existing assets and liabilities of their districts, as provided for by section 1715 of the code.

510.

SEC. 1802.

[By 20 G. A., ch. 103, boards of directors of independent districts, as well as district townships, are directed to remove any barb wire fence enclosing public school grounds, and the use of such wire in fencing school grounds is prohibited: See that act in supplement to page 493.]

521.

SEC. 1829.

A teacher, claiming that he is wrongfully discharged by the board for incompetency without being heard, should appeal, as here provided. He cannot, without doing so, maintain an action for his salary on the ground that such dismissal is void: *Kirkpatrick v. Ind. Sch. Dist. of Liberty*, 53-585.

Cases wherein the jurisdiction and power of directors are brought in question, and wherein questions arise

involving the construction of statutes conferring power upon school officers, may properly be brought in the courts, as by mandamus for instance, without prosecuting the appeal here provided. So held, as to power of directors to make certain rules, under which plaintiff was excluded from school: *Perkins v. Board of Directors, &c., of West Des Moines*, 56-476.

525.

SEC. 1850.

This section applies to land purchased upon judgments recovered upon mortgages or contracts referred to in §1874, being such mortgages or contracts as county authorities are authorized to make under the chapter of the Code relating to the school fund. In a case where the school

fund was not loaned by the county authorities under the provisions of the general statute, but was loaned by the state under the provisions of a special statute, held, that the county had no authority in the matter: *Carter v. Sherman*, 16 N. W. Rep., 707.

528.

SEC. 1862.

[19 G. A., ch. 174, § 2, amends this section by striking out, in the fourth line, the words, "together with two good sureties."]

529.

SEC. 1865.

[Repealed by 19 G. A., ch. 174, § 1.]

531.

SEC. 1873.

The change in this section made by prior to its passage, is not unconstitutional as impairing the obligation of contracts: *County of Kossuth v. Wallace*, 60-508.

535.

SEC. 1897.

[19 G. A., ch. 175, § 1, provides that the librarian shall make biennial reports to the governor, on or before the 15th day of August preceding the regular session of the general assembly: See that act in supplement to page 28.]

536.

SEC. 1899.

[19 G. A., ch. 13, amends this section as it here stands by inserting after the word "dollars," in the sixth line, the words, "annually from and after the first day of January, 1882." 19 G. A., ch. 113, amends 18 G. A., ch. 194, so as to insert in place of the word "two," in the second line of this section, the word "three."]

[20 G. A., ch. 191, § 3, repeals the provision in this section [as amended] appropriating \$500 per annum for an assistant librarian. Sec. 4 of same act changes the salary of the librarian. See that section, inserted in supplement to page 944. The other sections of the act make temporary provision for assistants and purchase of books.]

537.

SEC. 1906.

[19 G. A., ch. 175, § 1, provides that the board shall make biennial reports to the governor on or before the 15th day of August preceding the regular sessions of the general assembly: See that act in supplement to page 28.]

541.

SEC. 1920.

A lease for 999 years held not valid under this section: *Todhunter v. D. M., I. & M. R. Co.*, 58-205.

542.

SEC. 1923.

An instrument assigning a judgment need not be recorded to be valid as to third parties. The chose in action so assigned can not be regarded as in the possession of the assignor at the time of the transfer, or as retained in his possession afterward: *Howe v. Jones*, 60-70. Possession retained by vendor or mortgagor after recording the instrument, as authorized by this section and § 1925, is strictly lawful and

not fraudulent or a badge of fraud, unless such retention is a part of the consideration of the sale: *Jordan v. Lendrum*, 55-478.

A creditor who does not secure a levy under attachment or execution before notice of an unrecorded sale or mortgage, is not protected: (following *Cragin v. Carmichael*, 2 Dill., 519; *Allen v. McCalla*, 25-464) *Crooks v. Stuart* (U. S. C. C. for Iowa), 7 Fed. Rep., 800.

Where the property at the time of the sale is in the actual possession of a third person as lessee or the like, a sale without notice and without change of possession is valid, and it is wholly immaterial in such cases whether or not the owner has the right to the immediate possession: *Campbell v. Hamilton*, 19 N. W. Rep., 220.

This section has no application to an assignment of a judgment: *Howe v. Jones*, 57-130.

The mortgage must be filed in the county where the mortgagor resides. It is not sufficient that it is filed in the county where the property is situated: *Stewart v. Smith*, 60-275.

Where the mortgaged property is in the possession of an agent of the mortgagee, an officer levying an attachment thereon is bound to take notice of the possession of such mortgagee, although the mortgage is not properly filed for record: *Ibid.*

To bind an officer levying an attachment with notice of an existing unrecorded mortgage thereon, it is

not necessary that such notice be received by him subsequent to the writ being placed in his hands: *Ibid.*

An attaching creditor who makes a levy without notice of an unrecorded mortgage, is protected against such mortgage, although he receives notice thereof before the sale under his levy. (Overruling *Kessley v. McHenry*, 54-187): *Bacon v. Thompson*, 60-284.

Where the description of the property covered by the mortgage was "all the cut and growing and having grown on the" premises described, held, that the description was too uncertain to be of any validity against an officer who had levied upon the property, and that the court would not insert or understand the word "crops" for the purpose of curing the defect: *Clay v. Currier*, 17 N. W. Rep., 760.

The description of the mortgaged property as "one oscillation thresher, size 6, 30 inch cylinder, and also one Chicago Pitts ten horse power," held, insufficient: *Hayes v. Wilson*, 17 N. W. Rep., 110.

The fact that a chattel mortgage is given after the mortgagor becomes insolvent, and contains an agreement that he may remain in possession of the property, and sell it in the ordinary course of trade, and apply the proceeds to his own use, does not render the mortgage fraudulent: *Sperry v. Ethridge*, 19 N. W. Rep., 657.

544.

SEC. 1927.

The equity of redemption of the mortgagor of personal property after conditions broken, is subject to sale or transfer as other property, and passes under a general assignment. After such general assignment the assignee is not subject to garnishment in a suit against the mortgagor: *Gimble v. Ferguson*, 58-414. So, also, where, by agreement between mortgagor, mortgagee and an attaching creditor, it was agreed that the mortgaged property be sold in bulk and the proceeds, after satisfying the mortgage, be applied upon the attachment, held, that this agree-

ment transferred the mortgagor's equity of redemption and took priority over a subsequent attachment of such proceeds by another creditor: *Phelps v. Winters*, 59-561.

If mortgagee has the right to take possession, he may do so even after levy, and leave no interest in the mortgagor subject to levy: *Wells v. Chapman*, 59-658.

The mortgagor of exempt personal property may maintain an action for damage where the same has been wrongfully seized and sold upon execution: *Evans v. St. Paul Harvester Works*, 18 N. W. Rep., 881.

545.

SEC. 1931.

A mortgage will attach to an after | acquired title: *Rice v. Kelso*, 57-115.

SEC. 1933.

A grant of an estate to commence in |
futuro would give the grantee a present interest in the property; therefore, held, that an instrument purporting to convey premises in the usual form of a deed, but containing the stipulation that the grantee "shall have no interest in the said premises as long as the said grantor shall live" did not transfer any estate to the grantee: *Leaver v. Gauss*, 17 N. W. Rep., 522.

SEC. 1934.

Though the conveyance to the trustee is absolute in form, a purchaser from the trustee, with knowledge of the trust, takes subject there- |
 to: *Sleeper v. Iselin*, 17 N.W. Rep., 922.
 Section applied: *McHenry v. Painter*, 58-365.

546.

SEC. 1937.

This section applies where the person purporting to convey the title has no title, as well as where he is in fact the owner, but his title is subject to incumbrances, in violation of his covenants. In either case the wife joining is not estopped from relying upon an outstanding title or incumbrance inconsistent with the conveyance in which she joins: |
Thompson v. Merrill, 58-419.
 The fact that the land conveyed is not owned by the husband does not render the wife liable to any greater extent under the covenants of the deed than if it had been owned by him, in case the title is not in her, and such covenants will not work an estoppel as to her: *Thompson v. Merrill*, 58-419.

SEC. 1940.

The taking of a mortgage on the same property is a merger or waiver of the vendor's lien: *Stuart v. Harrison*, 52-511; *Escher v. Simmons*, 54-269.

A contract by the vendee to convey, will not operate to defeat the

vendor's lien: *Noyes v. Kramer*, 54-22.

This section is unconstitutional, so far as it applies to liens existing before its enactment: *Webster v. McCullough*, 61-496.

547.

SEC. 1941.

A deed which does not purport to convey the property, but quit-claims the grantor's right, title, interest and estate therein, is a quit-claim deed, and the grantee therein can not be regarded as a purchaser without notice of equities affecting grantor's title: |
Wightman v. Spofford, 56-145.

A subsequent purchaser by warranty deed from one holding by quit-claim, is protected as a *bona fide* purchaser: *Winkler v. Miller*, 54-476.

A purchaser at a sheriff's sale without notice is protected against latent equities, but a mere creditor is not: *Jones v. Brandt*, 59-332.

The fact that a party having a deed to property on record, stands by and lets it be sold as the property of another, without taking steps by injunction to restrain such sale, is not es-

topped from setting up his title as against the purchaser at such sale: *Ibid.*

Where a mortgage is given to secure a pre-existing indebtedness and not in consideration of any extension of time, the mortgagee, even without notice of a prior unrecorded mortgage, does not acquire any rights superior thereto: *Phelps v. Fockler*, 61-340.

Where an assignment of a mortgage is not recorded and a subsequent purchaser of the premises releases a mortgage he holds upon other land in consideration of the release by the mortgagee of the mortgage which has been assigned, such release will extinguish the mortgage as to the property and it cannot be foreclosed by the assignee: *Dows v. Craig*, 17 N. W. Rep., 778.

549.

SEC. 1944.

Where a mortgage, after being filed with the recorder, and indexed, was withdrawn, and not recorded for two years, held, that the indexing alone did not impart constructive notice to persons acquiring liens without other notice thereof. The index alone only amounts to constructive notice, for the time intermediate the indexing and recording in the usual manner, and while the instrument remains on file with the recorder: *Yerger v. Barz*, 56-77.

If a party is not charged with constructive notice by what appears in the index book, he is not bound to

look further, and is not bound by what appears of record: *Thomas v. Desney*, 57-58.

"Helen" and "Ellen" are not the same christian name, and an index entry in name of one does not impart notice as to lien against the other: *Ibid.*

Where the index erroneously describes the property, a subsequent purchaser will not be affected with notice, even though the examination of the record of the instrument would have disclosed facts which might have put him upon inquiry: *Peters v. How*, 18 N. W. Rep., 296.

553.

SEC. 1958.

Whilst a notary continues in office, it is competent for him to amend his certificate of acknowledgment to supply a defect, by making a new one, provided it is in accordance with the real facts: *C., B. & Q. R. Co. v. Lewis*, 53-101.

The certificate of the officer, and his testimony as to the acknowledgment, are entitled to great weight. The presumption is very strong in his favor: *Bailey v. Landingham*, 53-722.

555.

SEC. 1964.

In an action against a notary for damages under this section, it must be alleged that he knowingly mis-

stated a material fact: *Scotten v. Fegan*, 17 N. W. Rep., 491.

SEC. 1966.

[20 G. A., ch., 203, § 1, is a re-enactment of the provisions of this section, substituting, however, "shall" for "may" in the tenth line, inserting "legally" before "recorded" in the eleventh line, and omitting "thereof" in the twelfth line. The remainder of the act is as follows:]

Applies to deeds, mortgages and conveyances.

SEC. 2. This act shall apply to all deeds, mortgages and conveyances made, filed, recorded and proved as contemplated in section one of this act prior to the first day of January, 1884.

These provisions legalizing defective acknowledgments do not apply to tax deeds. The acknowledgment in such cases is by the statute essential

to the validity of the instrument, and a defect therein is not cured by such statute: *Goodykuntz v. Oisen*, 54-174.

SEC. 1967.

Following *Brinton v. Seecers*, 12-1389; *Ferguson v. Williams*, 58-717.

560.

SEC. 1988.

[20 G. A., ch. 23, § 2, exempts the homestead of a pensioner, whether the head of a family or not, paid for with pension money or the proceeds or accumulations thereof: See that act in supplement to page 816.]

An unmarried woman who had accepted, protected and was providing for children of a deceased sister, held, to be entitled to the homestead exemption: *Arnold v. Waltz*, 53-706.

As to who is "head of a family" under the provisions for exemption of personal property, see notes to § 3072.

Where a portion of the homestead is by proper proceeding condemned for right of way, the damages allowed are exempt from execution. Whether the proceeds of a voluntary conveyance by the husband of a portion of the homestead for right of way would be exempt, *quære: Kaiser v. Seaton*, 17 N. W. Rep., 664.

561.

SEC. 1990.

If the wife actually signs an instrument of conveyance or incumbrance, she will not be allowed to dispute its validity on the ground that she was ignorant of its contents or that she was induced to do so by fraud or deception of her husband, in the absence of a showing that the grantee or mortgagee was cognizant of such deception and fraud: *Edgell v. Huggens*, 53-223; *Van Sickles v. Town*, 53-259.

An instrument in which the wife only joins for the purpose of releasing her dower, is not such a joint instrument as is required to convey or encumber the homestead: *Wilson v. Christopherson*, 53-481.

A conveyance of the homestead property from the husband to the wife will not vest in her such title that she alone can make a valid conveyance thereof: *Spoon v. Van Fossen*, 53-494.

An oral agreement by the parties to execute a mortgage upon the homestead, for money borrowed to redeem the same from execution, can not be specifically enforced, nor can the money so advanced be made a lien upon the premises by judicial decree: *Clay v. Richardson*, 59-483.

The verbal assent of the wife will not bind her to a conveyance of the homestead: *Donner v. Rodenbaugh*, 61-269.

Where the husband enters into

a contract to convey, to which both parties expect to secure the assent of the wife, but such assent is not secured, the husband is not liable in damages for failure to convey, to the same extent as in case of fraud. It is doubtful whether the measure of damage in such case against the husband would be more than the purchase money paid and interest. At any rate, he would not be liable to the extent of the difference between the contract price and such greater sum as the property might be worth at the time the contract should have been performed: *Ibid.*

Where the concurrence of the wife in a mortgage of the homestead is procured by duress, it can not be enforced: *First National Bank of Nevada v. Bryon*, 17 N. W. Rep., 165.

Where a husband and wife have a homestead right as to property greater in amount than can be claimed under the homestead law, the boundaries of the homestead not having been established, the husband cannot, by conveying a portion of the property by an instrument in which the wife does not join, limit the homestead right to another portion thereof. He cannot make a valid sale of any portion until the provisions of § 1998 have been complied with: *Goodrich v. Brown*, 18 N. W. Rep., 893.

562.

SEC. 1992.

[20 G. A., Ch. 23, § 2, exempts to a pensioner his homestead acquired with pension money, even as to debts contracted prior to the purchase thereof. See that act in supplement to page 816.]

The entry of land under the U. S. homestead laws, which is afterward occupied as a homestead, constitutes

the purchase of the homestead within the meaning of this section. The exemption dates from such entry and

not from the issuance of a patent: *Green v. Farrar*, 53-426.

The homestead being subject to the lien of a judgment for a debt contracted before its acquisition from the time such judgment is rendered, a purchaser after the lien attaches, takes subject thereto, and in case of sale of the property under such judg-

ment has no other right than that of making statutory redemption from the sale: *Kimball v. Wilson*, 59-638.

A conveyance of the homestead can not be set aside as a fraud upon creditors whose claims are not a lien against it: *Aultman v. Heiney*, 59-654.

563.

SEC. 1993.

Where possession of the property as a homestead was taken pending foreclosure proceedings, *held*, that the wife acquired no right which she could assert as against the mortgage, even to compel the plaintiff to first exhaust other property: *Kemerer v. Bournes*, 53-172.

This section applies only where the other property pledged still belongs to the mortgagor. If he has sold such other property he cannot require that it be proceeded against, in the hands of a third party, before the homestead is sold. Also, by a sale of a portion of homestead premises, the homestead right thereto is lost, and mortgagor cannot insist that such portion be first applied to the payment of the mortgage: *Dilger v. Palmer*, 60-117.

The lien of a mortgage of the homestead executed by the owner before marriage, is prior to any claim the wife may have by the subsequent marriage, but in a foreclosure suit the wife must be made a party in order that the judgment be binding upon

her and that a sale thereunder may cut off her dower rights: *Chase v. Abbott*, 20-154.

Where a mortgage is given covering the homestead and other land, and then a second mortgage is executed upon the same land so far as not included in the homestead, and the second mortgage is foreclosed and the land covered by it sold, the purchaser thereof can not insist that the homestead be first subjected to the payment of the first mortgage: *Equitable Life Ins. Co. v. Gleason*, 17 N. W. Rep., 524.

Where a homestead was sold under special execution and the surplus in the sheriff's hands was applied upon other executions against the defendant, and it was shown that such other executions were not upon judgments which could be enforced against the homestead, but such application of the surplus was made without objection on the part of plaintiff, *held*, that he could not recover such surplus in an action against the sheriff: *Brumbach v. Zollinger*, 59-384.

564.

SEC. 1994.

Upon sale of the portion of the homestead upon which the house is situated, without intention to build upon and occupy the residue as a homestead, the remaining portion loses its homestead character: *Windle v. Brandt*, 55-221.

Continuing to occupy the house as tenant at will, after the conveyance, will not continue the homestead right: *Ibid*.

Where the building was not intended for business purposes, but the lower story was occupied for such purposes by the owner, while the cellar and second story were used by him for purposes of a residence, *held*, that the entire building was exempt: *Wright v. Ditzler*, 54-620.

Where a wife, owning a homestead, left it, and removed with her husband to another state, for a temporary purpose, *held*, that the intention to return must have existed, and would be presumed to continue until a contrary intent was shown: *Bradshaw v. Hurst*, 57-745.

Where the house used as a home is situated upon lands of the wife, the homestead may also include land owned by the husband. It is entirely immaterial whether the legal title be in the husband or wife, or whether one of them holds the title to one tract and the other to another tract, where the two tracts are used as a homestead: *Lowell v. Shannon*, 60-713.

The case of *Rhodes v. McCormick*, 4-368, as to a homestead right in the upper story of a building, followed: *Mayfield v. Maasden*, 59-517.

Where it appeared that a party owning and occupying a farm as a homestead moved to town to practice law with the intention of pursuing his profession permanently if he was able to make a living by it, *held*, that the intention was such as to constitute an abandonment of the homestead: *Kimball v. Wilson*, 59-638.

Where the owner with his family removed permanently from the property, resided in different places, voted at elections where so residing, and had no definite intention of returning to the property, but intended to exchange it for another homestead when possible, *held*, that the facts showed an abandonment. Abandonment may be shown without proof

of the acquisition of a new homestead: *Cotton v. Hamil*, 58-594.

Facts held sufficient to show an abandonment: *Leonard v. Ingraham*, 58-406.

Where the wife, while absent from the homestead, requested a creditor of the husband to levy an attachment thereon, *held*, that she thereby abandoned her homestead right and could not insist upon it as against such attachment: *Parson v. Cooley*, 60-263.

The homestead exemption is for the benefit of the family. So long as the family desires to keep the homestead as such, and does actually keep it, it remains exempt, although the head of the family may have gone to another state, and acquired property and a residence there, with the intention of subsequently removing his family: *Savings Bank of Decorah v. Kennedy*, 58-454.

565.

SEC. 1997.

A stable kept for domestic use, in connection with the house, is appurtenant to the homestead, and ex-

empt without regard to value: *Wright v. Ditzler*, 54-620.

SEC. 1998.

Where a portion of defendant's farm, upon which he resided, was sold without platting a homestead, but the dwelling and more than enough land for a homestead were left, *held*, that the sale might be set aside as between the parties, but was not void: *Martin v. Knapp*, 57-336.

Even though a homestead right may exist in the undivided interest of a tenant in common, yet in case of an execution sale of such tenant's interest it is not proper for the officer to set off any specific portion as a homestead: *Farr v. Reilly*, 58-399.

White v. Rowley, 46-680, followed; *Lowell v. Shannon*, 60-713.

Failure of the officer to plat the homestead as here directed will render the sale void, whether it be on a general or special execution, and it is immaterial that the owners make no objection to a sale *en masse*: *Owens v. Hart*, 17 N. W. Rep., 898.

Where a tract of land including the owner's homestead was sold on special execution in a lump, after first having been offered in *forties*, *held*, that there was no prejudice to the owner resulting from failure of the sheriff to mark out and plat the homestead: *Brumbaugh v. Zollinger*, 59-384.

SEC. 2000.

The change of metes and bounds contemplated by this section has no reference to a conveyance or mortgage, and the change herein referred to cannot be effected in that way without the consent of the husband or wife, unless it is for the purpose of the acquisition of a new homestead: *Goodrich v. Brown*, 13 N. W. Rep., 309.

The purchase of a second homestead with the proceeds in part of the

first and other means entitles the owner to hold it exempt from debts contracted subsequent to the occupancy of the old homestead, where the value of the second homestead does not exceed that of the first: *Lay v. Templeton*, 59-634.

The proceeds of the homestead when invested in a new homestead in another State do not remain exempt. Therefore, where a party sold his homestead in Iowa and purchased

one in Missouri, and thereafter sold his homestead in Missouri and invested the proceeds in a homestead in Iowa, *held*, that he could not hold the last homestead in Iowa exempt from debts existing at the time of its purchase, even though they did not antedate the first homestead: *Rogers v. Raisor*, 60-365.

Where a debtor holding a homestead exempt from execution for his debts exchanged the same for other property which he procured to be conveyed directly to his wife, *held*, that

the property thus conveyed to the wife did not become subject to payment of his debts, and that such conveyance to the wife was not fraudulent: *Jones v. Brandt*, 59-332.

Where defendant relies upon the fact that his homestead was procured with the proceeds of a previous homestead in order to establish its exemption from a claim which antedates the last homestead, the burden of proof to establish that fact is upon him: *First National Bank of Davenport v. Baker*, 57-197.

566.

SEC. 2001.

The defendant claiming that his homestead, purchased since the contracting of a debt which it is sought to enforce against it, was purchased with the proceeds of a prior home-

stead, has the burden of proving such fact. Plaintiff makes a *prima facie* case by showing that his claim antedates the homestead: *First Nat. B'k of Davenport v. Baker*, 57-197.

SEC. 2005.

These provisions apply where the party claims more than forty acres

exempt as a homestead: *Green v. Farrar*, 53-426.

567.

SEC. 2007.

The survivor is entitled to occupy the homestead for a reasonable time in which to make an election whether to retain such possession for life, or take a distributive share of the property. During occupancy for such reasonable time the survivor should be allowed to receive the income and profits therefrom. So *held*, as to rent of coal mine on premises: *Cunningham v. Gamble*, 57-46.

As to right of survivor to recover damages for injuries to the property during occupancy, see *Cain v. C., R. I. & P. R. Co.*, 54-255.

The right of the wife to occupy

the homestead after the death of the husband is not a right or interest in his estate which she takes by inheritance, but a mere personal right unaccompanied by a title or property interest therein; therefore, *held*, that the stipulation in an ante-nuptial contract by which the wife accepted the provision therein made in lieu of her rights of dower and inheritance, did not constitute a relinquishment of her right to occupy and possess the homestead during her life: *Mahaffy v. Mahaffy*, 18 N. W. Rep., 655.

SEC. 2008.

Where at the time of the death of the wife, owning the fee of the homestead, she and the husband were absent from the homestead, but without having as yet abandoned it, *held*, that there could not subsequently be an abandonment by the husband of his life interest, except by a setting off of a distributive share, and that upon his death the property descended to the heirs free from his debts: *Bradshaw v. Hurst*, 57-745.

The homestead is not liable in the hands of the survivor or heirs for funeral expenses and expenses of last sickness of deceased owner: *Knox v.*

Hanlon, 48-252.

Where the entire homestead exceeds in extent the dower interest of the wife, and she continues occupying it for ten years without making claim to have dower admeasured, she will be regarded as having elected to take the homestead for life in lieu of the distributive share: *Conn v. Conn*, 58-747.

The occupancy of the homestead under a devise of a life estate of land including the homestead, will not be considered as an election defeating the widow's right to dower: *Blair v. Wilson*, 57-177.

568.

SEC. 2014.

Where the person in possession does not recognize the owner as landlord, he can not be regarded as tenant at will: *Martin v. Knapp*, 57-336.

569.

SEC. 2015.

A tenant holding over after the termination of a tenancy, which by express terms of the lease was to end at a particular time, is entitled only to three days' notice to quit, as specified in § 3611: *Kellogg v. Grove*, 53-395.

Where property was bought in at an execution sale under such circum-

stances that there was no right of redemption, but the execution defendant was allowed to remain in possession during the year following the sale, and thereafter, held, that he became a tenant at will: *Dobbins v. Lusch*, 53-304; *Munson v. Plummer*, 59-120.

SEC. 2017.

A creditor of the tenant can not, by levy on a growing crop, acquire priority over the landlord's lien for rent: *Atkins v. Womeldorf*, 53-150.

Where a chattel mortgage was executed by the tenant during the term of the lease, and afterward, before the expiration of the term, a new lease was executed covering the remainder of the term and an additional period, held, that for rent accruing during the unexpired term of the old lease, the landlord's lien remained paramount to the chattel mortgage: *Hollins v. Proctor*, 56-326.

Where a grocer used horses and wagons in connection with his business, but did not keep them on the premises leased for a grocery, held, that the landlord owning such premises did not have a lien upon such horses and wagons: *Van Patten v. Leonard*, 55-520.

A lien exists upon crops raised by the tenant, and such crops may be followed by the landlord into the hands of the purchaser: *Holden v. Cox*, 60-447.

The lien of the landlord can be en-

forced against a purchaser from the tenant, of property which in the ordinary course of business of the tenant is kept for use and not for sale, such as the team of horses used in cultivating a farm: *Richardson v. Peterson*, 58-724.

Negotiation of a note which is given for rent does not prevent the landlord (payee), who is afterward compelled to take up the note as indorser, from enforcing his lien for the rent for which the note was given: *Farwell v. Grier*, 38-83; and see *German Bank v. Schloth*, 59-316, 323.

If the landlord proceeds under the general attachment law for rent not due, he will be confined to the remedy there given, and can not claim the benefit of his landlord's lien: *Clark v. Haynes*, 57-96.

A landlord can not claim a lien prior to that of a mortgage, where he did not, at the time of the execution of the mortgage, have a subsisting contract by virtue of which the rent claimed was to accrue: *Thorpe v. Fowler*, 57-541.

572.

SEC. 2031.

A highway can not be established by user alone, although the owner may have had knowledge of the use, if he did not have also express notice

that a claim was made based thereon, independent of or additional to the mere use: *State v. Mitchell*, 58-567.

580.

SEC. 2077.

Under a contract not in writing to pay ten per cent. interest, the plaintiff may set up and recover upon a

contract to pay six per cent. interest: *Brockway v. Haller*, 57-368.

A contract providing for interest at

the rate of ten per cent. payable semi-annually, and that the semi-annual installments of interest shall draw interest at the rate of ten per cent. after they become due, is not usurious: *Hawley v. Howell*, 60-79.

When money is paid for the use of

another, imposing an obligation upon the party who received the benefit of the payment to reimburse the party paid, interest from the day of payment is recoverable: *Goodnow v. Litchfield*, 19 N. W. Rep., 226.

SEC. 2079.

Usurious interest paid on a note afterward put in judgment, cannot subsequently be applied as payments on other notes. In the absence of collusion, or intent to cover usury, a judgment is conclusive between parties and privies: *Phillips v. Gephart*, 53-396.

Usury once paid cannot be recovered back. If in separate transactions two notes are given, both usurious, and one is paid, the unlawful interest thus paid cannot be set up in an action on the note remaining unpaid: *Ibid*.

If, by consent of both parties to a usurious contract, the unlawful interest already paid is refunded, with the agreement that thereafter only lawful interest shall be charged, the contract is thereby purged of usury: *Phillips v. Columbus City Building Association*, 53-719.

Where deposits were made from time to time by a debtor with his creditor, such creditor being a bank which held his notes, and from time to time balances were struck and new notes given, usurious interest being

included in the computation, *held*, that the deposits must be regarded, in the absence of evidence of an agreement to the contrary, as having been applied *pro rata* upon interest and principal, notwithstanding the entry upon the books of the bank showing application of such payments to the extinguishment of interest: *Kinser v. Farmers' National Bank of Centreville*, 58-728.

Where a party, in order to raise an additional loan of money, agreed that if the person who already held his note and mortgage for a certain sum would sell it and then take another loan under a mortgage for a similar amount, the bearer would repay to him whatever discount he was compelled to suffer in selling the first note and mortgage, *held*, that such transaction was not usurious: *Comstock v. Wilder*, 61-274.

Where a usurious indebtedness has been paid in full and discharged, notes subsequently given in partial revival of such indebtedness will not be usurious: *Hoopes v. Ferguson*, 57-39.

582.

SEC. 2080.

It is not competent for the parties to settle a suit in which usury appears, in such manner as to deprive the state of a judgment on account of the usury: *Reynolds v. Babcock*, 60-289.

The existence of usury in the note upon which a judgment by confession is rendered, does not alone authorize the conclusion that the parties caused

the judgment to be entered for the purpose of concealing it or to evade the statute against it: *Kendig v. Marble*, 58-529.

Usury cannot be shown as a defense in the foreclosure of a mortgage, when the deb itself is reduced to judgment: *Kendig v. Marble*, 58-529.

584.

SEC. 2082.

The doctrine of *Richards v. Daily*, 34-427, is not applicable under § 2546, as it now stands: See *Downing*

v. Gibson, 53-517, cited in supplement to that section.

586.

SEC. 2086.

[20 G. A., ch. 183, § 1, amends this section by striking out the words "suit is commenced thereon" in the last line of said section and inserting in lieu thereof the words "notice of the assignment thereof is given in writing to the maker of such instrument."]

As to defenses and counter-claims which may be set up by the maker of a negotiable instrument in an action by an assignee thereof acquiring the same after maturity, see § 2546.

The word *instrument* as used in this section does not apply to a rail-

way ticket issued to a particular person by name, and expressly made non-transferable; and another person attempting to ride upon such ticket would be guilty of fraud: *Way v. C. R. I. & P. R. Co.*, 19 N. W. Rep., 828.

SEC. 2087.

[20 G. A., ch. 183, § 2, amends this section by inserting after and as a part of said section the words "before notice of such assignment is given in writing by the assignee to the debtor."]

While the debtor might, under the section as it originally stood, voluntarily pay the assignor and thus avoid liability to the assignee, he is not under obligation to do so, and the assignor cannot compel him to make such payment: *Bailey v. U. P. R. Co.*, 17 N. W. Rep., 167.

The account in a particular case held to be an open account under the provisions of this section, and the assignment thereof subject to counter-claims arising before suit commenced: *Wing v. Page*, 17 N. W. Rep., 181 (On rehearing).

589.

SEC. 2104.

In order to make a sufficient tender after action brought, the amount tendered should be sufficient to cover

the sum admitted to be due and costs accrued at the time: *Martin v. Whisler*, 17 N. W. Rep., 593.

590.

SEC. 2105.

Where a contract for the delivery of butter provided that such delivery should be made within a specified time after demand, held, that a written offer in accordance with this sec-

tion was sufficient, although the party making the offer had not at the time any butter on hand with which to fill the offer: *Holt v. Brown*, 19 N. W. Rep., 235.

591.

SEC. 2109.

It is not sufficient for the creditor to direct the institution of a suit (as by sending a claim to a justice of the peace with orders to sue) but he

must see that such suit is actually commenced within the time fixed: *German-American Bank v. Demire*, 58-137.

592.

SEC. 2113.

Although a written contract (under our statute) imports a consideration, it is competent to show a failure of consideration to defeat the contract,

the burden of proof being upon the defendant: *University of Des Moines v. Livingstone*, 57-307.

SEC. 2115.

To justify the court in finding that a mortgage may be taken in connection with some other instrument as constituting an assignment, it should appear that the mortgagor at the time he made the mortgage had an intention to make an assignment: *Perry v. Vezina*, 18 N. W. Rep., 657.

The fact that mortgages and an instrument purporting to be a general assignment, were all made on the same day, acknowledged before the same officer, and delivered to the recorder by the same person, *held*, not sufficient to show that the mortgages were a part of the assignment, it being proved by positive evidence that the mortgages were executed in the forenoon, when the party did not contemplate making the assignment, and that the purpose to do so was conceived after noon when the parties to whom the mortgages were given had separated. To bring the case within the rule of *Van Patten v. Burns*, 52-518, it must be shown that all of the instruments were part of the same transaction: *Farwell v. Jones*, 19 N. W. Rep., 241.

A mortgage, though executed by an insolvent person and covering all his property, is not necessarily an assignment. Whether it is to be con-

strued as such or not depends upon the intent with which it is made. It is not to be considered an assignment where there is nothing to indicate that the mortgagor intended anything but the giving of security: *Kohn v. Clement*, 58-589.

Where a debtor conveyed a stock of merchandise to his wife, who thereupon and in consideration thereof executed a chattel mortgage upon the same to secure the payment of her husband's indebtedness, in which mortgage certain creditors were preferred to others, *held*, that the transaction was in the nature of a general assignment and therefore void: *Van Horn v. Smith*, 50-142.

An assignment for benefit of creditors made by one partner without the consent of his co-partner, who might be consulted and is capable of giving assent or dissent, is void and does not prevent attachment by a creditor although no proceedings are taken by the partner not consenting to set the assignment aside: *Loeb v. Pierpont*, 58-469.

An assignment is not rendered invalid by the fact that a reservation is therein made as to property exempt from execution: *Perry v. Vezina*, 18 N. W. Rep., 657.

593.

SEC. 2117.

The provision as to recording the assignment is intended for the protection of subsequent purchasers, and if the assignment is duly executed and acknowledged and the assignee consents to accept the trust before the

levy of an attachment, the failure to record it until thirty seconds after the writ of attachment comes into the sheriff's hands will not render it invalid: *American v. Frank*, 17 N. W. Rep., 464.

594.

AFTER SEC. 2122.

[Twentieth General Assembly, Chapter 124.]

SECTION 1. Upon making order for the distribution of the assets in the hands of the assignee of an insolvent, as provided in section 2122 of the code, the court shall order to be paid in full, as a preferred claim, the earnings of any creditor for his personal services rendered to the assignor at any time within ninety days next preceding the execution of the assignment.

SEC. 2. If upon the making of the final dividend to the creditors of the estate of an insolvent by the assignee, he shall be unable, after proper efforts, to ascertain the place of residence of any creditor, or any person who is authorized to receive the div-

Personal service, a preferred claim.

Report to the court when unable to find creditor.

idend due such creditor, he shall report the same to the court, with evidence showing diligent attempt to find the creditor, or person authorized to receive the dividend. Whereupon the court may, in its discretion, order the distribution of the unclaimed dividend among the other creditors.

Court may order distribution of unclaimed dividend.

595.

SEC. 2127.

The right of action for damages for the wrongful suing out of an attachment upon property subsequent to a general assignment thereof is in the assignee, and not in the person making the assignment: *Rumsey v.*

Robinson, 58-225.

The sale of real property by an assignee is a judicial sale, and cuts off contingent right of dower in the property: *Stidger v. Evans*, 19 N. W. Rep., 850.

596.

16 G. A., Ch. 14.

A tax levied upon personal property, at least if subsequent to the assignment, should be paid by the assignee, rather than allowed to become a lien upon real property as against a mortgagee: *Brooks v. Eighmey*, 53-276.

It is the duty of the assignee, to the extent of the property which comes into his hands, to devote the

same to the payment of taxes, subject possibly to the payment of expenses of executing the trust. No claim for taxes is required to be filed, nor need any demand be made. The assignee must, at his peril, inquire whether the property or fund in his hands is liable for assessments or levies of taxes: *Huiscamp v. Alberts*, 60-421.

16 G. A., Ch. 100, § 2.

A sub-contractor furnishing material is not barred of his lien by taking collateral security after such material is all furnished, although the building be not yet completed: *Bissell v. Lewis*, 56-231.

Where the person entitled to a lien

takes a negotiable note for the amount of his claim and negotiates it, but upon its dishonor is compelled, as indorser, to take it up, he may enforce his original right to a lien: *German Bank v. Schloth*, 59-316.

SEC. 3.

Breaking the sod is not such "improvement upon land" as to entitle the person performing such labor to a mechanic's lien: *Brown v. Wyman*, 56-452.

Proof of performance of labor upon a building is sufficient to entitle a party to a lien; he is not required to show a special agreement that the labor was to be performed about that building. An implied contract will support a lien: *Foerder v. Werner*, 56-157.

Loring v. Small, 50-271, followed: *Whiting v. Story Co.*, 54-41.

A mechanic's lien will attach upon an equitable title, and will follow the title into whosesoever hands it may pass, and a mere substitution of another contract for that under which the property is held, will not defeat

the lien, if the new contract was given as evidence of the same rights which were held under the old: *Clark v. Parker*, 58-509.

The lien having attached to the land will remain thereon after the improvements have been destroyed or removed: *Clark v. Parker*, 58-509.

The holder of a claim, which in his hands may constitute the foundation of a lien, or one bound by a contract to furnish labor or material, may do all things necessary to enforce the lien allowed by law; therefore, held, that where a firm made a contract to furnish, and did furnish materials, and a part of the members of the firm afterward transferred their interest in the partnership to others, one of such members had authority in the name of the original firm to

perfect the lien for the material so furnished, and the assignee of such firm might enforce the lien thus perfected: *German Bank v. Schloth*, 59-316.

An assignee for the benefit of creditors, may enforce a mechanic's lien existing in favor of the assignor: *Ibid.*

597.

SEC. 4.

Where defendants, lessees of a mill under verbal lease for five years, put in machinery and fixtures, and afterward gave a chattel mortgage thereon, *held*, that the plaintiffs who furnished such machinery, and filed their statement within proper time, had a mechanic's lien upon such ma-

chinery, and were prior to the claims of the chattel mortgagee. Although, as between lessor and lessee, such machinery and fixtures were chattel property, yet in connection with a leasehold interest they were subject to the lien: *Nordyke v. Hawkeye Woolen Mills Co.*, 53-521.

598.

SEC. 6.

A simple statement that a sum is due the person claiming a lien is not the "statement or account" required by statute to be filed. It should show the account whereon the demand is founded. The claim should show that the party is entitled to a lien, and the nature of the demand, and the time when it accrued should therefore appear: *Valentine v. Rawson*, 57-179.

Under corresponding provision of the Revision, *held*, that it was not required that the name of the owner of the property against which the lien was claimed, should be mentioned in the statement. Where the owner had died before the filing of the statement for a lien, *held*, that the statement was sufficient if made out against the estate, though the names of the heirs owning the property were not mentioned: *Welsh v. McGrath*, 59-519.

As to limitation of actions to enforce mechanic's liens, see § 2529, ¶ 2. The statute begins to run from the expiration of the thirty or ninety days here allowed for filing the statement for a lien, whether the statement be filed within that time or not: *Squier v. Parks*, 56-407; *Dimmick v. Hinckley*, 57-757.

The meaning of the proviso at the end of this section is that the sub-contractor shall have sixty days from the last day of the calendar month within which the work was performed, within which to file his claim: *Sandval v. Ford*, 55-461.

But this distinction between railroad sub-contractors and others, as to the time for filing claims, does not exempt the former from the provisions of the next section as to time within which such sub-contractor must serve notice upon the owner of the filing of his claim: *Ibid.*

599.

SEC. 7.

Where the principal contract recognizes the fact that there are to be sub-contractors whom the owner may be required to pay, and he knows that certain persons, as sub-contractors, have furnished material, he will be liable to the sub-contractors if their claims are properly filed, and notice served within the thirty days, although he has previously paid the owner; *Winter v. Hudson*, 54-336.

The court liberally construing this

section so as to protect the owner who in good faith pays the contractor within the thirty days in accordance with the agreement between them, has held that such payment to the contractor made without knowledge of the claim of the sub-contractor will defeat the lien of the latter; but that if payment is made within the thirty days, with knowledge of the sub-contractor's claim, even though such knowledge be merely through verbal

notice, the lien of the sub-contractor is not defeated. The fact that the building was not completed within the time prescribed in the contract can not change the result in such cases: *Andrews v. Burdick*, 16 N. W. Rep., 275.

Where an owner seeks to escape liability to a sub-contractor of whose claim he has notice within the thirty days, on the grounds that before notice of such claim he had settled with such contractor in accordance with the terms of his contract, the test as to whether he is to be protected in having made such settlement with the contractor is determined by whether he could probably, in the exercise of reasonable diligence, have discovered that the sub-contractor was entitled to a lien; and where it appeared that the owner knew that the contractor had to buy material, although he did not know from whom he bought it, *held*, that if he might have ascertained that fact from inquiry he should have done so and would not be protected: *Gilchrist v. Anderson*, 59-274.

It appearing that the owner of property before making the last payment under a contract had knowledge that the contractor had procured the materials used from the plaintiff, *held*, that as such owner could, in the exercise of ordinary care, have ob-

tained knowledge of plaintiff's claim by inquiring whether the material had been paid for, the sub-contractor might have his lien for materials used: *Fay v. Orison*, 60-136.

If the owner has knowledge of sub-contractors, or of facts sufficient to put him upon inquiry, he should withhold payment during the thirty days. After that, if no notice be served upon him, he may, of course, proceed, whatever his knowledge may be, for he would be justified in assuming that the right to a lien was waived: *Jones, etc., Co. v. Murphy*, 19 N. W. Rep., 898.

While it may be that the mere stipulation on the part of the contractor not to claim a mechanic's lien would not preclude sub-contractors from doing so, they are precluded where the contractor stipulates in the outset for a mode of payment inconsistent with the mechanic's lien: *Ibid.*

If the principal contractor by the terms of his contract is entitled to compensation in full before the work is completed, and this compensation is fully paid to him before that time, and without any notice of claims for liens, no liens can be enforced against the property owner or the property: *Roland v. C., M. & A. R. Co.*, 61-380.

600.

SEC. 9.

If the premises do not sell for more than enough to pay for the prior mortgage or other lien, the accounting or distribution of proceeds of sale is not required. The entire proceeds are to be applied in such cases to the prior mortgage or other lien: *German Bank v. Schloth*, 59-316.

The provision of paragraph four

of this section has no application where the mortgage has been foreclosed and the premises sold thereunder before the materials for which the lien is claimed have been furnished; in such case the statutory right to redeem is the only right which can be enforced: *Shepherdson v. Johnson*, 63-239.

602.

SEC. 13.

Under 15 G. A., ch. 44, *held*, that an assignment of an installment due a mechanic, before completion of his contract, would not entitle assignee to a lien: *Merchant v. Ottumwa Water Power Co.*, 54-451; and under the present section, *held*, that it was the lien which was assignable, and followed the assignment of the debt, and not the mere right to a lien which the mechanic has not yet availed himself of under the statute: *Brown v. Smith*, 55-31; *Langan v.*

Sankey, 55-52.

Where an attempt to commence action within the thirty days was made, but the notice served was void because not stating the term at which defendant was required to appear, *held*, that another notice served after the expiration of the thirty days, to which defendant appeared, would not constitute a compliance with this section, and a lien could not be established in such action: *Jones, etc., Co. v. Boggs*, 19 N. W. Rep., 678.

SEC. 14.

Under the provisions of Rev. § 1852, similar to this section, *held*, that the requirement that the clerk's abstract shall contain the name of the person against whose property the lien was filed really amounts to no more than that it shall contain the name of the person against whom the account was filed and the claim for lien was made and that it did not require, by inference, the claim should state the

name of the owner of the property against which the lien was claimed. Therefore, *held*, that where the person against whom the claim existed was dead, the claim for a lien was properly filed as against the administrator of his estate, without naming the heirs, who were owners of the property against which it was sought to establish the lien: *Welch v. McGraff*, 59-519.

603.

LIENS OF SUB-CONTRACTORS ON PUBLIC BUILDINGS OR BRIDGES.

[Twentieth General Assembly, Chapter 179.]

SECTION 1. Every mechanic, laborer or other person who as sub-contractor shall perform labor upon, or furnish materials for the construction of any public building or bridge or other improvement not belonging to the state, shall have a valid claim against the public corporation constructing such building, bridge or other improvement for the value of such services and material, in an amount not in excess of the contract price to be paid for the building, bridge or other improvement, nor shall any such corporation be required to pay any such claim, at any time before, or in any manner different from that provided in the principal contract.

How lien shall be made. SEC. 2. Such claim shall be made by filing with the public officer through whose order the payment is to be made, an itemized and sworn statement of the demand within thirty days after the performance of the last labor, or the furnishing of the last portion of the material, and claims shall have priority in the order in which they shall be filed.

How adjudicated. SEC. 3. Any party in interest may cause the adjudication as to the amount, validity, priority and mode and time of payment of such claim by equitable proceedings in any court having jurisdiction. In such case the court may assess a reasonable sum to be taxed as attorney's fees against the party failing in such action in favor of such corporation.

Contractor may release claim by filing bond. May prevent filing claim, by filing bond. SEC. 4. The contractor may at any time release such claim by filing with the treasurer of such corporation a bond, to such corporation, for the benefit of such claimants in sufficient penalty with sureties to be approved by such treasurer, conditioned for the payment of any sum which may be found due such claimant. And such contractor may prevent the filing of such claim by filing in like manner a bond conditioned for the payment of persons who may be entitled to file such claims. Suit may be brought on said bond by any claimant within one year after the cause of action accrues, and judgment shall be rendered against the principal and sureties for any amount due said claimant.

604.

SEC. 2155.

[19 G. A., ch. 8, repeals this section and enacts a substitute which is the same with the addition, after the word "filed" in the fifth line, of the words "a notice which shall contain the facts required to be set out in said certificate."]

606.

SEC. 2171.

The property contemplated by the statute, for which a warehouse receipt may be issued, must be the property of the receipt-holder. If the receipt is not designed as evidence of title, but merely as security, the title of the property remaining in the person issuing the receipt, it is void: *Sexton v. Graham*, 53-181.

Whether a warehouse receipt will be valid if the intention in executing it is to create a mere lien, *quære*: *Lowe v. Young*, 59-364.

609.

18 G. A., Ch. 25.

Prior to the enactment of this statute a livery stable keeper acquired no lien as such upon property kept by him in the course of his business: *McDonald v. Bennett*, 45-456; *Munson v. Porter*, 19 N. W. Rep., 290.

the assertion of a claim for a lien for too large an amount, the assertion should be clear and distinct, and operate to interfere in the present with a claimed right on the part of the owner: *Munson v. Porter*, 19 N. W. Rep., 290.

If under any circumstances the lien should be deemed forfeited by

613.

SEC. 2202.

Where a wife places money in the hands of her husband, upon the agreement by him to account to her for it, the transaction creates a debt in favor of the wife against the husband which will constitute a valuable consideration for the conveyance of real estate by him to the wife, if such conveyance is made before any lien thereon attaches. And under peculiar facts held that the wife was not estopped from holding such property as against creditors of her husband: *Jones v. Brandt*, 59-332.

The provisions of Rev. § 2499 as to liability of wife's property in her husband's hands for his debts, have no application in case of creditors of the husband becoming such after the taking effect of the present provisions of the Code: *Ibid*.

SEC. 2203.

This section renders invalid any agreement between husband and wife, even in contemplation of a separation, for the relinquishment of their respective interests (including dower interest) in each other's real property. It changes the rule recognized in *Robertson v. Robertson*, 25-350, and *McKee v. Reynolds*, 26-578, both decided before its enactment (see notes to § 2206): *Linton v. Crosby*, 54-478.

SEC. 2204.

Where a wife knowingly permits her property to be applied by her husband to payment of debts contracted for family expenses for which it would be liable under § 2214, she does not thereby become a creditor of her husband for the amount so applied: *Courtright v. Courtright*, 53-57.

If property or money of the wife in the husband's hands is used by him with her knowledge and consent, for purposes connected with the support of the family without any agreement to repay her, she cannot recover therefor from his estate: *Patterson v. Hill*, 61-534.

614.

SEC. 2206.

See additional notes to § 2203. |

SEC. 2207.

This section does not affect the common law rule of agency by which the wife, being abandoned by her husband without her fault, may pledge his credit for necessaries, and if left by him in the management of his business, may make all contracts reasonably incident to such management. Therefore, *held*, that a wife thus abandoned by her husband could

make a valid sale of a cow belonging to him for the purpose of procuring support, the cow being of such character as not otherwise to furnish family support, and that this might be done before the destitution of the family became complete and absolute: *Rawson v. Spangler*, 17 N. W. Rep., 173.

SEC. 2211.

The damages accruing to the estate of a married woman because of a wrongful act which causes her death, should not be assessed on the same basis as though she were unmarried, even though she may have been en-

gaged to some extent in a separate business. Damages should not be allowed in such case for services which would have been rendered for the benefit of her husband and family: *Stulmuller v. Cloughly*, 58-738.

615.

SEC. 2214.

To constitute a family expense, it is essential that the thing for which the expenditure was incurred should have been used or kept for use in the family: *Fitzgerald v. McCarty*, 55-702.

Where the husband, after the indebtedness was contracted, gave a note therefor, drawing interest at ten per cent. and providing for an attorney's fee, *held*, that a recovery could not be had against the wife for the attorney's fee nor for interest at that rate: *Ibid*.

Money borrowed for and used in purchasing articles which, if obtained on credit, would constitute proper items of family expense, cannot itself be treated as a family expense: *Davis v. Ritchey*, 55-719.

An action to make an indebtedness for family expenses a lien upon real property of the wife, may be brought in the county where the property is situated: See § 2578 and notes in supplement thereto.

Where the husband executes a note in payment of an account for family expenses, the statute of limitations as to the action against the

wife for such expenses, is suspended until the maturity of the note: *Davidson v. Biggs*, 61-309.

The fact that a creditor has brought an action against the husband alone and obtained judgment thereon by consent does not extend the statute of limitations as against the wife until the judgment shall become barred: *Polly v. Walker*, 60-86.

Where the husband purchased a watch and chain and other jewelry, a part of which was presented to his wife and the remainder used in the family, the wife was held liable therefor as family expenses, although she had no knowledge that they were not paid for until sometime afterwards: *Maquardt v. Flaught*, 60-148.

A father not being liable for necessaries furnished an adult son or daughter who lives with him, is not liable for such necessaries as being part of the family expenses. The purpose of this section is not to declare what charges or expenditures would be regarded as expenses of the family, but to provide a remedy therefor against both husband and

wife: *Blackley v. Laba*, 18 N. W. Rep., 658.

As husband and wife are equally bound for the support of the family, if money of the wife should with her consent be invested in the business of

carrying on a farm from which the support of the family is derived, it would be in effect devoted to the support of the family, and she cannot recover therefor from the husband's estate: *Patterson v. Hill*, 61-534.

617.

SEC. 2221.

The fact that the plaintiff is not a resident of the state cannot be taken advantage of by her for the purpose of defeating the judgment, where it

appears that she authorized suit to be brought and accepted alimony allowed by the decree: *Ellis v. White*, 17 N. W. Rep., 28.

SEC. 2222.

Defects in the verification of the petition are not jurisdictional and

cannot be urged in a collateral attack: *Ellis v. White*, 17 N. W. Rep., 28.

SEC. 2223.

There may be inhuman treatment endangering life although no physical injury is shown to have been sustained. Therefore, *held*, that where the husband had searched for a revolver with the intention of killing his wife, her life had been in danger within the meaning of the statute, and her husband had exhibited such a criminal disposition that her life would continue to be in danger if she continued to live with him, and she was entitled to a divorce: *Sackrider v. Sackrider*, 60-397.

Facts in a particular case *held* sufficient to show legal cruelty as herein specified; and further, *held*, that the condonement of the wrong was not sufficiently shown to defeat the right to divorce: *Sesterhen v. Sesterhen*, 60-301.

Facts in a particular case *held*

sufficient to constitute a willful desertion of the husband on the part of the wife: *Pilgrim v. Pilgrim*, 57-370.

In a particular case, *held*, that the evidence was not sufficient to show cruel and inhuman treatment entitling the wife to a divorce: *Rivers v. Rivers*, 60-378.

Where it appeared that defendant was convicted on an indictment for felony but the cause was appealed, and at the time of the trial in the divorce suit such appeal was undetermined, *held*, that there was no ground for divorce upon such conviction: *Ibid*.

The causes enumerated in this section are the only ones which will justify either party to the marriage in refusing to live with the other: *York v. Ferner*, 59-487.

618.

SEC. 2226.

Where the wife brings action for alimony without divorce, a temporary allowance may be made for the prosecution of the action in the same manner as is provided by this section in proceedings for divorce: *Finn v.*

Finn, 17 N. W. Rep., 739.

The proof of marriage in a particular case, *held*, sufficient to authorize the allowance of temporary alimony: *Smith v. Smith*, 61-138.

619.

SEC. 2227.

The attachment authorized by this section may be levied on the home-

stead, and may in a proper case be granted in suit to annul a legal mar-

riage as well as in one for divorce: *Daniels v. Morris*, 54-369.

The provisions of the Code relating to attachment in ordinary civil cases are not applicable: *Smith v. Smith*, 61-138. In a particular case, *held*, that an attachment

without a bond was properly allowed: *Ibid*.

The remedy by attachment is not exclusive of that by injunction, to restrain the disposition of property by the defendant: *Wharton v. Wharton*, 57-696.

SEC. 2229.

Where the action for divorce is brought by a resident of one state, in the courts of that state, against a non-resident, and service is had by publication only, without appearance by defendant, the court acquires jurisdiction only to declare the *status* of the parties before it, but cannot render a valid decree as to the custody of minor children who are non-residents of the state where the decree is rendered: *Kline v. Kline*, 57-336.

The party to whom the divorce is granted cannot have any further right or interest in the property of the other party than that which is given under this section, and cannot claim any share by way of dower in case of survival: *Marvin v. Marrin*, 59-699; *Boyles v. Latham*, 61-174.

It is competent for the court to set apart for the plaintiff a specific portion of the defendant's estate as alimony, and this may be done even though no prayer to have this specific property set off as alimony is contained in the petition, and notice of the action is served by publication only: *Tving v. O'Meara*, 59-326.

Alimony is rarely and only under

peculiar circumstances granted to the party in fault, even when that party is the wife, and where a suit was brought by the husband against the wife for divorce on the ground of inhuman treatment, and the wife in a cross-petition asked divorce from the husband on the same ground, and divorce was granted to the wife and denied to the husband, *held*, that it was error to allow to the husband a sum as alimony and make it a lien on the homestead, which was in the wife's name and acquired from her separate means: *Barnes v. Barnes*, 59-456.

Under particular circumstances, *held*, that the allowance for alimony was not excessive, and further, *held*, under peculiar facts indicating fraud on the part of the mortgagee, and in view of the further fact that the wife had not joined in such mortgage and therefore had a dower interest superior thereto, that the decree directing that the allowance of alimony should be a lien upon the premises prior to a previous mortgage was not erroneous: *Sesterhen v. Sesterhen*, 60-301.

621.

SEC. 2236.

In a proper case an attachment may issue as provided in § 2227 in

cases of divorce: *Daniels v. Morris*, 51-369.

SEC. 2238.

A minor may disaffirm his contract before attaining majority, as well as during a reasonable time thereafter: *Childs v. Dobbins*, 55-205.

Disaffirmance by an action brought three or four years after plaintiff, a female, attained her majority, the only excuse offered for the delay being that she was informed by her mother and neighbors that she could

not disaffirm the contract until her minor brother became of age, *held*, not within a reasonable time, especially in view of the further facts that she did not ask legal advice, and delayed at least three months after she was informed that she could disaffirm the contract before bringing action: *Green v. Wilding*, 59-679.

623.

SEC. 2241.

As between the father and mother of a child, the former has no paramount right to its custody, the controlling consideration in determining to which the custody will be awarded being the best interest of the child; and, *held*, that the custody of an unweaned infant fifteen months old was properly awarded to the mother: *The State v. Kirkpatrick*, 54-373.

The right of the parents to the custody of their child is not absolute under all circumstances. A parent can, by agreement, surrender the custody of his infant child so as to make the custody of him to whom he surrenders it legal, and when he does, either by abandonment or contract, surrender his present legal right to such custody, in all controversies subsequently arising in respect there-

to the matter of primary importance is the interest and welfare of the child: *Bonnett v. Bonnett*, 61-199.

In controversies as to the right of custody of a child the interest of the child is the controlling consideration: *Fonte v. Pearce*, 19 N. W. Rep., 854.

A step-father of minor children, who are members of his family, stands *in loco parentis* to such children, and under ordinary circumstances can make no claim for their support and maintenance, unless under peculiar circumstances: *Latham v. Myers*, 57-519; but he is under no obligation to preserve their property by paying off incumbrances thereon, and is not debarred from acquiring title thereto under foreclosure proceedings: *Otto v. Schlapkahl*, 57-226.

SEC. 2246.

A surety in a guardian's bond should not be absolutely discharged upon his application, upon the minor's coming of age. The most that he is entitled to is a conditional discharge. If after the majority of the ward and the final settlement with the guardian, the ward unreasonably delays to enforce what rights he may have

against sureties on the bond, he may, upon application of the sureties, be ordered to commence and prosecute proceedings within a time to be named, and in the event of a failure to do so the sureties may be regarded as discharged: *Vermilya v. Bunce*, 61-605.

624.

SEC. 2250.

This section modifies the common law rule as to the power of the guardian over the property of his ward. The guardian can only act in pursuance of the direction of the court

first obtained, and an act done without such direction will not bind the ward's property: *Bates v. Dunham*, 58-308.

SEC. 2253.

[19 G. A., ch. 100, § 1, amends this section by adding thereto the following:]

In all cases where a non-resident idiot, lunatic, or person of unsound mind has property in this state requiring care and protection, the circuit court in any county where such property or any part thereof is situated may appoint a guardian of the property of such person, who shall have the same power and authority in relation thereto, and be subject to the same liability, as the guardian of a resident minor.

SEC. 2254.

A failure to pay over money by the guardian will not constitute a breach of his bond until the guardianship accounts are settled, or until he has

failed to obey a mandate of the court requiring him to account: *Vermilya v. Bunce*, 61-605.

625.

SEC. 2258.

Where actual personal service of notice upon a minor was shown, and it appeared that the court had determined that the service had been duly made, as provided by law, and such determination was of record, *held*, that even though it did not appear that a copy of the petition was filed, as required by this section, the proceedings were not void: *Bunce v. Bunce*, 59-533.

A general averment in the petition in regard to the necessity of the sale is sufficient to give a court jurisdiction, and probably would be held sufficient even on appeal: *Ibid*.

SEC. 2261.

Where jurisdiction has attached and a sale has been approved, it cannot be successfully attacked in a collateral proceeding alleging the want of a sale bond: *Bunce v. Bunce*, 59-533.

626.

SEC. 2263.

It is at least doubtful whether, between the time of sale and the approval of the deed, the purchaser has any taxable interest in the property sold: *Ordway v. Smith*, 53-589.

Under 12 G. A., ch. 86, which allowed the clerk of the probate court to transact, in the absence of the judge, all probate business not requiring notice, subject to the supervision and approval of the judge, *held*, that the endorsement upon the deed of the approval by the clerk of the sale and deed, and the approval by the judge of the sale, when reported by the guardian, constituted a sufficient approval to render the deed valid: *Bunce v. Bunce*, 59-533.

SEC. 2266.

[19 G. A., ch. 100, § 2, amends this section by adding thereto the following:]

The foreign guardian of any non-resident idiot, lunatic or person of unsound mind may be appointed the guardian in this state of such ward by the circuit court, in like manner and with like effect in all cases where the foreign guardian of a non-resident minor could be appointed the guardian of such minor in this state. Such guardian shall have the same powers and be subject to the same liabilities as guardians of resident minors.

627.

SEC. 2272.

"Unsound mind" means something different from idiocy, lunacy, or insanity. Weakness is not necessarily unsoundness, but there may be a weakness short of idiocy, either congenital or superinduced by disease or old age, that amounts to unsoundness: *Smith v. Hickenbottom*, 57-733.

631.

SEC. 2310.

The filing for record is as essential to the validity of the adoption as is the execution or acknowledgment; and where the instrument was not filed for record until after the death of the person making the adoption, *held*, that it was not valid: *Tyler v. Reynolds*, 53-146. To same effect, see *Gill v. Sullivan*, 55-341, and *Shearer v. Weaver*, 56-578.

634.

SEC. 2312.

Following, *Murphy v. Creighton*, 45-179; *Lees v. Wetmore*, 58-170.

Where an action at law is brought against an administrator to enforce an indebtedness due from an estate, instead of being prosecuted by pro-

bate proceeding as a claim against the estate, the error is one as to the form of action only, to be corrected on motion under § 2319, and is not one affecting the jurisdiction, to be raised by demurrer: See note to that section.

SEC. 2313.

The hearing may be ordered to be had at a place other than the county

seat, notwithstanding the provisions of § 192: *Casey v. Stewart*, 60-160.

SEC. 2314.

Where a probate court directed that notice of an application by the administrator for sale of the real property to pay debts of the estate should be served by publication for two weeks in a newspaper, which

order was complied with, *held*, that the court thereby acquired jurisdiction as against non-resident defendants to act upon such application: *Casey v. Stewart*, 50-160.

635.

SEC. 2317.

Jurisdiction of the probate court is not exclusive as to land belonging to an intestate, which is not required for the payment of debts and remains in the possession of the heirs after ad-

ministration is concluded, and an action against heirs in possession by a person claiming to be heir may be brought in another court: *In re Estate of Seaton*, 58-523.

SEC. 2319.

The fact that a court in granting administration upon the estate of a foreign decedent, appoints an administrator for the care of real estate

in that county, does not limit its jurisdiction under this section as to property in other counties of the state: *Lees v. Wetmore*, 58-170.

636.

SEC. 2326.

A will made in another state and valid where made, but not executed in compliance with the laws of this state, will not be effectual to dispose of real property situated here: *Lynch v. Miller*, 54-516.

A subscribing witness cannot testify as to his understanding of the purpose and object of making the will: *Stephenson v. Stephenson*, 17 N. W.

Rep., 456.

A contestant having admitted that testator signed the paper purporting to be his will, and the same was properly witnessed, should not be permitted to introduce testimony tending to show that the will was not witnessed at the request of testator: *Ibid.*

SEC. 2327.

The fact that a husband is a legatee under the will does not render the wife an incompetent or interested witness thereto: *Hawkins v. Hawkins*, 54-443.

A corporator in a charitable corporation, in which it is not contemplated that any profits shall arise,

whose only interest therein is contingent upon a possible termination of the corporation and division of its assets, has no such interest as to be disqualified from being a witness to a will in which a bequest to such corporation is made: *Quinn v. Shields*, 17 N. W. Rep., 437.

SEC. 2329.

When the statute provides the manner in which a will may be revoked, that manner must be pursued. Scrolls drawn across the signature, which do not obliterate it nor render it illegible, do not constitute a destruction of the will, and, therefore, do not amount to a revocation unless witnessed, as required in the following section: *Gay v. Gay*, 60-415.

When an act of destruction or cancellation is sufficient to work a revocation, if done with that intent, the declarations of the testator may

be admissible to show the intent, but when the act does not amount to a revocation, the declarations of the testator are not admissible to prove the revocation: *Ibid.*

The birth of a child to the testator operates as a revocation of a will previously made: *Alden v. Johnson*, 18 N. W. Rep., 696; and the same rule holds in case of the birth and recognition of an illegitimate child by its father: *Milburn v. Milburn*, 60-411.

637.

SEC. 2340.

The parties may, under this section, demand a jury trial as a matter of right, and the verdict of the jury, in such cases, will be as conclusive as is the verdict of the jury in an action at law. It cannot be treated like a

verdict upon issues in chancery, which were referred to a jury for the purpose of informing the conscience of the court: *Collins v. Brazill*, 19 N. W. Rep., 338.

638.

SEC. 2347.

The provisions of this section, as to removal from the state, apply also to administrators. In ordinary cases a non-resident should not be appointed

administrator, although otherwise entitled under § 2354: *In re Estate of O'Brien*, 19 N. W. Rep., 797.

639.

SEC. 2350.

Persons to whom property is bequeathed in trust, to be applied as directed in the will, are legatees, and not trustees, within the meaning of

this section, and the probate court cannot require them to give bonds as here provided: *Perry v. Drury*, 56-60.

SEC. 2352.

The ancillary administrator should proceed without reference to the condition of the principal estate, at least until such condition is shown: *Ash-ton v. Miles*, 49-564.

Under provisions of Rev. §§ 2328-

31, held, that a person appointed by a proper court of this state as executor of a foreign will, might exercise the powers of discretionary sale conferred by such will upon the regular executors: *Lees v. Wetmore*, 58-170.

640.

SEC. 2353.

The probate of a foreign will may be set aside in an original proceeding, on the ground that the will is not in conformity to the requirements of the law of this state: *Lynch v. Miller*, 54-516.

In a proceeding in probate court

to obtain an interpretation of the will, a minor defendant, represented by a guardian *ad litem*, may, by cross-bill, seek to have the will set aside as invalid: *Kelsey v. Kelsey*, 57-333.

SEC. 2354.

The court has some discretion as to appointing a person designated by this section, and may properly refuse to make the appointment where the party is a non-resident: *In re Estate of O'Brien*, 19 N. W. Rep., 797.

641.

SEC. 2366.

This provision as to giving notice is directory, and omission to give the notice does not have the effect to annul the appointment, or prevent the administrator from discharging the duties pertaining thereto: *Johnson v. Barker*, 57-32.

SEC. 2367.

Where it appeared that administration on the estate of one dying out of the state was granted after five years from the time of his death, held, that it would be presumed that it was shown to the court that such grant of administration was within five years from the time decedent's death was known: *Lees v. Wetmore*, 58-170.

643.

SEC. 2371.

Failure to inventory and appraise the personal property thus to be set apart to the widow will not defeat her absolute ownership thereof, nor its exemption in her hands: *Adkinson v. Breeding*, 56-26.

As to who is deemed head of a family, so that upon his decease his widow may claim property as exempt, see § 3072 and notes: *Linton v. Crosby*, 56-386.

SEC. 2372.

The administrator is charged with the duty of collecting life insurance and distributing it to the proper persons, and is liable on his bond for failure to do so: *Kelley v. Mann*, 56-625.

This section contemplates a case where the policy is payable to deceased or his legal representative. If payable to another person for the use and benefit of such person, it cannot be otherwise disposed of by will: *McClure v. Johnson*, 56-620.

Proceeds of life insurance in the hands of the beneficiary are subject to his debts: *Murray v. Wells*, 53-256.

SEC. 2375.

Under particular facts, held, that the supreme court would not interfere with an order refusing to make an allowance to the widow: *Caldwell v. Estate of Caldwell*, 54-456.

The allowance provided herein for temporary support where necessary, is no part of the widow's dower or inheritance, but something entirely distinct, and the right thereto is not relinquished by an ante-nuptial release of all rights of dower and inheritance as the widow and heir of deceased: *Mahaffy v. Mahaffy*, 17 N. W. Rep., 46.

While the primary idea of the statute is that specific property must be set off, yet, in case it is not possible, the court may charge the executor with making money payments, and that, too, regardless of the question as to whether he has the requisite amount of money in his hands at that time, if there is property which the executor may convert into money for the purpose of making such payments. Sec. 2377 contemplates that the allowance may, upon a proper application and showing, be reduced. It should not ordinarily be paid in advance, but a reasonable opportunity should be left to modify and reduce the allowance in case it should be found necessary to do so: *Estate of McReynolds*, 61-535.

SEC. 2377.

A reduction of the allowance can only operate upon an unexpended balance thereof. The widow cannot be required to account for or pay back any portion already expended: *Harshman v. Slouaker*, 53-467.

644.

SEC. 2379.

The finding of the court upon such proceeding cannot be pleaded in bar of an action by the administrator to recover the property of the estate: *Ivers v. Ivers*, 17 N. W. Rep., 149.

645.

SEC. 2388.

Although the general rule as to time within which application to sell real estate is to be made be as stated in *McCrary v. Tasker*, 41-255, nevertheless matters excusing a delay beyond that time may be set up in the petition making application for leave to sell, and proved: *Conger v. Cook*, 56-117. And a judgment ordering a sale cannot be collaterally attacked, although rendered nine years or more after the death of intestate: *Stanley v. Noble*, 59-666.

Allegations in a petition that no personal estate had come into the hands of the administrator, and that there were debts remaining unpaid, held, sufficient to sustain the jurisdiction of the court in ordering a sale: *Ibid.*

Where the records show that claims were filed against the estate, proceedings for sale of property will be upheld against collateral attack, although it does not appear that such claims were ever paid: *Lees v. Wetmore*, 58-170.

Where an application to sell real estate was made more than fifteen years after administration was granted, held, that this long delay required the plaintiff to establish circumstances causing the delay: *Wilson v. Stanton*, 58-404.

In a particular case, held, that the circumstances were not such as to constitute an exception to the rule announced in *McCrary v. Tasker*, 41-255; *Hadley v. Gregory*, 57-157.

SEC. 2389.

The judgment of the court, where application for a sale has been properly made, as to the sufficiency of notice of the application as here required, and of the sale, is conclusive as against a collateral attack: *Lees*

v. Wetmore, 58-170.

A notice in a particular case, attacked on the ground of error in naming the decedent and in describing the land to be sold, held sufficient: *Stanley v. Noble*, 59-666.

648.

SEC. 2408.

The claim filed takes the place of a petition, and is to be regarded as a statement of the cause of action against the estate, and must contain all the averments necessary to show such cause of action: *Bremer Co. v. Curtis*, 54-72.

All that is required in the first instance of the claimant is to make out, verify and file his claim. The administrator may then approve or allow it, if he sees proper; otherwise it is deemed denied (§ 2410). But before the court can obtain any juris-

diction or power to decide as to the correctness of the claim, notice must be served on the administrator. The allowance by the administrator, after filing and before notice, of a part of the claim, is not an adjudication as to the balance, and is not binding on claimant, and he may prosecute his demand as to the balance: *Smith v. McFadden*, 56-482.

Where the claim against the estate grew out of a contract upon which the testator was jointly liable with another, and action was brought

against the survivor and the executors of decedent jointly, in the same court in which the claim against the surety might have been filed, *held*, that the

bringing of such action was a sufficient filing of the claim against the estate: *Moore v. McKinley*, 60-367.

649.

SEC. 2411.

Either party is, under this section, as construed in connection with other sections of the Code, entitled to a jury

trial upon demand. The trial may be by the court, if the parties waive a jury: *Ingham v. Dudley*, 60-16.

SEC. 2412.

Power is by this section conferred upon a probate court to appoint a referee in the matter of the examination of administrators' accounts: *In*

re Heath's Estate, 58-'76. As to reference in general, see §§ 2815-2830.

650.

SEC. 2418.

The purchase and erection of a tombstone is a proper expenditure to be made by an executor, as pertaining to the funeral expenses, and such expenditure may be made without any direction by the will, and notwithstanding the estate may be insolvent. The propriety of obtaining a tombstone, and the amount to be

expended therefor, may very properly be left to the court having the supervision of the settlement of the estate, and unless the provision thus made shall appear to be unreasonable or excessive, the persons in interest should be bound thereby: *Crapo v. Armstrong*, 17 N. W. Rep., 41; *Lutz v. Gates, Id.*, 747.

SEC. 2420.

A judgment rendered against deceased in his life-time must be paid in the first instance out of the personal estate, and must therefore be filed and allowed as other claims of the fourth class, and becomes barred if not thus filed and allowed within proper time. When the personal estate is insufficient to satisfy it, action

may be brought to enforce payment by sale of real estate. See § 3092: *Bayliss v. Powers*, 17 N. W. Rep., 907.

The fact that a contingent claim is allowed does not entitle the claimant to an order of payment until the right of the claimant becomes absolute: *Blanchard v. Conger*, 61-153.

SEC. 2421.

There being no statutory bar as to the proving of claims of the third class, they may be proved up after the expiration of the twelve-months: *Smith v. McFadden*, 56-482.

A claim of fourth class must be filed and *proved* within the twelve months: *Brownell v. Williams*, 54-353.

Where the claim is filed in time to have it properly allowed within the year, the fact that its allowance is postponed beyond the year, by a continuance granted to defendant to enable defense to be made, will be a ground of equitable relief from the bar of the statute: *Ingham v. Dudley*, 60-16.

Where it appeared that a claim

against the estate was placed in the hands of attorneys in due time for filing, and that they delayed filing upon request of an attorney who had been acting for the administratrix, upon representation by him that he would see the administratrix with a view to an adjustment of the matter, and was then filed three months before the expiration of the limitation, but at such time that the term of court, in which it would come up for allowance, did not commence until a few days after the expiration of the year, *held*, that in view of the fact that the estate remained unsettled and was solvent, a sufficient excuse was shown for the slight delay and that the court erred in rejecting

the claim: *Pettus v. Farrell*, 59-296.

Where a claim was left with attorneys more than six months before the expiration of the time for filing the same, and failure to file

resulted from accident or mistake on the part of such attorneys, *held*, that there was a sufficient ground for equitable relief from the bar of the statute: *Wilcox v. Jackson*, 57-278.

652.

SEC. 2436.

The widow's distributive share of personal property cannot be affected by will: (Overruling *In the matter of the Estate of Davis*, 36-24.) *Ward v. Wolf*, 56-465; *Linton v. Crosby*, 61-293, and *held*, that the fact that a widow, who, under this rule, was entitled to a share of personal property notwithstanding the will of her husband which made

other disposition of it, made no claim thereto until the executor had paid out a large portion of the personal estate in legacies, &c., and only asserted her right in opposition to the will after the decision in the case of *Ward v. Wolf*, *supra*, was announced, was not estopped from doing so: *Linton v. Crosby*, 61-293, and *Same v. Same, Id.*, 401.

653.

SEC. 2440.

The widow's share in property other than the homestead should bear its proportion of mortgage indebtedness to which she has assented by joining in the execution of the mortgage, and she can only claim, in such case, her distributive share of the proceeds of the property, after the mortgage indebtedness has been satisfied therefrom: *Troubridge v. Sypher*, 55-352; *McGlothlen v. Hite*, 55-392; but when the portion set off to the widow for dower includes the homestead, such homestead is not to be subjected to the payment of a mortgage covering it together with other property, though the widow joined in such mortgage, until such other property is exhausted: *Wilson v. Hardesty*, 48-515; *McGlothlen v. Hite, supra*; *Wells v. Wells*, 57-410.

Lucas v. Sawyer, 17-517, followed: *Parker v. Small*, 55-732.

The statute of limitations does not run against an unrelinquished right of dower, before it becomes vested by death of the husband or wife: *Murleman v. Hazlett*, 55-256.

The doctrine of *Robertson v. Robertson*, 25-350, that a relinquishment of dower in an agreement to separate is binding, is changed by § 2203. Such a relinquishment is no longer valid: *Linton v Crosby*, 54-478.

The widow's dower interest is only one-third. Though she may, under

§ 2455, become entitled to a one-half interest in property of her husband, the excess over one-third is not dower interest, and may be defeated by will, by debts, &c.: See notes to that section.

A wife who obtains a divorce from her husband thereupon loses all claim to a share in his property should she survive him: *Marrin v. Marrin*, 59-699; *Boyles v. Latham*, 61-174.

Where a man against whom a decree of divorce had previously been rendered at the suit of a woman claiming to be his wife, made an exchange of land with another who knew the fact of such divorce and believed that the party against whom it was rendered was therefore unmarried, and the transaction of exchange was effected through a son, by a former marriage, of the party against whom the divorce was rendered, such son and agent remaining silent as to the fact that his mother was yet living; *held*, that such son was estopped from claiming against the party with whom the exchange of property was made, that his mother was living in another state at the time that such exchange was made, and that she survived his father and became entitled to a dower interest in such property which descended to him as her surviving heir: *Williams v. Wells*, 16 N. W. Rep., 513.

A sale of real property by an as-

signee under an assignment for the benefit of creditors is a judicial sale within the terms of this section, and bars any contingent right of dower in the property: *Stidger v. Erans*, 19 N. W. Rep., 850.

If a widow, entitled to dower, fails to have her interest defined and set apart in her lifetime her heirs may recover the same after death: *Potter v. Worley*, 57-66.

Where the wife voluntarily unites in the conveyance of real property and the proceeds are invested by the husband in other property, title of which is taken in the name of a third person, the wife has no cause of action against her husband for the pro-

tection of her dower right: *Beck v. Beck*, 19 N. W. Rep., 876.

Where mechanics' liens and taxes on decedent's real property have been paid with money provided from the personal estate, such liens and taxes should not be deducted from the widow's share of the real estate: *Conger v. Cook*, 57-49; *Linton v. Crosby*, 61-293.

The widow's share in real property is subject to a *pro rata* liability for mortgages upon the whole of the property in which she joined. In case of a homestead her share therein should only be subjected to a *pro rata* liability for the mortgages upon it alone: *Conger v. Cook*, 57-49.

656.

SEC. 2452.

The widow's consent must be made of record within the six months. She will not be bound or estopped by a writing not so made of record: *Baldozier v. Haynes*, 57-683.

The provisions of a will considered, and held subject to the same construction as in *Cain v. Cain*, 23-31; *Van Guilder v. Justice*, 56-669.

This provision applies as well to a will executed before marriage as to one executed after marriage: *Ward v. Wolf*, 56-465.

The "widow's share" here referred to, means her "distributive share," as referred to in § 2437 and § 2441, and applies to her portion of personal property, as well as of real property; and this section prohibits a disposition by will of either personal or real property which operates to deprive the widow of her share therein (Overruling *Estate of Davis*, 36-24); *Ibid*.

It is only the widow's one-third, and not the whole of the one-half which she may be entitled to as distributive share under § 2455, that cannot be affected by will. See note

to that section.

It is not proper for a court upon proof that the surviving husband or wife had knowledge of the will from the first, and that it was in accordance with his wishes, to enter an order more than six months after the death of the party whose consent is thus established to take under the will. After the expiration of six months, consent alone does not defeat the party's rights. It cannot be claimed that if no notice be given, the consent may be entered at any time: *Houston v. Lane*, 17 N. W. Rep., 514.

Under the corresponding section in the revision, held that the acceptance of the provisions of a will would not bar a widow's right to dower where the provisions of the will are not inconsistent with her dower right: *Potter v. Worley*, 57-66.

Where a husband devises his real estate to his widow during her natural life such devise is not inconsistent with the dower right of the widow in the land devised: *Blair v. Wilson*, 57-177.

657.

SEC. 2454.

Where by a special act of another state, the adoption of a child was authorized, and it was declared that such child should inherit from the adopting parents, or either of them, as if she were their legitimate child, held, that such adopted child did not thereby become entitled by virtue of

this section to inherit property situated in this state, left by the father of her adopting father, dying in this state after having survived such adopting parents: *The Estate of Sunderland*, 60-730.

Where at the time of decedent's death, his son was already deceased,

held, that the widow of such son could not claim any interest in the estate by inheritance from a child of herself and such deceased son, said child having survived its father, but having died without issue before the

death of its grandfather. The statute only provides for inheritance by the parents of the *estate* of a child dying without issue: *Leonard v. Linton*, 57-648.

SEC. 2455.

The widow can only hold one-third free from decedent's debts and against his will. The balance of the one-half which she may be entitled

to under this section, she takes as any heir takes a distributive share: *Smith v. Zuckmeyer*, 53-14; *Linton v. Crosby*, 54-478.

658.

SEC. 2457.

Where intestate dies without issue, and his parents are both dead, it is immaterial which died first, and it is immaterial whether such parents, or either of them, made any disposition of their property by will, other than that which would have been made by law. The persons entitled to dis-

tributive shares in decedent's estate, take from him directly, and not through the parent, the supposition that such parent died in possession of the property being merely for the purpose of determining the descent: *Lash v. Lash*, 57-88.

SEC. 2459.

In a particular case, *held*, that the evidence established advancements to heirs such as to defeat their claim to

share in the intestate's real property: *Ramsey v. Abrams*, 58-512.

659.

SEC. 2465.

For the purpose of inheritance, an illegitimate child, when recognized by its father, stands on precisely the same footing as if it were legitimate, and the birth of such a child and its

recognition revoke a prior will in the same manner as the subsequent birth of a legitimate child: *Milburn v. Milburn*, 60-411.

660.

SEC. 2474.

Where a creditor has filed his claim and allowed the estate to be settled up and the administrator discharged, he cannot afterward, in an action against such administrator or heirs, subject to the payment of his claim property which he insists was fraudulently conveyed by decedent in his lifetime to such heirs for the purpose of defeating it. As he might, by proper proceedings, have had such property subjected

to the payment of his claim during the administration, he cannot after the estate has been settled, open up the settlement for that purpose. The settlement and discharge of the administrator is an adjudication not only that he has accounted for all property which came into his hands, but also that the estate has been properly administered upon: *Daniels v. Smith*, 58-577.

SEC. 2475.

A party seeking to avail himself of mistake or fraud under the preceding section, must allege sufficient reasons for not availing himself of these provisions for opening up the settlement, and if he asks equitable relief

on the ground of fraud, must set forth the fraudulent acts complained of, and show how he was deceived and misled thereby: *Kows v. Mowery*, 57-20.

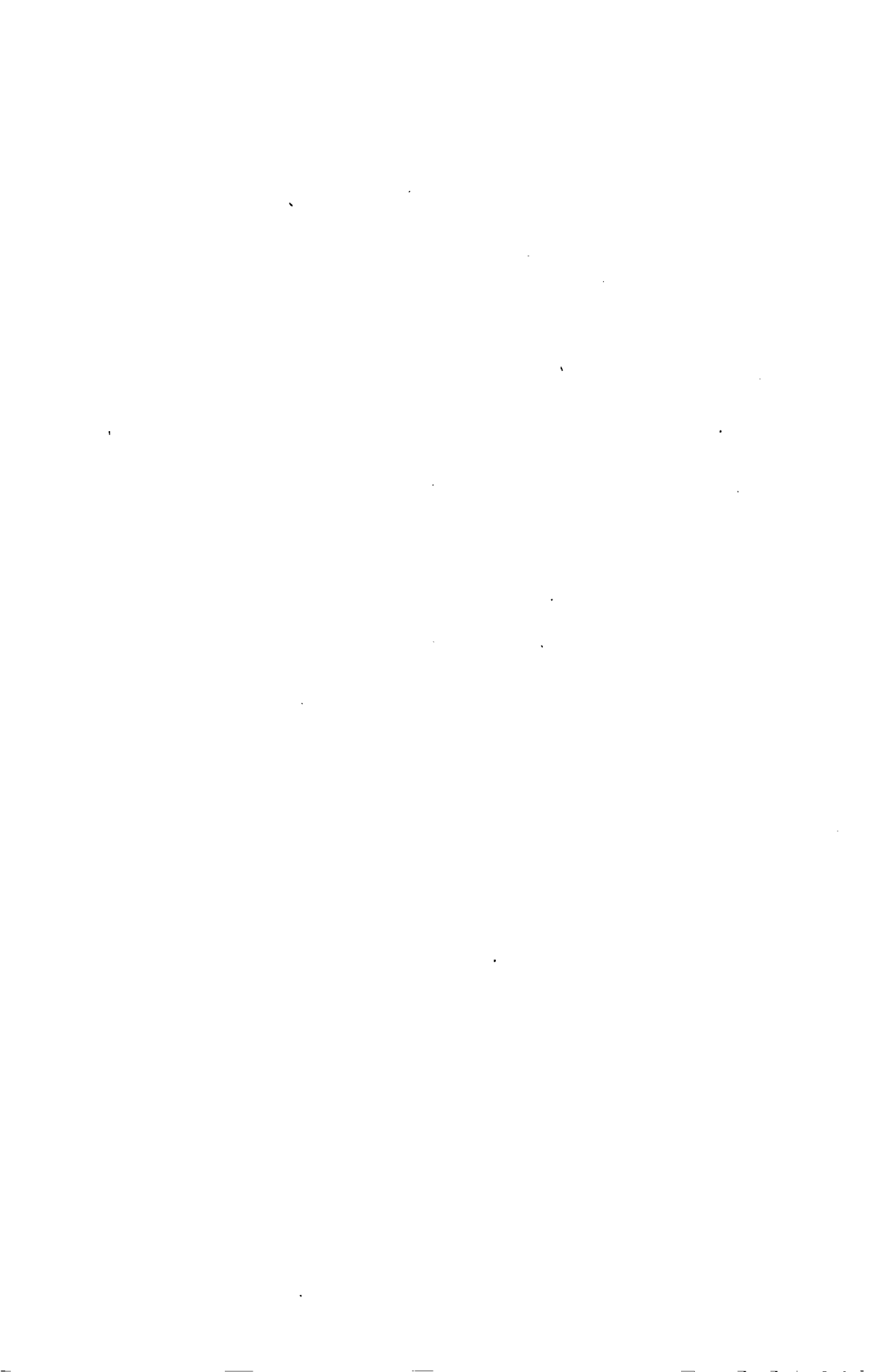
Orders of court approving pro-

gressive reports must be regarded as correct, and it is incumbent on the heirs attacking the reports to show that they were incorrect and fraudulent, if so claimed: *In re Heath's Estate*, 58-36.

661.

SEC. 2484.

An agent with whom notes are left for collection by decedent in his lifetime does not become liable as executor in his own wrong for failure to turn over said notes to a foreign administrator without demand having been made for the same: *Darr v. Darr*, 59-81.



SUPPLEMENT

TO

VOLUME II.



SUPPLEMENT

TO VOL. II.

666.

SEC. 2510.

Even if there is misjoinder of causes of action, objection thereto is deemed waived unless made as provided in § 2632. (Sec. also, § 2633): *Flynn v. D. M. & St. L. R. Co.*, 17 N. W. Rep., 769.

Under Rev. §§ 1858 and 1859, which provided that in case of death of one of the parties, the executor or administrator of such party should be

made plaintiff or defendant, as the case might require, and it should not be necessary to make the heirs or devisees of such deceased persons parties to such suit, held that a proceeding against the administrator of the deceased owner, without notice to the heir to whom the property had descended, was binding upon such heir: *Welch v. McGrath*, 59-519.

667.

SEC. 2516.

Where an amendment is made during the trial, changing the nature of the action, motion to change the cause to the proper docket should then be made, and not a motion to strike the amendment from the files, on that ground: *Weaver v. Kintzley*, 58-191.

Error of the court in sustaining motion to transfer to the equity docket, will not be ground of reversal on appeal, where it does not appear that the party excepted to such action or demanded a jury trial: *State v. Craig*, 58-238.

SEC. 2517.

The interposition of an equitable defense in an action at law, does not give rise to an equitable issue, unless defendant asks relief in equity. The issue arising upon an equitable de-

fense in such action is to be tried according to legal and not according to equitable procedure: *Carey v. Gunnison*, 17 N. W. Rep., 881.

668.

SEC. 2519.

This section held applicable in cases where a proceeding in the circuit court which should have been brought in probate was entitled in

equity or at law: *Ashlock v. Sherman*, 56-311; *McName v. Malvin*, 56-362; *First Nat'l Bank of Garrettsville v. Greene*, 59-171.

SEC. 2520.

Provisions of civil Code as to change of place of trial, held, applicable in an appeal to the circuit court

in a proceeding to condemn land for right of way: *Whitney v. Atlantic Southern R'y Co.*, 53-651.

SEC. 2521.

An action to foreclose a mortgage given to secure a note which is already reduced to judgment, is not

prohibited by this section: *Matthews v. Davis*, 61-225.

669.

SEC. 2525.

Although an action for slander will survive against the personal representatives of defendant, the plaintiff cannot recover as against such representatives exemplary or punitive damages: *Sheik v. Hobson*, 19 N. W. Rep., 875.

The right of recovery for an injury resulting in death, being statutory, exists only by the law of the place of

injury; therefore, *held*, that the personal representatives of the person whose death was caused by an injury in Missouri, where the statute does not authorize a recovery in such cases by the personal representatives, could not maintain an action for such injury in the courts in Iowa: *Hyde v. W.*, *St. L. & P. R. Co.*, 61-441.

670.

SEC. 2527.

A deposition taken after plaintiff's death, upon notice served before his death, should be stricken from the

files on motion: *Kershman v. Schwela*, 59-93.

671.

SEC. 2529.

The statute of limitations applies to equitable actions: *District Township of Spencer v. District Township of Riverton*, 17 N. W. Rep., 105.

The statute of limitations cannot be relied upon at the trial unless pleaded: *Brush v. Peterson*, 54-243.

The fact that a claim was barred by the statute of limitations before suit was brought thereon, does not affect title acquired through such action if parties have failed to interpose the defense of the statute at the proper time. They are deemed to have waived it: *Welch v. McGrath*, 59-519.

The statute of limitations will run in favor of the trustee of a resulting or constructive trust, from the time he disowns the trust and claims title in his own right to the trust property: *Otto v. Schlappkahl*, 57-226.

The cause of action for damages from the improper construction of a ditch does not arise until the ditch first begins to affect the party's premises: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

As against a cause of action for injury to property from the construction of a ditch which is of such character as to cause permanent injury unless human agency intervene to prevent it, the statute of limitations commences to run from the beginning of the injury. In such case there cannot be successive actions, but the whole injury is to be compensated in the one action: *Powers v. City of Council Bluffs*,

45-652. But this does not apply to a case where one party is under obligation to protect another from injury and fails from time to time to do so: *Drake v. C. R. I. & P. R. Co.*, 19 N. W. Rep., 215.

A party holding a claim or right of action cannot be allowed to prolong the operation of the statute by refusing to take the steps which the law requires in order to authorize the maintenance of the action: *Baker v. Johnson Co.*, 33-155; *Prescott v. Gonser*, 34-175; *Hintrager v. Hennessy*, 46-600; *First Nat'l Bank of Garrettsville v. Greene*, 17 N. W. Rep., 86.

When the right of action depends upon a demand, such demand must be made within the time prescribed by the statute of limitations, when there are no special circumstances which excuse the party from making the demand; otherwise the demand will be considered as not made within a reasonable time: *Ball v. K. & N. W. R. Co.*, 16 N. W. Rep., 592.

The statute of limitations commences to run against warrants drawn by a district township on its own treasurer, at least from the time of their presentation for payment, although such payment is refused only for the reason that there are not funds on hand at the time: *Carpenter v. District Township of Union*, 58-335.

Where a township clerk paid an order which should have been allowed by the township trustees at the first

settlement thereafter, *held*, that the statute of limitations, as against an action of mandamus to enforce the allowance of the claim, commenced to run from that time, and not from the time of subsequent demand: *Deucey v. Lins*, 57-235.

Where the transaction constitutes a partnership, the statute will not commence to run against an action between the partners relating thereto, until the partnership is dissolved, or until a sufficient time has elapsed after the demand for an accounting and settlement: *Richards v. Grinnell*, 18 N. W. Rep., 668.

As against an action by one of two claimants of land who, in a litigation between them as to title, has been defeated, and thereupon seeks to recover from the successful claimant the amount of taxes paid while claiming title, the statute of limitations commences to run from the time the question of title is finally adjudicated: *Goodnow v. Stryker*, 17 N. W. Rep., 506.

Action against a clerk of the court for improperly approving a stay bond does not accrue until the expiration of the stay (*Steel v. Bryant*, 49-116), and therefore an action by the clerk against his deputy for the default of the latter in approving such bond, does not accrue until the same time: *Moore v. McKinley*, 60-367.

The penalty provided by 15 G. A., ch. 68 (now repealed), of five times the amount of overcharge to be recovered from a railway company charging a greater amount of freight than allowed by law, *held*, to be a statute penalty, within ¶ 1 of this section, action for which was barred in two years: *Herriman v. B., C. R. & N. R. Co.*, 57-187.

Although the filing of a statement for a mechanic's lien, within the thirty or ninety days provided by statute (16 G. A., ch. 100, § 6, *supra*, p. 598) is not essential to enable the mechanic to enforce his lien against any one except purchasers or encumbrancers in good faith, without notice, after the expiration of that time, yet the two years' limitation, under ¶ 2 of this section, commences to run from the expiration of the period of thirty or ninety days as the case may be, whether the statement for the lien is filed within that time or not: *Squier v. Parks*, 56-407; *Dimmick v. Hinckley* 57-757.

If action against the sureties of an

officer on his official bond be not brought within three years after the breach thereof, it is barred, although in the meantime action may have been brought and judgment recovered against the principal: *Wadsworth v. Gerhard*, 55-367.

A person entering into possession as tenant in common, is presumed to continue to hold in that manner, and not adversely, until he has done some act amounting to eviction of his co-tenant: *Shell v. Walker*, 54-386.

One going into possession under a quit-claim deed from a tenant in common, does not thereby assert adverse possession as against the other tenant in common, so as to set the statute of limitations in motion: *Moore v. Antill*, 53-612; and see *Hume v. Long*, 53-299.

An owner of land, who, through ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, does not hold such portion by adverse possession, so as to set the statute of limitations in motion: *Skinner v. Crawford*, 54-119.

Where a party was in possession of land under claim of title from the United States government at the time that an adverse title was acquired and remained in such possession for the period of limitation, *held*, that his defense as against such adverse title was complete: *Tremain v. Weatherby*, 58-615.

The party claiming under a quit-claim deed, though he is not to be regarded as a good faith purchaser without notice, nevertheless has sufficient color of title to enable him to set up adverse possession: *Ibid*.

Where one takes possession of a government subdivision of land under a claim of title to the whole of it, breaks it up and puts part of it under cultivation, and no other person is in possession of any part, his possession must be held as applying to the whole tract claimed by him, especially when the actual possession extends to every government subdivision embraced in the whole tract: *Ibid*.

Actual possession of a part of a tract is legal possession of the whole of the tract covered by the title under which the actual possession is taken, and possession of the part will impart notice of the claim to the whole tract: *Watters v. Connelly*, 59-217.

Where a party erects upon a lot to

which he claims title, a substantial and permanent brick building, which he claims to own throughout its entire extent, such circumstance amounts to a claim of title to the land upon which the building is erected; that is in view of the provision of § 2019 as to party walls to the center of the walls: *Crapo v. Cameron*, 61-447.

Where parties agree as to a certain line between their property being the

true division line, and occupy to such line, each is to be considered as in adverse possession of the property so occupied, whether the line is correct or not: *Tracy v. Newton*, 57-210.

The rule that an action by a junior mortgagee to redeem from a senior mortgage is barred in ten years, is in no wise dependent upon the question of adverse possession: *County of Floyd v. Cheney* 57-160.

674.

SEC. 2530.

The recording of a deed is sufficient notice of any fraud in its execution to cause the statute to begin to run against an action based upon such fraud: *Bishop v. Knowles*, 53-268.

Where a judgment plaintiff failed to credit a payment made on the judgment and afterward, on execution, recovered the whole amount thereof, held, that the action to recover back the amount of the pay-

ment was barred in five years, although the judgment defendant was not aware of the failure to credit the payment until the expiration of the five years: *Shreves v. Leonard*, 56-74.

Evidence in a particular case, held sufficient to show that the discovery of the mistake relied upon was made within five years: *Eggspiller v. Nockles*, 58-649.

675.

SEC. 2531.

An interval of one year and nine months between two of the consecutive items of an account, both of which were on the credit side, held, not sufficient to show such break in the account or cessation of dealing as to cause the statute of limitations to commence to run, it appearing that all the items had relation to the same open and continuous transaction between the parties: *Keller v.*

Jackson, 58-629.

That an account appears to be barred is no ground of objection to the introduction in evidence of the book containing it: *Ibid.*

The claim of a public officer for compensation is not in the nature of an open account. Each one of successive terms of office is to be deemed a separate employment: *Griffin v. County of Clay*, 19 N. W. Rep., 327.

676.

SEC. 2533.

Where the only evidence of absence of defendant from the state (so as to bring the case within the doctrine of *Heaton v. Fryberger*, 38-185) was that he went East, held, that non-residence did not sufficiently appear: *Tremaine v. Weatherby*, 58-615.

Where a person leaves the state in

the employ of the general government, with the intention of returning when such employment shall cease, but the time of his return is indefinite, and he retains no domicile in the state, he is to be deemed a non-resident: *Hedges v. Jones*, 19 N. W. Rep., 675.

677.

SEC. 2537.

This section applies only when no judgment on the merits has been rendered, and another suit is brought

upon the same cause of action: *McDonald v. Jackson*, 55-37.

The provisions of this section will

not operate to extend the period of the statute where a condition precedent to the right to bring the action has not been complied with in proper time, for instance the presentation of

a claim to the board of directors of a school district: *District Township of Spencer v. District Township of Riverton*, 17 N. W. Rep., 105.

SEC. 2539.

Where a junior mortgage was taken while a senior mortgage was in existence and not barred by the statute of limitations, and the senior mortgage afterward became barred, but was subsequently revived by a new promise of the mortgagor to pay the debt, made while junior mortgage was in process of foreclosure, held, that no equities having intervened in favor of junior mortgagee, the debt secured by the senior mortgage was still a prior lien to that of

the junior mortgage: *Kerndt v. Porterfield*, 56-412.

Without determining whether an indorsement of payment signed by the party to be charged would remove the bar of the statute, held, that such endorsement, signed by the treasurer of a district township, had no such effect, as he had no authority to bind such township by his contracts or admissions: *Carpenter v. District Township of Union*, 58-335.

678.

SEC. 2540.

Any counter-claim, which may be interposed under § 2659, may be thus pleaded, although barred, and the provisions of this section are not limited to the counter-claims men-

tioned under the second subdivision of that section: *Folsom v. Winch*, 19 N. W. Rep., 305. (Overruling on rehearing the former opinion in the same case.)

SEC. 2543.

A sale of a promissory note on execution, as the property of one who had, as agent for the real owner, wrongfully converted it to his own use, conveys no title to the purchaser, and the latter cannot maintain action thereon or on a guaranty thereof: *McCormick v. Williams*, 54-50.

Where it appeared that the owner of negotiable instruments had deposited them with his agent as collateral security for another party, and

to be applied in payment of the debt so secured, held, that such other party became the owner thereof in such sense that he might have brought action on the securities in his own name as owner, and, therefore, that the death of the original owner did not terminate the right of such agent to possession of the notes and their proceeds: *Bennett v. Stoddard*, 58-654.

679.

SEC. 2544.

An agent who is left in charge of real property has not such interest therein as to enable him to maintain

in his own name an action for the possession thereof: *McHenry v. Painter*, 58-365.

680.

SEC. 2545.

Misjoinder of parties plaintiff or defendant must be raised by motion. It cannot be taken advantage of on

demurrer or in arrest of judgment: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

SEC. 2546.

The assignee, by endorsement or otherwise, of a negotiable instrument transferred after maturity, holds sub-

ject to any counter-claim, though it be an independent cause of action, acquired by the maker of the note

against the assignor before notice of the assignment (overruling *Richards v. Daily*, 34-427); *Downing v. Gibson*, 53-517; and this rule applies to negotiable paper transferred before due, if the transfer was not made in good faith and for a valuable consideration: *Bone v. Thorp*, 18 N. W. Rep., 906. Payment of a negotiable note to the payee, by the maker, without notice of a transfer made after maturity, is a defense to an action by an endorsee who takes by such transfer after maturity: *Haywood v. Seeber*, 61-574.

681.

SEC. 2547.

The grantor is not a necessary, though a proper party defendant in an action to set aside a fraudulent conveyance of property and subject it to payment of claims of creditors: *Potter v. Phillips*, 44-353.

SEC. 2548.

Joint owners of a note should join as plaintiffs, or if one refuses to join he should be made defendant: *McNamee v. Carpenter*, 56-276.

SEC. 2550.

Where action upon a joint contract is brought against a survivor and the executors of a deceased party in the same court in which the claim against the decedent's estate might have been filed, the bringing of such action will be deemed a sufficient filing of the claim against the estate: *Moore v. McKinley*, 60-367. In case of an action against two defendants jointly and severally liable, judgment may be entered against one although the case is not disposed of as to the other: *Poole v. Hintz*, 60-180.

682.

SEC. 2552.

In an action against a road supervisor upon his official bond, held, that the township clerk entitled to the money, for the misappropriation of which the action was brought, was the proper party to sue: *Wells v. Stomback*, 59-376. Section applied: *Jordan v. Katanagh*, 18 N. W. Rep., 851.

683.

SEC. 2553.

A partnership may be sued before a justice of the peace, and notice of service upon the resident partner will give the justice jurisdiction of the partnership so that judgment may be rendered against the firm as such and enforced against the partnership property; but the justice will not thereby acquire jurisdiction as to an individual partner residing in another county: *Ebersole v. Ware*, 59-663.

684.

SEC. 2558.

Where the action is against defendant by the name in which it signs the contract, it is not necessary to allege either copartnership or corporate capacity: *Wendall v. Osborne*, 18 N. W. Rep., 709.

685.

SEC. 2565.

Under a finding made by the court that the action was not being prosecuted for the benefit of the minor and that the further prosecution was not for his best interests, held, that the court was authorized to dismiss

the action upon a stipulation signed by the next friend who brought it: *Ball v. Miller*, 59-634.

A guardian *ad litem* may present by way of defense matter which is proper in an action in which he is

appointed, although the same subject-matter might have been the ground of an original suit, which could only be brought by his regular guardian or next friend: *Kelsey v. Kelsey*, 57-383.

686.

SEC. 2573.

In so far as it is attempted by this and the preceding and following sections to deprive a property owner of his right of action against a sheriff to recover property wrongfully seized

by such officer under an execution against another person, these three sections are unconstitutional: *Sunberg v. Babcock*, 61-601; *Maish v. Littleton*, 17 N. W. Rep., 182.

687.

SEC. 2574.

This provision is independent of the two preceding sections, and the application here provided for need

not be made before answer of defendant served: *Bixby v. Blair*, 56-416.

SEC. 2578.

[20 G. A., ch. 126, amends this section by striking out the word "may" in the third line thereof and inserting in its place the word "shall." It also contains the following provision: "This act shall not effect [affect] existing contracts."]

[Decisions under the original section.]

Where the note secured by a mortgage is made payable at a particular place, action to foreclose the mortgage may be brought in the county in which the note is made payable, although the land mortgaged be situated in another county: *Equitable Life Insurance Co. v. Gleason*, 56-47.

An action against husband and wife for indebtedness incurred for family expenses, and in which it is sought to make such indebtedness a lien upon real property of the wife, may be brought in the county where

such real property of the wife is situated, although neither husband nor wife be a resident of that county: *Hawke v. Urban*, 18-83.

A mortgage may be foreclosed in any county in which the court can acquire jurisdiction to render a personal judgment on the debt, but if the proceeding is upon publication only, and the defendant does not appear, the foreclosure cannot be had in a county where no portion of the property is situated: *Iowa Loan and Trust Co. v. Dory*, 19 N. W. Rep., 301.

688.

SEC. 2581.

An action upon service by publication to foreclose a mortgage cannot be brought in the county in which the note is made payable, if no por-

tion of the property is situated in that county: *Iowa Loan and Trust Co. v. Dory*, 19 N. W. Rep., 301.

689.

SEC. 2582.

Corporations operating railways within the state are subject to the jurisdiction of our courts the same as any

person resident within the state: *Mooney v. U. P. R. Co.*, 60-346.

SEC. 2583.

Where an action was brought by a sub-contractor, entitled to a mechanic's lien, against the contractor for the construction of a railway, on an agreement to pay the amount of such lien, *held* that the action was properly brought in the county through which the railroad was being constructed, and could not be removed to the county of defendant's residence: *Vaughn v. Smith*, 58-553.

The facts showing that the contract has been performed or the work

done in the county in which suit is brought may be established by affidavit on the hearing of the motion, if defendant seeks to change the place of trial to the county of his residence: *Jordan v. Kavanagh*, 18 N. W. Rep., 851.

On the motion for change of venue the question as to plaintiff's right of recovery against a portion of defendant's cannot be raised, as such a question must be determined upon demurrer: *Ibid.*

SEC. 2585.

One who accepts the benefits of a sale by a person claiming to act as his agent, or who accepts the benefits of a proposition made through and forwarded by him, thereby ratifies the transaction, so that an action arising therefrom may be brought in the county of such agency: *Miligan v. Davis*, 49-126.

An action by the agent against the principal for services as agent, is connected with the business of the agency in such sense that suit against the principal may be brought in the county of such agency: *Ocker-son v. Burnham*, 19 N. W. Rep., 676.

690.

SEC. 2587.

This section has no application to an action for the recovery of specific personal property brought in the

county in which the property is situated: *Porter v. Dalhoff*, 59-459.

SEC. 2589.

Where a transfer is ordered, but the papers are filed in the court to which the case is transferred after the time required by this section, the other party will not be held to waive

the right to have the action discontinued by appearing in the court where the papers are filed and moving for a discontinuance: *Hall v. Royce*, 56-359.

691.

SEC. 2590.

[20 G. A., ch. 94, amends this section by adding to subdivision 3 thereof the following:]

But when either party files an affidavit as provided by this subdivision the other party shall have a reasonable time to file counter affidavits, and the court or judge, in the exercise of a sound discretion, must decide whether a change shall be granted, when fully advised, according to the very right and merits of the matter.

The court may in its discretion cause the affiants upon either side to be brought into court for examination upon the matters contained in their said affidavits.

[Decisions under the original section.]

A court has no authority to change the venue of an action, on its own motion, to another court. Therefore,

held, that a change ordered in a case in which no application was made, was erroneous, although in another

case between the same parties an application had been made, supported by affidavit, on the ground of prejudice of the judge: *Bennett v. Carey*, 57-221.

A change of place of trial cannot be had while the case is pending on motion for new trial, after verdict: *Perkins v. Jones*, 55-211.

Motion for change of venue on account of prejudice of the judge, if properly made in vacation, should be granted, even though the judge to whom objection is made is to go out of office before the next term of court. The change is not merely for purposes of trial, but where the objection is to the court, the statute contemplates that it may be had before the issues are made up and the case ready for trial: *Allerton v. Eldridge*, 56-709.

A change of place of trial may be had as here provided, on an appeal to the circuit court in proceedings to assess damages for taking property for right of way: *Whitney v. Atlantic Southern R'y Co.*, 53-651.

The party by whom the principal affidavit is made cannot be compelled to submit to an examination as to the truth of the matters stated in his affidavit: *McGovern v. Keokuk Lumber Co.*, 61-265.

Where a cause is taken to another county by agreement that it shall be tried therein without further change, and subsequently additional parties are brought in, such stipulation does not prevent further change of trial according to law, even on the motion of one of the parties to the original agreement: *Bixby v. Carskaddon*, 18 N. W. Rep., 875.

In a suit against principal and sureties, where a ground for a change of place of trial is shown by the principal, the sureties, if they desire, may have the change granted as to them also, if their ground of defense is the same as that of the principal: *Sweet v. Wright*, 17 N. W. Rep., 463.

If the motion is made by more than one party it must distinctly appear from the affidavit that neither one of the three disinterested persons subscribing thereto is related nearer than the fourth degree to either of the parties making the motion: *Fairburn v. Goldsmith*, 58-339.

Where the affiants in their affidavit collectively declare that they are not related within the degree herein specified to the one party mak-

ing the motion, that is sufficient: *Goodnow v. Litchfield*, 19 N. W. Rep., 226.

Where the affidavit for a change on the ground of undue influence of the adverse party or his attorney stated that "defendants and their attorney" had such undue influence, held, that it was sufficient to authorize a change: *Bixby v. Carskaddon*, 18 N. W. Rep., 875.

An application for change of venue on the ground of alleged prejudice of the inhabitants of a county must be sworn to by the party asking the change if he is a natural person: *Hedge v. Gibson*, 58-656.

Where a change of venue is desired by a corporation, the requisite affidavit must be made by its officers or agents and, held, that an affidavit commencing "I, A. B., Vice President of the defendant above named, being duly sworn," etc., and not otherwise showing that the affiant was vice president, was not sufficient for the reason that the connection of the affiant with the corporation was thus shown merely by an unverified statement: *McGovern v. Keokuk Lumber Co.*, 61-265.

The affidavits on file become part of the record and may be certified by the clerk on appeal in the same manner as other matters of record; it is not necessary that they be preserved by bill of exceptions: *Ibid.*

An appeal will not lie from an order granting or refusing a change of venue, but upon a subsequent appeal properly taken, even from an intermediate order before final judgment, the order as to change of venue may be reviewed: *Allerton v. Eldridge*, 56-709.

By an appeal from an order granting a change of venue the supreme court acquires no jurisdiction, and will refuse to consider the case even though objection to the jurisdiction is not made by either party: *Groves v. Richmond*, 58-54.

The fact that a party, after properly excepting to the ruling granting a change of venue, goes to trial in the court to which the change is granted and does not raise an objection to the change by motion for new trial or in arrest of judgment, does not prevent his alleging it upon appeal: *Michaels v. Crabtree*, 59-615; *Bennett v. Carey*, 57-221.

Where the supreme court on appeal determines that a change of venue

has been granted without authority, it will not review errors in the proceeding subsequent to such change but will remand the case to the court from which it was improperly changed: *Bennett v. Carey*, 57-221; *Gilman v. Donovan*, 59-76.

692.

SEC. 2591.

After one change of venue, a party applying for another change must allege and show that the cause upon which he bases his application was not in existence when the first change was obtained: *Michaels v. Crabtree*, 59-615. A previous change, had by agreement of parties, does not, under this section, prevent a subsequent change on statutory grounds, whether existing at the time of the first change or not: *Bixby v. Carskaddon*, 18 N. W. Rep., 875.

693.

SEC. 2592.

Where the case is one in which the circuit court has exclusive jurisdiction, it cannot be changed to the district court, but it should be sent to some other circuit court: *Schuchart v. Lamney*, 17 N. W. Rep., 467.

SEC. 2594.

A party who has procured the dismissal of an action in one court on the ground that it is properly pending upon change of venue in another, is estopped from afterwards denying the jurisdiction of the latter court: *Perkins v. Jones*, 17 N. W. Rep., 573.

694.

SEC. 2596.

Costs accrued at a former term of the court are not to be taxed up to the party asking a change. It is not competent for the court to impose upon him conditions not authorized by the law. Upon a proper showing he is entitled to a change as a legal right: *Bannigan v. Central Iowa R. Co.*, 58-671.

SEC. 2599.

Where a penal bond provided that it should be deemed fulfilled unless action thereon was begun by Oct. 1st, and notice of suit thereon was placed in the hands of the sheriff Sep. 27, but not served until Oct. 8, held, that action was not commenced in time (following *Parkyn v. Travis*, 50-436): *Proska v. McCormick*, 56-318.

A notice, not stating the term of court at which defendant is required to appear, does not confer jurisdiction. And in a case where it was required by statute that suit be brought within a limited time, and the notice served did not contain a statement as to the next term, held, that a second notice served after the expiration of the time limited, to which the defendant appeared, would not enable the court to entertain the action: *Jones, &c., Co. v. Boggs*, 19 N. W. Rep., 678.

696.

SEC. 2600.

Where a petition is marked filed by the clerk within the proper time, but he makes no memorandum of the fact upon the appearance docket, it cannot (under the provisions of § 200) be considered filed, and the provisions of this section are applicable: *Nickson v. Blair*, 59-531. A judgment recovered upon a petition filed after the time named in the notice, is not void and cannot be collaterally impeached: *Hildreth v. Harney*, 17 N. W. Rep., 534.

697.

SEC. 2603.

In an appeal from an assessment of damages for the location of a highway, acknowledgment of service, signed by the auditor, is sufficient to

constitute a valid service upon him, although he is not "defendant" in the action: *Libbey v. McIntosh*, 60-329.

SEC. 2604.

Where a notice and return of service were sufficient in form, but the copy delivered erroneously stated the date at which the term of court would commence, *held*, that the case was not one of no service, but of merely defective service, and that the judgment rendered was not void, and de-

fendant might, under such circumstances, have applied to the officer to amend his return, and during the same term, or under § 3154 during a subsequent term, he might have had relief from the default: *Irons v. Keystone Man'f'g Co.*, 61-406.

699.

SEC. 2609.

[20 G. A., ch. 77, amends this section by adding thereto the following:]

Provided, that service may be made on any patient confined in the hospitals for the insane by the superintendent or assistant superintendent of such hospitals, and the certificate of such officer under the seal of such hospital shall be proof of such service.

How served on patients in hospitals for the insane.

SEC. 2610.

If a claim is allowed in part, an acceptance of the allowance is a bar to an action for the balance claimed: *Brick v. Plymouth Co.*, 19 N. W. Rep., 304.

The board cannot, by refusing to

act or make record of their action, deprive a claimant of his right to sue. Proof of demand may be made by the testimony of the person making it: *Ferguson v. Davis Co.*, 57-601.

SEC. 2612.

An agent having no authority to act for a corporation within the state, and whose duties outside of the state were limited to investigation of facts and reporting them to general manager, *held* not such an agent as that service upon him would constitute

service upon the company: *Philp v. Covenant Mut., &c., Ass'n*, 17 N. W. Rep., 903.

As to appointment by foreign insurance companies of agents upon whom service may be made, see § 1165.

700.

SEC. 2613.

In an action growing out of business done by one agent in a county, service can not be made upon another agent of the same party in that county whose agency is of a different scope. The service should be made upon some one connected with the business out of which it grew. If made upon an agent not connected with the business out of which the action arose it is a case not of defective service, but of entire want of service: *State Insurance Co.*

v. Granger, 17 N. W. Rep., 504.

This section allows service upon the agent in a suit against the principal in matters connected with the agency, but the principal is not required to respond to service upon the agent of a notice of garnishment of the principal in a proceeding for the collection of a debt from the agent in no manner connected with the agency: *Upton Manuf'g Co. v. Stewart*, 61-209.

SEC. 2616.

[Additional provisions for service of notice on patient in hospital for the insane are made by the act inserted *supra* in supplement to page 699.]

701.

SEC. 2618.

When notice of an action for a divorce is served by publication the court acquires jurisdiction to allow alimony: *Twigg v. O'Meara*, 59-326.

An indebtedness due from a resident to a non-resident may be subjected to the payment of claims against such non-resident, although the court acquires no jurisdiction to render a personal judgment. The *situs* of the debt regarded as property may be for such purposes treated as distinct from that of the owner:

Mooney v. U. P. R. Co., 60-346.

In a suit against a non-resident by an attachment, notice being served by publication, a debt due for personal services rendered by such non-resident in the state of his residence and payable there may be subjected, by garnishment of his creditor in this state, to the payment of the claim, although by the laws of the state of his residence the debt would be exempt from execution: *Ibid*; and see notes to § 2975.

702.

SEC. 2619.

Publication of notice in which the defendant's name was stated as "P. T. B. Hopkins," in place of "T. P. B.

Hopkins," held, insufficient to confer jurisdiction: *Fanning v. Krapfl*, 61-417.

703.

SEC. 2621.

Personal service upon the defendant made outside of the state supercedes the necessity of service by publication, and has the same force and effect, and the same jurisdiction is

acquired as would be if the service were by publication: *Mooney v. U. P. R. Co.*, 60-346. See also § 2881 and notes.

704.

SEC. 2626.

Subsequent appearance of defendant will validate the previous service of a writ of injunction made without the court having obtained jurisdiction of defendant: *Dist. T'p of Lodomillo v. Dist. T'p of Cass*, 54-115.

The filing of a demurrer by non-resident defendants constitutes an appearance to the action, and gives the court jurisdiction: *Johnson v. Tostevin*, 60-46.

705.

SEC. 2628.

After action is brought to set aside a deed for fraud, a purchaser at execution sale from the defendant in such action, of the property conveyed thereby, is charged with notice of the action: *Rider v. Kelso*, 53-367.

It is the *filing* of the petition which imparts notice. The indexing

in the appearance docket is no part of the filing, and failure to index reversely in name of defendant will not invalidate the notice. Nor is the service of original notice an essential of the filing or necessary to constitute notice: *Haverly v. Alcott*, 57-171.

707.

SEC. 2636.

Refusal by the court on motion to strike a demurrer from the files, because filed after the time herein provided, amounts in effect to an exten-

sion of the time and granting leave to file under § 2638: *Rumsey v. Robinson*, 58-225.

Where plaintiff was allowed a cer-

tain time to file an amended petition, after a demurrer to the original petition had been sustained, but did not file such amendment until after the expiration of the time fixed, and defendant thereupon moved to strike it from the files, and plaintiff asked for time to make resistance to the motion by filing an affidavit of excuse, which he did not file within the time fixed by the court nor until after the argument of defendant on the motion to strike was closed, *held*, that it was not error to strike the amended petition from the file, as asked: *Hayward v. Goldsbury*, 19 N. W. Rep., 307.

708.

SEC. 2639.

Where a demurrer has been submitted and not yet decided, the court may allow the party filing the demurrer to amend it and re-submit it, the prior submission having been set aside: *Poweshiek Co. v. Cass Co.*, 18 N. W. Rep., 895.

SEC. 2640.

The substitution of the word "noon" for the word "morning," in this section, as here made, *held* correct: *Brandt v. Wilson*, 58-485.

SEC. 2646.

Where defendant was sued as a partner, *held*, that evidence that he held himself out to the public as a partner was admissible in evidence without such fact being pleaded: *Hancock v. Hintrager*, 60-374. An allegation as to the doing of an act by the party, may be established by proof that the act was done by his agent: *Poole v. Hintrager*, 60-180.

710.

SEC. 2647.

Leave of court is not necessary to entitle plaintiff to file such amendment as here contemplated, and an appearance of defendant to move to strike such amendment from the files or to demur or answer thereto, obviates the necessity of notice of the amendment: *Kimball v. Bryan*, 56-632.

SEC. 2648.

The fact that the averments of the petition do not entitle plaintiff to the relief demanded should be raised by demurrer, and not through motion to strike them from the petition; but if the motion is made and passed upon without objection on that ground, the form of raising the question will not constitute reversible error: *Rhodabeck v. Blair Town Lot & Land Co.*, 17 N. W. Rep., 582. Objection on ground of defect of parties, unless raised by demurrer or answer, will be deemed waived: *Lillie v. Case*, 54-177. Misjoinder of parties is not a ground of demurrer. If not raised by motion it is waived, and cannot be afterwards raised, even in arrest of judgment: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

712.

SEC. 2649.

The objection in a demurrer to a petition in a law action that "the averments of the petition are insufficient to entitle the plaintiff to recover," is not sufficiently specific: *Davidson v. Biggs*, 61-309.

SEC. 2650.

Misjoinder of parties is waived where it does not appear on the face of the petition, if not taken by answer: *McKeever v. Jenks*, 59-300.

Such defect cannot be first raised by motion in arrest of judgment: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

If the facts stated in the petition do not entitle plaintiff to relief, the court may, at the trial, direct the jury to find for defendant: *Smith v. B., C. R. & N. R. Co.*, 59-73.

An objection that the facts stated in the petition do not entitle the plaintiff to any relief whatever, unless raised by demurrer, must be taken advantage of by motion in arrest of judgment. Such an objection,

is waived upon the face of the petition, is waived by going to trial on the merits and cannot be first raised in an instruction: *Cruver v. C., M. & St. P. R. Co.*, 17 N. W. Rep., 661.

Where a defect in a petition which might be raised by demurrer is not thus attacked, and defendant succeeds on the trial, he cannot, upon appeal by plaintiff, insist that on account of such defect plaintiff was not entitled to recover: *Kendig v. Overhulser*, 58-195.

An objection which might be raised by demurrer or motion in arrest, cannot be raised for the first time on appeal: *Church v. Higham*, 44-482.

Section applied: *Hanks v. North*, 58-396.

713.

SEC. 2654.

The rule that the filing of an amended pleading waives any error in sustaining a demurrer to such pleading is only applicable where the party, by pleading over, supplies omissions or cures defects in his pleading pointed out by the demurrer. Therefore, the filing of an amendment to an answer setting up a new defense does not waive error in sustaining a demurrer to the defense set up in the original answer: *Ingham v. Dudley*, 60-16.

The fact that the defendant, after excepting to the overruling of his demurrer, files an answer which is

withdrawn before the case comes on for trial, does not constitute a waiver of error in the overruling of his demurrer. The withdrawal of the answer restores the parties to the position they were in before the answer was filed: *Jordan v. Kavanagh*, 18 N. W. Rep., 851.

Where one division of an answer sets out a counter-claim, and a demurrer to that division as well as another portion of the answer is sustained, an amendment as to the other portion will not waive error in the ruling as to the counter-claim: *Folsom v. Winch*, 19 N. W. Rep., 305.

SEC. 2655.

A statement that defendant has no information sufficient to form a belief, &c., is not sufficient to raise an issue. The denial should be of any knowledge or information: *Clafin v. Reese*, 54-544.

Where the defendant sets out an equitable defense in an action at law

but does not ask equitable relief, the issue is to be tried as one at law; and held, that in an action upon a contract the defendant might set up mistake as a defense without asking a reformation of the contract in equity: *Carey v. Gunnison*, 17 N. W. Rep., 881.

715.

SEC. 2659.

The provisions of § 2540 allowing a counter-claim to be pleaded, even when barred as an independent cause of action, are applicable to counter-claims under the first or third subdivision of this section, as well as to those under the second: *Fol-*

som v. Winch, 19 N. W. Rep., 305 (overruling on rehearing the former opinion in same case).

In an action in equity by an insurance company for the cancellation of a policy, held, that a cause of action in behalf of defendant for a loss un-

der the policy was sufficiently "connected with the subject of the action" to be set up as a counter-claim under ¶ 2 of this section: *Revere Fire Ins. Co. v. Chambers*, 56-508.

In an action to recover upon a promissory note, a counter-claim in the nature of an action for the possession of the note, for the purpose of cancellation, is proper: *Sigler v. Hidy*, 56-504.

Although action on an attachment bond may be brought by way of counter-claim in the attachment proceeding (see § 3017 and notes), this applies only to a case where the right of action for damages for the wrongful suing out of the attachment inured to the attachment defendant and was held by him at the

very instant it came into existence. Where such defendant had previously made an assignment of his property, *held*, that the right of action on the attachment bond inured to the assignee, and that a subsequent assignment thereof by the latter to the defendant would not enable defendant to set it up as a counter-claim under subdivision 3 of this section: *Rumsey v. Robinson*, 58-225.

A counter-claim does not deny the cause of action or plaintiff's right to recover thereon. A defense denies the right to recover and shows either that plaintiff never had a right of action or that it is discharged: *Haywood v. Seeber*, 61-574.

716.

SEC. 2663.

The defendants to cross-bills or cross-actions brought by co-defendants, must be served with notice of the claim made against them: *Thode v. Spofford*, 17 N. W. Rep., 561.

Where plaintiffs brought action to set aside a guardian's deed to property held by defendant, and defend-

ant by cross-petition against certain mortgagees of the property from plaintiff, sought to have such mortgages set aside, *held* that the mortgages were properly brought in by cross-petition and their rights determined: *Bunce v. Bunce*, 59-533.

717.

SEC. 2665.

As a mere denial of affirmative matter not constituting a counter-claim is not permitted in a reply, such denial, if coupled with matter in confession and avoidance, will be disregarded and the reply will be regarded as containing nothing further than an admission and avoidance of the allegations of the answer, notwithstanding the provisions of § 2710, allowing inconsistent defenses to be stated in the same reply: *Meadows v. Hawkeye Ins. Co.*, 17 N. W. Rep., 600.

Where defendant in an action on a written contract of subscription set

up want of consideration, *held*, that plaintiff might prove facts showing the incurring of expenses on the faith of such subscription, without having pleaded it in reply, such matter being in denial and not in confession and avoidance of the matter averred in the answer: *University of Des Moines v. Livingston*, 57-307.

Where a defendant pleads a defense which avoids the cause of action, plaintiff cannot introduce evidence to show the waiver of such defense without having set up such waiver in the reply: *Zinck v. Phœnix Ins. Co.*, 60-266.

SEC. 2669.

Where an affidavit was headed "State of Iowa, Delaware County," and a signature with the addition "Notary Public" was authenticated with a seal, *held* that it was sufficient: *Stone v. Miller*, 60-243.

It seems that since the provisions

of Rev. § 2913 are not retained, it is not necessary that the certificate to the affidavit show the name of the affiant. There is no such requirement of law as to affidavits not made to pleadings: *Ibid*.

718.

SEC. 2673.

Where the certificate shows that affiant was possessed of the requisite knowledge of the facts to make a verification, that is sufficient, although it be not certain to a certain intent, in every particular: *First National Bank of Bellaire v. Mason*, 57-105.

719.

SEC. 2681.

As to what is sufficient to constitute a libel, see § 4097 and note in supplement.

SEC. 2682.

The rule that in order to establish the truth of a charge imputing a crime as a defense in an action for slander, the crime must be proved beyond a reasonable doubt, is not applicable in other civil cases where the commission of a criminal act is in question: See notes in supplement to § 4423.

720.

SEC. 2683.

While a party interested in the subject-matter involved may unite with the defendant in resisting the claim of the plaintiff, he cannot ask to be substituted as the defendant to the action in place of the original defendant: *Britton v. D. M., O. & S. R. Co.*, 59-540.

721.

SEC. 2684.

An intervenor cannot be allowed to tender an issue which can be tried only by a change in the form of proceeding, and a continuance of the cause for testimony: *VanGorden v. Ormsby*, 55-657.

SEC. 2685.

A party cannot, by one petition, intervene in several distinct and unconsolidated actions, nor can an agent make his principal a party to the intervention by filing the petition in his (the agent's) name: *Rosenbaum v. Adams*, 61-382.

SEC. 2689.

Where the amendment set up a distinct cause of action, which when pleaded, was barred by the statute of limitations, *held*, that it would not be considered as dating back to the date of the original petition, so as to avoid the bar: *Van der Haar v. Van Domseler*, 56-671.

A demurrer may be amended: *Poweshiek Co. v. Cass Co.*, 18 N. W. Rep., 895.

It is not error to allow an amendment after the conclusion of the testimony, and for the purpose of conforming the pleadings to the proof, even when such amendment changes the issue. If, after the amendment, the opposing party can make it appear that he is surprised, or is not prepared to meet the issue raised by

the amendment, a continuance will be allowed at the cost of the other party. If such continuance is not applied for, the objection is waived: *Thomas v. Town of Brooklyn*, 58-438.

Held, error to refuse leave to plaintiff after the close of the arguments to file an amendment to his petition for the purpose of conforming the allegations to the proofs: *Tiffany v. Henderson*, 57-490.

Where suit was brought in the name of a township, *held*, that, although the township had no capacity to sue, the name of the township officer entitled to the possession of the money sued for might, on motion, be substituted as plaintiff and the action proceed: *Wells v. Stomback*, 59-376.

724.

SEC. 2690.

Where, after a verdict for defendant, plaintiff moved to set aside the verdict and for a new trial on the ground of error in the admission of evidence, and the court overruled such motion, *held*, that as plaintiff's petition was not sufficient to show a cause of action, the decision of the court below would not be reversed although the defects in the petition had not been raised by demurrer: *Wetmore v. Mellinger*, 18 N. W. Rep., 870.

725.

SEC. 2695.

Where the interrogatories are attached to an answer which requires no reply, the court should be asked to fix a time within which they should be answered, before moving to dismiss the action for want of such answers: *Hogaboom v. Price*, 53-703; *Garvin v. Cannon, Id.*, 716.

726.

SEC. 2710.

Notwithstanding this section, a denial and a confession and avoidance of the affirmative allegations of an answer not constituting a counter claim, cannot be set up in the reply. The denial, being improper under § 2665, will be disregarded: *Meadows v. Hawkeye Ins. Co.*, 17 N. W. Rep., 600.

SEC. 2711.

Section applied in a particular case: *Baker*, 57-197.
First National Bank of Davenport v.

SEC. 2712.

A denial of an indebtedness to the plaintiff in any sum whatever, raises no issue: *McIntosh v. Lee*, 57-356.

727.

SEC. 2713.

In an action founded upon tort, plaintiff cannot be required to attach a bill of particulars of the items included in his claim for damages, although his petition may, in a proper case, be required to be made more specific in this respect under provisions of § 2720: *McDonald v. Barnhill*, 58-669.

728.

SEC. 2716.

This section implies that where the plaintiff or defendant is a corporation or partnership, such averment of corporate or partnership capacity should be made: *Sweet v. Ervin*, 54-101; and see *Steamboat, etc., v. Wilson*, 11-479; *Byington v. M. & M. R. Co., Id.*, 502; *Hard v. City of Decorah*, 43-313.

SEC. 2717.

An answer of a defendant denying that it was or ever had been a corporation, etc., *held*, sufficiently specific: *Folsom v. Star Union, etc., Line*, 54-490. A general denial does not put in issue the fact of administratorship where it is generally averred: *Mayer v. Turley*, 60-407.

SEC. 2719.

Immaterial matter is anything stated in the pleading which, if established, would not entitle the party to, or aid him in obtaining the relief demanded, or in sustaining the defense pleaded. Any party required to answer a pleading containing irrelevant matter is aggrieved thereby and may have it stricken out on motion: *Johns v. Pattee*, 55-665.

729.

SEC. 2727.

The averment of malice by plaintiff should be made in the petition or an amendment thereto. Such allegation made in the reply only, would not be sufficient: *Jones v. Marshall*, 56-739.

730.

SEC. 2730.

[The word "denying," in the seventh line of this section is a misprint. It should be "deny."]

Where a written assignment was not so incorporated into an answer as to render denial of signature under oath necessary, held, error to receive such assignment in evidence without proof of the signature: *Hay v. Frazier*, 49-454.

731.

SEC. 2732.

This section does not prohibit a defendant who has filed a plea in abatement which has been held bad on demurrer, from answering in bar: *Winet v. Berryhill*, 55-411.

732.

SEC. 2740.

Issues of fact in an action at law may be such as rest upon an equitable defense, and the fact that the party interposes such equitable defense where he does not ask equitable relief, does not entitle him to a trial of the issue by equitable procedure: *Carey v. Gunnison*, 17 N. W. Rep., 831.

SEC. 2741.

The evidence in full is required in law actions only when, as an objection to the judgment, it is urged that the verdict is not supported by the testimony. Upon no other question would it be proper to take all the evidence to the supreme court on appeal. The supreme court will pass upon the correctness of instructions or rulings as to the admission or rejection of testimony when the bill of exceptions contains a statement that there was evidence tending to prove the facts to which the instructions are applicable, or states evidence, not necessarily in full, about which the question as to the admissibility of evidence arises. The issues in the case in determining the applicability of instructions and the competency and relevancy of the evidence are to be determined from the pleadings: *Kelleher v. City of Keokuk*, 60-473.

In order to determine whether prejudice resulted to appellant by reason of the exclusion of evidence, not only the questions, but the answers, or the facts that they would tend to establish, should appear in the record. Unless prejudice be thus shown, the judgment cannot be disturbed on account of exclusion of evidence: *Jenks v. Knott's Mexican Silver Mining Co.*, 58-549; and see cases in supplement to § 2836.

733.

SEC. 2742.

[19 G. A., ch. 35, repeals this section and substitutes and enacts a substitute therefor, with an additional section, as follows:]

SEC. 2742. But in equitable actions, wherein issue of fact is joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party may, at pleasure, take his testimony or any part thereof, by deposition. All the evidence so taken shall be certified by the judge at any time within the time allowed for the appeal of said cause, and be made a part of the record, and go on appeal to the supreme court, which shall try the cause anew.

SEC. 2. This act shall apply to all causes not already submitted to the supreme court, and any certificate heretofore made by the said trial judge within the six months allowed for appeal shall be deemed to be made within proper time.

The substitute for the original section (17 G. A., ch. 145), *held*, applicable to the trial of a case commenced before the act was passed, but not tried until after it took effect: *Bailey v. Malvin*, 53-371.

Where an equitable action was sent back, on appeal upon errors assigned, for a new trial, with permission to the parties to replead, and new pleadings were filed and a trial thereon was had after the repeal of § 2742 and the enactment of this substitute, *held*, that the method of securing trial *de novo* on appeal was not determined by that section, though it was in force when the first trial was had: *Cross v. B. & S. W. R. Co.*, 58-62.

The taking of the testimony in short-hand, no transcript thereof being filed, is not a taking down "in writing": *Godfrey v. McKean*, 54-127.

Where the certificate of the judge stated that the record contained all the evidence "introduced" on the trial, *held*, that this was insufficient to show that it contained all the evidence offered, as required by this section: *Taylor & Co. v. Kier*, 54-645. So *held*, as to a certificate showing that the record contained all the evidence used on the trial: *Hart v. Jackson*, 57-75. So *held*, also, as to a certificate that the record contained all the evidence "adduced," it further appearing from the record itself that in several instances evidence was offered and excluded which was not made part of the record: *Tuttle v. Story County*, 56-316.

A certificate that the evidence cer-

tified was all that was "offered, adduced and introduced," *held* sufficient: *City of Marshalltown v. Forney*, 61-578. So *held*, also, as to a certificate that the evidence certified "is all the evidence offered in said trial, as well as the evidence introduced and admitted and used in the trial": *Wood v. Wood*, 61-256.

A certificate that the evidence certified was "all the evidence submitted in said cause," *held* sufficient: *Miller v. Wolf*, 18 N. W. Rep., 889.

A certificate not attached to any evidence, but merely showing the names of the witnesses, and the side upon which they were introduced, respectively, without referring to any testimony as taken in writing, *held* insufficient: *Alexander v. McGrew*, 57-287.

Where the issues in the case are equitable, it will be presumed that it was tried as an equitable action, unless the record otherwise shows: *Baldwin v. Davis*, 18 N. W. Rep., 897.

An action to test the validity of a will is not triable *de novo* on appeal: *Kelsey v. Kelsey*, 57-383.

On trial *de novo* in the supreme court, the appellant, having secured a reversal, is entitled to have such decree entered as the lower court should have entered upon the record as made: *First National Bank of Davenport v. Baker*, 60-132.

Where, by an agreement of the parties in an equity case, the facts are reduced to a statement in writing which takes the place of depositions, or oral testimony reduced to writing, an appeal and a trial *de novo* may be

had thereon: *Williams v. Wells*, 16 N. W. Rep., 513.

Where appellant insists upon a trial *de novo*, and appellee objects, there can be no ground of complaint of either party where the court tries the cause anew, and affirms the judgment: *McClain v. McClain*, 57-167.

Upon trial of an equitable action *de novo*, the supreme court passes upon the sufficiency of the evidence properly admitted, and need not consider the objections to the admissibility of evidence made in the court below: *Hanks v. Van Garder*, 59-179. And the court will consider all questions presented which legitimately appear on the record, whether urged or relied on in argument in the lower court or not: *Seymour v. Shea*, 16 N. W. Rep., 196.

Where a case is tried without objection or exception in the court below as a case in chancery, and appealed to the supreme court in form to be tried *de novo*, it will be so tried, whether properly triable as an equitable action or not: *Clute v. Frasier*, 58-268.

As the provisions of this section, as amended, can be complied with and the full benefit of a trial *de novo* be secured only by causing all the evidence offered to be written down, if questions asked are not permitted to be answered, and thus made part of the record, the defeated party must be allowed to have a review of such questions upon error. Otherwise he would be denied the benefit of an appeal: *Clinton Lumber Co. v. Mitchell*, 61-132.

Under the section as it stood before the passage of the last substitute, *held*, that the certificate of the judge must be made at the term at which the cause is tried, or during the following vacation: *Cornell v. Cornell*, 54-366.

Evidence certified at such time as is provided for under 19 G. A., chapter 35, although before the passage of this act, may be considered in an appeal submitted after the taking effect of the act: *Starr v. Case*, 59-491.

The judge may certify to the record within the proper time, even though it be after the appeal is taken: *Goff v. Hawk-eye Pump, etc., Co.*, 18 N. W. Rep., 307.

Where the abstract does not show that the judge's certificate of the evidence was made within the period required by law, the case cannot be tried *de novo*: *Mitchell v. Laub*, 59-36.

Where it appears that the evidence on the trial of an equitable action consists wholly of depositions and papers on file, the certificate of the clerk to such evidence, as provided for in § 3184, is sufficient to authorize the supreme court to entertain the appeal. The rule requiring the certificate of the judge to be made during the term has no application to such certificate of the clerk: *Cross v. B. & S. W. R. Co.*, 58-62.

That in order to enable the supreme court to try the case anew the abstract must purport to contain all the evidence introduced on the trial, see notes in supplement to § 3184.

Where a party in an equitable action stands upon the ruling upon a motion or demurrer and desires to appeal therefrom, he should take exception to the ruling and assign errors, as in a law action: *Powers v. County of O'Brien*, 54-501; *Patterson v. Jack*, 59-632; and see notes to § 2831.

Where an appeal is taken from a decree in an equitable case triable *de novo*, an exception to such decree is not necessary: *Dicken v. Morgan*, 59-157.

735.

SEC. 2746.

Where a plaintiff, seeking to recover a sum of money, based his right in the first count of his petition upon the ground of his minority at the time of making a contract, and in the second count upon the ground

of fraudulent representations, *held*, that it was not error in the court to refuse to grant separate trials upon the two counts: *Childs v. Dobbins*, 61-109.

SEC. 2747.

A bar-docket printed in pursuance of the provisions of this section is no

part of the official records of the court: *Gifford v. Cole*, 57-272.

736.

SEC. 2749.

Under this section there is a judicial discretion in the court which, when exercised, will not be reversed unless such discretion has been abused, and in such cases counter affidavits on the part of the state, denying the facts shown by defendant in a criminal prosecution to obtain a continuance, may be considered: *State v. Wells*, 61-629.

739.

SEC. 2767.

The fact that vacancies in the panel from which the jury is drawn have been filled with talesmen in an illegal manner, is not a ground for challenge to the panel. The objection should be raised by challenge to such talesmen when called: *Buford v. McGetchie*, 60-298.

SEC. 2771.

Error in overruling a challenge for cause will be considered as without prejudice, if the party does not exhaust his peremptory challenges: *State v. George*, 18 N. W. Rep. 293.

SEC. 2772.

Where it was shown that a juror had a bet of twenty-five cents outstanding which would be affected by the result of the trial, and this fact was not disclosed when he was interrogated as to his qualifications, *held*, that he was incompetent, and that a new trial should have been granted: *Seaton v. Swem*, 58-41.

741.

SEC. 2779.

Where the court, in advance, informed the respective parties that the number of witnesses as to a particular point (the value of property in an appeal from an assessment for damages for right of way) would be limited to five on each side, *held*, that such action was not erroneous: *Errett v. U. P. R. Co.*, 59-243; and see *Bays v. Hunt*, 60-251.

Unless an abuse of discretion is shown, the action of the court in allowing the plaintiff on rebuttal to introduce evidence which is not strictly rebutting, furnishes no ground of reversal: *Hess v. Wilcox*, 58-380.

The absence of the judge during the argument of the case to the jury

will not constitute error sufficient to authorize reversal of a judgment, unless prejudice resulting from his absence, or some ground from which such error can be presumed, is shown: *Baxter v. Ray*, 17 N. W. Rep. 576. See, also, *Hall v. Wolff*, 61-559.

Under the circumstances of a particular case, *held*, that the order of argument rested largely in the discretion of the court; and a reversal would not be justified on account of the ruling in relation thereto, in the absence of a clear showing of abuse of discretion and prejudice: *Van Horn v. Smith*, 59-142.

743.

SEC. 2789.

Instructions written with a lead-pencil are sufficiently "in writing": *Harvey v. Tama Co.*, 53-228.

A cutting out of a portion of the instruction as asked, will not constitute error where the change is a proper one: *Ham v. W., I. & N. R'y Co.*, 61-716.

Where a court is warranted in directing a jury to return a verdict of a particular character, it is not prejudicial error to do so orally instead of in writing: *Milne v. Walker*, 59-186.

All instructions should be read together for the purpose of determining

the accurateness of any part of the charge: *Beazan v. Incorporated Town of Mason City*, 58-233; *Gronan v. Kukkuck*, 59-18.

It is error to give instructions based upon a state of facts or an issue as to which there is no proof: *Clark v. Ralls*, 58-201; *Hess v. Wilcox*, 58-380; *Hall v. Wolff*, 61-559; *Manning v. B., C. R. & N. R. Co.*, 17 N. W. Rep., 669. But an instruction embodying a correct presentation of the law, which may have been given to meet positions taken in argument, will not be ground for reversal, although not applicable to the evidence, if not of such nature as to mislead the jury: *Hall v. Stewart*, 58-681.

It is error to give an instruction which assumes the existence of a material fact about which there is conflict in the evidence: *Roach v. Parcell*, 61-98.

An instruction to the jury as to liability for a cause of injury not alleged in the petition is ground for a reversal: *Cressy v. Town of Postville*, 59-62.

An erroneous instruction cannot be said to have been without prejudice unless that fact affirmatively appears: *Roby v. Appanoose Co.*, 18 N. W. Rep., 711.

Where an erroneous instruction as to a particular matter is given, but from the verdict it is apparent that the jury have adopted a view of the case which renders such matter immaterial, the error will be considered as without prejudice: *Hall v. Stewart*, 58-681; *Hall v. Ballou*, 58-585.

In a particular case held that there was no prejudicial error in referring in an instruction to the matter charged in the petition, without specifying also an amendment to the petition: *Fuhs v. Osweiler*, 59-431.

The giving of an erroneous instruction held not to be error without prejudice in a particular case: *Kendig v. Overhulser*, 58-195.

If the facts stated in the petition do not entitle plaintiff to relief, the court may, at the trial, direct the jury to find for defendant: *Smith v. B. C. R. & N. R. Co.*, 59-73.

It is not proper to direct a verdict against a party for failure to allege and prove an essential element of his cause of action or defense (as, for instance, for failure to aver performance of conditions of a contract on which

he relies). Such failure is a ground for motion in arrest of judgment, and the party should be allowed the opportunity to cure it as provided in § 2342: *Wrought Iron Bridge Co. v. Greene*, 53-562.

In a particular case, held, that if the court had submitted the case to the jury on the evidence, and there had been a verdict for the plaintiff, it would have been its duty to set the verdict aside as being wholly unsupported, and therefore that the instruction to the jury to find for the defendant was proper: *Bothwell v. C., M. & St. P. R. Co.*, 59-192.

Under the facts in a particular case, held, that the court should have given an instruction asked by plaintiff directing the jury to find a verdict for him and assessing his damages at a certain sum: *Fairburn v. Goldsmith*, 58-339.

Where the court dismisses an action or counter claim, after the evidence has been introduced, the party prejudiced by such ruling is entitled to have every thing on which his right to recover depends, which the evidence tended to prove, regarded as established: *Welch v. Jenks*, 58-694.

It is improper to direct the jury to the pleadings for the purpose of ascertaining what the issues are or what is or is not admitted or denied: *Poster v. Knight*, 19 N. W. Rep., 282; *Bryan v. C., E. I. & P. R. Co.*, *Id.*, 295.

It is error in the court to submit the construction of a contract to the jury: *Vaughn v. Smith*, 58-553.

The court cannot, by instructions to the jury, cure error in admitting evidence: *Wicks v. Town of De Witt*, 54-130.

Where the instructions given are correct as far as they go, there will be no error in failing to give instructions as to other points, upon which no instructions were asked: *Mackie v. Central Railroad of Iowa*, 54-540.

A party cannot complain of failure of the court to instruct with reference to a particular matter, if he has not asked specific instructions in reference thereto: *Hall v. Stewart*, 58-681.

It is error sufficient to warrant a reversal that instructions laid down two contradictory rules for the guidance of the jury, if it appears that they may have adopted the erroneous instead of the correct one: *State v. Hartzell*, 58-520.

Instructions to the jury constitute the law of the case, and must be followed by the jury whether right or wrong: *Stewart v. Smith*, 60-275. Where the verdict is in conflict with the instructions a judgment will be reversed on appeal without inquiry as to the correctness of the instructions: *Musser v. Maynard*, 59-11; *Griffith v. Parton*, 59-31. Therefore it cannot be presumed in favor of the verdict on appeal that it was upon the theory of the case which is correct in law, but in violation of an instruction given: *Mast v. Pearce*, 58-579.

A justice of the peace has no authority to give instructions to a jury in his court: *St. Joseph M'fg Co. v. Harrington*, 53-380.

A general exception to the refusal to give several instructions, is sufficient: *Harvey v. Tama Co.*, 53-228; *Williamson v. C., R. I. & P. R. Co.*, 53-126, 143.

If there is but a single proposition stated in the charge, an exception thereto, if taken at the time the charge is given, is sufficient: *Boyce v.*

Wabash R'y Co., 18 N. W. Rep., 673.

Instructions cannot be considered on appeal which are not excepted to within the time here specified, even though exceptions thereto are taken in the bill of exceptions filed within such time as is agreed upon by the parties: *Bailey v. Anderson*, 61-749.

Where the motion for new trial stated that "the court erred in its charge to the jury excepted to at the time by the plaintiff," and it did not appear that exceptions were taken to the instructions when given, *held*, that error in giving instructions could not be urged: *Stevens v. Taylor*, 58-664.

In order to secure the review of instructions properly excepted to, it is only necessary that the record present so much of the evidence as will show that facts to which instructions are applicable were before the court. And what is usually necessary is a statement in the bill of exceptions that there was evidence tending to prove such facts: *Kelleher v. City of Keokuk*, 60-473.

746.

SEC. 2790.

Where the value of property is in issue and the jury have inspected the premises, it is not error to instruct them that in determining the market

value of the property they are to weigh the evidence in the light of what they have seen: *Thompson v. City of Keokuk*, 61-187.

747.

SEC. 2799.

This section is applicable to a case where a witness is by accidental delay prevented from reaching the place of trial in time for the introduction of his testimony at the proper time: *Smith v. State Insurance Co.*, 58-487.

Even if the power of the court under this section is discretionary, the abuse of such discretion in refusing to admit testimony in a proper case,

will be ground for reversal: *Smith v. State Insurance Co.*, 58-487.

This section was applied in a case tried in equity upon depositions, and the party was allowed, after the announcement of the decision of the court and before entry of judgment, to introduce oral evidence to correct a misstatement in the witness's deposition: *Eggspjeller v. Nockles*, 58-649.

749.

SEC. 2808.

Where the jury in answer to special interrogatories used the words "think" and "have reason to believe," *held*, that such answer presented in positive language the conclusion reached by the jury: *Martin v. Central Iowa Railway Co.*, 59-411.

It is not error to refuse to submit to the jury interrogatories not submitted to opposing attorneys until after the argument has commenced. It is not sufficient that they are submitted to the court before that time: *Crosby v. Hungerford*, 59-712.

Held, not prejudicial error to

dismiss the jury without requiring answer to an interrogatory propounded, where such answer if given could not have controlled the general verdict: *Dreher v. I. S. W. R. Co.*, 59-599.

This section contemplates that specific questions of fact shall be submitted to the jury, and not such questions as whether a person was guilty of negligence as to a certain matter, and if so, in what manner, etc.: *Lewis v. C., M. & St. P. R. Co.*, 57-127.

The court cannot be required to ask special findings as to immaterial facts: *Lauson v. C., R. I. & P. R. Co.*, 57-672.

A special finding by one jury is not binding upon the court on a second

trial: *Hollenbeck v. City of Marshalltown*, 17 N. W. Rep., 155.

The court has no authority against the objection of the party to direct the jury to return only a special verdict. Either party has a right to a general verdict if he demands it and the jury renders it: *Shultz v. Cremer*, 59-182.

The fact that the answer to a special interrogatory is not inconsistent with the general verdict, and nothing is claimed for it, does not prove that its submission to the jury was not erroneous; it may nevertheless have misled the jury as to the effect to be given to the facts therein referred to: *Ferguson v. Central Iowa R. Co.*, 58-293.

751.

SEC. 2816.

As to reference in matters of administrator's accounts see § 2412 and notes.

Where, upon the evidence it was

impossible to determine whether a referee's report was correct or not, held, that it should be allowed to stand: *In re Heath's Estate*, 58-36.

SEC. 2821.

Where the report of the referee is to be reviewed, exceptions should be taken to it as the foundation of the review; an exception to the final

judgment will not enable the supreme court on appeal to inquire into the correctness of the report: *Bauder v. Hinckley*, 60-185.

753.

SEC. 2831.

Exception to a judgment must be taken at the time it is rendered: *Nagel v. Guittar*, 17 N. W. Rep., 671.

Where a party in an equitable suit stands upon the ruling upon a motion or demurrer, and desires to appeal therefrom, he should except thereto as in a law action: *Powers v. County of O'Brien*, 54-501; *Patterson v. Jack*, 59-632; and see notes to § 2742.

An exception to a final decree in an equitable action is not necessary where the party is entitled to a trial *de novo* on appeal: *Dicken v. Morgan*, 59-157.

An exception to the overruling of a demurrer is all that is necessary to preserve the party's right of appeal from such ruling. It is not necessary for him to except again when the final judgment is entered: *Jordan v. Kavanagh*, 18 N. W. Rep., 851.

An exception to the overruling of

a motion for a new trial is sufficient exception to the judgment: *Gullither v. C., R. I. & P. R. Co.*, 59-416.

Where a motion asking for judgment on the findings of a special verdict was overruled, and proper exception taken, held, that it was not necessary to except to the judgment afterwards rendered: *Aldrich v. Price*, 57-151.

Where time is not extended for the settling of the bill of exceptions, it must be signed and filed within the time fixed by this section: *Hahn v. Miller*, 60-96; *Gates v. Brooks*, 59-510.

If the bill of exceptions is not filed within the time prescribed in the order, it will be disregarded or stricken from the record: *Fuller v. C., R. I. & P. R. Co.*, 61-125.

Where it appears that the bill of exceptions was signed within proper time and it is made part of the transcript, it will be presumed, in the absence of all showing to the con-

trary, that it was filed within the proper time: *Wilson v. First Presbyterian Church of Mt. Ayr*, 60-112.

It is not necessary that affidavits which have been presented on the motion for change of venue be preserved and made matter of record by bill of exceptions. When filed they become part of the record, and may be certified by the clerk on appeal in the same manner as other matters of record: *McGovern v. Keokuk Lumber Co.*, 61-265.

A bill of exceptions, when signed and filed, becomes a part of the

record and the judge cannot change or modify it by a contradictory statement or certificate filed with the papers of the case. Where a party has excepted to rulings upon the evidence when made and has not waived his objection, and his bill of exceptions is filed within the time allowed by law or agreed upon, between the parties, it is competent for him to embody in it all ground of objection upon which he desires a review of the cause, and to waive such others as he sees fit: *Dedric v. Hopson*, 17 N. W. Rep., 772.

755.

SEC. 2834.

A skeleton bill of exceptions which does not identify the evidence which is to be inserted, but merely directs the clerk to insert all the evidence, or "plaintiff's evidence" and "defendant's evidence," is not sufficient. The clerk has no power to determine what is to be inserted under such a direction. The bill must so identify the evidence that a mistake of the clerk as to what is to be inserted in the transcript may be readily corrected: *Tootle v. Phoenix Ins. Co.*, 17 N. W. Rep., 583; *Wells v. B. C. R. & N. R. Co.*, 56-520; *Wilson v. Tenant*, 61-194.

A bill of exceptions referring to the evidence in the following manner: "the following rulings were had and reduced to writing by said reporter, being all the testimony in said trial. Here insert evidence in full": held to sufficiently identify the evidence: *Wilson v. First Presbyterian Church of Mount Ayr*, 60-112.

Where the original notes of the reporter are filed, and the reporter has therein marked and identified, in writing, the papers offered in evidence, and the clerk is directed to insert in the bill of exceptions all exhibits referred to and identified by said reporter, the written evidence offered is sufficiently identified to become a part of the record: *Town of Manson v. Ware*, 19 N. W. Rep., 275.

The evidence may be sufficiently incorporated into the bill of exceptions by reference to the stenographer's report of the evidence, whether such report is certified by the reporter or not. A transcript or extension in long-hand of the reporter's notes is not necessary to complete the bill of exceptions, and is not necessary un-

less a transcript is required: *Hamp-ton v. Morehead*, 17 N. W. Rep., 202.

The only way oral evidence introduced on the trial of the cause can be preserved and identified for the purposes of an appeal, is by bill of exceptions signed by the trial judge. A paper purporting to contain a portion of the evidence introduced on a trial, and certified to by the official reporter, but not embodied in the bill of exceptions, cannot be recognized as a part of the transcript: *State v. Hemrick*, 17 N. W. Rep., 594.

As to incorporating short-hand report of testimony in bill of exceptions, see § 3777 and notes.

Where the bill of exceptions directed the clerk to insert the instructions given by the court on its own motion, and such instructions were incorporated by the clerk in the transcript, held, that it would not be presumed that instructions were given by the court other than on its own motion, and therefore that it would be considered that all the instructions given were before the court, and that the identification of the instructions in the skeleton bill of exceptions was sufficient: *King v. Barber*, 17 N. W. Rep., 88.

Where the affidavits on which the change of venue is asked in a civil case are before the court, it will presume that it has before it all the evidence upon which the court acted. In such case the opposite party cannot file counter affidavits, and in the absence of any showing it will not be presumed that affidavits were produced in court and subjected to a cross-examination: *McGovern v. Keokuk Lumber Co.*, 61-265.

756.

SEC. 2836.

The fact that the court erroneously sustains a demurrer to a count of the answer is error without prejudice, where the issue raised by such count is elsewhere presented and passed upon by the jury: *McKeever v. Jenks*, 59-300.

The admission of evidence and giving instructions as to a certain matter, held to be error without prejudice, in view of the fact that the successful party was entitled to recover without regard to such evidence and instructions: *Langford v. Ottumwa Water Power Co.*, 59-283.

Where evidence is admitted over the objection of a party it will be presumed that the court consid-

ered it and that, if it was erroneously admitted, prejudice resulted: *Leasman v. Nicholson*, 59-259.

In order to determine whether prejudice has resulted to a party by the exclusion of evidence offered by him, the answers, or the facts proposed to be proved by the witness in response to the question asked, must be made to appear. Unless prejudice be thus shown, the error in sustaining objection to the question or the evidence offered will not be ground of reversal: *Jenks v. Knott's Mexican Silver Mining Co.*, 58-549; *Bays v. Hunt*, 60-251; *Kelleher v. City of Keokuk*, 60-473; *Klaman v. Malvin*, 61-752.

SEC. 2837.

While it is the general rule that the order of the court granting a new trial will not be as readily reversed on appeal as when the motion has been denied, yet it is limited to cases where there is a discretion reposed in the court below, or where the new trial is granted on the ground that the verdict is against the evidence, or because injustice has been done. No discretion is reposed in the court in determining whether or not evidence which is relied on to entitle the party to new trial on the ground of newly discovered evidence, is cumulative, and a ruling of the court in granting a new trial upon the showing as to such evidence, will be reviewed as readily as though the court had refused to grant the new trial: *Town of Manson v. Ware*, 19 N. W. Rep., 275.

There are very many things attendant upon the trial in a *nisi prius* court which never can be presented to an appellate court. The *nisi prius* court has much better facilities for determining whether justice has been done and hence its ruling is always regarded by the supreme court as having a presumption in its favor: *Conklin v. City of Dubuque*, 54-571; *Hill v. Denslinger*, 61-240; *Johnson v. C. R. I. & P. R. Co.*, 58-348.

When the trial court determines that the verdict is contrary to the evidence, and ought to be set aside on that ground, the case must be a very clear one to warrant an appellate court in interfering with its action: *Moran v. Harris*, 19 N. W. Rep., 278.

The fact that a juror had an outstanding bet, which would be directly affected by the result of the trial, which fact was not disclosed by him when questioned as to his competency and was not known to the adverse party, held, sufficient ground for a new trial, although the bet was trifling in amount: *Seaton v. Swem*, 58-41.

Acts of social intimacy between a juror and an attorney in the case, during the progress of the trial, held sufficient misconduct to require the granting of a new trial: *Stafford v. City of Oskaloosa*, 57-743.

The drinking of intoxicating liquors at the instance and solicitation of one of the parties cannot be made ground for new trial on the motion of such party: *Webster Co. v. Hutchinson*, 60-721.

An affidavit of a person who states that he heard a juror talking about the evidence that had been produced in the case, but not giving the name of the juror nor the statements made by him, is not sufficient to require the verdict to be set aside for misconduct: *Brant v. City of Lyons*, 60-172.

The fact that a juror is shown to have gone to sleep during the trial of the case, if known to the attorney of the party at the time, should be called to the court's attention at once and cannot be raised for the first time in a motion for a new trial: *Carey v. Gunnison*, 17 N. W. Rep., 881.

Where statements were made by an attorney in his concluding argument not warranted from anything

in the evidence and relating to the animus actuating the other party, etc., *held*, that it was misconduct for which a new trial should have been granted; and that where such statements were made while the judge was not present but was hearing another case, the fact that objection was not made to the court by the opposite party at the time of the misconduct, did not defeat his right to call it into question: *Hall v. Wolff*, 61-559.

That the successful party has introduced false testimony constitutes misconduct which, upon motion, requires granting of a new trial: *First National Bank of Shenandoah v. W., St. L. & P. R'y Co.*, 17 N. W. Rep., 48.

The question whether the verdict ought to be set aside on account of alleged misconduct, is left very largely to the sound discretion of the trial court, and, in the absence of a showing of an abuse of discretion, its action will not be reversed upon appeal: *Perry v. Cottingham*, 18 N. W. Rep., 680.

The fact that a material witness who is expected to be present at the trial is accidentally delayed and unable to reach the place of trial in time, would be ground for a new trial. But if he might be introduced after the conclusion of the testimony, and even after some of the arguments have been made to the jury, application for leave to introduce him should be made under § 2799: *Smith v. State Insurance Co.*, 58-487.

The incompetence of an attorney does not ordinarily constitute ground for a new trial. Indeed in civil cases the rule may be regarded as almost

invariable: *Stette v. Bengel*, 61-658.

In a particular case, *held*, that the verdict was not so wanting support in the evidence as to warrant the court in saying the jury were governed by either passion or prejudice, and therefore it could not reverse the judgment: *Beazan v. Incorporated Town of Mason City*, 58-233.

Where the direct testimony and circumstances shown could be reconciled and made harmonious, *held*, that a verdict in conflict with such testimony should have been set aside and a new trial granted: *Sullivan v. W., St. L. & P. R. Co.*, 58-602.

The party moving for a new trial on the ground of newly discovered evidence, must make it appear that the proposed evidence is competent and material: *Town of Manson v. Ware*, 19 N. W. Rep., 275.

Newly discovered evidence in a particular case, *held*, not sufficient ground for a new trial: *Harnett v. Harnett*, 59-401.

Affidavit for new trial in particular case on ground of newly discovered evidence, *held*, not to show sufficient diligence in attempting to secure the evidence before the former trial: *Smith v. Wagaman*, 58-11.

A new trial should not be granted upon the ground of newly discovered evidence which is merely cumulative or impeaching: *Morrow v. C., R. I. & P. R. Co.*, 61-487.

Evidence as to declarations of a party in relation to the terms of the contract sued upon, is not to be deemed cumulative with other evidence of such contract: *Cook v. Smith*, 58-607.

761.

SEC. 2838.

It is not required that the motion for new trial be determined at the term at which it is filed. It stands like any other matter submitted to the court, and upon final adjournment, in absence of agreement that it may be decided in vacation, goes over to next term by operation of law; and the court has jurisdiction to determine it at such term: *Van der Haar v. Van Domseler*, 56-671.

A motion filed after the time herein specified cannot be considered for any cause except newly discovered evidence: *Clinton National Bank v.*

Graves, 48-228; *Patterson v. Jack*, 59-832.

Under facts in particular case, *held*, that there was not sufficient excuse for not filing motion for new trial by the time stipulated by the parties, even conceding that in a proper case such failure might be excused: *Boema v. C., R. I. & P. R. Co.*, 58-150.

This section is not applicable to a motion by the plaintiff to reinstate a cause which has been dismissed for want of prosecution: *Byington v. Quincy*, 61-430.

A judgment entered before the expiration of the time for filing motion for a new trial, under the statute or stipulation of the parties, could not be set aside on that account: *Beems v. C., R. I. & P. R. Co.*, 58-150.

Where a court takes a recess during the term, such recess is not to be excluded in determining the time when a motion for a new trial shall be filed: *Ewaldt v. Farlon*, 17 N. W. Rep., 487.

The affidavit of a juror is not receivable to show that he only concurred in the verdict because he had learned that his father was very sick, and for that reason was unwilling to hold out longer, and that the verdict was not his deliberate judgment: *Fox*

v. Wunderlich, 20 N. W. Rep., 7.

When it is sought to sustain the verdict, or to show the basis upon which the verdict was found, not for the purpose of impeaching, but for the purpose of determining the rights of the parties in a mere matter of costs, affidavits of jurors may be considered; for instance, on the question whether any allowance of interest was included in the verdict: *Swails v. Cissna*, 61-693.

Affidavits of the attorney of the unsuccessful party as to statements made to him by jurors, showing misconduct of the jury, held, not admissible to impeach such verdict. Such evidence is merely hearsay: *State v. Quinton*, 59-362.

762.

SEC. 2842.

It is not proper to direct a verdict against a party on account of the insufficiency of his pleading (as, for instance, where he has failed to aver performance of conditions of a contract on which he relies), as such

action of the court would deprive such party of the benefit of this section: *Wrought Iron Bridge Co. v. Greene*, 53-562. See, also, on this point, notes in supplement to § 2650.

763.

SEC. 2844.

Where the character of the court's instructions to the jury was stated to the parties, but they had not yet been read over to the jury, held, that plaintiff had a right to dismiss: *Mullen v. Peck*, 57-430.

Where the cause has been dismissed for want of prosecution and not for default in pleading, the court may, at its discretion, reinstate it on the motion of plaintiff: *Byington v. Quincy*, 61-480.

SEC. 2845.

This section and the preceding are applicable in equitable actions as well as in actions at law, and the court has no authority upon the final

submission of an equitable action to dismiss the bill at plaintiff's cost without prejudice: *Forsythe v. McMurty*, 59-162.

765.

SEC. 2853.

Judgment against one of two defendants, jointly and severally liable, may be rendered without the case

being disposed of as to the other: *Poole v. Hintrager*, 60-180.

SEC. 2855.

That the court should not grant plaintiff relief in any respect greater

than what is claimed in his petition, see *Tice v. Derby*, 59-312.

SEC. 2856.

See *Musser v. Crum*, 48-52

SEC. 2858.

The court cannot properly render judgment for a party upon a special

verdict, unless, taken in connection with the pleadings, it is such as to

show conclusively that the party is entitled to judgment: *Crouch v. Deremore*, 59-43.

Where the general verdict is contrary to instructions it should be set aside, but it does not necessarily follow that judgment should be rendered upon a special verdict in accordance with the court's instructions; for, while the instructions were binding upon the jury, they are not binding upon the court, and it is under no obligation to follow them: *Evans v. St. Paul Harvester Works*, 18 N. W. Rep., 881.

When a court is called to rule upon a motion for judgment upon a special verdict, it is to consider what the law is, and is not bound by its instruction previously given to the jury: *Baird v. C., R. I. & P. R. Co.*, 61-359.

Under peculiar facts, *held*, that a special verdict was not sufficient to entitle plaintiff to judgment in a case where a general verdict for defendant was set aside on account of error in the instructions: *Pettus v. Farrell*, 59-296.

766.

SEC. 2864.

There can be no judgment until it is entered in the proper records of the court: *Balm v. Nunn*, 19 N. W. Rep., 810.

767.

SEC. 2867.

Where a cause has been dismissed, not for default in pleading, but merely for failure of the plaintiff to appear and prosecute at the time set for trial, it may be reinstated on the motion of the plaintiff at the discretion of the court: *Byington v. Quincy*, 61-480.

Where an answer was filed some eighteen days after the time allowed for filing of answer by agreement of parties, but some months before

the next term of court, and in answer to an amended petition setting up a new cause of action, and in pursuance of an order of court made in vacation upon application extending the time, but without notice to the adverse party, *held*, that there was no abuse of discretion on the part of the court in refusing to grant default on motion: *Redfield v. Miller*, 59-393.

768.

SEC. 2871.

Where rules of court provided for the filing of a copy of petition for the use of defendant, and three days before the appearance day defendant applied for such copy and it was not on file, and he thereupon filed an affidavit of such fact and asked to have a copy, and to be allowed reasonable time thereafter to defend, and thereafter was detained at home by sickness for nine days, *held*, that upon proper application default

against him entered on the regular appearance day, should have been set aside: *Brett v. Farr*, 58-442.

In a particular case, *held*, that the motion to set aside default made a sufficient showing of a meritorious defense: *Willett v. Millman*, 61-123.

Default improperly entered should be set aside without showing of excuse or affidavit of merits: *Brandt v. Wilson*, 58-485.

769.

SEC. 2872.

A party in default waives his right to demand a jury to assess the damages: *Preston v. Wright*, 60-351.

770.

SEC. 2873.

A party in default cannot object to the evidence offered, nor cross-examine the witnesses in relation to portions of the claim which are not referred to in the testimony in chief of such witness; thus *held*, that where a portion of plaintiff's claim

was sufficiently established by a sworn account, and a witness was introduced to prove another portion, the cross-examination could not be extended to items of account established by the sworn account: *Lyman v. Bechtell*, 58-755.

SEC. 2877.

The provisions of this section are, under § 3516, applicable to proceedings in justices' courts: *Taylor & Farley Organ Co. v. Plumb*, 57-33.

This section authorizes a re-trial in all cases where a judgment by

default has been rendered against one served by publication only. It has no reference to a case wherein a judgment is void for want of jurisdiction to render it: *Smith v. Griffin*, 59-409.

771.

SEC. 2881.

In a proceeding by attachment, when the defendant is personally served, the judgment should be *in rem* only, and a personal judgment

would be void even though the attached property were sold thereunder: *Smith v. Griffin*, 59-409.

772.

SEC. 2882.

A judgment recovered by a creditor after a fraudulent conveyance by his debtor, does not become a lien upon the property so conveyed in the absence of proceedings to subject the property to such judgment. The conveyance is absolute as to the grantor, and leaves no interest in him subject to the lien: *Howland v. Knox*, 59-46.

The fact that a party has a verdict against another does not give him any interest in or lien upon the property of the latter in advance of the rendition of a judgment, nor will a *nunc pro tunc* judgment of the court become a lien upon his property prior to its actual rendition so as to bind third persons: *Miller v. Wolf*, 18 N. W. Rep., 889.

775.

SEC. 2895.

The omission of the notary to write his full name to the jurat, when the seal is added showing his full name,

is not sufficient to vitiate the judgment: *Grattan v. Matteson*, 54-229.

SEC. 2896.

That the confession recites that the indebtedness accrued for borrowed

money is sufficient: *Kendig v. Marble*, 58-529.

776.

SEC. 2897.

Judgment may be entered by the clerk in vacation and approved at the next term: *Kendig v. Marble*, 58-529.

The mere fact that the note upon which judgment by confession is

rendered is usurious, does not authorize the conclusion that the parties caused judgment to be entered for the purpose of concealing usury or to avoid the statute against it: *Ibid*.

SEC. 2899.

If the offer to confess is insufficient, it is to have no effect on the question of costs: *McClatchey v. Finley*, 17 N. W. Rep., 469.

778.

SEC. 2903.

Where the adverse party is not within the jurisdiction of the court, and cannot be served or cannot be readily served with notice, the court may, under some circumstances, appoint a receiver without notice: *Maish v. Bird*, 59-307.

Under the facts in a particular case, held, the party was not entitled to the appointment of a receiver: *Sleeper v. Iselin*, 59-379.

In a prosecution for larceny of goods from the possession of a receiver, held that it was not necessary upon the part of the state to prove that a bond had been given before the property was taken by such receiver, it appearing that he was acting under a proper order of the court, and that defendant, before the commission of the acts charged, knew that he was so acting: *State v. Rivers*, 6J-381.

In an indictment for larceny of goods from a receiver, the ownership of the property may be laid in the

receiver. It is not a case falling under section 3915, which relates to the wrongful taking of property while in possession of an officer by virtue of legal process: *Ibid*.

Where a chattel mortgagee brought an action in equity to foreclose his mortgage against the mortgagor and certain attaching creditors, the mortgage being upon a stock of dry goods which would have been greatly depreciated in value if taken and withheld from sale by the mortgagee, and the mortgagee having by the mortgage the right to take possession whenever he should choose to do so, and proceed to subject the property to the payment of the amount due or to become due on his mortgage, held that the case was a proper one for the appointment of a receiver upon request of such mortgagee, although the action was commenced before the mortgage indebtedness had become due: *Maish v. Bird*, 59-307.

779.

SEC. 2905.

A receiver may appeal from an order erroneously fixing the amount of property in his hands, and directing him to turn over more than he has in custody: *How v. Jones*, 60-70.

781.

SEC. 2927.

This section does not mean that a party may have his own time to file the motion. When the time arrives for an answer, demurrer, or motion, he may properly be required to do something, and if he chooses to make the motion, he must make it instant, or within such time as is given him by the court. If he fails, without sufficient excuse, he may properly be held to have waived his right to file the motion, and may be required to answer or demur: *Sprague v. Haight*, 54-446.

783.

SEC. 2933.

In an action by a minor in his own name, a valid judgment for costs may be rendered against him: *Albee v. Winterink*, 55-184.

Equitable apportionment of costs made in a particular case: *Starr v. Case*, 59-107.

784.

SEC. 2935.

The statute does not contemplate the issuance of a fee bill against a party against whom no judgment has been rendered, but, under the provisions of § 3842, that he shall only be rendered liable on motion as here provided: *McConkey v. Chapman*, 58-281.

SEC. 2942.

The judgment, so far as it covers costs, is for the use of the parties entitled to such costs, and the successful party has no interest in that part of the judgment except in so far as such costs have been paid by him; therefore a payment to him of the costs covered by the judgment will not release his judgment debtor from the claims of parties entitled to such costs: *McConkey v. Chapman*, 58-281.

785.

18 G. A., Ch. 185.

An attorney's fee is to be treated as part of the costs and not as part of the amount in controversy: *Speisberger v. Thomas*, 59-606.
The attorney's affidavit here contemplated is not evidence to be introduced by the plaintiff; it is rather a condition precedent to be performed by the attorney before the attorney's fee can be allowed in his favor: *Ibid*.

789.

SEC. 2955.

Where a writ of attachment in an action not founded on contract, issues and is levied, without an allowance being made as here required, and a motion is made to quash the writ on that ground, the court may then make an allowance, to relate back, as between the parties, to the issuance of the writ, and fix the additional amount of property which may be levied on: *Magoon v. Gillett*, 54-54.
Action for tortious conversion of property still in possession of defendant cannot be considered as on contract: *Moses v. Arnold*, 43-187.

790.

SEC. 2961.

In action on the bond for wrongful suing out of the writ, the burden of proof is on defendant in the attachment suit to show that no reasonable grounds for belief of the facts stated existed: *Dent v. Smith*, 53-262.

To entitle himself to exemplary damages on the bond, it is not sufficient that attachment defendant show that the facts alleged as basis for the attachment were not true, and that attachment plaintiff had no reasonable grounds to believe them true. He must prove these facts to entitle himself to actual damages. To recover exemplary damages, he must show that plaintiff acted with intention, design, or set purpose of injuring him: *Nordhaus v. Peterson*, 54-68.

A verdict for actual damages, in an action on the bond, and a special finding that the attachment was wrongfully sued out, are sufficient to warrant the allowance of an attorney's fee. That there was no reasonable cause to believe the ground upon which the attachment was issued to be true, is implied in such verdict and special finding: *Nockles v. Eggspieler*, 53-730.

Although proof that plaintiff had no cause of action whatever would be admissible if attachment was wrongfully sued out, yet in fixing the attorney's fee the court is not to take into account the trial of the whole case: *Porter v. Knight*, 19 N. W. Rep., 282.

In an action upon a bond, it must be alleged that the damages sustained have not been paid, and a failure to make such averment may be raised for the first time on motion in arrest of judgment, at least in a case where there is no evidence offered of any damages: *Hencke v. Johnson*, 17 N. W. Rep., 766.

792.

AFTER SEC. 2964.

INDEMNIFYING BOND.

[Twentieth General Assembly, Chapter 45.]

SECTION 1. An officer is bound to levy an attachment on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which the plaintiff directs him to levy. But if after such levy he shall receive notice in writing under oath from some other person, his agent or attorney, that such property belongs to him, and stating the nature of his interest and the facts showing how he acquired such interest and for what consideration, such officer may release the property unless a bond is given as provided in the next section. But such officer shall be protected from all liability by reason of such levy until he receives such written notice.

Levy of attachment.

Notice that property belongs to another.

Protection of officer.

SEC. 2. When the officer receives such notice, he may forthwith give the plaintiff, his agent or attorney, notice that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sureties, to be approved by the officer, to the effect that the obligors will protect and indemnify him against the damages which he may sustain in consequence of the seizure and sale, and warrant to any purchaser of the property such estate or interest therein as is sold, and thereupon the officer shall proceed to subject the property to the attachment, and shall return the bond aforesaid to the district or circuit court of the county in which the levy is made.

Notice to plaintiff.

Indemnifying bond.

Proceedings where bond is given.

SEC. 3. If such bond is not given, the officer holding the attachment may, within a reasonable time after demand being made by said officer, restore the property to the person from whose possession it was taken, and the levy shall stand discharged.

Proceedings where bond is not given.

SEC. 4. The provisions of the foregoing sections shall apply to attachments issued by justices of the peace, and such bonds shall be returned to the justice issuing said writ.

Applies to attachments issued by justices.

SEC. 5. All acts and parts of acts in conflict with this act are hereby repealed.

Repealing clause.

[The provisions of this act are almost identical with those found in sections 3055-7 in relation to indemnifying bond in case of levy under execution.]

SEC. 2967.

In order to make a legal and valid levy, an officer must do such acts as that, but for the protection of the writ, he would be liable in trespass. Therefore, *held*, that a levy upon certain patterns, which remained locked up in a building, the key of which was in the possession of the owner, was not sufficient: *Rix v. Silkmitter*, 57-262.

793.

SEC. 2970.

To authorize the appointment of a receiver under this section, there must be some showing that the exercise of the power is necessary: *Silberman v. Kuhn*, 53-436.

SEC. 2972.

The sheriff or constable is only held to the exercise of ordinary care in the preservation of the property in his hands: *Creswell v. Burt*, 61-590.

794.

SEC. 2975.

While a garnishment of an employer for wages of his employe will hold not only wages due but such as afterwards become due, yet, as the employe, if a married man, is entitled to have ninety days' wages exempt (by § 3072), the employer is not to be held liable to judgment in such case unless it appears that at the time of garnishment, or some time subsequent thereto, he had more than ninety days' wages in his hands: *Davis v. Humphrey*, 22-137.

The notice upon the defendant required by this section, as amended by 18 G. A., ch. 58, should be served ten days before the trial of the issue, and in case there is no issue, ten days before the judgment is rendered against the garnishee. This notice is essential to the jurisdiction of the court over the subject-matter in controversy, and if the garnishee fails to assert his right to be discharged on account of such want of notice but submits the case without making that question of record, it is proper for the court to set aside the trial and submission as premature and continue the cause for such action as either of the parties may take: *Williams v. Williams*, 61-612.

An answer of the garnishee that he was informed and believed that the defendant was a married man living with his family, held, not sufficient to show the right of exemption, for the reason that it did not allege such to be the fact, nor allege that he was a resident of the state: *Smith v. C. & N. W. Ry Co.*, 60-312.

An indebtedness due from a resident to a non-resident, even for services rendered outside of the state, is subject to attachment by garnish-

ment in an action brought against such non-resident by publication. Therefore, held, that where the defendant in an action by publication was a non-resident, a railway company which was operating a railway from a point within to a point without the state and was indebted to such non-resident defendant for services rendered outside the state, might be held liable as garnishee for such indebtedness: *Mooney v. U. P. R. Co.*, 60-346.

The equity of redemption of the mortgagor of personal property after condition broken is subject to sale or transfer as other property and passes under a general assignment. After such general assignment the mortgagee is not subject to garnishment in a suit against the mortgagor: *Gimble v. Ferguson*, 53-414.

Where it was agreed by and between the mortgagor and attaching creditors and the mortgagee, that the property should be sold in bulk and the proceeds applied upon the attachment, held, that the proceeding operated as a transfer of the equity of redemption of the mortgagor, and took priority over a subsequent garnishment by a second attaching creditor of the surplus in the sheriff's hands after the satisfaction of the first mortgage: *Phelps v. Winters*, 59-561.

Judgment against a garnishee cannot be properly entered where there is no return to the writ of attachment showing the fact of garnishment: *Rock v. Singmaster*, 17 N. W. Rep., 744.

As to garnishment upon judgment, see § 3051 and notes.

796.

SEC. 2979.

Garnishee's answer is not a pleading in the case, but in the nature of evidence, and is not a part of the record unless made so by bill of exceptions: *Brainard v. Simmons*, 58-464.

A notice to a garnishee requiring him to appear on any other day than the first day of the next term of the court is void, and confers no jurisdiction over such garnishee: *Padden v. Moore*, 58-703.

SEC. 2980.

A debtor who procures himself to be garnished without the knowledge of his creditor, for a debt the proceeds of which are exempt, and does not set up such exemption, or notify his creditor so that the latter may do so, is guilty of fraud, and will not be released from liability by a judgment against him: *Smith v.*

Dickson, 58-444.

Where a corporation aggregate is garnished, it is competent for such corporation to answer in writing through some officer or agent authorized by the corporation to do so: *Bailey v. U. P. Ry Co.*, 17 N. W. Rep., 567.

SEC. 2981.

The plaintiff is not precluded by the fact that the garnishee makes answer to the sheriff from prosecuting the examination further if he sees fit: *Thompson v. Silvers*, 59-670.

Where a commissioner is appointed to take the answer of garnishee, and

the court does not fix a time and place for the answer to be taken, the commissioner may fix such time and place and give the garnishee notice thereof, and without such notice the garnishee is not in default for failing to appear and answer: *Thomas v. Hoffman*, 17 N. W. Rep., 431.

797.

SEC. 2982.

It is within the discretion of the court to require that questions to be propounded to the garnishee shall be reduced to writing and submitted to the court before answer: *Elwood v. Crowley*, 19 N. W. Rep., 857.

A wife garnished as a debtor of her husband is not exempt from

answering questions touching such indebtedness, on the ground that such answers would be testimony against her husband. It could not be regarded as against her husband's interest that his property be subjected to the payment of his debts: *Thompson v. Silvers*, 59-670.

SEC. 2984.

Where a court appoints a commissioner to take the answer of a garnishee, without fixing a time or place for such answer, the garnishee should not be judged in default for failure to appear and answer unless notified by the commissioner of the time and place fixed for taking his answer: *Thomas v. Hoffman*, 17 N. W. Rep., 431.

Where a garnishee refuses to answer questions propounded before a referee appointed to take such answers and plaintiff upon the facts being reported by the referee moved for an or-

der requiring her to answer at a particular time, at which time she refused to answer and her refusal was sustained by the court, *held*, upon appeal, that although the plaintiff might have been entitled to judgment by default against the garnishee for refusal to answer questions propounded by the referee, yet having obtained an order for further examination he could not have judgment against the garnishee for refusal to answer when the court sustained her objections, although in so doing the court erred: *Thompson v. Silvers*, 59-670.

SEC. 2985.

The garnishee is entitled to reasonable notice to show cause, but it is not necessary that such notice be served ten days before the term. Ten days notice during term, *held*, sufficient in particular case. After failure to appear in response to such notice, no motion is necessary, and no new judgment should be entered: *Langford v. Ottumwa Water Power Co.*, 53-415.

Where the court has not acquired jurisdiction of the garnishee by proper notice, the fact that the garnishee, when served with notice to show cause why execution should not issue against him, appears and protests that the court has acquired no jurisdiction, will not render judgment by it valid: *Padden v. Moore*, 58-703.

SEC. 2986.

Where property is turned over by the garnishee to an officer upon certain conditions, such conditions should be recognized when shown to the court, and carried out: *Buckham v. Wolf*, 58-601.

798.

SEC. 2987.

When trial is required to determine the rights of all the parties, the question as to whether the garnishee is indebted to the defendant is not to be presented separate from that as to whether the debt in the hands of the garnishee is to be condemned for the payment of such indebtedness: *Williams v. Williams*, 61-612.

The answer of a garnishee is not a pleading and does not become a part of the record unless embodied in a bill of exceptions: *Brainard v. Simmons*, 58-464.

The venue of the garnishment proceeding cannot be changed to the county of garnishee's residence: *Smith v. Dixon*, 58-444.

SEC. 2988.

Where a garnishee seeks in equity to have a judgment against him set aside on the ground that the notice was not sufficient to give the court jurisdiction, the burden is not upon him to show that the judgment is also erroneous, but is upon the adverse party who insists that it is just. The garnishee is not presumed to be indebted: *Padden v. Moore*, 58-703.

800.

SEC. 2994.

The delivery bond is not superseded or rendered null by a supersedeas bond given on appeal: *State v. McGlothlin*, 61-312.

SEC. 2996.

A mistake in the bond as to the court in which the attachment issued will not render the bond invalid as to the sureties: *Ripley v. Gear*, 58-460.

803.

SEC. 3010.

The return of the writ is the statutory evidence of what it purports to show. It must be endorsed upon the writ or made upon a paper annexed thereto. The writ and return constitute essentially one record and must go together. Therefore, held, that judgment against a garnishee could not be properly rendered in the absence of a return of the writ showing the garnishment: *Rock v. Singmaster*, 17 N. W. Rep., 744.

804.

SEC. 3016.

A third person, not a party to the action, claiming to be owner of attached property, having discharged it by giving bond as provided in § 2996, may still proceed under this section. The property does not cease to be attached property, though released by the bond: *Tuttle v. Wheaton*, 57-304.

This section clearly contemplates that any claim, lien, interest, or title, in and to the property attached, may be set up at any time before the proceeds are paid to the plaintiff in attachment: *Howe v. Jones*, 57-130.

SEC. 3017.

Where, in an attachment suit brought against a partnership and the individual partners jointly, the writ directed the attachment of any prop-

erty of said partnership, and the attachment bond was executed to the partnership and the attachment was levied upon individual property of a partner not served with notice, who appeared and interposed a counterclaim on the bond, *held*, that such partner could therein recover for injuries to his individual property: *Mason v. Rice*, 19 N. W. Rep., 897.

805.

SEC. 3018.

Where it was shown that the property attached was exempt, *held*, that it should have been discharged upon motion, and that such showing was not inconsistent with the allegations in the petition for attachment, that plaintiff was about to remove his property from the state: *Hastings v. Phœnix*, 19-394.

SEC. 3021.

Where the writ was defective in not stating the sum claimed in the action, *held*, that it might be amended in this respect after levy: *Atkins v. Womeldorf*, 53-150.

Where, in an action not founded on contract, there was no allowance by the judge of the amount of property to be attached, as required by § 2955, *held*, that upon motion to discharge attached property on that ground, the court might order as to how much property should be held: *Magoon v. Gillett*, 54-54.

806.

SEC. 3025.

If there is no valid existing judgment when the execution is issued, it is void: *Balm v. Nunn*, 19 N. W. Rep., 810.

An execution must be regarded as existing until it is returned, although the return day has passed; and a sale under a second execution, issued before the first is returned, should, as to judgment creditor purchasing thereat, be set aside: *Merritt v. Grover*, 57-493.

that another execution was in existence and not only stood by and made no objection to the sale under the second, but at the expiration of the time for redemption surrendered the possession of the property without objection, *held*, that he could not thereafter in the absence of a showing that the land was sold for less than its value and an offer to pay the judgment, take advantage of the error: *Merritt v. Grover*, 61-99.

The provision that but one execution can be in existence at the same time is mandatory and not merely directory; nevertheless, it may be waived by the party for whose benefit it was enacted; and where it appeared that the party against whom the execution was issued knew

The mere issuance of a second writ before the return of the prior execution under which the levy has been made, is not of itself sufficient to establish the abandonment of such levy: *West v. St. John*, 19 N. W. Rep., 238.

SEC. 3026.

The proper method of enforcing obedience to a continuing order in the nature of a mandatory injunction is by attachment for contempt: *State v. Baldwin*, 57-266.

807.

SEC. 3029.

As to effect of statements in sheriff's return entered by the clerk on the judgment docket, see notes to section 3038.

808.

SEC. 3037.

Failure to return execution within the time here required, does not render the officer liable to an action for damages, unless special injury is alleged and proved: *Musser v. Maynard*, 55-197.

The rule that a sale made after the expiration of the execution is valid applies to executions issued by justices of the peace: *Walton v. Wray*, 54-531.

An officer is required to make his return in writing endorsed on the execution. If the execution is lost or destroyed, it may be that it would be competent to make the return on a copy, but unless the fact of such loss or destruction is shown by the return, a return made upon a copy cannot be

introduced in evidence; nor can the return be explained by parol, unless it is shown that it has been made and lost or cannot be produced: *West v. St. John*, 19 N. W. Rep., 238. And see notes in supplement to § 3043.

Where the right of the sheriff to subject the property levied on to the satisfaction of the execution, is contested by an action of replevin, he should not make any return until after the disposition of the replevin suit. Having made a levy it is competent for him to exhaust the property on that execution, no matter what time expires between the levy and sale of the property: *Cox v. Currier*, 17 N. W. Rep., 767.

SEC. 3038.

A return upon an execution should be a statement of what is done by the officer in obedience to the writ; and a statement therein purporting to show the acts of a person other than the officer is without authority of law, and surplusage; therefore held that a statement in the return that

the execution was satisfied by defendant giving security, which was taken by order of plaintiff and an entry by the clerk upon the judgment record of the same facts, did not show a satisfaction upon which a subsequent encumbrancer could rely: *Aultman v. McGrady*, 58-118.

SEC. 3039.

This statute only applies when judgment has been obtained against both principal and surety; and not

then, unless the order of liability is stated in the judgment: *Donney v. Cocke*, 61-303.

809.

SEC. 3043.

The officer's return endorsed on the writ, is the evidence as to what property is covered by the levy, and it is not proper for the officer as a witness to testify as to whether other property was levied upon: *Flannigan v.*

Allhouse, 56-513.

If the execution and return be shown to be lost, parol evidence may be introduced to show the contents of such return, but for no other purpose: *Le Barron v. Taylor*, 53-637.

SEC. 3044.

In order to make a legal and valid levy upon personal property, the officer must take possession and control, by doing such acts as that, but for the protection of the writ, he would be liable in trespass therefor. Levy upon property which remained locked in an outbuilding, the key of which

was in possession of the debtor, held, not sufficient: *Rix & Stafford v. Silkmitter*, 57-261.

The sheriff or constable is only held to the exercise of ordinary care in the preservation of the property in his hands: *Creswell v. Burt*, 61-590.

810.

SEC. 3048.

The question decided in *Loring v. Small*, 50-271, again considered and

that case followed: *Whiting v. Story Co.*, 54-81.

811.

SEC. 3051.

There is no provision requiring notice of the garnishment proceeding to be served on the judgment debtor, and the court may proceed in such cases against the garnishee without having jurisdiction of such debtor: *Smith v. Dixon*, 58-444.

SEC. 3054.

Where a creditor levied on firm property upon a judgment against one partner on an individual debt, and sold such property without bringing action as here contemplated, held that a creditor of the firm, obtaining judgment against the partners individually, might subsequently levy on such property, and maintain an action in equity to have the property subjected first to the payment of the firm debt, it appearing that there was no other partnership property: *Aultman v. Fuller*, 53-60.

812.

SEC. 3055.

Showing and delivering to the officer a bill of sale purporting to transfer the property to claimant, is not sufficient to constitute notice to the officer: *Gray v. Parker*, 53-505.

It is the imperative duty of the officer under this section to make a levy at once, and it is not his duty, on the mere disclaimer by the defendant of any interest in the property, to institute an inquiry as to the truth of the statement: *West v. St. John*, 19 N. W. Rep., 238.

Where the officer has been indemnified, it is his duty to use all proper means to make the levy effective on the property: *Cox v. Currier*, 17 N. W. Rep., 767.

This section does not apply to a case where the execution defendant claims that the property is exempt from execution: *Parsons v. Thomas*, 17 N. W. Rep., 526.

Acceptance of service of such notice by the sheriff's deputy is not binding: *Chapin v. Pinkerton*, 58-236.

Where the sheriff seizes property of one person under an execution against another, the owner may maintain replevin to recover the value of the property, even though it has

been sold by the sheriff, proper notice of ownership having been given: *Hardy v. More*, 17 N. W. Rep., 200.

Notice served upon an officer by a mortgagee of property under chattel mortgage that such party is the owner of the property by virtue of a certain chattel mortgage and demanding the immediate return of the goods to the place from which they were taken, is sufficient notice to constitute a taking possession of the property under the terms of the chattel mortgage authorizing the mortgagee to do so whenever he chooses, and such notice evidences the intention of the party to claim his right of possession and foreclosure as provided in the mortgage: *Wells v. Chapman*, 59-658.

These provisions do not relate to levy of attachments and in an action of replevin against an officer holding property under attachment it is not necessary to aver the service of notice of ownership as herein contemplated: *Hall v. Ballou*, 58-585. (But now there is a statute in relation to attachment containing provisions similar to these three sections: See 20 G. A., ch. 45 in supplement to page 792.)

SEC. 3056.

If indemnifying bond is given, the officer must hold the property and cannot relieve himself from such duty, even by releasing to the rightful owner. His liability is absolute, unless the property is taken from him by legal process: *Erans v. Thurston*, 53-122.

A sheriff is not liable in damages for failure to levy upon property in the execution defendant's possession if it is shown that such execution defendant had no interest therein subject to levy: *Crosby v. Hungerford*, 59-712.

Where an officer has several writs

of execution under different judgments against the same defendant, and another person claiming the property serves notice of his claim upon the officer, an indemnifying bond may be given jointly by the execution plaintiffs and on such bond an action may be maintained against them jointly: *Baxter v. Roy*, 17 N. W. Rep., 576.

SEC. 3058.

This section, in so far as it denies to the party whose property is wrongfully levied upon under an execution against another any action against the officer, is unconstitutional, as depriving the owner of his property without due process of law by substituting the liability of the party to the bond for that of the officer for his trespass: *Craig v. Fowler*, 59-200; and see *Sunberg v. Babcock*, 61-601.

814.

SEC. 3062.

A right of action against the clerk for damages arising from his fault in approving a stay bond does not accrue until the expiration of the stay; and so the right of action by the clerk against his deputy for fault of the latter in making such approval arises at the same time. In the latter action, it is no defense for the deputy that his principal had previously approved bonds signed by the same surety: *Moore v. McKinley*, 60-367.

SEC. 3064.

The determination of the clerk as to whether the bond is filed within the time required by § 3061, or whether the filing within the time specified is essential to its validity, is a judicial act, and an error in his decision on that question will render the judgment voidable, and not void: *Maynes v. Brockway*, 55-457.

815.

SEC. 3068.

Unless the surety objects, and such objection appears of record, he will be presumed to have consented to the stay and (under § 3102) thereby waived the right to redeem his property, if sold under execution: *Chase v. Welty*, 57-230.

SEC. 3072.

[19 G. A., ch. 49, amends this section by adding at the end thereof, after the word "dollars," the following:]

Any person entitled to any of the exemptions mentioned in this section does not waive his right thereto by failing to designate or select such exempt property or by failing to object to a levy thereon, unless failing or refusing so to do when required to make such designation or selection by the officers about to levy.

Exemption not waived.

Where husband and wife lived separate and apart for seven years prior to his death, and he neither contributed or was asked to contribute to her support, and during that time he lodged in his office and boarded in the family of others, it not appearing that the separation was intended to be temporary, *held*, that he was not the "head of a family" within the meaning of this section, and therefore, upon his death, his widow was not entitled, under § 2371, to claim personal property as having been exempt in the hands of the husband. The construction given to the expression "head of a family," as used in Rev. § 2277, in relation to homestead exemptions, is not applicable as to this section: *Linton v. Crosby*, 56-386. [The expression "head of a family" is not used in the Code in relation to homestead exemptions: See § 1988.]

Proceeds of a voluntary sale of exempt property are not exempt: *Harrier v. Fassett*, 56-264.

Where it appears that the debtor has the right to select one of several vehicles as exempt and such selection is made before levy, it should be respected by the officer: *Parker v. Haley*, 60-325.

Wages for personal services earned in the use of exempt property are exempt, and it is not fraudulent for the husband to contract to render such services to another: *Patterson v. Johnson*, 59-397.

The exemption of pension money, provided in R. S. of U. S. § 4747, applies only to such money while in course of transmission to the pensioner, and not after it comes into his possession: *Webb v. Holt*, 57-712;

Triplett v. Graham, 58-135. (But see 20 G. A., ch. 23, inserted below in supplement to page 816.)

Standing by, and failing to object to a levy on exempt property amounts to a waiver of the exemption: *Maffitt v. Adams*, 60-44. But in a particular case, held, that the facts did not show a failure on the part of the debtor to object to the levy sufficient to constitute a waiver of exemption: *Green v. Blunt*, 59-79.

A non-resident is not entitled to an exemption of his wages, even where the services are rendered in the state where he resides and are such that under the laws of that state they would be exempt in an action brought there: *Mooney v. U. P. R. Co.*, 60-346.

816.

AFTER SEC. 3072.

PENSION MONEY.

[Twentieth General Assembly, Chapter 23.]

SECTION 1. All money received by any person, resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution or attachment, or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not. Moneys and credits.

SEC. 2. The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations of such pension money, shall also be exempt as is now provided by the law of this state in relation to homesteads; and such exemption shall also apply to debts of such pensioner contracted prior to the purchase of such homestead. Homestead.

SEC. 3. When a debtor absconds and leaves his family, the property exempted by this act, shall also be exempt to his wife and children, or either of them. Absconding debtor.

SEWING MACHINE.

[Nineteenth General Assembly, Chapter 62.]

SECTION 1. If the debtor is a seamstress, one sewing machine shall be exempt from execution and attachment. Sewing-machine exempt.

817.

SEC. 3074.

The person entitled to hold earnings exempt from execution may use such earnings in payment of property purchased by his wife, and such property will be held by the wife free from his debts: *Robb v. Brewer*, 60-539. The object of this section is to exempt the earnings for personal service, as contra-distinguished from the

income arising from a business involving other elements of gain than the mere personal service of those conducting it; therefore, *held*, that the business of keeping a boarding house involves many elements of profit aside from the mere personal earnings of the proprietor and of his family, and that money due to him in that business is not exempt from execution as personal earnings:

Shelly v. Smith, 59-453.

To entitle a debtor to this exemption, it must be shown that he is a resident of the state: *Smith v. C. & N. W. R. Co.*, 60-312.

If defendant is a non-resident he cannot claim exemption of earnings, even if they are rendered in the state of his residence, and are exempt by the laws of that state: *Mooney v. U. P. R. Co.*, 60-346.

SEC. 3076.

Facts considered and *held* to show a starting to leave the state, although the debtor had not actually set out

upon his journey: *Graw v. Manning*, 54-719.

SEC. 3078.

To constitute an absconding, such as to entitle the wife to hold property as exempt, the departure of the

husband need not be without the knowledge and consent of the wife: *Malvin v. Christoph*, 54-562.

820.

SEC. 3088.

This section applies to sales under special, as well as general execution:

Taylor v. Truloch, 59-558.

SEC. 3090.

Where the sale has been judicially set aside, the satisfaction of the judgment which followed the sale, and

was entered of record by reason thereof, should be set aside also: *Farmer v. Sasseen*, 18 N. W. Rep., 714.

821.

SEC. 3092.

The judgment should be filed and approved as a claim of the fourth class, within the time specified in

§ 2420, for payment out of the personal estate: *Bayliss v. Powers*, 17 N. W. Rep., 907.

SEC. 3097.

The fact that a judgment has been assigned to the attorney in the case to secure his lien will not prevent the opposite party from setting off

against it a judgment in his favor for costs in the same action: *Tiffany v. Stewart*, 60-207.

SEC. 3100.

The fact that where it appears that the sheriff appointed one appraiser, his return does not show that the party for whom he acted in making

such appointment was absent or refused to appoint, will not render the sale void: *Preston v. Wright*, 60-351.

822.

SEC. 3102.

The taking of an appeal defeats the right of redemption, although no supersedeas bond be filed: *Dobbins v. Lusch*, 53-304.

Where the execution defendant has no right of redemption, a judgment creditor, who did not become such until after the sale, cannot

redeem (distinguishing *Sieben v. Becker*, 53-24); *Brown v. Markley*, 58-689.

The term "defendant" in the first sentence of this section includes a vendee of the execution defendant, and such vendee may redeem as here provided. An appeal or stay of execution by the defendant in the action will not defeat the right of redemption in such vendee: *Thayer v. Coldren*, 57-110.

Where a surety does not object (as provided in § 3068) to stay of execution being granted, he will be considered as having assented thereto, if taken, and held to have thereby waived the right to redeem his property, if sold under such judgment: *Chase v. Welty*, 57-230.

A party who is surety on a debt for which a judgment is rendered,

but has no interest in the property sold, cannot make redemption; he is not a defendant within the meaning of this section: *Miller v. Ayres*, 59-424.

This section is applicable to stay of execution on judgments in justices' courts: *Brown v. Markley*, 58-689.

Where the debtor redeems property sold in part satisfaction of a prior judgment, the unsatisfied portion of the judgment attaches as a lien upon the land (explaining *Clayton v. Ellis*, 50-510). Therefore, held, that where a debtor conveyed his right of redemption to his wife, and furnished her the money to make redemption, with intent to hinder and delay his creditors, the land so redeemed remained subject to his debts: *Peckenbaugh v. Cook*, 61-477.

823.

SEC. 3103.

The holder of a junior judgment lien, who is not made party to the foreclosure of a prior mortgage, is not limited to this statutory right of redemption, but may redeem by action in equity in the same manner as a junior mortgagee under similar circumstances: *American Buttonhole, etc. Co. v. Burlington Mutual Loan Association*, 61-464. In such equitable action the lien holder may have an accounting of the rents and profits, and have them applied in satisfaction of the mortgage debt from which he is seeking to redeem: *Bunce v. West*, 17 N. W. Rep., 179.

Where a mortgage is foreclosed for one installment of a mortgage debt, a purchaser from the mortgagor, prior to redemption, acquires, upon making redemption, title to the property, free from the lien of the mortgage for the unpaid balance: *Fischer v. Simmons*, 54-269; *Micklewait v. Raines*, 58-605.

The foreclosure of a mortgage for part of the sum secured thereby, and the sale of the land, exhausts the remedy of the mortgagee under the mortgage against the land so sold, and he cannot after redemption by the mortgagor under the statute, through the mortgage, subject the land to the payment of a part of the debt remaining unsatisfied. This rule holds where the mortgage secures different notes, some of which are

assigned to a third party, and the foreclosure and sale of the premises in an action by the assignee exhausts the lien of the mortgage upon such premises: *Harms v. Palmer*, 61-483. See also notes to § 3321.

While it may be true that the debtor's statutory right of redemption may be sold upon execution, it cannot be sold under an execution issued on the balance of the same judgment under which the original sale is made: *Hardin v. White*, 16 N. W. Rep., 520.

A creditor who obtains judgment against a grantor who has made a fraudulent conveyance, is not entitled to redeem from execution sale of the property fraudulently conveyed, which is made under a decree obtained by other judgment creditors subjecting such property to the lien of their judgment: *Houland v. Knax*, 59-46.

Where the party seeking to redeem was one of several plaintiffs at whose suit the property in question was in equity declared subject to their judgments and sold to satisfy the same, held, that redemption could not be made by him, the doctrine of *Clayton v. Ellis*, 50-590, being applicable: *Hayden v. Smith*, 58-255.

The creditor or lien holder cannot make statutory redemption after the expiration of nine months: *Newell v. Pennick*, 17 N. W. Rep., 432.

After sale of land upon foreclosure, the mortgagee cannot redeem from the sale: *Todd v. Davy*, 60-532.

A purchaser of land at tax sale, which is covered by school fund mortgage, acquires a lien which is

not extinguished by the sale unless he is made party to the suit, and not having been made party he may maintain an equitable action to redeem: *Ayres v. Adair Co.*, 17 N.W. Rep., 161.

SEC. 3104.

A creditor holding a judgment which is a lien upon real property of his debtor may become the purchaser of such real property at a sale under another judgment and make redemp-

tion from such sale in the same manner as if some other person had been the purchaser: *Citizens Savings Bank of St. Louis v. Percival*, 61-183.

824.

SEC. 3106.

The rule of *Tuttle v. Dewey*, 44-306, is not applicable to an equitable redemption by a junior mortgagee

who was not made party to the foreclosure: *Iowa County v. Beeson*, 55-262.

SEC. 3109.

The purchaser under a judgment may redeem from a prior mortgage

previous to the foreclosure thereof: *Hammond v. Leavitt*, 59-407.

SEC. 3112.

If no redemption by a creditor is made within nine months, none can be made afterward, even though the

purchaser is also a junior judgment creditor: *George v. Hart*, 56-706.

826.

SEC. 3123.

The purchaser of property at a sale under a judgment which is junior to a mortgage may redeem from such mortgage before the foreclosure

thereof, in the same manner as the debtor himself might have redeemed: *Hammond v. Leavitt*, 59-407.

SEC. 3124.

The estate of the debtor is not divested until execution of the deed, and any crops upon the premises already matured do not pass thereby,

although they were not matured when the purchaser became entitled to his deed: *Everingham v. Braden*, 58-133.

827.

SEC. 3128.

The term defendant, as here used, must be construed to mean the particular debtor or person who has the legal or possibly an equitable title in and to the premises sought to be re-

deemed, but does not include the surety for the indebtedness who has no interest in the property sold: *Miller v. Ayres*, 59-424.

SEC. 3130.

Where action is brought, by mistake, in the name of a deceased person, and judgment is rendered and

sale had thereunder, the proceedings are invalid: *White v. Secor*, 58-533.

831.

SEC. 3154.

Where, in an action against a minor, an attorney appeared for him and was appointed guardian *ad litem*, held, that there was no ground, in the absence of prejudice being shown, to authorize setting aside the verdict and granting a new trial: *Webster v. Page*, 54-461.

A judgment rendered after the death of a party to the action, without substitution being made, is voidable and not void, and must stand unless set aside under ¶ 6 of this section, upon an adjudication that there is a valid defense to the action: *Gilman v. Donovan*, 53-362.

Fraud of the prevailing party on the former trial being shown which is sufficient to constitute reasonable grounds to believe that a different result may be anticipated on the retrial, the judgment should be vacated and the new trial ordered: *Brown v. Byam*, 59-52.

That defendant was misled by an error in the copy of the notice served upon him in regard to the date of commencement of the term of court might be a sufficient averment of unavoidable casualty or misfortune, but where the petition contained an inconsistent averment that defendant had taken legal advice as to whether the error relieved him from obligation to appear at the proper time, held, that he did not make out a case for relief: *Irons v. Keystone Man'g Co.*, 61-406.

The provisions of this section are applicable to a judgment in an adversary proceeding but not to an order for a guardian's sale of property: *Bunce v. Bunce*, 59-533.

Although the application under this section should be by petition and not by motion, yet where a motion was filed and the question as to the right to a new trial was determined thereunder without objection to the

form, held, the supreme court would not reverse the proceedings for the defect: *Incorporated Town of Storm Lake v. I. F. & S. C. R. Co.*, 17 N. W. Rep., 459.

Where there is one judgment against two defendants, and one of them shows himself entitled to have it set aside, it should be set aside as to both: *Ibid.*

The proceedings authorized under this statute are in the nature of a writ of error *coram nobis* and are provided for a review of a case, after final judgment, in the very court wherein it was rendered. The jurisdiction of all other courts of such proceeding is thereby excluded and a change of venue cannot be had: *Gilman v. Donovan*, 59-76.

While courts of equity have jurisdiction to grant relief against judgments obtained by fraud in cases where the fraud is not discovered until after the expiration of one year from the rendition of the judgment, yet this statute defines the remedy to which the party is entitled, whether action be brought during the year provided for by the statute or after its expiration, and a court of equity can only grant the relief provided by the statute. The question whether a party is entitled to the remedy must be determined with reference to the terms of the statute, and, held, that the promise of a person seeking to foreclose a mechanic's lien that he would pay the claim of another person holding a prior lien upon the premises if the latter would not appear and assert such prior lien, would not constitute fraud authorizing the setting aside of the judgment thus obtained on failure of the promisor to make such payment, even though the promise was made without intention of performance: *Lumpkin v. Snook*, 19 N. W. Rep., 333.

832.

SEC. 3155.

The fact that an appeal from the original judgment is taken and pending cannot be pleaded in bar of an action under this section: *Cook v. Smith*, 58-607.

The filing of a petition for a new trial under this section cannot have

any greater force and effect than would a motion seeking the same thing when filed within the time prescribed by statute. The petition for a new trial is deemed denied by operation of law, and before there can be a new trial the court must

make an order granting it, which should be entered of record among the proceedings of the court: *Brown v. Byam*, 59-52.

Newly discovered evidence set out in a particular case as ground for new trial in an action for divorce, held not sufficient: *Harnett v. Harnett*, 39-401.

833.

SEC. 3157.

A party who has knowledge of the error complained of before the expiration of the year and does not pursue his remedy as herein provided, cannot have equitable relief against the judgment: *Freeman v. Hart*, 61-525.

834.

SEC. 3158.

The proceeding here provided for is not in the nature of a new or independent action, but is supplementary and is intended to correct errors committed in the trial of the case and in the rendition of judgment. The very court rendering judgment is to review its own decision, and the case cannot therefore be transferred by a change of venue to another court: *Gilman v. Donovan*, 59-76.

SEC. 3159.

It is not the duty of the court, where a new trial is asked on the ground of fraud in procuring the judgment, to carefully weigh the evidence and determine upon which side there is a preponderance, but to examine the evidence produced and therefrom, in connection with the evidence introduced on the former trial, determine whether there is reasonable ground to believe a different result will be reached upon a re-trial; and it is not proper for the court to render another judgment without first having decided whether the original judgment should be set aside and a new trial ordered: *Brown v. Byam*, 59-52.

835.

SEC. 3163.

The supreme court can entertain an appeal only when a judgment has been rendered from which an appeal may be taken. The judgment must be affirmatively shown, and the court will dismiss the case where it does not appear that such judgment has been rendered, even though the parties fail to present the objection; for, being jurisdictional in its nature, the parties can not waive it by silence or consent: *Green v. Ronen*, 59-83; *Pittman v. Pittman*, 56-69.

It will not amount to a waiver of an appeal that money paid in to the clerk by the opposite party is applied in part by the clerk in satisfaction of a claim for an attorney's lien, without the knowledge of appellant, where he, as soon as he becomes aware of the fact, repudiates the transaction, and pays back to the clerk the amount so paid in: *Jewell v. Reddington*, 57-92.

SEC. 3164.

An order recommitting a cause to arbitrators is a decision from which an appeal lies: *Brown v. Harper*, 54-546.

An order granting or refusing a change of place of trial is not such as can be appealed from, but upon an appeal properly taken upon some order from which an appeal is allowed, even though it be an intermediate ruling before final judgment, any error in ruling upon the motion for change may be reviewed: *Allerton v. Eldridge*, 56-709. By an appeal from an order granting change of venue, the supreme court acquires no jurisdiction, and will refuse to consider the case, though no objection on that ground is made by either party: *Groves v. Richmond*, 58-54.

But where the motion for change of venue was treated as raising the question whether the action on an appeal bond was properly brought in the county where the suit was commenced, and by that county, for the use of the school fund, or whether it should not have been brought in and by another county, *held*, that the decision of that question would be treated in the same manner as though made upon a demurrer and an appeal therefrom would be entertained: *Lucas County v. Wilson*, 59-354.

Where final judgment is rendered in favor of a defendant, he cannot appeal from a finding of facts which is against him. But if defendant has properly objected to the correctness of such finding, it is not proper, in case of a reversal on plaintiff's appeal, to render judgment against defendant thereon without opportunity for a new trial: *Boyce v. Wabash R. Co.*, 18 N. W. Rep., 673.

An order of court substituting other defendants in a case and releasing the original defendants may be appealed from, and such appeal may be prosecuted even though after such substitution the new defendants have procured a transfer of the case to the circuit court of the United States: *Sunberg v. District Court of Linn Co.*, 61-597.

An order of court declaring a bail bond forfeited is a final order from which appeal may be taken: *State v. Conneham*, 57-351.

Where in an appeal to the circuit court from the judgment of a justice of the peace, a motion was made to dismiss the appeal for want of jurisdiction on the ground that the amount in controversy was not sufficient, *held*, the action of the court in overruling such motion and taking jurisdiction was a determination affecting the final result, and that an appeal therefrom might be taken: *Curran v. Excelsior Coal Co.*, 18 N. W. Rep., 698.

An appeal may be taken from a decree in a partition proceeding settling the rights and interests of the parties as provided in § 3289. In that respect such decree is to be deemed final: *Williams v. Wells*, 16 N. W. Rep., 513.

A plaintiff, to whose petition a demurrer has been sustained, has the right to appeal unless it appears that such right has been in some manner waived: *Hampton v. Jones*, 58-317.

An order of discharge in a *habeas corpus* proceeding cannot be suspended by *supersedeas* bond pending an appeal: *The State v. Kirkpatrick*, 54-373.

836.

SEC. 3168.

This section only applies to such errors as, without such motion, would not be called to the attention of the inferior court. The next section ren-

ders a motion for new trial unnecessary: *Brown v. Rose*, 55-734.

Section applied: *Keller v. Jackson*, 58-629.

SEC. 3169.

Where exceptions are duly preserved in the course of the trial, they may be brought up on appeal although motion for new trial is

stricken from the files because filed too late: *Beems v. C., R. I. & P. R. Co.*, 58-150.

838.

SEC. 3173.

Where judgment is entered and afterward a motion for new trial is made and overruled, an appeal from the judgment must be within six months after the entry thereof, and an appeal from the overruling of the motion for a new trial will not raise any question not involved in the ruling upon such motion: *Patterson v. Jack*, 59-632.

The period for taking an appeal runs from the time the decision is in fact made, and not from the time to which it has relation by agreement, as in case the decision is to be entered in vacation as of the preceding term: *Carter v. Sherman*, 16 N. W. Rep., 707.

The fact that it is sought to establish a lien, special or general,

upon real estate, does not make the case one involving an interest in real property, authorizing an appeal without regard to the amount in controversy: *Colyar v. Pettit*, 18 N. W. Rep., 694; therefore, *held*, that an action to foreclose a mechanic's lien was not within the exception: *Andrews v. Burdick*, 16 N. W. Rep., 275.

The provision of this section, requiring a certificate of the question upon which the decision of the supreme court is desired, when the amount in controversy is less than one hundred dollars, applies to chancery cases as well as actions at law, and as thus applied is not unconstitutional as depriving a party in such cases of a right to appeal and trial *de novo*. It amounts simply to a restriction or regulation of appeals in such cases: *Ibid*.

The statute does not contemplate that mere abstract questions of law shall be certified, but only such as are decisive of the case: *Eckert v. Pickel*, 59-545.

The certificate must point out the questions upon which it is desirable to have the opinion of the court in such a way as to be intelligible in and of themselves, without requiring the court to examine the whole case and determine what the questions are: *Hawkeye Ins. Co. v. Lewis*, 19 N. W. Rep., 311.

It is not the province of the supreme court to decide questions certified but not argued, nor questions argued but not certified, nor questions certified and argued where it is shown that they do not arise in the case: *Speisberger v. Thomas*, 59-606.

Where the question is certified by the trial judge, it will be presumed that it arises in the case unless it is shown affirmatively otherwise: *Noble v. Chase*, 60-261.

The court will sometimes look at the record for the purpose of determining whether the question certified properly arises in the case, but it will not consider a certificate sufficiently specific which requires examination of the record to determine what the question certified is: *Votaw v. Corvin*, 17 N. W. Rep., 142.

A certificate of the judge which fails to indicate the specific question or questions to be determined, but presents the whole case and every question involved therein, without showing what they are, or what one

or more of them it is deemed desirable to present for determination, is not sufficient: *Dunn v. Zoller*, 61-227.

It is not proper to certify a general question which cannot be fully determined without a search of the entire record and a determination of two or more questions: *Wheaton v. Foster*, 58-661; and while it was not the intent that only a single question should be certified, the several questions must be so stated that the supreme court can readily ascertain the point to be determined, and that it is a question of law. Questions of law and fact cannot be mingled together under a guise of a question of law: *City of Centerville v. Drake*, 58-564.

Held, in a particular case, that the certificate of the judge did not sufficiently point out the question of law upon which the opinion of the supreme court was desired: *Fitch v. Flynn*, 58-159.

Where the appellant's abstract failed to show that the judge's certificate stated that it was desirable to have the opinion of the supreme court on the question certified, *held*, that the supreme court did not acquire any jurisdiction by the appeal: *Milliken v. Dougherty*, 59-294.

While the sufficiency of the evidence to support a verdict may, in a certain sense, be said to be a question of law, yet it is not such a question as can be certified: *Hudson v. C. & N. W. R. Co.*, 59-581.

The certificate must be given at the time of the trial, unless delayed upon order or for cause: *Callanan v. Smart*, 60-305.

Where the certificate was entitled of a proper term, but did not show when it was made, nor that it was made at the time of the trial, or even during the term of the trial, *held*, that it was not sufficient: *Babcock v. Chickasaw Co.*, 60-752.

The making and filing of a certificate during the same term but subsequent to the rendition of judgment is not sufficient; it must be made at the time the final judgment is rendered: *Foye v. Walker*, 17 N. W. Rep., 494.

Where defendant concedes a part of the claim, the amount in controversy is the part not admitted: *Thomson v. French*, 59-559.

It must appear from the pleadings that it was possible for the court,

consistently therewith, to render judgment against one of the parties to the action for more than one hundred dollars. The amounts of the original claim and a counter claim cannot be added together in determining the amount in controversy under this section: *Madison v. Spitsnogle*, 58-369; *Fox v. Duncan*, 60-321.

A deceased party cannot appeal,

nor can the right of his estate be adjudicated if an appeal in form is taken: *Tracy v. Roberts*, 59-624.

The court will take notice for itself of its want of jurisdiction, where the amount in controversy does not exceed one hundred dollars, although that question is not raised by either party: *Sperry v. Kretchmer*, 19 N. W. Rep., 807.

840.

SEC. 3178.

The court below may settle and sign a bill of exceptions after appeal is taken, if done within the time allowed for that purpose: *Tiffany v. Henderson*, 57-490.

The lower court retains jurisdiction after the taking of the appeal to perfect the record by giving the certificate as to the evidence intro-

duced in an equitable case: *Goff v. Hawkeye Pump, etc., Co.*, 18 N. W. Rep., 307.

A notice of appeal from a judgment brings up all the objections properly saved on the trial of the cause, including the motion for a new trial: *Gulliver v. C., R. I. & P. R. Co.*, 59-416.

SEC. 3179.

The appeal is not perfected until the fees for transcript are paid or secured, and giving a *supersedeas* bond cannot be regarded as "securing" such fees; and *held*, that after service of notice of appeal and filing of *supersedeas* bond, but before paying or securing costs of transcript, appellant had the right to abandon his appeal, and that the trial court had authority to entertain application by such party for a new trial, and grant it: *Loomis v. McKenzie*, 57-77.

The time within which the appeal is to be perfected by paying or securing the fees for transcript, is not fixed. Filing an abstract and having the cause docketed is evidence of good faith, and the cause will not be dis-

missed for want of transcript. While one must be furnished, if insisted upon by appellee, time will be given to do so, unless appellant or his counsel have had notice that one would be required, and through negligence have failed to furnish it: *Fairburn v. Goldsmith*, 56-347.

It will not be a ground for striking the transcript from the files that it appears that it was delivered to the attorney of the party, where it is not shown that it was not afterward forwarded in the manner directed by the statute: *Deadic v. Hopson*, 17 N. W. Rep., 772.

As to the sufficiency of the abstract and how far it will take the place of the transcript, see notes to § 3184.

SEC. 3181.

Failure to file a transcript can only be taken advantage of by motion to dismiss the appeal or affirm the judgment, and cannot be urged on final hearing: *Holmes v. Hull*, 48-177.

The court will not dismiss the ap-

peal on motion for failure to file a transcript, but order the transcript to be filed and continue the case until it can be done: *Town of Manson v. Ware*, 19 N. W. Rep., 275; *Aldrich v. Price*, 57-151.

841.

SEC. 3183.

If the assignment of errors is filed at the time here required, it cannot be stricken from the files, although not served or filed until appellee's argument is filed: *Conner v. Long*, 19 N. W. Rep., 221.

As to sufficiency of abstract, etc., see notes in supplement to next section.

The want of an assignment of errors must be taken advantage of prior to the final trial and submission,

or it will be deemed waived, although the court may, notwithstanding such waiver, require an assignment: *Andrews v. Burdick*, 16 N. W. Rep., 275.

Where an amended assignment of errors is filed more than ten days before

the term at which the cause is submitted, and duly served, it will be considered: *Kendig v. Overhulser*, 58-195.

As to assignments of error, see, also, § 3207 and notes.

SEC. 3184.

This section, so far as it authorizes a certificate by the clerk in equitable actions tried wholly upon depositions and papers on file, is not repealed by 17 G. A., ch. 145, amending § 2742 (which see), and such certificate of the clerk is still sufficient in such cases to enable the supreme court to consider the case, and the rule that the certificate of a judge must be given at the term has no application to such certificate of the clerk: *Cross v. B. & S. W. R. Co.*, 58-62.

An objection that papers of record in the court below are certified to the supreme court by copy instead of in their original form should be raised in time to permit the other party to correct the error, if it be one, by filing the original papers. Such an objection not made before the final submission of the case will not be regarded: *McDonald v. Farrell*, 60-335.

It is not competent to contradict the recitals in the bill of exceptions by affidavit or by certificate of the judge: *Pearson v. Maxfield*, 47-135; *Dedric v. Hopson*, 17 N. W. Rep., 772; *Conner v. Long*, 19 N. W. Rep., 221. But upon suggestion of diminution of the record a party may have the record in the lower court corrected or amended by proper proceedings therein, and present the record as thus amended to the supreme court by supplemental abstract: *Mahaffy v. Mahaffy*, 18 N. W. Rep., 685.

A motion to strike the evidence from the abstract because not preserved by the bill of exceptions, properly raises the question whether there was or not a bill of exceptions, and this can be settled only by the record of the court below. Lost records in the court below cannot be supplied by affidavits in the supreme court: *Morris v. Steele*, 17 N. W. Rep., 490.

The supreme court will not strike the evidence from the abstract upon motion, where it is in considerable doubt as to what ought to be done, or where the proper ruling would require a somewhat careful and extended investigation of the abstract; it

will either overrule the motion or require it to be submitted with the cause, and where such a motion is overruled the court does not consider itself precluded from determining upon the submission whether the record is such that the case can properly be considered upon its merits, especially where appellee insists in his argument that it cannot: *Alexander v. McGrew*, 57-287.

If no question is made as to the filing of the bill of exceptions, the court presumes that the evidence has been properly preserved. If the appellee states in his abstract that no proper bill of exceptions has been filed and moves to strike out the evidence on that ground, the court does not take the statement as true, but refers to the transcript for a determination: *Wilson v. First Presbyterian Church of Mount Ayr*, 60-112.

Even if it appears that the transcript contains a paper not properly identified by the bill of exceptions, this fact will not warrant the striking the whole bill of exceptions from the record: *Hardy v. Moore*, 17 N. W. Rep., 200.

If an abstract is not denied by the appellee in an amended abstract, the record set out will be taken to be correct, as, for instance, it will be assumed that a bill of exceptions was filed. But if such facts are denied in an amended abstract, the denial will be taken to be true, in the absence of a transcript: *Brainard v. Simmons*, 58-464.

Where the abstract, although failing to show that a bill of exceptions was filed in the court below, contains matter which it could not properly contain unless made of record, the court will regard the appellant as claiming that it was made of record and a direct statement to that effect will not be necessary. If the appellee desires to claim that no bill of exceptions was filed he must do so in an additional abstract: *Thompson v. Silvers*, 59-670.

To secure a review of a law action

it is not essential that the evidence and instructions should be certified by the judge. It is sufficient that the evidence is properly made part of the record by bill of exceptions, and the instructions are identified by the bill of exceptions or in other proper manner: *Wilson v. First Presbyterian Church of Mt. Airy*, 60-112.

The court cannot consider an action triable *de novo* where the abstract does not purport to contain all the evidence. The statement in the abstract that "the testimony was all taken in writing, in substance as follows" *held*, not sufficient: *Britt v. Case*, 58-757. If the abstract does not show that it contains all the evidence, the appeal may be dismissed on motion: *Green v. Ronen*, 59-83.

An abstract which states that all the evidence in the case was reported and certified to by the reporter of the court and duly certified by the court as being all the evidence offered in said trial, will not be sufficient to enable the court to try the case *de novo* if it fails to state that it (the abstract) contains all the evidence, that is, an abstract of all the evidence upon which the case was tried: *Cassady v. Spofford*, 57-237; *Ward v. Snook*, 61-610; *Porter v. Stone*, 17 N. W. Rep., 654; *Hall v. Harris*, 61-500; *Phoenix Ins. Co. v. Findley*, 59-591; but this objection will not be regarded where appellee files an additional abstract setting out the evidence on which he relies: *Alexander v. McGrew*, 57-287.

The statement in the abstract to show that all the evidence is comprehended therein is sufficient, if the opposite party and the court are fairly apprised that the appellant claims that he has presented an abstract of all the evidence, and in such cases the court will presume that he has, unless appellee sets out additional evidence: *Miller v. Wolf*, 18 N. W. Rep., 889.

Where an abstract contains a statement that it is an abstract of all the evidence, it is assumed, not only that this statement is true, but that the evidence was made of record by due certification unless it is made to appear to the contrary; but where the certificate relied upon is set out, and appears to be insufficient, that presumption will not be entertained: *Alexander v. McGrew*, 57-287.

In the absence of an amended ab-

stract denying the statements contained in appellant's abstract, the latter is deemed to be true, notwithstanding such a denial is made in the argument of counsel: *Farmer v. Sasseen*, 18 N. W. Rep., 714; *Weaver v. Kintzley*, 58-191; and this is the rule, even where the bill of exceptions containing the evidence has been stricken from the file: *Roberts v. Leon Loan & Abstract Co.*, 18 N. W. Rep., 702.

Where appellant's abstract purported to contain all the evidence in the case, and appellee in his abstract denied that the appellant's abstract contained all the evidence offered, and that the evidence therein was correctly abstracted, *held*, that appellant's abstract would be deemed correct, it appearing that all the evidence was by depositions which were before the court, and appellee's abstract not showing wherein appellant's abstract was insufficient or incorrect: *Cross v. B. & S. W. R. Co.*, 58-62.

Where appellant's abstract contains no averment that all the evidence is found therein, and appellee files an amended abstract setting out certain evidence alleged to have been omitted from the original abstract without the statement or claim that the two abstracts together do not contain and present all the evidence, appellee cannot afterwards urge that all the evidence is not before the court: *Van Sandt v. Cramer*, 60-424.

Where the abstract of the appellant does not purport to contain all the evidence, the appellee may set forth in his amended abstract omitted portions with the statement that with his additions the abstract does not contain all the evidence: *Cartwright v. Copess*, 60-195; *Hall v. Harris*, 61-500. But where the abstract of appellant purports to contain all the evidence, the appellee must supply what he claims has been omitted: *McArthur v. Linderman*, 17 N. W. Rep., 531.

Where appellee in an amended abstract states that the abstracts together do not present all the evidence, such statement will be deemed true unless denied, and the court cannot hear the case *de novo*: *Love v. Donaldson*, 19 N. W. Rep., 804.

Where the abstract shows upon its face that it does not contain all the testimony, and appellee files an

amended abstract, and does not, until the argument, claim that the evidence is not all before the court, the court will presume that the amended abstract together with the original abstract presents all the evidence in the case: *O'Brien v. Harrison*, 59-686.

The appellee may, by an additional abstract, undertake to supply deficiencies in the appellee's abstract without thereby precluding himself from objecting that the evidence is not properly certified: *Alexander v. McGrew*, 57-287; and if such objection is made it will be deemed true, unless appellant shows by an amended abstract that the evidence was properly certified: *Roby v. Hall*, 57-213.

Unless an additional or amended

abstract be denied it will be regarded as presenting the record correctly, and will prevail against the original abstract: *Hart v. Jackson*, 57-75; and this is true even though it seeks to eliminate something from appellant's abstract: *Richardson v. Hoyt*, 60-68; *Burkhart v. Ball*, 59-629; *Kearney v. Ferguson*, 50-72; *Lucas v. Jones*, 44-298.

It is not proper to set out in the abstract the entire testimony of witnesses, by question and answer, without excluding matter that is immaterial: *Vaughn v. Smith*, 58-553.

An amendment to appellant's abstract, filed by him without leave of court after the filing of appellee's argument, was stricken from the files on motion: *In re Caywood*, 56-301.

843.

SEC. 3186.

The giving of a supersedeas bond does not supersede or render void a delivery bond previously given to secure the release of attached property: *State v. McGlothlin*, 16 N. W. Rep., 137.

A supersedeas bond given in an action by a party claiming a public office, and who has been adjudged entitled thereto, does not suspend his right to exercise such office in pursuance of the judgment, and to receive the salary incident thereto; and therefore in an action on such supersedeas bond the sureties are not liable for salary accruing pending the suit: *Jayne v. Drorb.ugh*, 17 N. W. Rep., 433.

When an order has been determined to have been correctly made, it is then too late for a party to claim relief because he was not allowed to

supersede it: *Yetzer v. Martin*, 58-612.

A supersedeas bond is not essential in perfecting the appeal; it does not secure the clerk's fees for transcript, so as to render unnecessary the payment or securing of the same in order to perfect the appeal as required in § 3179: *Loomis v. McKenzie*, 57-77.

The language at the end of the section in reference to rents and damages to property, specifies only the conditions of the bond and is not a portion of the clause just preceding it, stating the limitation on the amount which the obligee may recover. Where the bond did not contain this condition as to rents and damages, held, that there could be no recovery in an action on such bond for rents or profits accruing during the appeal: *Gill v. Sullivan*, 17 N. W. Rep., 738.

844.

SEC. 3190.

Where, in an action to foreclose a mechanic's lien, a personal judgment for the amount claimed is rendered against defendant, and the lien is declared established upon the property, and the property is ordered sold upon special execution to satisfy the judgment, and it is directed that a

general execution issue for any sum remaining unpaid after exhausting said property, the penalty of the appeal bond should be twice the amount of the judgment rendered: *Flynn v. D. M. & St. L. R. Co.*, 17 N. W. Rep., 769.

845.

SEC. 3194.

Where in a case triable *de novo*, the appellant fails to file any argument, it will be regarded as a failure to prosecute the appeal: *Scott v. Neises*, 61-62.

A party who has not appealed cannot have any relief: *Deroy v. Hall*, 60-749.

Where the court below made a finding of facts unfavorable to defendant, and to which he excepted, and rendered judgment for defendant upon another question, and upon appeal by plaintiff the judgment was reversed, *held*, that as the correctness of the finding of facts could not be inquired into, although defendant also appealed, for the reason that that there was no judgment against him, the court would not enter up judgment upon the finding of facts, but remand the case to the district court to retry the issues of law and fact: *Boyce v. Wabash R. Co.*, 18 N. W. Rep., 673.

The supreme court will not reverse a case in behalf of a party where the right which he seeks to protect, if it ever existed, has expired: *Cuicomp v. Utt*, 60-156; nor to enable appellant to recover nominal damages when that is all the relief to which he is entitled: *Watson v. Moeller*, 18 N. W. Rep., 857; *Wire v. Foster*, 17 *Id.* 174.

Where a decree was reversed on the ground that the court below had erred in overruling a motion to strike certain depositions from the files, for the reason that they had been taken without authority, and the decree was reversed and the cause remanded, *held*, that the court below could not be required to dismiss the cause or enter decree for opposite party, but must proceed to try the case anew: *Kershman v. Swehla*, 17 N. W. Rep., 908.

Where an equity case is appealed and tried anew, and the action of the court below is determined to have been erroneous, the successful party is entitled to have such decree as is

proper on the record as made in the court below, entered up in the supreme court: *First National Bank of Davenport v. Baker*, 60-132.

Where an ordinance provided for a fine for maintaining a nuisance and a person was under such ordinance fined, and the abatement of the nuisance ordered, and the supreme court held that the ordinance in so far as it provided for a fine was in excess of authority and void, *held*, that it would not sustain so much of the judgment as provided for the abatement of the nuisance, but would reverse the whole judgment: *Incorporated Town of Nevada v. Hutchins*, 59-506.

Where an appeal is taken on the ground of defects in the record, it is incompetent for the appellant, without obtaining a rehearing, to bring the case again before the court upon the same appeal, on a corrected record: *Green v. Ronen*, 17 N. W. Rep., 180.

Want of jurisdiction of the subject-matter in the court below, may be raised for the first time on appeal to the supreme court, or may be taken notice of by the court, although not raised: *Groves v. Richmond*, 53-570; therefore *held*, that where a change of place of trial had been granted to a court which could not entertain jurisdiction of the action, the judgment in such court would upon appeal be reversed, and the cause would be remanded to the court from which the change was improperly taken, and proceedings subsequent to the improper change of venue will be disregarded: *Cerro Gordo Co. v. Wright Co.*, 59-485; *Bennett v. Carey*, 57-221; and see notes to § 2590.

Where the judgment will affect the title to real estate, it should be entered in the district court, and the case will be remanded for that purpose: *Hait v. Ensign*, 17 N. W. Rep., 163.

846.

SEC. 3198.

Where at the time of sale an appeal was pending, and on a subsequent determination of such appeal, the judgment was reduced to an amount less than that for which the plaintiff bought in the property at the sale,

held, that defendant was not entitled to an order upon plaintiff to repay the excess, but that the property should be restored to defendant: *Munson v. Plummer*, 58-736.

SEC. 3199.

Where the purchaser at a judicial sale, and the grantee holding under him, paid only the costs and not the whole amount bid, *held*, that not having paid value they could not be regarded as good faith purchasers and *held* further, that the attorney for the plaintiff in the lower court and on appeal, could not, upon purchase of the property, become entitled to protection as a good faith purchaser: *O'Brien v. Harrison*, 59-686.

847.

SEC'S 3201 AND 3202.

[19 G. A., ch. 144, repeals these two sections, and enacts in lieu thereof the following:]

SEC. 3201. If a petition for rehearing be filed the same shall suspend the decision, if the court on its presentation, or one of the judges if in vacation, shall so order, in either of which case such decision shall be suspended until after the final arguments provided for in the next section.

SEC. 3202. The party filing a petition for rehearing may make the same an argument or a brief of authorities upon which he relies for a rehearing, and if he desires to make an oral argument in support of his petition, and as upon rehearing, he shall make an indorsement upon his argument, or brief either in writing or print, stating in substance that the petition[er] for a rehearing will ask to be heard orally in support thereof, which notice shall be served with the petition for rehearing upon the adverse party, and deposited with the clerk of the supreme court; and in such case such petitioner and the counsel for the adverse party shall have the right to be heard orally thereon at the next term of said court, or any subsequent term to which the same is continued. In such case it shall be the duty of the clerk to place the cause wherein the petition is filed upon the docket for the next term of the court beginning not less than twenty days after the depositing of the petition, indorsed as aforesaid, in his office.

Where a cause was reversed on appeal because the judgment for plaintiff included an item erroneously allowed, *held*, that appellee might, on rehearing, offer to remit the excess over the amount of the proper judgment, and judgment for the balance would be entered in the supreme court: *Hyde v. Minneapolis Lumber Co.*, 53-243.

The supreme court will not grant a rehearing upon the application of a party who failed to file or make an argument when the cause was submitted. But if it is satisfied that error has been committed, it will, on its own motion, order a rehearing for the purpose of correcting the error: *Wachendorf v. Lancaster*, 61-509.

After the opposite party has filed a reply to the petition for rehearing, he has no right to file any other argument: *Webster Co. v. Hutchinson*, 60-721.

848.

SEC. 3207.

Where a motion is made upon a statutory ground, and the overruling of the motion is assigned as error, such assignment will be sufficiently

specific although the motion has specified more than one thing as constituting the irregularity complained of in the motion: *Thomas v. Hoffman*, 17 N. W. Rep., 431.

An assignment of error which specifies merely the overruling of a motion for a new trial, when such motion is based upon several grounds, is not sufficiently specific: *Stephens v. Brown*, 60-403; *Marsel v. Bowman*, 17 N. W. Rep., 176; *Terry v. Taylor*, 19 N. W. Rep., 841.

An assignment that "the court erred in overruling the defendant's exceptions to the report of the referee and entering judgment against defendant," held not sufficiently specific: *Hofer v. City of Burlington*, 59-281.

An assignment not discussed or

urged in argument is deemed to be waived: *Clark v. Incorporated Town of Epicorth*, 61-750; *Wood v. Whitton*, 19 N. W. Rep., 907.

When an appeal is taken in an equity case from a ruling upon motion or demurrer, error must be assigned: *Powers v. O'Brien County*, 54-501; *Patterson v. Jack*, 59-632; and see notes to § 2742.

Assignment of error held sufficiently specific in a particular case: *Kendig v. Overhulser*, 58-195.

An assignment of error made at the end of appellant's argument, and not objected to by appellee until after the filing of his argument, and within two days of the submission of the cause, held sufficient: *University of Des Moines v. Livingstone*, 57-307.

SEC. 3212.

That plaintiff has caused transcript of the judgment to be filed in another county, so as to make it a lien upon property in such county, will not be considered as defeating his right to prosecute an appeal: *Tama Co. v. Melendy*, 55-395.

To justify a dismissal of the appeal under this section upon a showing by affidavits, it should clearly appear that the appellant has no further right to prosecute the appeal. Where there is any doubt as to the facts in

question, the appeal will not be dismissed: *Lewis v. Tilton*, 17 N. W. Rep., 199.

Where the party appealed from a decree restraining his use of property for a certain purpose, and on motion it was made to appear that he had lost his interest in the property, held that the appeal would not be further entertained for the purpose of determining the question of costs: *Faucher v. Grass*, 60-505.

849.

SEC. 3216.

The decision of a board of supervisors as to the sufficiency of remonstrances against ordering an election for the removal of a county seat, is a judicial act, reviewable on certiorari: *Herrick v. Carpenter*, 54-310.

Certiorari will lie to control the action of a city council in improperly vacating streets: *Stubenrauch v. Neyenesch*, 54-567; but the action of the council in passing ordinances of a legislative nature cannot be controlled in such proceeding: *Iake v. City of Newton*, 54-586.

A tax-payer may, in this proceeding, question the action of a city council in remitting taxes assessed against another tax-payer, although such plaintiff have no greater interest in the matter than any other tax-payer: *Collins v. Davis*, 57-256.

The action of the council in such

case in hearing the petition for reduction of tax and granting the same, held, to be judicial and properly brought in question by certiorari: *Ibid.*

If the tribunal, in determining the matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally; but when a discretion is conferred upon the tribunal, its exercise cannot be illegal. The statute does not contemplate that the decisions of inferior tribunals upon questions of fact, where the tribunal is clothed with authority to decide upon facts submitted to it, and the subject-matter and the parties are within its jurisdiction, may be reviewed by a writ of certiorari. Therefore, held, that in a proceeding by certiorari in the circuit court, the decision of the board

of supervisors upon the question whether the public interests demand a proposed highway, and whether it is practicable and expedient to establish it, cannot be reviewed: *Tiedt v. Carstensen*, 61-334.

Certiorari will not lie where there is a remedy by appeal, or when the party fails to appeal within the time prescribed by law: *Sunberg v. District Court of Linn Co.*, 61-597.

Where taxes have been levied in different townships in aid of a railroad, the levy in each township is to be considered distinct, and tax-payers of different townships cannot join as

plaintiffs in an action of certiorari to test the validity of such taxes: *Woodworth v. Gibbs*, 61-398.

In an action of certiorari, the object of which is to annul the action of an inferior tribunal, board, or officer, it is peculiarly the duty of the court to scrutinize the petition and interfere only in a case properly made, and even then the court may exercise a certain measure of discretion, and in general should exercise its power sparingly. It is not bound to grant a writ on merely technical grounds, and where no prejudice is shown: *Ibid.*

851.

SEC. 3222.

The provision allowing the circuit court to consider other evidence than that presented in the return of the writ is not intended to extend the remedy so that inquiry can be made into matters other than the jurisdiction and legality of the proceedings of the inferior court. It is not the purpose of the statute to change the office of certiorari so that it will operate as an appeal wherein causes may be tried *de novo*. The provision for the introduction of other evidence is for the purpose of permitting the consideration of all the facts involved in the case bearing upon the issues in the proceeding touching the jurisdiction and the compliance with law in the case reviewed: *Tiedt v. Carsten-*

sen, 61-334.

Where certiorari was brought to determine the legality of the action of the board of supervisors in submitting to vote the question of changing the location of the county seat, *held*, that the return of the board showing upon what evidence the board proceeded, and in what manner they reached the result upon which the order was based, was proper: *Stone v. Miller*, 60-243.

Upon a return of the writ of certiorari, *held*, that it was the duty of the court to examine not only the statement of defendant made in the return, but also the evidence submitted: *Stone v. Miller*, 60-243.

852.

SEC. 3225.

An action of replevin must be brought in the county where defendant resides, or some portion of the property is situated, and § 3230 does not authorize the bringing of the action in the county from which the property has been wrongfully removed, unless such county is that of the defendant's residence: *Hibbs v. Dunham*, 54-559; *Parker v. Norris*, 56-295.

The venue in such actions is not limited to the county of the residence of the defendant, and if action is brought where the property is situated, the defendant must either disclaim any interest or claim to the property or defend the action in the

county where the suit was brought; he is not entitled to a change in the place of trial to the county of his residence: *Porter v. Dalhoff*, 59-459.

This rule is applicable in actions where bond is not given, and the possession of the property before judgment is not sought. It is also applicable where, although possession of property is sought no property is actually seized, and that fact will not entitle defendant to have the venue changed to the county of his residence: *Laughlin v. Main*, 19 N. W. Rep., 673.

Replevin may be maintained by the owner of property, against an officer

who has seized and holds it under a writ of replevin issued against another person, in an action to which the real owner was not a party: *Davis v. Gambert*, 57-239.

Replevin will not lie in favor of one who is already in possession of the property in controversy, nor can it be successfully maintained against one who does not detain possession of the

property: *Hove v. McHenry*, 60-227.

Where a sheriff, in levying on personal property under an execution, simply made a list of the property and took a delivery bond from the execution defendant therefor, held, that such defendant could not maintain replevin against the officer for the property: *Ibid.*

853.

SEC. 3226.

Held, that an action for the possession of a note, on the ground that it had been paid, could properly be

set up as counter-claim to an action on the note: *Sigler v. Hidy*, 56-504.

SEC. 3228.

The provisions of this section do not prevent such third person from bringing replevin against the sheriff to recover possession of the property: *Davis v. Gambert*, 57-239.

An assignee in bankruptcy acquires

such an interest in the property of the bankrupt fraudulently conveyed, that he may maintain an independent action to recover the property: *Wetmore v. McMillan*, 57-344.

856.

SEC. 3239.

Where plaintiff sought to recover possession of property held by a sheriff, but did not allege service of notice of his ownership upon the sheriff, and, thereafter, upon demurrer being interposed on that ground, the court allowed him to dismiss his ac-

tion upon payment of costs and, upon payment to the sheriff of the amount of the judgment for which the property was seized, to retain possession of the property, held, that under the facts appearing there was no error: *Reisner v. Currier*, 58-213.

SEC. 3241.

Whether the successful party must make his election as to whether he will take the property or its value, at the time of judgment, or may do so when execution issues, seems left in doubt, but where the judgment was that plaintiff have immediate possession of the property, and, in default thereof, recover the value, held, that the judgment amounted to an election to take the property, and it should have been accepted when tendered, and the judgment satisfied: *Oskaloosa Steam Engine Works v. Nelson*, 54-519.

This section, allowing the successful party to have execution for the property, or its value, at his option,

is intended to apply only to cases in which the court has jurisdiction to try and determine the merits of the controversy. Where the defendant becomes entitled to a return of the property on a demurrer to plaintiff's petition on the ground that the court has not jurisdiction—for instance, where the action is in a state court against a U. S. marshal for property seized by him under process from a circuit court of the U. S.,—the state court can properly only render judgment ordering the return of the property, and awarding an execution for its value in the event of its not being returned: *Williams v. Chapman*, 60-57.

857.

SEC. 3246.

A person who is the agent of the owner of real property cannot main-

tain such action in his own name: *McHenry v. Painter*, 58-365.

860.

SEC. 3268.

This section does not seem to contemplate any notice to, or defense by the opposite party as to the applica-
tion for a new trial: *County of Buena Vista v. I. F. & S. C. R. Co.*, 55-157.

861.

SEC. 3273.

Action to quiet title may be brought against a person in possession. In such a case plaintiff may unite a prayer to recover possession with a prayer that the cloud be removed: *Lees v. Wetmore*, 58-170.

862.

15 G. A., Ch. 8.

A proceeding under this chapter is a special proceeding triable on appeal like an ordinary action, and not *de novo*: *In matter of application of Harrington*, 54-33.

Where the commissioners have determined facts rendering the final location of the corner a mere matter of measurement, they may properly postpone the expense of such actual survey until the court acts upon their report: *Ibid*.

Where it was stated in a petition that certain persons named as defendants were the only persons that would be affected by the proceedings, and it appeared that but one of them had been served with a notice or had made appearance, *held*, that the court nevertheless acquired jurisdiction to appoint a commissioner as between the plaintiff and the defendant who appeared, unless it was shown that there were other persons who were necessary parties: *Nesselrode*

v. Parrish, 59-570.

The proceeding contemplated in this statute is a summary proceeding designed to determine and locate the true division line between land holders without issue in court or trial by jury, and *held*, that where parties make a conditional claim to the property in dispute, depending upon the location of the premises in reference to the true section line, the question whether the unsuccessful party is deprived of property within the meaning of the constitution is so doubtful that it would not warrant the court in declaring the statute unconstitutional: *Gates v. Brooks*, 59-510.

Actions of this character not being triable *de novo* on appeal, the finding of the commissioner and court must have the force and effect of the verdict of a jury: *Vitoe v. Richardson*, 58-575.

863.

SEC. 3277.

An agreement by an heir, binding him to pay off a certain incumbrance on the property, *held*, not to create a lien which could be set up against him in a partition proceeding: *Rider v. Clark*, 54-292. But taxes which such heir has agreed to pay should be made a lien upon his share: *Ibid*.

865.

SEC. 3289.

An appeal may be taken from a decree settling the rights and interests of the parties. Such decree is in that respect final: *Williams v. Wells*, 16 N. W. Rep., 513.

A party who is, by the decree here-

in contemplated, adjudged to have no interest in the property, may appeal from such decree as a final judgment as to himself: *Ramsey v. Abrams*, 53-512.

SEC. 3290.

Where a division, though practicable, would greatly depreciate the value of the property, the court may	order a sale: <i>Branscomb v. Gillian</i> , 55-235.
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SEC. 3297.

In determining whether there was a contest respecting the extent of the plaintiff's share, <i>held</i> , that the court will not be justified in taking a very critical view of the proceedings; the question is whether there was practi-	cally a contest, and if the parties actually engaged in such contest, whether regularly raised in the pleadings or not, that fact is sufficient to control the question of costs: <i>Duncan v. Duncan</i> , 18 N. W. Rep., 858.
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ATTORNEYS' FEES IN PARTITION.

[Twentieth General Assembly, Chapter 184.]

SECTION 1. In all actions for partition of real estate where there is no defense made no greater attorney fee shall be allowed by the court to be taxed for and as attorney fees in such action for partition than provided in section two here of.

SEC. 2. For the first two hundred dollars or less in value of the property to be partitioned ten per cent, for the excess of two hundred dollars to five hundred dollars five per cent, and for the excess over five hundred to one thousand dollars three per cent, for all excess over one thousand one per cent.

866.

SEC. 3300.

The approval of the sale is essential, and inadequacy of price alone is sufficient to justify the court in refus-	ing its approval: <i>Loyd v. Loyd</i> , 61-243.
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867.

SEC. 3317.

The injunction is not to issue as a matter of right, where it is not necessary to protect the rights of parties interested, and they have already adopted another proceeding affording a full and complete remedy: <i>Sweet v. Oliver</i> , 56-744.	shadow of right, upon the pretense that it is covered by the mortgage (as where it has been, by valid agreement, released from the mortgage at the time of its purchase from the mortgagor) from bringing an action at law to recover the property: <i>Black v. Howell</i> , 56-630.
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This provision does not prevent one whose property is seized without

868.

SEC. 3320.

After a general judgment upon the note secured by the mortgage, an action may be maintained to foreclose	the mortgage; the mortgage is not merged in the judgment: <i>Matthews v. Davis</i> , 61-225.
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SEC. 3321.

A sale of property under judgment of foreclosure for one installment of the debt, discharges the property sold from the lien of the mortgage for other installments. The grante	of the mortgagor, becoming such before judgment is rendered, may redeem from sale under judgment of foreclosure for part of the debt, and hold the property free of any lien
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under the mortgage, or under the judgment against his grantor, for the balance of the debt: *Escher v. Simmons*, 54-269; *Todd v. Davey*, 60-532; and this rule holds where some of the notes covered by the mortgage are transferred, and in such case the foreclosure and sale of the premises in an action by the assignee will exhaust the lien of the mortgagee as to notes still held by the mortgagee upon the land so sold: *Harms v. Palmer*, 61-483.

Where a mortgage is foreclosed for one installment of the debt, and during the period for redemption the mortgagor conveys the property to a third person agreeing to redeem, and afterward does redeem, such third person takes the property free from the lien of the mortgage for the balance: *Micklewait v. Raines*, 58-605.

Where a junior mortgage is assigned, and the assignment is not made of record, a foreclosure of the senior mortgage to which the junior mortgagee is made a party, is binding upon the assignee of such junior mortgage, and he can only make statutory redemption, although not made a party, where the fact of his interest is not known to the party foreclosing. And the fact that such

assignee, pending foreclosure of the senior mortgage, brings an action upon such junior mortgage, will not make it incumbent upon the party foreclosing the senior mortgage to bring such assignee into such foreclosure: *Reel v. Wilson*, 19 N. W. Rep., 814.

This section simply declares that there may be statutory redemption from a sale under a foreclosure. The statutory redemption may be by one who is a party to the suit, but must be made within the time and in the manner prescribed by statute as to other execution sales: *Newell v. Pennick*, 17 N. W. Rep., 432.

It was not the purpose of the statute, in conferring a statutory right of redemption, to take away the equitable right of redemption, but to allow it instead of and independent of the right by statute, and it will be enforced by a court of chancery until it is taken away by express legislative enactment; therefore held, that a junior lien-holder, not having been made a party to the foreclosure, had an equitable right to redeem by action without taking advantage of the provision for statutory redemption: *Spurgin v. Adamson*, 18 N. W. Rep., 293.

869.

SEC. 3324.

Where a surplus was realized by the sheriff from the sale of a homestead under special execution, and the defendant permitted the sheriff without objection, to apply such surplus upon other executions, and turn

the same over to such execution creditors, held, that the debtor was estopped from seeking to recover such surplus from the sheriff: *Brumbaugh v. Zollinger*, 59-384.

870.

SEC. 3327.

This penalty cannot be recovered from one who is assignee of the note secured by the mortgage, but has no written and recorded assignment of

the mortgage. Whether it could be recovered from an assignee by such written and recorded assignment, *quære*: *Low v. Fox*, 56-221.

SEC. 3329.

Iowa R. Land Co. v. Mickel, 41-402, followed: *Johnson v. Thornton*, 54-144.

Where the vendor proceeds to fore-

close the contract of sale, he loses his lien for any balance of the purchase money not paid by the foreclosure sale: *Todd v. Davey*, 60-532.

871.

SEC. 3331.

While the business of carrying on a slaughter house may be necessary

and essential, it may be a nuisance in residence portions of a city, even

though carried on in as careful a manner as possible. Individual property owners may have damages separate from the public, and may maintain a joint action for injunction, although owning separate property, and an action to enjoin the nuisance may be prosecuted in equity, as before the adoption of the Code, although such relief may now, under this section, be had in an action at law: *Bushnell v. Robeson*, 17 N. W. Rep., 888.

Where it is determined that premises are so occupied as to create a nuisance, but it is not found that they are a nuisance, that is, a nuisance *per se*, the court can only enjoin such use of the premises as will amount to a nuisance: *Richards v. Holt*, 61-529.

A blacksmith shop is not a nuisance *per se*, and a party cannot be enjoined from transacting the business of blacksmithing upon his premises. The decree in such cases should require the owner to so change his shop and so prosecute his business that no annoyance should result therefrom to others: *Faucher v. Grass*, 60-505.

Where smoke and soot from the smoke stack of a waterworks company came upon plaintiff's premises in such a manner as to deprive him of the comfortable enjoyment of his

property, but the health of himself and family was not affected thereby, or his property destroyed, *held*, that while such injury constituted a nuisance for which the plaintiff might recover at law, yet he would not be entitled to have an abatement thereof in equity. The rule in equity is that where the damages sustained can be admeasured and compensated, equity will not interfere where the public benefit greatly outweighs private and individual convenience: *Daniels v. Keokuk Waterworks*, 61-549.

The fact that a party recovers damages for something on the ground that it has been injurious to him as a nuisance, does not necessarily show that it is a nuisance at the time of the trial, and that he is therefore entitled to have it abated: *Fuller v. C., R. I. & P. R. Co.*, 61-125.

In an action at law under this section, damages may be recovered for a nuisance, and the nuisance itself may be abated; therefore in an action for damages for a nuisance, the plaintiff is entitled to have his damages assessed by a jury, notwithstanding the fact that he may couple with his claim for damages a prayer that the defendants may be enjoined from continuing the nuisance: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

872.

SEC. 3339.

For similar provisions see § 3127.

SEC. 3345.

An action may be brought upon relation of the auditor to close the business of an insurance company for failure to comply with provisions of chapter 5, title 9, of the Code, which would not fall under this section, and for the purposes of such action it would be assumed that the corporation was duly organized: *State of Iowa ex rel. Auditor v. Iowa Mutual Aid Asso-*

ciation, 59-125.

Where the office for the recovery of which the action is brought, is one to which no compensation attaches, it is not error for the court to dismiss the suit when, at time of trial, the term of office contested for has expired. So *held* in case of sub-director of school district: *State ex rel. McNulty v. Porter*, 58-19.

874.

SEC. 3353.

A supersedeas bond, given on appeal from the judgment of the court that plaintiff is entitled to the office sued for, does not suspend his right to such office, and to the salary incident thereto, to which he becomes entitled by the judgment, and therefore in

an action upon such appeal bond, after affirmance of the judgment, the appellee cannot recover the salary accruing during the pendency of the appeal: *Jayne v. Drorbaugh*, 17 N. W. Rep., 433.

875.

SEC. 3368.

For somewhat similar provisions | see § 2552.

876.

SEC. 3370.

The county in which the action upon the appeal bond is properly brought, is the county entitled to the money collected thereon: *Lucas Co. v. Wilson*, 61-141.

SEC. 3373.

Mandamus will lie to compel a railway company to construct and maintain a private crossing where such duty is imposed by law: *Boggs v. C., B. & Q. R. Co.*, 54-435.

Mandamus is not designed to enable a party to have a review of the action of officers when they are clothed with a discretion, or when their action depends upon facts to be ascertained by them: *Scripture v. Burns*, 59-70.

A court will not, upon an application for a writ of mandamus against a religious corporation, compel the reinstatement of a member expelled and inquire into the rightfulness of such action, it appearing that no property interest or other valuable civil right has been affected: *Sale v. First, etc., Church of Mason City*, 17 N. W. Rep., 143.

878.

SEC. 3376.

Where the board of directors of a school district refuses to act in a proper case, mandamus will lie: *Albin v. Board of Directors of Ind. Dist. of West Branch*, 58-77.

SEC. 3378.

A party cannot have relief without showing the demand herein provided: *Scripture v. Burns*, 59-70.

879.

SEC. 3386.

□ A district township may have an injunction to restrain another district township from removing a schoolhouse from the territory of the former. It is not limited to an action at law for the trespass: *Dist. T^{wp} of Lodomillo v. Dist. T^{wp} of Cass*, 54-115.

An action in equity to enjoin the continuance of a nuisance may be prosecuted as before the adoption of the Code provision found in § 3331, authorizing such relief in an action at law for damages. Different property owners, suffering damages distinct from the public, may join as plaintiffs in such action: *Bushnell v. Robeson*, 17 N. W. Rep., 888.

A citizen and tax-payer may maintain an action to enjoin the issuance by the county auditor of a warrant in payment of a refund of taxes illegally ordered by the board of supervisors. The determination by the board of the legality of such a refunding is not an adjudication which must be attacked only upon appeal or by *certiorari*: *Hospers v. Wyatt*, 19 N. W. Rep., 204.

Where defendant had sold to plaintiff the good will of a business and obligated himself under a penalty not to prosecute the same business in the same place for a limited time, held that the only remedy for a breach of the agreement not to prosecute the business was an action for the penalty, and that an injunction could not be had under this section to restrain defendant from violating his contract: *Stafford v. Shortreed*, 17 N. W. Rep., 756.

Where a road supervisor has served

notice to have a road opened as an official act by virtue of proceedings in which it is claimed that a highway has been established, the owner of property which would be trespassed upon in opening the road, may main-

tain an action for injunction to restrain the contemplated trespass before any actual trespass upon his land is committed: *Morgan v. Miller*, 59-481.

880.

SEC. 3388.

An affidavit to the petition to the effect that the contents thereof are true as the affiant believes, constitutes

a sufficient verification: *Kelley v. Briggs*, 58-332.

882.

SEC. 3395.

Where an injunction is the only relief sought, and dissolution is procured only upon final hearing, attorney's fees should be allowed in an action on the bond for defending in the entire action: *Reece v. Northway*, 58-187; but when the injunction is not the main relief sought, and no effort is made to have it dissolved until final hearing, attorney's fees cannot be recovered: *Carroll Co. v. Iowa R. Land Co.*, 53-685.

An attorney's fee is allowable where the injunction is dissolved on motion; also, where the injunction is dissolved on final hearing if it is the only relief sought. An attorney's fee may also be allowable in case of partial dissolution or modification where such is the relief sought in the action, but not where the motion is to dissolve as an entirety, and is only partially sustained or a modification granted: *Ford v. Loomis*, 16 N. W. Rep., 193.

In an action on an injunction bond

given to stay execution on a judgment where it was alleged that the action for the injunction had been dismissed, *held*, that the entry on the judge's calendar "dismissed as per stipulation," was not sufficient evidence to sustain the action in the absence of a showing as to what such stipulation was: *Toule v. Leacor*, 59-42.

Where real estate depreciates in value during the time that sale thereof is prevented by injunction proceedings, there is no presumption that the owner, if not prevented, would have sold before depreciation and saved himself from loss, and damages are not recoverable for loss of sale unless it is made to appear that there was a *bona fide* application on the part of some person to buy, and that the sale was lost by reason of the injunction: *Reece v. Northway*, 58-187.

SEC. 3396.

Where the action is not to enjoin the enforcement of an execution under a judgment, but merely the sale under it of a particular piece of prop-

erty, it is not necessary that the bond be in double the amount of the judgment: *Hardin v. White*, 16 N. W. Rep., 580.

883.

SEC. 3400.

An injunction should not be dissolved without proofs, upon an answer which seeks to avoid the allegations of the petition: *Huskins v. McIlvooy*, 17 N. W. Rep., 670.

When relief is sought by the in-

junction against fraud which is the gravamen of the bill, the court will continue the injunction, though the defendant has fully answered the equity set up: *Johnston v. C., M. & St. P. R. Co.*, 58-537.

884.

SEC. 3409.

The requirement of this section is jurisdictional, and in the absence of compliance therewith a court is not allowed to take cognizance of the case: *Keeline v. City of Council Bluffs*, 17 N. W. Rep., 668.

885.

SEC. 3416.

The question whether or not an alleged nuisance should be abated may be submitted to arbitration without the submission of any claim for damages: *Richards v. Holt*, 61-529.

886.

SEC. 3425.

An arbitrator, so far as he acts within his jurisdiction, is not civilly liable, even though it be alleged he acted fraudulently and corruptly: *Jones v. Brown*, 54-74. Unless the submission provides otherwise, or consent to a minority award is in a proper manner shown, all the arbiters must concur in the award: *Richards v. Holt*, 61-529.

887.

SEC. 3427.

A court of equity can entertain jurisdiction to set aside an award made by arbitrators chosen under § 1715, to make division of assets and liabilities in case of division of district township: *Dist. T'p of Algona v. Dist. T'p of Lott's Creek*, 54-286. differently apportion costs: *Dist. T'p of Little Sioux v. Ind. Dist. of Little Sioux*, 60-141.

But a court cannot decrease the amount of the award in such case, or

An appeal will lie from an order re-submitting a cause to arbitrators. Under particular facts indicating partiality of an arbitrator, held, error to re-submit the case to the same arbitrators: *Brown v. Harper*, 54-546.

890.

SEC. 3449.

Proceedings by *habeas corpus* for the custody of a child are not criminal in their nature. The action should be in the name of the person alleged to be illegally restrained, and not in that of the state, and in case of failure to secure the discharge the costs should not be taxed to the county: *The State v. Collins*, 54-441.

In a proceeding by *habeas corpus* for the custody of a child, the controlling consideration is the interest of the child itself: *Fonts v. Pearce*,

19 N. W. Rep., 854.

This is the rule when the parent seeking the custody has, either by abandonment or contract, surrendered his personal, legal right to such custody: *Barnett v. Barnett*, 61-199, and see notes to § 2241.

Habeas corpus is prosecuted by ordinary proceeding and the determination of the court upon the facts has the effect of a verdict of a jury: *Ibid.*

891.

SEC. 3452.

The person restrained is to be regarded as the petitioner, and if the proceeding is for the recovery of the custody of a child it may be brought

in any county wherein the sworn petition states that the child is to be found: *Rivers v. Mitchell*, 57-193.

893.

SEC. 3475.

Where a writ was sought to recover the custody of a child from its father, *held*, that it was not a sufficient answer that he had sent the child out of the state, where it did not appear but that he could secure its return if he desired to do so: *Rivers v. Mitchell*, 57-193.

894.

SEC. 3483.

The supreme court cannot in a *habeas corpus* proceeding review an order of imprisonment for contempt and reverse it, unless the act constituting the alleged contempt was such that it can pronounce as a matter of law that the act was not a contempt: *State ex rel. v. Seaton*, 61-563.

895.

SEC. 3491.

The visiting committee of an insane hospital has no authority under this or any other provision of the Code to punish a witness for contempt for refusing to testify when summoned before it: *Brown v. Davidson*, 59-461.

896.

SEC. 3496.

A party may show, as excuse for disobedience to order of court, that a compliance with such order was impossible. He is not confined to an attack upon the order on that ground, by way of appeal: *Hogue v. Hayes*, 53-377.

898.

SEC. 3507.

A resident of Buchanan Co. went with his family to Clayton Co., to reside there temporarily while building a school-house under a contract, with intention of returning to his former home when the work was completed. *Held*, that he did not become a resident of Clayton Co. so as to give a justice of the peace of that county jurisdiction in an action against him: *Bradley v. Fraser*, 54-289.

The fact that the defendant has a domicile in another county than that in which suit is brought does not prove that he is an actual resident of such other county; therefore, *held*, that a contractor upon a railroad who had resided in another county for seven years and was absent from that county only for the purpose of constructing such railroad and expected to return to that county as soon as the job upon which he was at work should be completed, was not an actual resident of such other county within the meaning of this section, it appearing that he was living and keeping house with his family during the time that he was performing his contract in the county where suit was brought: *Fitzgerald v. Arel*, 16-712, and on rehearing, 18 N. W. Rep., 713.

Where suit is brought before a justice of the peace against two persons jointly, as partners, and one of such partners is resident of another county, the justice of the peace acquires no jurisdiction as to such partner by service upon him in the county of his residence. The justice may acquire jurisdiction to render judgment against the firm upon service upon the resident partner, but not as to the non-resident, partner individually: *Ebersole v. More*, 59-663.

SEC. 3508.

A clause in a note giving a justice of the peace jurisdiction in an action thereon to the amount of three hundred dollars, will entitle plaintiff

to bring action thereon before any justice who, but for the amount in controversy, would have had jurisdiction without such clause: *Marshallow Bank v. Kennedy*, 53-357.

Where a note dated and payable at Des Moines recited that judgment might be taken thereon "before any justice in said county," the only county mentioned therein being that of the maker's residence, Dallas county, *held*, that the specification did not operate to give a justice of the peace in Polk county before whom action was properly brought, jurisdiction of the case to an amount in excess of the amount of one hundred dollars: *Brown v. Davis*, 59-641.

Where the amount claimed by the plaintiff is such as to bring the case within the jurisdiction of a justice of the peace, the fact that he erroneously renders judgment for an amount in excess of his jurisdiction will not render his judgment void

and the excess may be remitted: *Reed v. Shum*, 19 N. W. Rep., 254.

The amount of the attorney's fee provided for in the note is not to be taken into consideration in determining the amount in controversy, the attorney's fee being part of the costs: *Spiesberger v. Thomas*, 59-606.

In determining the amount in controversy it is not proper to add together the amounts of the original claim and of a counter claim: *Madison v. Spitsnogle*, 58-369.

A justice has no equitable jurisdiction. Therefore, *held*, that where an action was brought before a justice upon a note, blank as to amount, the plaintiff could not, on appeal to the circuit court, ask a reformation of the note and judgment thereon as reformed, for the reason that he thereby sought to introduce an equitable cause of action which could not be tried before a justice: *Hollen v. Davis*, 59-444.

900.

SEC. 3516.

A justice of the peace has no power to give instructions to a jury sitting in the trial of a case before him: *St. Joseph M'fg Co. v. Harrington*, 53-380.

The provisions of § 2877 for re-trial

of actions where service is by publication, are, under this section, applicable to proceedings in justices' courts: *Taylor & Furley Organ Co. v. Plumb*, 57-33.

901.

SEC. 3518.

Where the notice of suit in the justice's court set out the cause of action as a claim for a certain sum with interest, etc., etc., and the petition filed on the return day claimed to recover the same sum

with interest, etc., upon a bond signed by defendant as surety, *held*, that the petition was not based upon a different cause of action from that stated in the notice: *Winneshiek Co. v. Humpal*, 61-172.

903.

SEC. 3534.

Although the justice from whom the change is taken commit an error in sending the case to a justice who is not the nearest one in the county to whom it might be sent, yet the justice to whom the case is thus sent cannot review such decision, and will have jurisdiction, and his action cannot be collaterally attacked: *Tennis v. Anderson*, 55-825.

It is necessary that the justice granting a change shall designate

by name the next justice to whom the case is sent. This is a judicial determination and in no other way can it be known who is the proper justice to whom the case has been transferred. Until the justice does determine and designate such nearest justice the change of venue is not complete and no other justice can acquire jurisdiction: *Bremner v. Hallowell*, 59-433.

904.

SEC. 3543.

This section applies only to cases where there has been personal service. In case of judgment upon service by publication, § 2877 is applicable: *Taylor & Farley Organ Co. v. Plumb*, 57-33.

907.

SEC. 3567.

The filing of the transcript in the circuit court does not prevent the taking of appeal or writ of error: *Wilson v. Robinson*, 61-357.

SEC. 3568.

Execution on the judgment so filed may be issued at any time within twenty years: *McCoy v. Cox*, 54-395.

SEC. 3569.

This section, in so far as it extends the time within which an execution may issue upon a judgment of a justice of the peace beyond that allowed under the Revision, is applicable to cases in which the time allowed under the Revision had not expired when this Code was enacted, but not to cases where such time had expired: *Woods v. Haviland*, 59-476.

SEC. 3574.

A sale after the expiration of the execution under which levy is made, and without renewal as here contemplated, will be valid: *Walton v. Wray*, 54-531.

SEC. 3575.

Where the defendant makes a tender which is not accepted, the amount in controversy is the difference between the amount claimed and the amount tendered, and if that does not exceed twenty-five dollars, no appeal is allowed: *Young v. McWaid*, 57-101.

The amendment to this section limiting the right of appeal to cases in which the amount in controversy exceeds \$25, is not unconstitutional as depriving the party of a trial before a common law jury in such cases. The constitution authorizes the legislature to provide for trial by jury of less than twelve, in inferior courts, irrespective of the right of appeal: *Higgins v. Farmers' Ins. Co.*, 60-50.

In determining the amount in controversy under this section the costs taxed up by the justice of the peace will not be taken into consideration: *Curran v. Excelsior Coal Co.*, 18 N. W. Rep., 698.

Where plaintiff claimed less than twenty-five dollars in his account, and defendant set up, not by way of counter claim, but as a defense, the payment of more than twenty-five dollars to plaintiff on the indebtedness, held, that the amount in controversy was what was claimed and not what defendant alleged that he had paid: *Boyle v. Wilcox*, 59-466.

A party cannot appeal from a judgment entered before a justice of the peace by his consent: *Stever v. Heald*, 17 N. W. Rep., 145.

908.

SEC. 3576.

An appeal taken after the lapse of twenty days is in effect no appeal, and the case should be stricken from the docket of the circuit court. In such case the court has no jurisdiction to render any judgment except for costs: *Martin v. Croker*, 17 N. W. Rep., 533.

909.

SEC. 3587.

Failure of party appealing to appear and file any pleading in the circuit court, even when judgment went against him by default before the justice, will not entitle the court, in the absence of any general rule of court on the subject, to dispose of the case until regularly reached on the docket for trial: *Harty v. D. M. & M. R. Co.*, 54-327.

910.

SEC. 3591.

The circuit court may allow the defendant to file an amended answer setting up the defense of payment. Such matter does not constitute a new demand or a counter claim: *St. Louis Type Foundry v. Medes*, 60-525.

The claim made to the justice and the remedy sought cannot be changed, and issues involving other matters presented in the circuit court upon appeal. Therefore, *held*, that where an action before a justice was upon a note, blank as to amount, the plaintiff could not, on appeal, change his cause of action so as to ask for the reformation of the instrument and judgment thereon: *Hollen v. Davis*, 59-444.

911.

SEC. 3594.

Although it is error in the court to enter up judgment against the appellant for a greater sum than the penalty of the bond, yet such a judgment would not be void for want of jurisdiction: *Freeman v. Hart*, 61-525.

SEC. 3596.

Where, on appeal by defendant from a judgment by default against him before the justice, he makes no appearance, the judgment may be affirmed without again introducing the evidence: *Harty v. D. M. & M. R. Co.*, 54-327.

SEC. 3597.

The justice of the peace is only required to show in his return such matters as are rendered necessary by the affidavit for the writ: *Spiesberger v. Thomas*, 59-606.

912.

SEC. 3601.

A judgment from which writ of error has been sued out, without filing a *supersedeas* bond, may be enforced, notwithstanding the writ of error. The giving of a *supersedeas* bond on appeal from the judgment of the circuit court in the case will not stay proceedings under the judgment: *Thomas v. Nicklas*, 58-49.

Although no *supersedeas* bond is filed and the transcript of the judgment is taken to the circuit court, this will not prevent the taking of appeal or writ of error: *Wilson v. Robinson*, 61-357.

913.

SEC. 3608.

The justice having jurisdiction of the subject-matter and the defendant, may render judgment against a garnishee who has answered, although he be a resident of another county: *Smith v. Dickson*, 58-444.

SEC. 3611.

A tenant holding over after the expiration of his lease does not become a tenant at will, entitled to thirty days' notice to terminate such tenancy, but is entitled to only the three days' notice to quit, provided in § 3614: *Kellogg v. Groves*, 53-395.

Under particular facts, *held*, that defendant went into possession as assignee of an unexpired lease, and not by stealth, and was, therefore, at the expiration of the lease, entitled to notice to quit: *Gifford v. King*, 54-525.

914

SEC. 3614.

Under Code of 1851, *held*, that proof of service of such notice by affidavit of a person not an officer, in the manner provided for service of original notices by private persons, was not sufficient to entitle the notice to be received in evidence with-

out further proof. The notice here contemplated is not one in an action, but one which forms the basis of a private right, and must be proved as any other matter *in pais*: *Hollingsworth v. Snyder*, 2-435.

917.

SEC. 3636.

A defendant in a criminal prosecution who becomes a witness in his own behalf may be subjected to the same tests of credibility, of memory and of intelligence, by cross-examination, as any other witness: *The State v. Red*, 53-69.

If the defendant requests to become a witness, the fact that he testifies to a part only of his defense may properly be made a subject of comment by the district attorney. The exemption from unfavorable comment extends only to such defendants as choose to avail themselves of the privilege of not testifying in their own behalf: *State v. Tatman*, 59-471.

There is nothing which the prosecuting attorney can say about the fact that defendant has not testified in his own behalf that would justify a reference to it, and courts should hold district attorneys to a strict ob-

servance of their duties in this respect: *State v. Graham*, 17 N. W. Rep., 192.

The fact that a witness does not believe in a God, and that He will reward or punish us according to our deserts, may be shown as affecting the credibility of the witness, but it is erroneous to confine the evidence to a belief in *future* rewards and punishments. The facts as to belief are not to be brought out by cross-examination, but by proof of declarations, etc., etc.: *Searcy v. Miller*, 57-613.

A witness cannot be required to testify to his want of belief in any religious tenet nor to divulge his opinions on matters of religious faith for the purpose of affecting his credibility by showing that he does not believe in a future conscious state of existence: *Dedric v. Hopson*, 17 N. W. Rep., 772.

918.

SEC. 3637.

The rules relating to the admissibility of evidence showing the interest of a witness, are the same at common law and under the statute. The difference is that at common law the court passes upon the evidence, and if the interest be established, excludes the testimony, while under the statute the evidence of interest goes to

the jury to be weighed in determining the credibility. Evidence as to declarations of a witness to the effect that he is interested is not admissible at common law to affect his competency, nor under the statute to affect his credibility: *Erickson v. Bell*, 53-627.

SEC. 3639.

The only restriction placed by this section upon the right of a witness to testify, is as to personal transactions: *Harvey v. Alcott*, 57-171.

The exception at the end of the section, as to cases where the executor testifies in his own behalf, *held*, not to apply where such testimony was not as to a personal transaction, and was not adverse to the opposite party: *In re Edwards*, 58-431.

The disqualification provided for in this section is not limited to actions brought by an executor, assignee or guardian, but applies also in actions against such parties. It extends however only to cases where the witness is examined as against such executor, assignee or guardian, and not to cases where he is examined by such party: *Leasman v. Nicholson*, 59-259.

A party whose liabilities would not be affected by the result of the action, *held*, not incompetent to testify under this section: *Fuller v. Lendrum*, 58-353.

Where one of the parties defendant in an action by an administrator had entered into a stipulation for judgment against him to a particular amount, *held*, that he was no longer a party to the action in such sense as to be disqualified from testifying under this section, although judgment had not yet been formally rendered: *Conger v. Bean*, 58-321.

In a particular case, *held*, that the facts testified to by witness did not involve a transaction between the witness and decedent within the meaning of the section: *Mayes v. Turley*, 60-407; *Miller v. Dayton*, 57-423.

That a party defendant in an action by an administrator, after stating that he signed the note sued on in his own house, was allowed to state who were in the house at that time, was held not error under this section: *Conger v. Bean*, 58-321.

The testimony of a party to an action brought by an heir or adminis-

trator and relating to a personal communication between himself and deceased is not competent, although such party has no interest in common with the other defendants against such heir or administrator: *Burton v. Baldwin*, 61-283.

If the testimony of such a witness is not competent when taken by deposition, it is not admissible, although at the time it is offered the status of such witness is changed, and he is no longer a party: *Ibid*.

An objection under this section is not to the competency of the witness, but to the competency of the testimony: *Ibid*.

Where plaintiff proposed to prove upon his own testimony, in an action against an administrator for services alleged to have been rendered decedent under contract, that he had never received payment for such services, *held*, that the evidence was properly rejected: *Van Sandt v. Cramer*, 60-424.

The statute contemplates that when the administrator or other representative of the deceased testifies as to a personal transaction and describes it, then a party may also testify in relation thereto and give his version of the transaction, but the fact that the administrator refers to a personal transaction as possible does not open the way for the admission of such testimony: *In re Estate of Edwards*, 58-431.

The fact that the executor or administrator testifies as to one transaction does not entitle the opposite party to testify in reference to other transactions with the decedent: *Luehrsmann v. Hoings*, 60-708.

The prohibition prescribed in this section does not extend to any transaction as to which the administrator has been examined in his own behalf: *Ivers v. Ivers*, 17 N. W. Rep., 149.

This section is applicable to a controversy between the heirs of deceased: *Neas v. Neas*, 17 N. W. Rep., 30.

919.

SEC. 3641.

In a prosecution of the husband for bigamy, the lawful wife is a competent witness against him. The crime is one against the wife, within the meaning of the section: *The*

State v. Sloan, 55-217; *The State v. Hughes*, 58-165.

A wife, summoned as garnishee in an action against her husband, is not exempt from answering interrogato-

ries touching her indebtedness to him. The subjection of such indebtedness to the payment of claims against him cannot be regarded as against his interests: *Thomson v. Silvers*, 59-670.

920.

SEC. 3642.

A transfer of a claim from husband to wife is not a communication within the meaning of this section: *Hanks v. Van Garder*, 59-179. Exclamations made by the wife upon the killing of her son by her husband, held not communications between husband and wife within the meaning of this section: *State v. Middleham*, 17 N. W. Rep., 446.

SEC. 3643.

As it may be lawful, under some circumstances, to produce a miscarriage, a communication by a woman to a physician, in relation to such matter, will be privileged, in the absence of a showing that it was not for an unlawful purpose: *Guptill v. Verback*, 58-98. Statements by a person injured as to the cause of the injury, made to the physician called to treat him, in response to a question by the physician as to how the injury occurred, are privileged, and cannot be dis-

closed by the physician to whom they were made, or by his partner, who was present and heard them: *Raymond v. B., C. R. & N. R. Co.*, 17 N. W. Rep., 923. An attorney is competent to testify where it appears that he is not the attorney of the party with reference to any matters about which he testifies, and that no information respecting such matters was obtained from him through the confidential relation of attorney and client: *Reinehart v. Johnson*, 17 N. W. Rep., 452.

921.

SEC. 3647.

Where a witness, who has taken advantage of his privilege, is afterward prosecuted, the fact that he so refused to testify cannot be given in evidence against him: *The State v. Bailey*, 54-414.

SEC. 3649.

Under the common law rule, the moral character of a witness could not be shown, but only his reputation for want of truth and veracity. The object of this section is to change this rule, and therefore the general reputation may be now shown, but not the witness's character as known to the witness, independent of his reputation: *State v. Egan*, 59-636. It is competent for a witness, whose reputation for general morality and truth is assailed, to sustain his character by showing that those having the best opportunity of knowing his reputation have heard nothing said respecting his character; and in a particular case, held, that certain language of the court indicating that evidence of this kind was the best evidence of good reputation, was erroneous, yet that such error was, under the circumstances, without prejudice: *State v. Nelson*, 58-208. Held, not proper, under this section, to ask a witness who has admitted that he has been guilty of horse-stealing, how long he has been engaged therein; such fact would have no bearing upon the moral character of the witness: *State v. McIntire*, 58-572. Where defendant in a criminal prosecution becomes a witness on his own behalf, evidence tending to show that his moral character is bad is admissible, as in the case of any other witness: *State v. Kirkpatrick*, 19 N. W. Rep., 660.

SEC. 3650.

Section applied: *Hess v. Wilcox*, 58-380.

922.

SEC. 3655.

The party whose handwriting it is sought to prove, may, on his behalf, offer in evidence writings of his own proved to be genuine, and is not to be limited to such writings as were made before the issue as to genuine-

ness of handwriting was raised. Therefore, *held*, that defendant might offer in evidence his signature to his answer in the case: *Singer M'fg Co. v. McFarland*, 53-540.

923.

SEC. 3658.

Where it appeared that a certain book was used as a mere memorandum book, from which an entry up of charges against parties in what was called the sales-book was made, *held*,

that the sales-book was the book which was receivable in evidence under this section, and not the memorandum or order book: *Hancock v. Hintrager*, 60-374.

925.

SEC. 3663.

If the party sought to be charged has in writing admitted the contract, this is sufficient to take the case out of the statute, no matter to whom the writing may have been addressed: *Warfield v. Wisconsin Cranberry Co.*, 19 N. W. Rep., 224.

Where the contract is such as is required to be in writing, the written evidence thereof cannot be aided or

added to by parol testimony: *Vaughn v. Smith*, 58-553.

Although a promise by one party to be individually responsible for the debts of another would be within this statute, yet if such a promise has been performed, the objection of the statute cannot be enforced: *Putnam v. Swinney*, 19 N. W. Rep., 286.

926.

SEC. 3664.

A parol agreement to enter into a partnership for the purpose of dealing in real estate does not come within the provision as to contracts for the creation or transfer of an interest in land, and need not be evidenced in writing: *Richards v. Grinnell*, 18 N. W. Rep., 668.

Where an oral assignment of a judgment was made to an attorney, in pursuance of an agreement entered into with the attorney, in payment of services in obtaining such judgment, and before the services were all rendered, *held* that such assignment was valid: *Howe v. Jones*, 57-130.

Where goods were furnished one party and charged to him upon agreement of another to pay for

them, *held* that the agreement of the latter must be regarded as collateral and within the statute of frauds: *Langdon v. Richardson*, 58-610.

An agreement by an incoming partner to become liable for the debts of the firm in consideration of the property acquired by the purchase, is not within the statute of frauds, and the creditors may recover thereon: *Poole v. Hintrager*, 60-180.

An express trust not evidenced in writing cannot be enforced against the trustee. The mere refusal of the trustee to perform the contract, and his denial of its existence, will not authorize a court of chancery to enforce the contract: *McClain v. McClain*, 57-167.

928.

SEC. 3667.

In a particular case, *held* that the contract sued upon was sufficiently established by the evidence of one of the defendants to entitle the plaintiff

to recover against the defendants thereon, although it was within the statute of frauds and not in writing: *Dewey v. Life*, 60-361.

929.

SEC. 3669.

A court of inferior jurisdiction can not acquire jurisdiction under this section over the subject-matter by simple declaration that it has such jurisdiction, and while it may be that the decision of a justice of the peace that he has jurisdiction is presumed to be right until the contrary is shown, yet where the assumption upon which

the decision is based appears, and the decision is thereby shown to be erroneous, the presumption in favor of the justice's jurisdiction is thereby rebutted: *Brown v. Daris*, 59-641.

Section applied: *Lees v. Wetmore*, 58-170.

932.

SEC. 3693.

A justice of the peace has full power to pass on the question of the legality or propriety of the affidavit sought and is not without jurisdiction to issue a subpoena to compel such affidavit, though as a matter of law it appears upon the face of the petition for an affidavit that it could

not, when taken, have any legal use. Therefore, *held*, that the supreme court could not, in a *habeas corpus* proceeding, enquire into an order of imprisonment for contempt made by a justice for refusal of a witness to make such affidavit: *State ex rel. v. Seaton*, 61-563.

933.

SEC. 3702.

Parol evidence is not competent to correct a mistake in a duly certified

copy of a record: *Monk v. Corbin*, 58-503.

935.

SEC. 3717.

The journals of the respective houses of the general assembly are competent evidence to show the

proceedings of such houses: *Kæhler v. Hill*, 60-543.

936.

SEC. 3721.

Where a party to an action dies after notice is served to take depositions, but before they are taken, they are illegal and should be stricken from the files on motion: *Kershman v. Sabela*, 59-93.

It is not essential that the notice and interrogatories be on file in the clerk's office on the day fixed for the commission to issue. The opposite

party having been served with a copy of the interrogatories, the filing of the original interrogatories is not necessary to enable him to file his cross-interrogatories. A delay of seven days in issuing a commission after the date fixed in the notice, *held*, not such a defect as to warrant the exclusion of the deposition when taken: *Bonney v. Cocke*, 61-303.

SEC. 3722.

Where under an agreement to take the deposition of *S. M. Kim*, a deposition of *Sally E. McKim* was

taken, *held*, that it was properly suppressed upon motion: *Glenn v. Gleason*, 61-28.

937.

SEC. 3725.

The person executing the commission and making a return of his do-

ings, should appear to be the person commissioned, and should so appear

of record from the certificate appended to and returned with the commission, but where the commission was issued to *Fred. R.*— and the certificate was signed *F. A. R.*—, *held*, that the presumption that the commission was sent to the person named therein, and the certificate signed by a name which might be that of the person to whom it was sent, were sufficient to show that the commission was properly executed; also, *held*, that the re-issuance of the commission on an order of the court in order that the proper return might be made, was not error, no prejudice being shown: *Byington v. Moore*, 17 N. W. Rep., 644.

SEC. 3727.

If there is a material difference between the name given in the notice and that of the witness whose deposition is taken, the deposition may be suppressed on motion: *Strayer v. Wilson*, 54-565.

939.

SEC. 3737.

Where it appears from the caption of a deposition that it was taken before the proper officer, in the proper county, and that the witness was first duly sworn, and from the certificate that the deposition was read over by said witness, and subscribed and sworn to by said deponent therein, it sufficiently appears that the statute has been complied with: *Vaughn v. Smith*, 58-553.

SEC. 3741.

The fact that the commission is not issued until seven days after the date fixed in the notice is not sufficient to exclude the deposition: *Bonny v. Cocke*, 61-303.

941.

SEC. 3751.

An objection to testimony on the ground that it relates to a personal transaction between the witness and decedent in an action by or against an administrator within the provision of § 3639 is an objection to competency, and, therefore, not within the provisions of this section, as to the time when exception must be taken: *Burton v. Baldwin*, 61-283.

944.

SEC. 3762.

[20 G. A., ch. 191, § 4, provides as to salary of librarian as follows:]

Salary of librarian.

SEC. 4. The salary of the state librarian shall be twelve hundred dollars per annum payable as salaries of other state officers, and there is hereby appropriated out of any money in the treasury not otherwise appropriated, the sum of twelve hundred dollars annually, for the payment of said salary.

[Other sections of the act are referred to in supplement to page 536.]

SEC. 3764.

[19 G. A., ch. 153, amends this section by adding thereto the following:]

Printing of letter-heads, envelopes, &c., to be done by contract.

Provided, that nothing contained in this section shall be construed as fixing the rate of compensation for printing letter-heads, envelopes, or postal cards; and it shall be the duty of the secretary of state to have such work done by contract with the office agreeing to do the same for the lowest price.

946.

SEC. 3771.

[19 G. A., ch. 117, amends this substitute enacted by 17 G. A., ch. 74, by striking therefrom that portion commencing with "and there is allowed" in the second line of the section as it stands, and ending with "duties of his office" in the sixth line, and inserting in lieu thereof the words "and the salary of the deputy clerk of the supreme court shall be twelve hundred dollars per annum." The same act also amends § 766, which see.]

947.

SEC. 3775.

To entitle the district attorney to the per cent. on "fines and forfeitures actually collected by him," it is not essential that the money collected shall actually pass through his hands: *Smith v. Linn Co.*, 55-232.

SEC. 3777.

The reporter cannot be required to transcribe and file his notes until his fees therefor are paid, even where he has by order of the court taken down in writing the evidence offered in an equitable action: *Godfrey v. McKean*, 54-127.

The stenographer's notes, when filed with the clerk as a part of the record of the case, may be amended or corrected by the court when it is ascertained in a proper proceeding that they do not fully or correctly embody the action or proceeding of which they were intended to be the record: *Mahaffy v. Mahaffy*, 18 N. W. Rep., 685.

The filing of the stenographer's original notes, and the subsequent incorporation of them into the bill of exceptions, and the insertion of a duly certified copy thereof in long-hand in the transcript, constitute a

substantial compliance with this section as amended: *McAnnully v. Seick*, 59-586.

The stenographer's report of the evidence may be incorporated into the bill of exceptions by a reference thereto, and becomes a part of such bill of exceptions without being transcribed. A transcript of such notes will only be necessary where a transcript of the record is required: *Hampton v. Moorhead*, 17 N. W. Rep., 202.

It is the better practice to preserve evidence which is taken down in shorthand by a bill of exceptions. Whether it may be done by filing the original notes and making certified transcripts therefrom, *quære*. At any rate the record must be made up in the court below: *State v. Hessian*, 58-63.

950.

SEC. 3784.

The limitation contained in this section applies to the compensation of the clerk for all official services; he is not entitled to receive, in excess of the limit here imposed, the fees as commissioner of insanity specified in § 3825: *Moore v. Mahaska Co.*, 61-177.

951.

SEC. 3786.

[19 G. A., ch. 151, repeals this section, and enacts in lieu thereof the following:]

SEC. 3786. The clerk of the district and circuit courts shall, on the first Monday in January and July of each year, pay into the county treasury for the use of the county all fees of whatever kind in his hands at the date of preceding payment and still unclaimed, and at the time of so doing he shall take from the treasurer duplicate receipts thereof, giving the title of the cause and

Clerk to pay into county treasury unclaimed witness fees.

style of the court in which the same was pending, with the names of the witnesses, jurors, officers, or other persons, and the amount each one is entitled to receive, one of which receipts he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and on demand by the persons entitled to said fees he shall issue county orders for the amount due each person respectively.

[The remainder of this act is inserted in supplement to page 962, in connection with § 3815.]

952.

SEC's 3788, 3789 and the substitute, 18 G. A., Ch. 115.

COMPENSATION OF SHERIFFS.

[Nineteenth General Assembly, Chapter 94.]

Repeal. SEC. 1. Chapter 115, laws of the Eighteenth General Assembly, relating to compensation of sheriffs, is hereby repealed and the following enacted in lieu thereof:

Attending supreme court. SEC. 2. The sheriff is entitled to charge and receive the following fees:—For attending the supreme court, to be paid out of the amount appropriated for contingent expenses of said court, two dollars per day.

Serving notice. SEC. 3. For serving a notice and making a return thereof, for the first person served, fifty cents, and for each additional person twenty-five cents.

Serving warrant. SEC. 4. For each warrant served, two dollars, and the repayment of any amount actually paid by him as necessary expenses in executing such warrant as sworn to by the sheriff. If service of the warrant cannot be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable.

Serving subpoena. SEC. 5. For serving and returning a subpoena, for each person, twenty cents.

For service of subpoenas on the same witnesses in several state cases, the sheriff was entitled to mileage but for one trip: *Redfield v. Shelby Co.*, 19 N. W. Rep., 828. *held*, that the sheriff made in one trip.

Summoning jury. SEC. 6. For summoning a grand or trial jury, for each person served, sixty cents, to be paid out of the county treasury; and such sum shall be in full compensation for such service.

Summoning jury to assess damages. SEC. 7. For summoning a jury to assess the damages to the owners of lands taken for public improvements, and attending to them, five dollars per day. There shall be nothing in this section so construed that will allow any sheriff to make separate charges for different assessments, provided they can be done by the same set of appraisers and completed in one day of ten hours.

Serving execution, attachment, order or injunction. SEC. 8. For serving an execution, attachment, or order for the delivery of personal property, injunction, or any order of court, and making return thereof, two dollars.

SEC. 9. For collecting and paying over money: On the first five hundred dollars or fraction thereof, two per cent.; and on excess over five hundred dollars and under five thousand dollars, one per cent.; on all over five thousand dollars, one-half per cent.

Collecting money.

SEC. 10. For making and executing a certificate or deed for lands sold on execution, or a bill of sale for personal property, one dollar.

Executing deed or bill of sale.

SEC. 11. For the time necessarily employed in making an inventory of personal property attached or levied upon, twenty-five cents per hour.

Inventory of property levied on.

SEC. 12. For copy of paper required by law, made by him, for each one hundred words, ten cents.

Making copies.

SEC. 13. Mileage in all cases required by law, going and returning, per mile, five cents.

Mileage.

SEC. 14. For taking each bond required by law, twenty-five cents.

Taking bond.

SEC. 15. Each commitment to jail, twenty-five cents; discharge from same, twenty-five cents.

Commitment or discharge.

SEC. 16. For receiving a prisoner on surrender by bail, fifty cents.

Receiving prisoner.

SEC. 17. For boarding a prisoner, a compensation to be fixed by the board of supervisors, not less than fifty cents per day.

Boarding prisoner.

SEC. 18. For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors.

Waiting on prisoners.

SEC. 19. For attending before any judge with a prisoner, one dollar per day.

Attending with prisoner.

SEC. 20. For attending sale of property, for each day, one dollar.

Attending sale.

SEC. 21. The sheriff, for conveying one or more convicts to either of the penitentiaries of this state, or any prisoner to any county jail outside of the county in which said sheriff resides, or any insane person or persons to any insane asylum in the state, or person or persons to the reform school in the state, shall be allowed, as full compensation therefor, his necessary traveling expenses, actually paid by him, including board and railroad fare for himself and such convicts, insane, or other prisoners, or any other necessary expenses, and in addition thereto forty cents per hour for the time necessarily employed in going to and returning from said prisons, asylums, or reform schools, to be certified by the oath or affidavit of such sheriff, accompanied by the proper vouchers to the board of supervisors of the county where the convictions took place. Should the sheriff need any assistance in taking prisoners to the penitentiary or insane persons to the asylum, the same shall be furnished at the expense of the county, the compensation to be fixed by the board of supervisors.

Conveying convict, prisoner or insane person to penitentiary, jail, asylum or reform school.

SEC. 22. The jailer may be furnished a dwelling in connection with the jail, or as convenient thereto as practicable, in the discretion of the board of supervisors.

Dwelling for jailer.

SEC. 23. The sheriff is also entitled, for attending district and circuit courts, and for other service for which no compensation is allowed by law, such annual salary as may be fixed by the board of supervisors, but in no case less than two hundred dollars nor

Annual salary.

more than four hundred dollars; and the sheriff shall make a full report to the board of supervisors at their January meeting of each year, showing the full amount of fees received by him for the previous year in pursuance of this act.

Repealing
clause.

SEC. 24. All acts and parts of acts in conflict with this act are hereby repealed.

SEC. 3788.

As to fee under the original section | *dington*, 54-561.
for serving execution, see *Bell v. Wed-*

953.

SEC. 3789.

[This section is repealed by 19 G. A., ch. 94, inserted above.]

The board may properly fix the | services on the faith of such action
amount of the sheriff's annual salary, | will constitute a contract binding
under this section, at the beginning | upon the county: *Holmes v. Lucas*
of his term, and the rendering of the | *Co.*, 53-211.

SEC. 3790.

This section applies only to sher- | defendant to the supreme court, al-
iff's fees and does not render the | though on such appeal the judgment
county liable for cost of printing ab- | against defendant be reversed: *Red*
stract and argument on appeal by | *v. Polk County*, 56-98.

954.

SEC. 3791.

[19 G. A., ch. 159, repeals this section, and enacts in lieu thereof, the following:]

Members of
board of super-
visors.

SEC. 3791. The members of the board of supervisors shall each receive four dollars for each day actually in session, and two dollars and fifty cents per day, exclusive of mileage, when not in session but employed on committee service, and six cents per mile for every mile traveled in going to and from the regular and adjourned sessions of the board and in going to and from the place of performing committee service: *Provided*, that in counties having a population, as shown by the last preceding census, of ten thousand or less, they shall not receive compensation for session service for more than twenty days in one year; and in counties having a population of more than ten thousand, but less than twenty-three thousand, for more than thirty-five days of such service in one year; and in counties having a population of twenty-three thousand or over, for more than forty days of such service in one year.

SEC. 3793.

An attempt of the board of super- | to be an allowance to the extent of
visors to make an allowance to the | \$1,500, as herein authorized: *Griffin*
treasurer greater than they are au- | *v. County of Clay*, 19 N. W. Rep.,
thorized to do, cannot be construed | 327.

957.

SEC. 3804.

In default cases, where plaintiff is | 3542), the justice is entitled to both a
required to prove up his claim before | trial fee and a fee for entering judg-
getting judgment (under §§ 3541, | ment: *Shaw v. Kendig*, 57-390.

961.

SEC. 3814.

A witness is not entitled to fees for the time during which he is confined in jail on commitment by a magistrate for failure to give security to appear as a witness for the state in a criminal prosecution: *Markwell v. Warren Co.*, 53-422.

Where a justice of the peace dismisses a criminal prosecution for failure of the prosecuting witness to appear, the costs, including witness fees, may properly be taxed to the county: *Cassidy v. County of Palo Alto*, 58-125; unless the justice has ground for taxing them against the prosecuting witness, as provided in § 4691: *County of Palo Alto v. Moncrief*, 58-131.

Where the county fails to pay costs properly taxed against it, action may be brought against it therefor;

Cassidy v. County Palo Alto, 58-125.

Since the amendment made in § 3818, the county is not liable for fees of defendant's witnesses in a criminal case before a justice of the peace, unless they have been subpoenaed upon order of the court as therein provided: *Kennedy v. Delaware County*, 59-123.

A witness for the prosecution who comes from another state at the request of the state, and testifies in a criminal prosecution where the defendant is adjudged not guilty, should be compensated by the county in accordance with this section for his mileage outside of as well as within the state: *Westfall v. Madison Co.*, 17 N. W. Rep., 614.

962.

SEC. 3815.

[19 G. A., ch. 151, repeals this section, and in lieu thereof enacts the following substitute, together with an additional section.]

SEC. 3815. Each justice of the peace shall, on the first Monday in January and July, each year, pay into the county treasury, for the use of the county, all fees of whatsoever kind in his hands at the date of preceding payment and still unclaimed, and at the time of so doing he shall take from the treasurer duplicate receipts therefor, giving the title of the cause, with the names of the witnesses, jurors, officers, or other persons, and the amount each one is entitled to receive, one of which receipts he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and on demand by the persons entitled to said fees he shall issue county orders for the amount due each person respectively.

Justices to pay unclaimed witness fees into county treasury.

SEC. 2. Each county treasurer shall make a certified statement of all unclaimed fees in his hands at the time of the taking effect of this act, showing the title of the cause, style of the court, name of the individual, and the amount to which each one is entitled, and file the same with the county auditor, who shall charge the treasurer in the county fund with the aggregate amount so certified, and place the same on the proper record as a claim allowed, and issue county orders therefor upon demand by the parties entitled thereto.

County treasurer to make statement of unclaimed fees.

[The first part of this act is a substitute for § 3786, and is inserted in supplement to page 951.]

SEC. 3818.

This section applies to cases in all courts held by justices of the peace, the courts of the state, including and in the absence of such order by a

justice of the peace, the county is not liable for fees of defendant's witnesses in a criminal proceeding, wherein the defendant is adjudged not guilty, notwithstanding the provisions of § 3814: *Kennedy v. Delaware County*, 59-123.
Held, not error for the court to refuse an order for all the witnesses asked for by defendant upon showing made in a particular case: *State v. Benge*, 17 N. W. Rep., 100.

964.

SEC. 3825.

A clerk is not entitled to the fees specified in this section in excess of the limit of the compensation specified in § 3784: *Moore v. Mahaska Co.*, 61-177.

965.

SEC. 3830.

No duty is hereby imposed upon an attorney appointed to defend a criminal, to present the case to the supreme court, but if, in the exercise of his discretion, he does appear there, the statute provides a compensation shall be paid him by the county. The amount of such compensation is not to be what his services would have been reasonably worth in case he had been employed by the county, but an enlarged compensation, graded on a scale corresponding to the prices fixed for a trial in the district court. Therefore, *held*, that an allowance of twenty-five dollars for arguing the case in the supreme court was proper: *Baylies v. Polk Co.*, 58-357.

967.

SEC. 3842.

The party against whom the judgment is rendered is primarily liable for all the costs to the parties entitled thereto. They may issue their fee bill therefor, and failing in that they may, by motion, require the successful party to pay such of the costs as accrued at his instance, as provided in § 2935. The statute does not contemplate the issuance of a fee bill against a party against whom no judgment has been rendered: *McConkey v. Chapman*, 58-281.

970.

SEC. 3848.

Where death is caused by the administration of poison, the crime will be murder if the poison is unlawfully administered and without a good intention. Such administration of the poison constitutes the required deliberation, premeditation and intent to kill, and it is immaterial whether or not there is a specific intent to kill: *State v. Wells*, 17 N. W. Rep., 90.

971.

SEC. 3851.

Where defendant was charged with committing murder in the perpetration of robbery and burglary, and the verdict of the jury was "guilty as charged in the indictment," *held*, that this was a sufficient finding of the degree of the crime and was a conviction of murder in the first degree (distinguishing *The State v. Moran*, 7-236): *The State v. Weese*, 53-92.

975.

SEC. 3856.

On a trial for manslaughter it is not necessary to define the crime of murder or any lesser crime than manslaughter, if from the evidence it appears that defendant admits the killing, but seeks to justify. Where

there is any evidence sustaining the claim that the blow was accidental, the law in relation to accidental killing should be given to the jury: *State v. Hartzell*, 58-520.

SEC. 3858.

An indictment under this section need not in express terms charge an assault; if it charge putting in bodily fear and danger of life, it will be sufficient in this respect, the charge of an assault being thereby necessarily implied: *The State v. Brewer*, 53-735.

An indictment stating that defendant, with force, etc., and by putting in fear, etc., "did take, steal and carry away from the said, etc.," is

not sufficient to charge this offense. It should charge a taking, etc., from the person: *The State v. Leighton*, 56-595.

An indictment charging that defendant made an assault upon the person named, "and with force and violence unlawfully and feloniously did steal, take and carry away from the person of" said person, etc., held, sufficient to charge robbery: *State v. Kegan*, 17 N. W. Rep., 179

SEC. 3861.

While a female over ten years of age is presumed capable of giving consent, yet the fact that a female over that age lacked puberal development may be considered in sup-

port of her claim that she did not understand the nature of the intended act: *State v. McCaffrey*, 19 N. W. Rep., 331.

977.

SEC. 3864.

[19 G. A., ch. 19, amends this section by striking out the words "one year" in the sixth line, and inserting in lieu thereof, the words "five years."]

SEC. 3867.

Mere unlawful commerce for a consideration paid is not seduction. There must be some artifice or false promise by which the virtuous female is induced to surrender her person. But the allegations in the indictment in a particular case, of representations as to the innocence of the act and promises of presents, &c., held sufficient on demurrer: *State v. Fitzgerald*, 19 N. W. Rep., 202.

Proof of unchaste conduct on the part of prosecutrix just prior to the alleged seduction would entitle defendant to acquittal; therefore, an instruction that proof of such conduct should be considered against prosecutrix, held erroneous, in that it did not go far enough in stating the effect of such conduct: *State v. Carr*, 60-453.

Instruction as to effect of proof of improper liberties allowed to others than defendant, prior to the alleged crime, held misleading, in that the meaning of such term was left ambiguous: *Ibid.*

In a particular case, held, that it sufficiently appeared from the evidence that prosecutrix was an unmarried woman; also that the seductive arts were such as were sufficient to constitute the crime, being promises to marry, &c.; also, that the corroboration was sufficient: *State v. Heatherton*, 60-175.

An indictment charging that defendant "did unlawfully and feloniously seduce," &c., is sufficient, without stating the means employed: *State v. Conkright*, 58-338.

979.

SEC. 3872.

Under indictment for assault with intent to commit murder, defendant may be convicted of assault with in- tent to commit manslaughter: *State v. White*, 45-325; *State v. Connor*, 59-357.

SEC. 3873.

If the jury find that the prisoner charged with the assault of this character was so drunk that he was incapable of forming an intent to ravish, they should find him not guilty: *State v. Donovan*, 61-369.
It does not follow as a legal presumption that any specific offense is intended by a man chasing a woman: *Ibid.*

983.

SEC. 3891.

An indictment charging that defendant did "with intent to commit, etc., feloniously and willfully break and enter in the night time, etc.," is sufficient. It is not necessary to charge that the breaking and entering were "burglarious." *The State v. Short*, 54-392.
The possession of goods recently burglariously stolen is not of itself sufficient evidence upon which to find the defendant guilty of burglary: *State v. Shaffer*, 59-290.
As to whether an indictment will be bad for duplicity if it charges the breaking and entering, and also the larceny of goods from the building so entered, see notes to § 4300.

SEC. 3894.

While the offense defined by this section is similar to that of burglary, defined by § 3891, an indictment which describes the house as a place "in which goods were kept for use, sale, and deposit," sufficiently specifies that the offense charged is one under this section, and not under the other: *State v. Franks*, 19 N. W. Rep., 832.
The possession of burglars' tools may be shown as evidencing the intent of defendant in entering the house: *Ibid.*

985.

SEC. 3901.

[This section is repealed by 20 G. A., ch. 185, § 15, inserted in supplement to page 447.]

INTERFERENCE WITH RAILROAD PROPERTY.

[Nineteenth General Assembly, Chapter 112.]

Uncoupling
locomotive or
cars.

SECTION 1. If any person shall willfully and maliciously uncouple or detach the locomotive or tender or any of the cars of any railroad train, or shall in any manner aid, abet, or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiary not exceeding five years, or by fine not exceeding one thousand dollars, or both, at the discretion of the court.

Seizing or run-
ning locomo-
tive.

SEC. 2. If any person shall unlawfully seize upon any locomotive, with or without any express, mail, baggage, or other car attached thereto, and run the same upon any railroad, or shall aid, abet, or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiary not exceeding

ten years, or by fine not exceeding two thousand dollars, or both, at the discretion of the court.

SEC. 3. If any person shall, without permission from the proper authority, wrongfully take or run any hand car upon any railroad in this state, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not more than one hundred dollars, or imprisoned not more than thirty days, at the discretion of the court: *Provided*, that if by such unlawful use of any hand car any locomotive or car is thrown from the track, or a collision produced, or any person injured thereby, he shall, on conviction, be imprisoned in the penitentiary for a term of not more than five years; and *provided further*, that if by reason of such unlawful use of any hand car any person is killed, such person offending shall be deemed guilty of manslaughter.

Wrongfully running hand car.

SEC. 4. If any person not an employe upon a railroad shall wrongfully interfere with any automatic air-brake or bell-rope upon any railroad car, or use the same for the purpose of stopping or in any way controlling the movement of the train, [he] shall be subject to the penalty provided in section three of this act for the unlawful running of a hand car on any railroad; and any conductor or brakeman on a railroad train shall have power to arrest such person so offending and deliver him to some peace officer on the line of the railroad.

Interference with air-brake or bell-rope.

Conductor or brakeman may arrest.

986.

SEC. 3902.

There are not two degrees in the crime of larceny, but only in the punishment; and a conviction for petit larceny bars a subsequent prosecution for grand larceny: *The State v. Murray*, 55-530.

So, also, a conviction for petit larceny bars a prosecution for larceny from the person, under § 3905: *The State v. Gleason*, 56-203.

Where the prosecution relies upon possession by defendant of recently stolen property, the defendant is not required to overthrow such presumption by preponderance of evidence of the honesty of such possession. Evidence sufficient to raise a reasonable doubt in his favor is sufficient: *The State v. Reichart*, 57-245.

A pledgee has such special property in the thing pledged that a taking from him by the pledgor may be larceny: *Bruley v. Rose*, 57-561.

In an indictment for larceny the venue may be laid in any county in which the thief was possessed of the stolen goods: *State v. Lillard*, 59-479.

Under an indictment for larceny of property of greater value than twenty

dollars, defendant may be convicted upon proof of a larceny of part of the property less than twenty dollars in value. The offense is the same: *State v. Hessian*, 58-68.

It is not required that in an indictment for larceny of an instrument in writing the property shall be more particularly described than any other stolen property; therefore, *held*, that an indictment charging that defendant took, etc., a bill of exchange, to-wit: an order for the payment of money (describing it), and of the value of \$20.97 was sufficient: *State v. Pierson*, 59-271.

In the case of larceny of property in the possession of a receiver the indictment may properly lay the ownership of the property in the receiver: *State v. Rivers*, 60-381.

A felonious taking is a taking without color of right or excuse for the act, and it may safely be said that there was no color of right or excuse if the defendant knew that he had no authority to take the property, and with this knowledge he knowingly carried it away and converted it to his own use: *Ibid*.

988.

SEC. 3906.

Representations made by acts or declarations intended to induce the belief that the person making them is some one else, may be sufficient to constitute the crime, although not amounting to direct representations that the party's name is that of the person whom he impersonates: *State v. Goble*, 60-447.

SEC. 3908.

The fact that the officers of a municipal corporation loaned the public funds in violation of this section, does not prevent the same being recovered in an action by the corporation against the person to whom they were so loaned, or his surety: *Dist. T'p of Pleasant Valley v. Calvin*, 59-189.

A county treasurer prosecuted for embezzlement may show that the defalcation took place at such time that prosecution is barred by the statute of limitations, although by fraudulent statements to the board of supervisors he made it appear subsequent to such actual defalcation that he had on hand the necessary balance, and that his accounts were correct. The rule of estoppel applicable in a civil action against the treasurer cannot be enforced in a criminal prosecution: *State v. Hutchison*, 60-478.

990.

SEC. 3914.

Where the indictment alleges the value of a check charged to have been stolen, such allegation must be taken as equivalent to an allegation that the instrument called for at least that amount of money: *State v. Pierson*, 59-271.

991.

SEC. 3915.

A receiver does not hold property under what is denominated a legal process issuing out of any court, and he is not an officer within the meaning of this section. Therefore, it is proper to charge the wrongful taking of property from him as larceny, laying the ownership of the property in the receiver: *State v. Rivers*, 60-381.

SEC. 3917.

The alteration of an unsigned indorsement, on the back of a note, of money paid, will not constitute forgery, where it does not appear but that such indorsement was a mere private memorandum made by the holder and not intended as a receipt: *The State v. Davis*, 53-252.

Forgery, and uttering and publishing as true a forged instrument, are distinct offenses, and an indictment charging both is bad for duplicity (overruling *State v. Nichols*, 38-110): *The State v. McCormack*, 56-585.

An indictment alleging in substance that the defendant falsely and feloniously and with intent to defraud, made a negotiable promissory note for a certain amount to which, as maker, the name of a certain person was attached, a copy of which note is set out in full, sufficiently charges a crime and states the facts as distinguished from mere legal conclusions: *State v. Stuart*, 61-203.

998.

SEC. 3948.

[20 G. A., ch. 123, amends this section by inserting after the word "constable" in the first line thereof, the words, "marshal, deputy marshal, policeman, or any police officer of any city or town."]

SEC. 3951.

If a person corruptly exacts a consideration from another for an agreement not to prosecute, he is guilty under this section, although he took such consideration for the benefit of another: *State v. Ruthven*, 58-121.

The fact that a person guilty of a

crime under this and the following section is an officer, coming within the provisions of § 3948, does not exempt him from the higher punishment prescribed in this section: *Ibid.*

1003.

SEC. 3977.

Actual malice against the owner is not an essential ingredient of the crime. If the act be done maliciously, for the purpose and with the in-

tent of injuring the owner, although unknown, it is sufficient: *The State v. Linde*, 54-139.

1007.

SEC. 3993.

Dishon v. Smith, 10-212, followed, and distinguished from *Carrothers v. Russell*, 53-346: *Hawes v. Miller*, 56-395.

Giving or offering a bribe to an elector is a ground for contesting an election: See § 692 and note

1009.

SEC. 4008.

The act may constitute adultery as to the man, although, as to the woman, it is effected by force and against her will: *State v. Donovan*, 61-278.

Where two acts of intercourse a week apart were proved, and the prosecution, at the close of the argument, elected to rely upon one of them, *held*, that this removed the evidence as to the other from the jury and cured any error there might have been in its admission: *Ibid.*

It is essential that the state prove that the prosecution was commenced by the wife. The averment in the indictment that it was so commenced will not be presumptive proof of its truth: *State v. Henke*, 58-457. But the state is not required to prove the fact beyond a reasonable doubt: *State*

v. Donovan, 61-278.

The appearance of the wife before the grand jury, in response to a subpoena, and the giving testimony against the husband without intending to prefer a charge, but supposing she was required to do so, would not constitute a complaint by the wife: *Ibid.*

The words "husband or wife" as used in this section, refer to and mean the spouse of the person charged with the offense: *Bush v. Workman*, 19 N. W. Rep., 910.

The provisions of § 4010, as to the presumption arising from absence, do not apply as against a defendant to establish the validity of his marriage with a wife who had previously been married: *State v. Henke*, 58-457.

1010.

SEC. 4009.

The continuing to cohabit, after a bigamous marriage, consummated within the state, is a crime in itself, in such sense that the parties may be tried therefor, although the lapse of time since the marriage is such as to bar prosecution for the marriage itself: *The State v. Sloan*, 55-217.

The lawful wife is a competent witness against the husband in a prosecution for bigamy: See notes to § 3641.

An indictment for this crime, stating that the date of the lawful marriage was to the grand jury unknown, that it took place in Illinois, and that

at the time of the second marriage the former marriage relation still existed, *held*, sufficient as against the objections, first, that it did not state the date of the first marriage; second, that it did not state that such marriage was lawful and valid by the laws of Illinois; third, that it did not appear that the lawful wife was still living at the date of the second marriage: *State v. Hughes*, 58-165.

The guilty party may be prosecuted in any county where he unlawfully cohabits with a second wife,

although the second marriage was consummated in another county; but evidence of the second marriage in such other county is proper, not to show a crime in that county, but to fix the nature of the subsequent cohabitation: *Ibid*.

The testimony of a witness as to the fact of marriage is sufficient without record evidence thereof: *Ibid*.

It seems that the fact that defendant in a second marriage acted under reputable legal advice would be no defense: *Ibid*.

SEC. 4010.

The provisions of this section are not applicable where, in a prosecution for adultery, it is attempted to show that defendant was married by

proof of a marriage with a woman who had been previously married: *State v. Henke*, 58-457.

1011.

SEC. 4013.

[20 G. A., ch. 142, § 1, repeals this section and enacts in lieu thereof the following:]

Penalty for keeping house of ill-fame.

SEC. 4013. If any person keeps a house of ill-fame, resorted to for the purpose of prostitution or lewdness, such person shall be punished by imprisonment in the penitentiary not less than six months nor more than five years.

A previous conviction under an indictment charging only an offense under Code § 4091 will not warrant a sentence, on conviction under this

section, as it stood before amendment, of imprisonment in the penitentiary: *The State v. Holmes*, 56-583.

SEC. 4016.

[20 G. A., ch. 142, § 2, repeals this section and enacts in lieu thereof the following:]

Penalty for enticing females to house of ill-fame.

SEC. 4016. If any person entice back into a life of shame any person who has heretofore been guilty of the crime of prostitution, or who shall inveigle or entice any female before reputed virtuous to a house of ill-fame, or knowingly conceal or assist or abet in concealing such female, so deluded or enticed for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the penitentiary not less than three nor more than ten years.

[The same act contains the following:]

Penalty for lewdness.

SEC. 3. If any person for the purpose of prostitution or lewdness resorts to, uses, occupies or inhabits any house of ill-fame or place kept for such purpose, or if any person be found at any hotel, boarding house, cigar store or other place leading a life of prostitution and lewdness, such person shall be punished by imprisonment in the penitentiary not more than five years.

Evidence on trial.

SEC. 4. The state, upon the trial of any person indicted for keeping a house of ill-fame, may, for the purpose of establishing the character of the house kept by defendant, introduce evi-

dence of the general reputation of such house as so kept, and such evidence shall be competent for such purpose.

1012.

SEC. 4018.

[20 G. A., ch. 195, repeals this section and enacts the following as a substitute therefor:]

SEC. 4018. Any coroner or undertaker, or the superintendent or managing officer of any public asylum, hospital, poor house or penitentiary shall deliver to any medical college or school or any physician in this state for the purpose of medical and surgical study, the body or remains of any deceased person except when such body has been interred, but no such body shall be so delivered without the consent of the relatives or friends of such deceased person if any such are known, nor when such deceased person expressed a desire during his last sickness that his body should be interred. If the body of any person is so delivered and the same shall be subsequently claimed by any relative or friend of such deceased person, such body shall be given up to such relative or friend. Any person who delivers or receives any body or remains having knowledge that any of the foregoing provisions have been violated shall upon conviction thereof be punished as provided in the foregoing section.

What bodies of deceased persons may be delivered to medical schools or physicians.

Penalty.

1014.

SEC. 4026.

An indictment substantially charging that defendant did keep a house, &c., in which he did permit divers persons to the jurors unknown to

play at cards, &c., for money, cigars, beer and other things, held, sufficient: *State v. Kaufman*, 59-273.

1015.

SEC. 4028.

Playing billiards, with the understanding that the person losing the game shall pay for the use of the table, is gambling. Whether the game played is one of skill or one of chance is immaterial under this section: *The State v. Miller*, 53-154.

The offering by an agricultural society of a premium to the winner at a horse race held under its authority, does not constitute an offense under this section: *Delier v. Plymouth County Agricultural Society*, 57-481.

SEC. 4029.

Negotiable instruments of the character here described are void, even in the hands of an innocent holder before maturity: *Traders' Bank v. Alsop*, 19 N. W. Rep., 863.

AFTER SEC. 4029.

GAMBLING IN OPTIONS.

[Twentieth General Assembly, Chapter 93.]

SECTION 1. It shall be unlawful for any corporation, association or society, person, or persons to keep within this state any store, office or other place, wherein is conducted or permitted the

Unlawful to keep a place to deal in mar-

pretended buying or selling of grain, pork, lard, or any mercantile or agricultural products on margins, without any intention of future delivery, whether such pretended contracts are to be performed within or without this state; and the keeping of all such places is hereby prohibited; and it shall be unlawful for any person, corporation, association or society, within this state, to make or enter into any contract, or pretended contract, such as is above stated and referred to, and all such contracts are hereby prohibited; the intention of this act being to prevent and prohibit within this state the business now engaged in and conducted in places commonly known and designated as bucket shops. *Provided*, however, that this act shall not apply to or in any way affect any contract for the actual buying or selling of any commodity whatever for present or future delivery, where the actual delivery or receipt of the thing sold is contemplated, and in good faith intended by either of the parties to the contract.

SEC. 2. Any person whether acting individually or as a member of any copartnership, corporation, association or society, guilty of violating any of the provisions of this act shall upon conviction thereof be adjudged to pay a fine for each offense of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than one year, or be both fined and imprisoned at the discretion of the court.

Unlawful to make such contracts.

Proviso.

Punishment.

SEC. 4030.

To constitute incest the parties must have carnal knowledge of each other. A woman who is ravished cannot be said to have carnal knowledge of the man. Connection between persons within the prohibited degrees, consummated by force, is rape and not incest: *The State v. Thomas*, 53-214.

1017.

SEC. 4039.

[20 G. A., ch. 102 amends this section by adding thereto the following:]

Or, if any person shall place, or put, or aid, or abet, in placing or putting any person upon any railroad car, steamboat, or other public conveyance knowing such persons to be infected with diphtheria, small-pox, or scarlet fever, he shall be punished by fine of not more than one hundred dollars or by imprisonment in the county jail not more than thirty days.

Transportation of persons infected.
Penalty.

1018.

ADULTERATION OF FOOD, DRINK AND MEDICINE.

[Nineteenth General Assembly, Chapter 170.]

SECTION 1. No person shall mix, color, stain, or powder, or order or permit any other person to mix, color, stain, or powder any article of food with any ingredient or material so as to render the article injurious to health, with the intent that the same may be sold, and no person shall sell or offer for sale any such article so mixed, colored, stained, or powdered.

Adulterating articles of food with injurious materials.

SEC. 2. No person shall, except for the purpose of compounding in the necessary preparation of medicine, mix, color, stain, or powder, or permit any other person to mix, color, stain, or powder any drug or medicine with any ingredients or materials, so as to affect injuriously the quality or potency of such drug or medicine, with the intent to sell the same, or shall offer for sale any such drug or medicine so mixed, colored, stained, or powdered.

Adulterating drugs or medicines with injurious materials.

SEC. 3. No person shall mix, color, stain, or powder any article of food, drink, or medicine, or any article which enters into the composition of food, drink, or medicine, with any other ingredient or material, whether injurious to health or not, for the purpose of gain or profit, or sell or offer for sale the same, or order or permit any other person to sell or offer for sale any article so mixed, colored, stained, or powdered, unless the same be so manufactured, used or sold, or offered for sale, under its true and appropriate name, and notice that the same is mixed or impure is marked, printed, or stamped upon each package, roll, parcel, or vessel containing the same, so as to be and remain at all times readily visible, or unless the person purchasing the same is fully informed by the seller of the true names of ingredients (if other than such as are known by the common name thereof) of such articles of food, drink, or medicine, at the time of making the sale thereof or offering to sell the same: *Provided*, nothing in this section shall prevent the use of harmless coloring material used in coloring butter and cheese.

Adulterating food drink or medicine for profit, notice.

Coloring matter in butter and cheese.

SEC. 4. No person shall mix any glucose or grape sugar with syrup or sugar intended for human food; and any cheese manufactured from skimmed milk, or from milk that is partly skimmed, shall be branded as skimmed-milk cheese, when the same is offered for sale; or any oleomargarine, suine, beef-fat, lard or any other foreign substance with any butter or cheese intended for human food; or shall mix or mingle any glucose, grape sugar, or oleomargarine with any article without distinctly marking, stamping, or labeling the article or the package containing the same with the true and appropriate name of such article, and the percentage in which glucose or grape sugar, oleomargarine, or suine enters into its composition. Nor shall any person sell, or offer for sale; or permit to be sold, or offered for sale, any such food, into the composition of which glucose or grape sugar, oleomargarine, or suine has entered, without at the same time informing the buyer of the fact and the proportion in which glucose or grape sugar, oleomargarine, or suine has entered into the composition.

Mixing glucose with syrup or sugar.

Skimmed milk cheese branded.

Butter or cheese adulterated with oleomargarine, suine, etc., to be labeled.

Offering same for sale.

SEC. 5. Any person or persons convicted of violating any provisions of any of the foregoing sections of this act shall, for the first offense, be fined not less than ten dollars nor more than fifty dollars. For the second offense they shall be fined not less than twenty-five [dollars] nor more than one hundred dollars, or confined in the county jail not more than thirty days. And for the third and all subsequent offenses they shall be fined *not to exceed* [not less than] five hundred dollars, nor more than one thousand dollars, and imprisonment in the state prison not less than one year nor more than five years.

Penalty.

Repealing
clause.

SEC. 6. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

1019.

AFTER SEC. 4043.

SALE OF FIRE-ARMS TO MINORS.

[Twentieth General Assembly, Chapter 78.]

Unlawful to
sell or give to
minors fire
arms or toy
pistols.
Fine or im-
prisonment.

SECTION 1. It shall be unlawful for any person to knowingly sell, present or give any pistol, revolver or toy pistol to any minor.

SEC. 2. Any violation of this act shall be punishable by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the county jail of not less than ten nor more than thirty days.

15 G. A., Ch. 59.

Under this act it is the duty of saloon keepers not only not to permit, but to prevent minors remaining in their saloons, and the same duty is imposed on their employes. If the keeper or employe fails to take prop-

er measures to prevent, he is to be deemed to permit it, and the liability will not depend upon the knowledge of the keeper or his employe of the fact that the person is a minor: *State v. Probasco*, 17 N. W. Rep., 607.

1020.

DENIAL OF CIVIL RIGHTS.

[Twentieth General Assembly, Chapter 105.]

All citizens en-
titled to same
civil rights.

SECTION 1. All persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, barber shops, theaters and other places of amusement; subject only to the conditions and limitations established by law, and applicable alike to every person.

Violation of
Sec. 1, a
misdemeanor.

SEC. 2. Any person who shall violate the foregoing section by denying to any person, except for reasons by law applicable to all persons, the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated in said section, or by aiding or inciting such denial, shall, for each offense, be deemed guilty of a misdemeanor.

1021.

17 G. A., Ch. 156, § 2.

[This section, as amended by 18 G. A., ch. 193, is further amended by 20 G. A., ch. 67, by striking out of the third line of said section the words "fifteenth day of August," and inserting in lieu thereof the words "first day of September."]

PRESERVATION OF QUAIL.

[Twentieth General Assembly, Chapter 164.]

Unlawful to
destroy quail
for two years
from October
1st, 1884.

SECTION 1. It shall be unlawful for any person or persons within this state, to shoot or kill, to catch or attempt to catch, in any snare, trap or net, any quail from and after the first day of

October, 1884, for and during the period of two years from said date, except for the preservation of the same during the winter months.

SEC. 2. The same penalty, as it now exists, in section 7, chapter 156, of the laws of 1878 [17 G. A.] shall be held to apply to any violation of this act. Penalty.

1023.

AFTER SEC. 4054.

PRESERVATION OF FISH IN PERMANENT LAKES.

[Twentieth General Assembly, Chapter 9.]

SECTION 1. No person shall take by spearing with a gaff, spear or other device any fish from any of the permanent lakes or ponds or outlets or inlets thereto within the state of Iowa, between the first day of November and the thirty-first day of May next following. Spearing season.

SEC. 2. It shall be unlawful for any person, company, or corporation, knowingly to buy or sell, or offer for sale, or have in his or their possession, any fish which shall have been taken from any of the permanent lakes or ponds, or outlets or inlets thereto within this state by spearing with gaff, spear or other device between the first day of November and the thirty-first day of May next following. And any person who may draw from the water any game fish such as pike, bass, and the like when seining for minnows for bait, shall return the same without injury under the penalties of this act. Unlawful vending.

SEC. 3. Any person found guilty of a violation of any of the provisions of this act shall upon conviction before any magistrate be fined not less than five dollars nor more than twenty dollars for the first offense, and for the second or any subsequent offense not less than twenty dollars nor more than one hundred dollars, and shall stand committed until such fine be paid. Penalty.

SEC. 4. Prosecution for violations of this act may be brought and maintained in any county in which offense was committed or in any county where the person, company, or corporation against whom complaint is made, has or has had or has bought or sold or offered for sale any fish which were taken by spearing in violation of this act. Place of action.

SEC. 5. In all prosecutions under this act the court before whom the same is brought, or in which it shall be prosecuted, shall appoint an attorney for the prosecution of the case, and such attorney and the person filing the information under this act shall each be entitled to a fee of five dollars for each and every conviction, which fees of such attorney and informant shall be taxed as costs in the case against the person or persons so convicted, and any fish found in the possession of any person, company or corporation in violation of the provision of this act may be seized and sold for the purpose of paying the costs in the case, but in no case under this act shall any county be liable for the fees of such attorney or informant. Prosecutor appointed.
Fees of prosecutor and informant.
Fish seized and sold for costs.

SEC. 6. Nothing in this act shall prevent any person from tak-

Spearing on
one's own
land.

ing fish of his own propagation or from waters wholly within his own land, to which there is no natural outlet through which the fish pass up or down.

1025.

AFTER SEC. 4064.

[By 20 G. A., ch. 104, it is required that a bell and a steam whistle shall be placed on each locomotive engine operated on any railway in the state, and signals are required to be given therewith at highway crossings; any officer or employe violating such provisions being subject to punishment by fine: See that act in supplement to page 357.

By 20 G. A., ch. 163, trains on any railway are required to be brought to a full stop at the crossing or intersection of its track with any other railway track, and for a violation of this provision a penalty is imposed upon the engineer and the corporation: See that act in supplement to page 357.]

1027.

SEC. 4072.

A vendee obtaining possession of property under a Sunday contract may maintain replevin for such property when subsequently taken from him by the vendor by force: *Kinney v. McDermot*, 55-674.

An action for damages for fraud in trading a horse affected with glanders, held not maintainable where it appeared that the trade was made on Sunday: *Gunderson v. Richardson*, 56-56.

The transferee, after maturity, without knowledge of the fact that the note bearing date on a secular

day was actually executed on Sunday, may recover thereon. The defense to the note is not an equity which may be set up against one who purchases after maturity: *Leightman v. Kadetska*, 58-676.

The mere operation of a railway train in violation of the provisions of this statute, does not render the railway company liable for damages accidentally occurring without fault or negligence on its part other than the mere operation of the train in violation of statute: *Tingle v. C., B. & Q. R. Co.*, 60-333.

1028.

SEC. 4073.

An indictment charging the obtaining by false pretenses of certain notes, designating them as property, and in a second count charging the obtaining in the same manner of the same notes, but designating them as written instruments, the false making of which would be forgery, does not charge two offenses. Such charges might be contained in the same count without rendering the indictment bad for duplicity: *The State v. House*, 55-466.

That the false representations were made in another county will not prevent the offense being punishable in

the county where the property was obtained. The latter county is the one where the offense was committed: *Ibid.*

False promises, coupled with false statements of fact, may amount to false pretenses: *The State v. Montgomery*, 56-195.

The question is for the jury whether the false representations actually misled the person claimed to have been defrauded, and in determining that question, they should take into account his age, experience, state of health, etc.: *Ibid.*

1033.

SEC. 4089.

Shade trees at the side of the highway, which would not interfere with the traveled track if confined to the center of the highway, should be permitted to stand: *Quinton v. Burton*,

61-71.

As to power of municipal corporation to abate nuisances, see section 471.

1034.

SEC. 4092.

Held, that as the so called prohibitory amendment submitted to the people by the 19th G. A. was not properly submitted, the act of selling beer, which was therein prohibited, did not become a nuisance under this section; *State v. Johnson*, 61-504.

1036.

SEC. 4097.

A petition in a civil action for damages for what would be a libel under this section is sufficient, though the alleged libel does not charge plaintiff with a public offense. The plaintiff will be entitled to recover at least nominal damages, though no special damages be alleged. The publications which the law regards are actionable *per se*: *Call v. Larabee*, 60-212.

SEC. 4102.

Although the jury determine both the law and the facts, yet the court has the right to instruct the jury in this as well as other criminal cases, and the conclusive presumption is that the jury will follow the instructions of the court. Therefore, an erroneous instruction of the court in such case will be regarded as prejudicial and a ground for reversal, as in other cases: *The State v. Rice*, 56-431.

1039.

SEC. 4115.

[The proviso at the end of this section seems to be meaningless, as there is no provision for authentication of a warrant of arrest on preliminary information. See § 4190.]

SEC. 4118.

Whether or not there is any right of appeal from an order taxing the costs to complainant, *quære*; but a motion to retax the costs, made before a justice of the peace, the successor of the one by whom such taxation was made, not filed until three years after the order taxing the costs, *held* properly overruled: *State v. Rogers*, 58-644.

1044.

SEC. 4155.

The court will take judicial notice of the county in which an incorporated town is situated. Proof of the commission of the act in a certain town is sufficient proof of the commission within the county in which the town is located: *State v. Reader*, 60-527.

1046.

SEC. 4166.

A defendant in a prosecution for embezzlement is not estopped by subsequent fraudulent statements from showing that the defalcation actually took place at such time that the prosecution therefor is barred: *State v. Hutchinson*, 60-478.

SEC. 4169.

The clause of this section relating to non-residence of defendant, is not to be restricted to offenses committed when the defendant is out of the state, but applies equally to all cases: *State v. McIntire*, 58-572.

1053.

SEC. 4212.

A sheriff is justified in searching the person arrested and taking from him all money or property in any way connected with the crime charged, or which might serve to identify the prisoner, or be used by the prisoner in effecting an escape. When it is ascertained that money or property so taken cannot be held on these grounds, the same should

be returned, and while held, the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and such money should be no more liable to attachment than if it were in the prisoner's pocket: *Commercial Exchange Bank v. McLeod*, 19 N. W. Rep., 329.

1057.

SEC. 4241.

The testimony given upon the preliminary examination by a witness who dies before the trial, may be

provided upon such trial: *State v. Fitzgerald*, 19 N. W. Rep., 202.

1060.

SEC. 4254.

The appeal by the prosecuting witness must be taken at the time judgment is rendered, and cannot be tak-

en afterward: *State v. Knapp*, 61-522.

SEC. 4256.

Where a part of the grand jury fails to appear, the court may orally direct the sheriff to summon a sufficient number to complete the panel, such order being entered of record. The written precept provided for in § 244 is only required where the entire panel fails to appear: *The State v. Miller*, 53-84.

If a court, whether correctly or not, should discharge a grand jury and cause another one to be impaneled, to which there were no objection except the erroneous discharge of the first, it would be no ground for quashing an indictment found by the second: *State v. Hughes*, 58-165.

1061.

SEC. 4258.

A party under arrest in a preliminary proceeding but not yet bound over is not entitled to challenge grand jurors, although it is possible that his case may afterward come before them: *State v. Fitzgerald*, 19 N. W. Rep., 202.

Where a person was in court to answer an indictment, and, on motion,

such indictment was quashed, and the court then referred the matter to the grand jury for further consideration, and they returned an indictment charging defendant with a different crime, held, that an objection to the panel should have been then raised and could not be raised afterward: *State v. Ruthven*, 58-121.

1062.

SEC. 4261.

The time within which the right of challenge to grand jurors shall be exercised is not prescribed, and the prisoner ought to be permitted to exercise such right at any time before the grand jury considers the case, upon information gained that they are

liable to challenge, even though the ground therefor be matter arising after a prior challenge has been made. Therefore, held, that where a case is resubmitted to the same grand jury under 18 G. A., ch. 180, § 5 (see page 1067), the prisoner should have

been allowed an opportunity to challenge the members of such grand jury on the ground that they had previously formed and expressed an opinion in returning the first indictment: *State v. Osborne*, 61-330.

1065.

SEC. 4289.

Where an indictment is found by a grand jury upon the minutes of the testimony before the magistrate, the names of the witnesses examined before the magistrate may be endorsed on the back of the indictment and they may then be examined for the prosecution, without their having testified before the grand jury: *State v. Rodman*, 17 N. W. Rep., 663.

1066.

SEC. 4293.

Where an indictment is set aside and the case recommitted to the same grand jury, there is no objection to their considering the evidence of witnesses who have already been before them without calling them the second time: *State v. Clapper*, 59-79.

1067.

18 G. A., Ch. 130.

When a case is sent back to the same grand jury, the prisoner should be allowed to challenge the member of such grand jury on the ground of having formed and expressed an opinion by the finding of the first indictment: *State v. Osborne*, 61-330.

SEC. 4294.

Failure of the clerk to file the indictment will not invalidate the proceedings. If the indictment is lost or abstracted after the arraignment of defendant, the court may, upon motion, substitute a copy and proceed upon the record thus made, the same as upon the original indictment: *State v. Rivers*, 58-102; *State v. Stevisiger*, 61-623.

In the absence of an affirmative showing to the contrary, it will be presumed that the requirements of the statute as to the presentation were complied with: *State v. McIntire*, 59-267.

Where defendant moved to strike the indictment from the files because it had been altered by erasure and insertion of other words, held, that the affidavits introduced disproved the defendant's allegation: *State v. Hughes*, 58-165.

1068.

SEC. 4297.

The fact that on the face of the indictment there is no title to the action, in accordance with this form, where the body of the indictment sets forth the names of the parties, does not constitute a valid objection thereto on motion or demurrer: *State v. McIntire*, 59-264. *Same v. Same*, 59-267.

It is not essential that the indictment be signed by the district attorney: *State v. Ruby*, 61-86; *State v. Wilmoth*, 19 N. W. Rep., 249.

An indictment for larceny corresponding in form to this section, charging the offense as committed "in the county aforesaid," held, sufficiently specific as to the venue of the crime: *State v. Lillard*, 59-479.

1069.

SEC. 4300.

Rape committed by a man upon a woman who is related within the prohibited degrees specified in § 4030, does not constitute incest under that section, and an indictment charging both offenses is bad for du-

plicity: *The State v. Thomas*, 53-214.

An indictment charging in one count forgery, and in a second the uttering of the forged instrument, charges two offenses, and is bad (overruling *State v. Nichols*, 38-110): *The State v. McCormack*, 56-585; but objection to the indictment on the ground of duplicity cannot be raised for the first time in the supreme court: *State v. Henry*, 59-391; and *held*, that where one of the counts was dismissed before the introduction of any evidence, and the plea of guilty entered as to the remaining count, the defect in the indictment was cured and the defendant properly convicted: *State v. Buck*, 59-382.

Where an indictment charges breaking and entering with felonious intent and the felonious taking, stealing and carrying away of personal property, the charge of stealing may be regarded as a mere pleading

of evidence, or surplusage, and if the case is tried as upon the indictment for the breaking and entering with the criminal intent, a conviction thereunder will not be erroneous on the ground of duplicity in the indictment. It is otherwise where under such indictment the defendant is convicted of larceny: *State v. Shaffer*, 59-290.

The parties who enter into a conspiracy are by that act guilty of but one offense, whether their agreement is to commit one crime or many crimes, and the fact that an indictment alleges that the parties conspired to commit more than one crime is not bad for duplicity; but an indictment charging a conspiracy to commit, and also facts constituting the commission of the crime, charges two offenses and cannot be sustained: *State v. Kennedy*, 18 N. W. Rep., 885.

1071.

SEC. 4305.

Where an indictment charged the larceny of goods from a railroad company, naming it, belonging to parties to the grand jurors unknown,

held, that the indictment was sufficient under this section: *State v. McIntire*, 59-264; *Same v. Same*, 59-267.

1073.

SEC. 4314.

Under an ordinary indictment as principal, defendant may be found

guilty of aiding and abetting the crime: *State v. Hessian*, 58-68.

1079.

SEC. 4350.

A defendant cannot waive jury trial and consent to a trial by the

court: *State v. Carman*, 18 N. W. Rep., 691.

1080.

SEC. 4357.

[It is evident by an examination of the sections referred to in this section, as well as by reference to the corresponding section in the Revision, and to the section as it appears in the Code Commissioners' Report, that § 4342 and § 4343 are intended to be referred to, instead of § 4341 and § 4342 respectively.]

1081.

SEC. 4362.

Where judgment was entered upon a plea of guilty and a motion for leave to withdraw such plea and for new trial was filed, based on the ground that defendant was surprised by the punishment inflicted being

greater than expected, *held* that the alleged ground of surprise was not sufficiently established to entitle the defendant to relief: *State v. Buck*, 59-382.

1082.

SEC. 4374.

To justify a reversal of the case for the action of the judge in overruling a motion for a change of venue, the record must show affirmatively that there was an abuse of the discretion reposed in the court in determining the same: *State v. Williams*, 18 N. W. Rep., 682.

1086.

SEC. 4405.

Where, in a prosecution for nuisance in using a building for illegal sale of intoxicating liquors, the juror testified that he was opposed to the business of saloon-keeping and to the law regulating the sale of intoxicating liquors, but that as long as the law stood, he was not prejudiced against a man for selling beer or wine, *held*, that he was a competent juror: *State v. Nelson*, 58-208.

A judgment rendered by a disqualified jury is erroneous, but not void. It might be reversed upon appeal but cannot be disregarded as a nullity: *Foreman v. Hunter*, 59-550.

1089.

SEC. 4420.

The court cannot, under the guise of determining some questions which are legitimate, make remarks in the presence and hearing of the jury which would constitute error if contained in an instruction, and thus deprive the defendant of the opportunity of having such error reviewed: *State v. Stowell*, 60-535.

Statements by the district attorney in opening the case to the jury, of facts which he expects to prove and which if proved would be material and competent, may be made by him if in good faith, believing and having good reason to believe he will be able to sustain them, by evidence, although he is afterward unable to obtain evidence to sustain some of them: *State v. Meshek*, 61-316.

In a particular case, a lengthy statement was made by prosecuting attorney of the evidence which it was expected would be introduced, and followed by an unfair argument of the case based to a considerable extent upon facts which were wholly unsubstantiated by the evidence afterward introduced, was held sufficient misconduct to require a reversal, the defendant having objected to the remarks of the prosecuting attorney at the time; and further, *held*, that the fact that attorney for defendant replied to this opening argument in the same manner did not render the action of the prosecuting attorney error without prejudice: *State v. Williams*, 18 N. W. Rep., 682.

1090.

SEC. 4421.

Where an indictment is found upon the minutes of testimony taken before a magistrate, as provided by § 4289 as amended by 18 G. A. ch. 130, § 5, the names of the witnesses examined before the magistrate may be endorsed on the back of the indictment and they may then be called to testify on the part of the prosecution without having been examined by the grand jury: *State v. Rodman*, 17 N. W. Rep., 663.

The state may, in rebuttal, call witnesses whose names are not endorsed upon the back of the indictment: *State v. Ruthven*, 58-121.

1092.

SEC. 4427.

Under facts of a particular case, *held*, that the *corpus delicti* was not proven, aside from defendant's confessions not in open court, and the conviction was reversed: *The State v. Dubois*, 54-363.

SEC. 4428.

Where defendant seeks to establish an *alibi*, the burden of proof is upon him, and it cannot be established except by a preponderance of evidence. This rule does not abrogate the doctrine of reasonable doubt. There may be a preponderance of evidence against defendant, and yet a reasonable doubt of his guilt. This reasonable doubt may be based upon the whole evidence, or upon the evidence establishing certain essential facts necessary to be established, or upon evidence of facts inconsistent with the prisoner's guilt. If upon the consideration of the whole evidence, or any part of it, the reasonable doubt arises as to any essential fact, the jury must acquit: *The State v. Red*, 53-69.

The defense of an *alibi* must be established by defendant by a preponderance of evidence: *The State v. Hamilton*, 57-596.

It is error to charge that "A reasonable doubt is such a doubt as fairly and naturally arises in the minds of the *whole* jury." Each juror must, under his oath, vote according to his own convictions, and the doubt with which he has to do is the doubt in his own mind: *The State v. Sloan*, 55-217.

Where the prosecution relies upon the presumption of defendant's possession of recently stolen property to

establish his guilt, the defendant is only required to introduce sufficient evidence as to having honestly come into possession of the goods, to raise a reasonable doubt of guilt: *The State v. Richart*, 57-245.

The doctrine of *Barton v. Thompson*, 46-30, that in a civil action for damages for a criminal act, the commission of the act must be proven beyond a reasonable doubt, is overruled, and it is held that a preponderance of evidence in such case is sufficient to entitle plaintiff to recover. Whether slander and libel constitute an exception, *quære*: *Welch v. Jugenheimer*, 56-11; *Barton v. Thompson*, 56-571; *Behrens v. Germania Ins. Co.*, 58-26; *Kendig v. Overhulser*, 58-195.

The mere preponderance of evidence is all that is required to establish a fraudulent alteration of an instrument in writing: *Coit v. Churchill*, 61-296.

An instruction that "previous good character is not of itself a defense, but is a circumstance which should be considered by the jury in connection with all the other evidence, and which might be able to turn the scale in favor of the defendant, but its value as defensive evidence in any given case is to be determined by the jury" held correct: *State v. Donovan*, 61-278.

1093.

SEC. 4429.

Where a person is charged with a crime which in its nature includes inferior offenses, and the evidence is such that the jury might find defendant guilty of one of the inferior offenses, the court should instruct in regard to such inferior offenses and allow the jury to find according to the evidence: *State v. Kegan*, 17 N. W. Rep., 179. But failure to instruct

as to lower degrees will not be error where there is no evidence which would support a conviction of a lower degree: *State v. Cole*, 17 N. W. Rep., 183.

Failure of the court to instruct the jury in accordance with the provisions of this section, is error sufficient to work a reversal: *State v. Jay*, 57-164.

SEC. 4431.

[By a reference to the corresponding section in the Revision it is evident that the word "submitted" in this section should be "dismissed." The sections are otherwise identical, and the Code Commissioners' Report does not indicate that any change was intended.]

1097.

SEC. 4455.

Where, after all the evidence in a case had been produced, the judge, on receipt of a telegram from his home to the effect that his wife was

sick, adjourned court for a few days and went to his home, and on the day to which court was adjourned, by telegram adjourned court over the term, *held* that there was sufficient cause to warrant adjournment in the discretion of the judge, and that the defendant could not on the subsequent trial plead a previous jeopardy: *State v. Tatman*, 59-471.

1109S.

SEC. 4460.

Where the jury, without consent of defendant, sealed up their verdict and separated, *held*, that it was error for the court to receive and record such verdict against defendant's objection: *The State v. Callahan*, 55-364.

1102.

SEC. 4481.

While a certificate of the judge sufficiently setting out or identifying the testimony, may take the place of a bill of exceptions for the purpose of making the evidence a part of the record, such certificate, equally with a bill of exceptions, must be made at the time of the trial, or at such time as the court may fix; otherwise the evidence may be stricken out on appeal: *The State v. Newcomb*, 56-355.

1103.

SEC. 4489.

For the prosecuting attorney to refer in his argument to the fact that defendant has not testified in his own behalf is misconduct sufficient to entitle defendant to a new trial (see § 3636 and notes): *State v. Graham*, 17 N. W. Rep., 192; but where the evidence as to whether he made such statement or not is conflicting, the supreme court will abide by the action of the lower court: *State v. Maynes*, 61-119; and in a particular case, *held* that the fact was not sufficiently shown to require a reversal: *State v. Black*, 59-390.

In criminal cases, and especially in cases involving the life of the defendant, the incompetence of the attorney may constitute a ground for a new trial, but to justify a reversal upon such ground, there should be a strong showing both of incompetence and prejudice: *State v. Bengel*, 17 N. W. Rep., 100.

1106.

SEC. 4509.

The provision that the judgment shall specify the extent of the imprisonment, is directory only. The extent of the imprisonment is fixed by statute, and a judgment that defendant be imprisoned until the fine is paid will not be void: *Jackson v. Boyd*, 53-536.

1107.

SEC. 4511.

Failure of the court to make the order as to bail here contemplated, will not entitle defendant to a discharge upon *habeas corpus*, but his only relief will be in such a proceeding to have the amount of bail properly fixed: *Murphy v. McMillan*, 59-515.

1110.

SEC. 4538.

The court may make reasonable rules relating to practice upon appeals and provide that upon a sufficient showing they may be waived or mod-

ified, and it having provided that the evidence on an appeal must be abstracted and the abstract printed, it will not consider a case not presented in accordance with these rules, unless application for the waiver of such rules has been duly made: *State v. Day*, 58-678.

In the absence of assignment of error and of argument in criminal cases, the appellate court is required to examine the record and render such judgment upon it as the law demands, but the court will not enter into a discussion of imaginary errors: *State v. Quinn*, 19 N. W. Rep., 256.

A purely technical objection, as, for instance, the erroneous discharge of one grand jury and the summoning of another, by which the indictment was found, in the absence of any objection to the second except the

discharge of the first, will not be ground for a reversal: *State v. Hughes* 58-165.

Where a defendant was convicted upon an indictment which charged in two counts forgery and the uttering of forged paper, and did not object to the indictment on the ground of duplicity, in view of a decision of the supreme court on that point which was afterward overruled, held, on appeal, that although the court would not raise the question of duplicity, it would reduce the sentence to what would have been proper on the first count alone: *State v. Henry*, 59-391.

The supreme court will not interfere to reduce a sentence claimed to be excessive where all the evidence in the lower court is not before it: *State v. Buck*, 59-382.

1111.

SEC. 4539.

In case of appeal by the state, and reversal, it is improper to tax costs

to defendant: *The State v. Vail*, 57-103.

1113.

SEC. 4559.

It is not necessary that the accomplice be corroborated in every material fact. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which he is confirmed by unimpeachable

evidence, this may be ground for them to believe that he also speaks the truth in other parts as to which there may be no corroboration: *The State v. Allen*, 57-431.

SEC. 4560.

The court is to determine whether evidence is corroborative, that is, whether it is competent, and the jury is to pass upon the credibility of the corroborating witnesses, and the weight of their testimony. Instruction to the effect that the jury were to determine whether the testimony of the prosecutrix was sufficiently corroborated, etc., held, correct: *The State v. Bell*, 49-440.

Mere opportunity to have sexual intercourse does not amount to sufficient corroboration: *The State v. Araah*, 55-258; *The State v. Smith*, 54-743.

In a bastardy proceeding, the doc-

trine of *State v. Danforth*, 48-43, was not held applicable in case of a child two years old, and it was held that a child of that age might be shown to the jury and its family resemblance, if any, to defendant, considered by them as tending to prove that defendant was its father: *The State v. Smith*, 54-104.

Evidence that prosecutrix was bruised, &c., and made complaint, would not tend to connect defendant with the commission of the offense, and therefore should not be considered as tending to corroborate the testimony of prosecutrix: *State v. Stowell*, 60-535

1114.

SEC. 4571.

That a defendant held to answer for one crime is indicted for a higher crime does not release the surety on

his bail bond: *The State v. Bryant*, 55-451.

1120.

SEC. 4596.

Failure of a defendant indicted for misdemeanor to appear in person at the trial or at the rendition of verdict or at the sentence, will not constitute forfeiture of his bond if he makes appearance by counsel and thereby waives his personal presence: *State v. Conneham*, 57-351.

1121.

SEC. 4599.

Where a bond is given for the appearance of the defendant to answer an indictment, and afterward a change of venue is granted, on his application, to another county, and he fails to appear in the action in the county to which the change is granted, action on the bond for such failure to appear should be brought in the latter county: *Lucas Co. v. Wilson*, 59-354.

1130.

SEC. 4657.

Where the defendant is acquitted of the crime of larceny, money which was seized under a search warrant as the subject of the larceny should be surrendered to the defendant; the court has no authority to retain the case upon the docket for the purpose of determining the ownership of the property: *State v. Williams*, 61-517.

1132.

SEC. 4670.

That the justice is prejudiced against the defendant must be taken advantage of by motion for a change of venue. That fact will not render the conviction void: *Foreman v. Hunter*, 59-550.

1133.

SEC. 4673.

A judgment rendered by a disqualified jury is erroneous, but not void; it might be reversed upon appeal, but cannot be disregarded as a nullity: *Foreman v. Hunter*, 59-550.

1134.

SEC. 4691.

An appeal by a prosecuting witness from the action of a justice of the peace in taxing to him the costs of the prosecution when the defendant is acquitted (see § 4254), must be taken at the time judgment is rendered, and cannot be taken afterward: *State v. Knopf*, 61-522.

Where a criminal prosecution is

dismissed by a justice of the peace for failure of prosecuting witness to appear, the costs should be taxed to the county, unless there is ground for taxing them to the prosecuting witness under this section: *County of Palo Alto v. Moncrief*, 58-131; *Cassidy v. County of Palo Alto*, 58-125.

1135.

SEC. 4697.

In order to secure an appeal, notice thereof must be given at once: *State v. Knopf*, 61-522.

If defendant gives proper notice of appeal, nothing which the justice

can do or say about it by way of refusing the appeal, can deprive the party of his right, and unless the party takes proper steps to perfect his appeal, by giving bond, the jus-

tice will not be liable in damages for commitment, although his motives may be malicious: *Anderson v. Park*, 57-69.

The fact that the justice fails to inform the defendant of his right to an appeal, or fails to make such an

entry of the fact on his docket, does not render the conviction void. The person may have the amount of his bail fixed in a *habeas corpus* proceeding, but he is not entitled to a discharge without bail: *Jacoby v. Waddell*, 61-247.

1139.

SEC. 4715.

A proceeding under this chapter is a civil action of a summary nature, intended to secure the maintenance of the bastard, to the end that in no event shall the public become chargeable therewith. Therefore, where another person was chargeable for the maintenance of the bastard, by virtue of having married the mother while *enciente*, knowing the fact, and therefore standing to the child *in loco parentis*; *held*, that the proceeding could not be maintained: *State v. Shoemaker*, 17 N. W. Rep., 589.

The provisions of Code §§ 4559 and 4560, requiring corroboration of the testimony of an accomplice, or of that of the prosecutrix in case of rape, seduction, etc., to warrant a conviction in a criminal prosecution, are not applicable in this proceeding. Neither need the case against defendant be made out beyond a reasonable doubt; a preponderance of evidence is sufficient: *The State v. McGlothlen*, 56-

544. But this rule applies to the question of guilt or innocence which arises upon the whole case. It does not dispense with the force and effect which are to be given to presumptions arising from certain facts disclosed in evidence, as for instance, the presumption (which can only be overcome by distinct, strong, satisfactory and conclusive evidence), that a child born in wedlock was begotten by the husband, even though begotten before marriage: *The State v. Romaine*, 58-46. If, after giving due consideration to this presumption and properly considering the rule that to rebut such presumption the evidence must be clear, satisfactory and conclusive, there is a preponderance of evidence for the state, the defendant should be found guilty: *Ibid*.

In a particular case, *held* that under the evidence the instructions were not as favorable to the defendant as they should have been: *State v. Smith*, 61-538.

1140.

SEC. 4721.

If the child is not born alive, an action, if already commenced, abates and no judgment can be rendered for maintenance, nor for costs. In no

event can the defendant be liable for lying-in expenses and medical attendance upon the mother: *State v. Beaty*, 61-337.

1143.

SEC. 4735.

A person furnishing clothing to prisoners on the sheriff's request may maintain an action against the county therefor, and while only necessary clothing can be procured at the expense of the county, the discretion of the sheriff, acting in good faith, can-

not be controlled by the board of supervisors. The person furnishing clothing upon the sheriff's request is only bound to know that it is for prisoners, and suitable, and, perhaps, necessary: *Feldenheimer v. County of Woodbury*, 56-379.

1145.

SEC. 4746.

[20th G. A., ch. 17, amends this section by striking out the words "from the date of his election," in the third line, and inserting in lieu thereof the words "from the first day of April following his election."]

1146.

SEC. 4750.

[19 G. A., ch. 175, § 1, provides that the reports to the governor shall be made biennially, on or before the 15th of August, preceding the general sessions of the general assembly: See that act, in supplement to page 28.]

1152.

SEC. 4785.

[19 G. A., ch. 91, amends this section and the amendment thereto made by 17 G. A., ch. 83, by striking out the word "seven" in the second line, and inserting the word "nine" in lieu thereof.]

1157.

[Twentieth General Assembly, Chapter 187.]

SECTION 1. The name of the additional penitentiary at Ana-^{Name changed}mosa is hereby changed to penitentiary at Anamosa.

SEC. 2. The warden is hereby authorized to appoint and ^{Warden au-}remove at his discretion a matron for the women's department ^{thorized to ap-}at a salary of seventy-five dollars per month. Said matron shall ^{point a mat-}have exclusive charge of the women's department under the gen- ^{ron: salary.}eral direction of the warden. She shall keep a regular time table ^{Power and}of the female convict labor and record the same in a book to be ^{duty of mat-}kept for that purpose, and shall moreover keep a record of all ^{ron.}the business under her control, and return an account thereof, to-
gether with an account of the female convict labor, to the clerk
at the close of each day.

SEC. 3. There is hereby allowed the sum of ten dollars per
month as house rent for the deputy warden until the residence for ^{\$10 per month}
the warden is completed in accordance with plans and specifica- ^{house rent for}
tions adopted for the penitentiary, when he shall occupy the pres- ^{deputy.}ent residence of the warden.

SEC. 4. The warden is hereby authorized to purchase, with
the approval of the executive council, a strip of land south of the ^{Warden to pur-}
penitentiary and lying between the penitentiary wall and the ^{chase land.}track of the C. N. W. R. W'y for the use and benefit of said
penitentiary at a sum not to exceed \$3,000.00.

SEC. 5. The warden is hereby authorized to sell with the ap-^{Warden au-}
proval of the executive council the land known as the Old State ^{thorized to sell}
Quarry, and the proceeds of said sale shall go into the general ^{old quarry.}
construction fund of said penitentiary.

1158.

16 G. A., Ch. 137, § 5; 17 G. A., Ch. 81.

[19 G. A., ch. 165, amends the latter of these acts so as to change the word "eight," in the second line of the section which it amends, back to "ten."]

1163.

M'CLAIN'S ANNOTATED STATUTES RECEIVABLE AS EVIDENCE.

[Nineteenth General Assembly, Chapter 3.]

AN ACT authorizing McClain's Annotated Statutes of the State of Iowa to be received as evidence of the laws of the State:

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

SECTION 1. That the compilation of the general laws of this state now in force known as McClain's Annotated Statutes of the state of Iowa, prepared by Emlin McClain and published by Callaghan and Company, shall be received in all courts and proceedings, and by all officers in this state, as evidence of the existing laws thereof, with like effect as if published under the authority of the state.

SEC. 2. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the *Iowa State Register* and *State Journal*, newspapers published at Des Moines, Iowa.

Approved Feb. 4, 1882.

1166.

JUDICIAL DISTRICTS.

By chapter 98, acts of 10th General Assembly, the state was divided into twelve judicial districts. By chapter 61, Public Acts of the 14th General Assembly (amended by chapter 90 of the same), some of these districts were changed, and the thirteenth created; and by chapter 56, Acts of 16th General Assembly, the fourth district was divided and the fourteenth created. The fourteen districts are constituted of counties as follows:

- 1st. Lee, Henry, Des Moines and Louisa.
- 2nd. Van Buren, Davis, Wapello, Monroe, Appanoose, Lucas and Wayne.
- 3rd. Montgomery, Page, Taylor, Ringgold, Decatur, Clarke, Union and Adams.
- 4th. Harrison, Monona, Woodbury, Plymouth, Cherokee, O'Brien, Sioux, Lyon and Osceola.
- 5th. Polk, Warren, Madison, Adair, Guthrie and Dallas.
- 6th. Jasper, Marion, Poweshiek, Mahaska, Keokuk, Washington and Jefferson.
- 7th. Muscatine, Scott, Clinton and Jackson.
- 8th. Johnson, Tama, Iowa, Benton, Linn, Cedar and Jones.
- 9th. Dubuque, Delaware, Buchanan, Blackhawk and Grundy.
- 10th. Clayton, Allamakee, Fayette, Winneshiek, Howard and Chickasaw.
- 11th. Marshall, Story, Boone, Webster, Hamilton, Hardin, Wright and Franklin.
- 12th. Mitchell, Floyd, Bremer, Butler, Cerro Gordo, Worth, Winnebago and Hancock.
- 13th. Freemont, Mills, Audubon, Pottawattamie, Cass, Crawford, Shelby, Carroll and Greene.
- 14th. Calhoun, Sac, Ida, Buena Vista, Pocahontas, Humboldt, Kossuth, Palo Alto, Clay, Dickinson and Emmett.

JUDICIAL DISTRICTS DIVIDED INTO TWO CIRCUITS.

By 17 G. A., ch. 51, the first, fifth and seventh judicial districts are di-

vided into two circuits each, and provision made for the election of a circuit judge in each circuit, and by 20 G. A., ch's 19 and 181, the sixth and fourth districts, respectively, are similarly subdivided. By 19 G. A., ch. 56, it is further provided that in judicial circuits wherein a city is situated, containing a population in excess of twenty-two thousand and three hundred, by the U. S. census of 1830, an additional circuit judge shall be elected, and by 20 G. A., ch. 18, a similar provision is made as to the second judicial district. In other cases, a circuit judge is elected in each judicial district. (See Code, § 586, and above acts in connection therewith, in supplement to page 156.)

The new circuits created are constituted as follows:

- 1ST DISTRICT: *1st Circuit*, Lee and Henry counties.
2nd Circuit, Des Moines and Louisa counties.
- 4TH DISTRICT: *1st Circuit*, Lyon, O'Brien, Sioux, Osceola and Plymouth.
2nd Circuit, Woodbury, Monona, Harrison and Cherokee.
- 5TH DISTRICT: *1st Circuit*, Polk and Warren counties.
2nd Circuit, Madison, Adair, Guthrie and Dallas counties.
- 6TH DISTRICT: *1st Circuit*, Poweshiek, Keokuk, Washington and Jefferson.
2nd Circuit, Jasper, Marion and Mahaska.
- 7TH DISTRICT: *1st Circuit*, Clinton and Jackson counties.
2nd Circuit, Scott and Muscatine counties.

CONGRESSIONAL DISTRICTS.

19 G. A., ch. 163, divides the state into eleven congressional districts, constituted of counties as follows:

- 1st. Lee, Des Moines, Henry, Van Buren, Jefferson, Washington and Louisa.
- 2nd. Jones, Jackson, Clinton, Cedar, Scott and Muscatine.
- 3rd. Dubuque, Delaware, Buchanan, Black Hawk, Bremer, Butler and Grundy.
- 4th. Clayton, Fayette, Winneshiek, Allamakee, Howard, Mitchell, Floyd and Chickasaw.
- 5th. Marshall, Tama, Benton, Linn, Johnson and Iowa.
- 6th. Jasper, Poweshiek, Mahaska, Monroe, Wapello, Keokuk and Davis.
- 7th. Guthrie, Dallas, Polk, Adair, Madison, Warren and Marion.
- 8th. Clark, Lucas, Ringgold, Decatur, Wayne, Appanoose, Union, Adams, Page and Taylor.
- 9th. Pottawattamie, Cass, Mills, Audubon, Crawford, Montgomery, Shelby, Fremont and Harrison.
- 10th. Boone, Story, Hardin, Hamilton, Webster, Franklin, Wright, Humboldt, Hancock, Cerro Gordo, Worth, Winnebago and Kossuth.
- 11th. Lyon, Osceola, Dickinson, Emmet, Sioux, O'Brien, Clay, Palo Alto, Plymouth, Cherokee, Buena Vista, Pocahontas, Woodbury, Ida, Sac, Calhoun, Monroe, [Monona], Carroll and Greene.
- [Secs. 13 and 14 of the act in relation to election of representatives in Congress, are inserted in supplement to page 169.]

STATE SENATORIAL DISTRICTS.

[Nineteenth General Assembly, Chapter 162.]

SEC. 1. One senator for forty-six thousand inhabitants is hereby constituted the ratio of apportionment.

SEC. 2. Each senatorial district shall be entitled to one senator, and every county and district which shall have a number of inhabitants equal to one-half the ratio fixed in the first section hereof, shall be entitled to one senator.

[The act then divides the state into senatorial districts, each entitled to one senator, and gives the counties and number of inhabitants in each, as follows:]

1st. Lee.....	34,859	30th. Polk.....	42,395
2nd. Van Buren and Davis.....	33,510	31st. Boone and Story.....	37,744
3rd. Appanoose and Monroe.....	30,355	32nd. Hardin and Grundy..	30,448
4th. Wayne and Lucas.....	30,657	33rd. Buchanan and Delaware.....	36,499
5th. Clarke and Decatur... ..	26,848	34th. Harrison and Shelby..	29,345
6th. Ringgold, Taylor and Union.....	42,700	35th. Dubuque.....	42,997
7th. Fremont and Page... ..	37,300	36th. Clayton.....	28,829
8th. Mills and Montgomery.....	30,030	37th. Hamilton, Webster and Wright.....	32,264
9th. Des Moines.....	33,099	38th. Blackhawk.....	23,913
10th. Jefferson and Henry..	38,304	39th. Butler and Bremer... ..	38,374
11th. Louisa and Washington.....	33,521	40th. Allamakee and Fayette.....	42,049
12th. Keokuk and Iowa... ..	40,480	41st. Howard, Mitchell and Worth.....	33,151
13th. Wapello.....	25,292	42nd. Winneshiek.....	23,937
14th. Mahaska.....	25,201	43rd. Cerro Gordo, Franklin, Hancock and Winnebago.....	50,079
15th. Marion.....	25,111	44th. Chickasaw and Floyd..	29,211
16th. Madison and Warren.....	36,803	45th. Poweshiek and Tama.....	40,521
17th. Audubon, Guthrie and Dallas.....	41,057	46th. Woodbury, Monona and Crawford.....	35,965
18th. Adams, Adair and Cass.....	40,030	47th. Humboldt, Pocahontas, Palo Alto, Emmett, Kossuth and Clay..	25,162
19th. Pottawattamie.....	39,846	48th. Greene, Carroll and Calhoun.....	31,071
20th. Muscatine.....	23,168	49th. Plymouth, Sioux, Lyon, O'Brien, Osceola and Dickinson.....	24,236
21st. Scott.....	41,270	50th. Buena Vista, Cherokee, Sac and Ida.....	28,933
22nd. Clinton.....	36,764		
23rd. Jackson.....	23,771		
24th. Cedar and Jones.....	39,989		
25th. Johnson.....	25,429		
26th. Linn.....	37,235		
27th. Benton.....	24,888		
28th. Marshall.....	23,752		
29th. Jasper.....	25,962		

SEC. 53. The change of any district shall not affect any senator during the term of office for which he has been elected.

REPRESENTATIVE DISTRICTS.

[Twentieth General Assembly, Chapter 180.]

SECTION 1. One representative for every sixteen thousand eight hundred and fifty inhabitants is hereby constituted the ratio of apportionments and each representative district shall be as hereinafter described.

Ratio.

[The act then designates the counties constituting the respective districts, and the number of representatives to which each is entitled, as follows:]

1st. Lee.....	2	13th. Decatur.....	1
2nd. Des Moines.....	2	14th. Union.....	1
3rd. Henry.....	1	15th. Ringgold.....	1
4th. Jefferson.....	1	16th. Adams.....	1
5th. Van Buren.....	1	17th. Taylor.....	1
6th. Wapello.....	2	18th. Montgomery.....	1
7th. Davis.....	1	19th. Page.....	1
8th. Monroe.....	1	20th. Mills.....	1
9th. Appanoose.....	1	21st. Fremont.....	1
10th. Lucas.....	1	22nd. Pottawattamie.....	2
11th. Wayne.....	1	23rd. Cass.....	1
12th. Clarke.....	1	24th. Adair.....	1

25th. Madison	1	58th. Hamilton	1
26th. Warren	1	59th. Webster	1
27th. Marion	1	60th. Woodbury	1
28th. Mahaska	1	61st. Butler	1
29th. Keokuk	1	62nd. Bremer	1
30th. Washington	1	63rd. Fayette	1
31st. Louisa	1	64th. Clayton	2
32nd. Muscatine	1	65th. Allamakee	1
33rd. Scott	2	66th. Winneshiek	1
34th. Cedar	1	67th. Howard	1
35th. Johnson	2	68th. Chickasaw	1
36th. Iowa	1	69th. Mitchell	1
37th. Poweshiek	1	70th. Floyd	1
38th. Jasper	2	71st. Plymouth	1
39th. Polk	2	72nd. Sioux, Lyon and Osceola ..	1
40th. Dallas	1	73rd. Monona	1
41st. Guthrie	1	74th. Crawford	1
42nd. Harrison	1	75th. Ida and Buena Vista	1
43rd. Boone	1	76th. Cherokee and Clay	1
44th. Story	1	77th. Sac	1
45th. Marshall	1	78th. Calhoun and Pocahontas..	1
46th. Tama	1	79th. Greene	1
47th. Benton	1	80th. Carroll	1
48th. Linn	2	81st. Shelby	1
49th. Jones	1	82nd. Audubon	1
50th. Clinton	2	83rd. O'Brien and Dickinson	1
51st. Jackson	1	84th. Palo Alto, Emmett and	
52nd. Dubuque	2	Kossuth	1
53rd. Delaware	1	85th. Humboldt and Wright ...	1
54th. Buchanan	1	86th. Winnebago, Hancock and	
55th. Blackhawk	1	Worth	1
56th. Grundy	1	87th. Cerro Gordo	1
57th. Hardin	1	88th. Franklin	1

ART. I, SEC. 4.

It is not inconsistent with this section to provide that the credibility of the evidence of a witness may be affected by the fact as to his sensibility to the obligation of an oath: *Searcy v. Miller*, 57-613, and see notes to § 3636.

1216.

ART. I, SEC. 9.

The right of trial by jury cannot be waived by the defendant in a criminal prosecution. The court has no jurisdiction without the jury to try such a case: *State v. Carman*, 18 N. W. Rep., 691.

It is herein contemplated that the legislature may provide for trial by jury of less than twelve, in inferior courts, irrespective of the right of appeal to a higher court in which a trial before a jury of twelve may be had. The admission of the state with a constitution containing this provision was an abrogation of the unlimited right of trial by common law jury found in the ordinance of 1787: *Higgins v. Farmers' Ins. Co.*, 60-50.

1218.

ART. I, SEC. 10.

The provisions of § 1401 as to method of determining the question of sanity by commissioners are not in violation of this section: *County of Blackhawk v. Springer*, 58-417.

The admission in evidence upon a criminal trial of testimony of witnesses given in a preliminary examination, which witnesses have since died, is not in violation of the right to be confronted by witnesses under this section: *State v. Fitzgerald*, 19 N. W. Rep., 202.

1220.

ART. I, SEC. 18.

Advantages to the land resulting from its better drainage will not be taken into account in estimating the deterioration in value: *Britton v. D. M., O. & S. R. Co.*, 59-540.

1223.

ART. I, SEC. 26.

[By the Nineteenth General Assembly (Joint Resolution No. 8) the following proposed amendment was agreed to, as having already been in due form agreed to by the previous general assembly (18 G. A., Joint Resolution, No. 8). By 19 G. A., ch. 172, (in pursuance of a previous statute authorizing submissions of constitutional amendments at special elections, 19 G. A., ch. 7, inserted in supplement to page 1247) this proposed amendment was submitted to the people at a special election to be held June 27, 1882. By proclamation of the governor, dated July 29, 1882, this proposed amendment was declared adopted.]

SEC. 26. No person shall manufacture for sale, or sell, or keep for sale, as a beverage any intoxicating liquors whatever, including ale, wine and beer. The general assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall thereby provide suitable penalties for the violation of the provisions hereof.

For irregularities in entering this amendment upon the journals of the Eighteenth General Assembly, and a want of agreement between the amendment as there entered and as subsequently agreed to by the Nineteenth General Assembly, this amendment, as submitted to and adopted by the people, did not become a part of the constitution: *Koehler v. Hill*, 60-543; *State v. Johnson*, 61-504.

ART. II, SEC. 1.

A student, whose home had been with his father in Mitchell County while still a minor, entered the State University at Iowa City, making his father's home still his residence or "headquarters" during vacations, and receiving support from his father. Not having any definite intention to make Iowa City his home after graduation, held, that he was not a resident of the county where he was attending college, so as to be entitled to vote there on becoming of age: *Vanderpoel v. O'Hanlon*, 53-246.

1225.

ART. III, SEC. 4.

[By an amendment to the constitution proposed by the Seventeenth General Assembly (Joint Resolution, No. 5), and agreed to by the Eighteenth General Assembly (Joint Resolution, No. 6), and adopted by vote of the electors at the general election in 1880, the words "free white" were stricken from the third line of this section.]

1228.

ART. III, SEC. 29.

For similar provisions as to ordinances of a city, see § 489.

ART. III, SEC. 30.

A legalizing statute purporting to make valid the act of a city which it had no lawful power to do, held unconstitutional: *Ind. School Dist. of Burlington v. City of Burlington*, 60-500.

city, it follows that it cannot, after the passage of an ordinance not authorized by such charter, legalize it by special act: *Stange v. City of Dubuque*, 17 N. W. Rep., 518.

As the legislature cannot, in view of this section, pass a special law for the amendment of the charter of a city, it follows that it cannot, after the passage of an ordinance not authorized by such charter, legalize it by special act: *Stange v. City of Dubuque*, 17 N. W. Rep., 518.

A curative act legalizing the action of a county superintendent in attaching territory of one district township to another, without circumstances

which by statute are necessary to authorize such action, is constitutional, as no general law could be made applicable: *Ind. Dist. of Union v. Ind. Dist. of Cedar Rapids*, 17 N. W. Rep., 895.

1233.

ART. V, SEC. 4.

Section 3173, prohibiting appeals in cases where the amount in controversy does not exceed one hundred dollars, unless the judge shall certify the question on which the decision of the supreme court is desired, is not unconstitutional as taking away the

right of appeal and trial *de novo* in equity cases as provided by this section. Such statutory provision is a mere restriction or regulation upon the right of trial *de novo*: *Andrews v. Burdick*, 16 N. W. Rep., 275.

1238.

ART. VIII, SEC. 9.

The words "banking corporation," used in this section, mean a bank of issue, and not one of discount and

deposit: *Allen v. Clayton*, 18 N. W. Rep., 663.

1241.

ART. X, SEC. 1.

It is the design and intention of this provision that the proposed amendment should be so entered upon the journals that it can be known from an examination of such journals what it is that has been agreed to by the houses of the General Assembly; and such entry is the highest evidence of what the amendment is which is agreed to by each house. Therefore, where it appeared from the journal of the Senate of one General Assembly that the proposed amendment, as passed by it, was different from the same amendment as concurred in by the subsequent General Assembly, and submitted to and voted upon by the people, *held*, that it was not legally adopted and did not become a part of the constitution although the joint resolution of the General Assembly first acting upon the amendment, which was signed

by the presiding officers of the two houses and by the governor, and preserved in the office of the secretary of state, showed such amendment to be the same as that subsequently concurred in and submitted; also, *held*, that the recital in the joint resolution of the General Assembly which submitted said amendment to vote of the people that it had been agreed to by the previous General Assembly was not conclusive upon the court: *Koehler v. Hill*, 60-543.

The provisions as to the amendment of the constitution are not simply directory, and the legislative department is not the sole judge as to whether or not they have been complied with, but the courts have jurisdiction to inquire into the question whether these requirements have been observed, and if not to declare the amendment invalid: *Ibid*.

1242.

ART. XI, SEC. 3.

Bonds issued in payment of a valid judgment indebtedness which does not exceed the constitutional limitation at the time the judgment was rendered will not be invalid merely by reason of the indebtedness ex-

ceeding the limitation at the time they are issued. The issue of such bonds does not increase the indebtedness: *City of Sioux City v. Weare*, 59-95.

1244.

ART. XI, SEC. 6.

Where there was a failure to elect a county officer at a general election

at which such office should have been filled, and the incumbent held over,

qualifying anew as required by statute, *held*, that he filled a vacancy only, and his successor should be elected at the next general election: *Dyer v. Bagwell*, 54-487; *Boone Co. v. Jones*, 58-373.

1247.

16 G. A., Ch. 114.

[19 G. A., ch. 7, § 1, amends § 2 of this act by adding, after "Constitution," in the fourth line, the words, "*When no other time is fixed by such general assembly for its submission to the people.*"]

19 G. A., ch. 7, § 2, further amends this act by adding thereto the following:]

Submission at
special elec-
tion.

SEC. 5. The general assembly to which a proposition to amend the constitution has been referred by the last preceding general assembly, and which has agreed to such proposed amendment, may provide for its submission to the people at a special election for that purpose, at such time as the general assembly may prescribe, proclamation for which election shall be made by the governor, and the same shall in all respects be governed and conducted as prescribed in this act for submission of a constitutional amendment at a general election so far as applicable.

1279.

NINETEENTH GENERAL ASSEMBLY (1882).

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUP- PLE- MENT TO PAGE.
3	An act authorizing McClain's Annotated Statutes of the State of Iowa to be received as evidence of the laws of this State..... Took effect by publication, February 7, 1882.	1162
7	An act to amend chapter 114 of the acts of the Sixteenth General Assembly, relating to the submission of amendments to the constitution to a vote of the people..... Took effect by publication, February 14, 1882.	1247
8	An act to repeal section 2155 of the Code, relating to limited partnerships, and enacting a substitute therefor..... Took effect by publication, February 17, 1882.	604
13	An act to amend chapter 194, laws of the Eighteenth General Assembly, relative to making appropriations for the Iowa State Library..... Took effect by publication, February 18, 1882.	536
16	An act to authorize cities of the first and second class and incorporated towns to change their corporate names, and to prescribe the manner in which such change may be made..... Took effect by publication, February 23, 1882.	106
17	An act to repeal chapter 123, acts of the Eighteenth General Assembly, relative to fishways..... Took effect by publication, March 3, 1882.	412
19	An act to amend section 3864 of the Code of 1873, in relation to the penalty for attempts to produce a miscarriage..... Took effect July 4, 1882.	977
23	An act requiring Boards of Directors to set out trees on school grounds..... Took effect by publication, March 1, 1882.	494 498
24	An act to amend chapter 143, of the acts of the Sixteenth General Assembly, entitled, "an act to provide for establishing Superior Courts in cities of a certain grade, relating to cities and incorporated towns"..... Took effect by publication, March 4, 1882.	140
25	An act to repeal part of section 521, title IV, chapter 10, of the Code, and enact a substitute therefor, relating to the election of alderman in cities of the first class..... Took effect by publication, March 3, 1882.	131
27	An act to amend chapter 159, section 3, acts of 1876, in relation to the printing and distribution of public documents..... Took effect, July 4, 1882.	23
32	An act to repeal section 487 of the Code, and enact a substitute in lieu thereof, in relation to Poll Tax..... Took effect by publication, March 7, 1882.	120
35	An act relating to the trial of equitable actions, amending section 2742, chapter 9, title 17, of the Code of Iowa, as amended by chapter 145 of the laws of the Seventeenth General Assembly..... Took effect by publication, March 10, 1882.	733
36	An act to insure the better education of practitioners of dentistry in the State of Iowa..... Took effect July 4, 1882.	450
38	An act requiring the cost of paving street and alley intersections in certain cities, to be paid out of a general paving fund, and authorizing the levy of a special tax therefor..... Took effect by publication, March 10, 1882.	111

NINETEENTH GENERAL ASSEMBLY.—Continued.

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUP- PLR- MENT TO PAGE.
40	An act to repeal chapter 152 of the acts of the Sixteenth General Assembly, and chapter 164 of the acts of the Eighteenth General Assembly, and to provide for the establishment and maintenance of the Institution for Feeble-Minded Children at Glenwood..... Took effect by publication, March 11, 1882.	475
44	An act to provide for the construction of levees by amending sections 1207, 1208, 1209, 1210 and 1211 of chapter 2, title X of the Code of 1873, and chapter 140 of the laws of the Sixteenth General Assembly, and chapter 121 of the laws of the Seventeenth General Assembly, and chapter 85 of the laws of the Eighteenth General Assembly, relating to drains, ditches, and water-courses..... Took effect by publication, March 14, 1882.	324 325 326
45	An act to amend section 890 of the Code, relating to the redemption of Tax Sales..... Took effect July 4, 1882.	220
46	An act to repeal section 1739 of the Code of 1873, and to enact a substitute therefor, in relation to the duties of the President of the Board of School Directors..... Took effect July 4, 1882.	496
49	An act to amend section 3072, chapter 2, title XVIII of the Code, relating to exemptions..... Took effect July 4, 1882.	815
51	An act to amend section 1717 of chapter 9, title XII, of the Code of Iowa, so as to enable the board of directors of district townships to procure highways to school-house sites..... Took effect by publication, March 12, 1882.	490
52	An act to repeal section 2, of chapter 38, of the laws of the Eighteenth General Assembly, in relation to compensation of officers and employes of the general assembly and to enact a substitute therefor..... Took effect by publication, March 14, 1882.	2
54	An act authorizing boards of supervisors to appropriate amounts received as insurance thereon in reconstructing public buildings destroyed by fire, wind, or lightning..... Took effect by publication, March 14, 1882.	73
56	An act to increase the number of circuit judges in each circuit of this state containing a city having a population in excess of twenty-two thousand and three hundred, and to provide for the election of said judges..... Took effect July 4, 1882.	157 38
62	An act in relation to the exemption of sewing machines from execution and attachment..... Took effect July 4, 1882.	816
63	An act to enable townships, incorporated towns and cities, including cities acting under special charters, to aid in the construction of county bridges, in certain cases..... Took effect March 15, 1882.	73
80	An act to amend section 934 of the Code of 1873..... Took effect July 4, 1882.	238
89	An act granting additional powers to cities organized under the general incorporation laws of the state..... Took effect by publication, March 22, 1882.	106

NINETEENTH GENERAL ASSEMBLY.—Continued.

CHAP.	TITLE TIME OF TAKING EFFECT.	SUP- PLE- MENT TO PAGE
91	An act to amend chapter 83 of the acts of the Seventeenth General Assembly, amendatory of section 4785 of the Code, in relation to the support of convicts, Took effect by publication, March 22, 1882.	1152
92	An act to increase the support fund of the girls' department of the Iowa reform school. Took effect by publication, March 17, 1882.	480
94	An act to repeal chapter 115, laws of the Eighteenth General Assembly, relating to compensation of sheriffs, and to enact a substitute in lieu thereof. . . . Took effect by publication, March 21, 1882.	952
100	An act to amend sections 2253 and 2266 of the Code, in relation to the appointment and powers of guardians of non-resident idiots, lunatics, and persons of unsound minds. Took effect by publication, March 21, 1882.	624 626
102	An act providing for the cancellation of taxes voted to aid in the construction of railroads. Took effect by publication, March 22, 1882.	372
103	An act enabling county treasurers to pay outstanding warrants. Took effect by publication, March 22, 1882.	80
104	An act to amend section 1324, chapter 6, title 10, of the Code of 1873, relating to telegraphs. Took effect by publication, March 22, 1882.	374
105	An act to amend section 1, chapter 203, laws of the Eighteenth General Assembly, relating to the Institution for the Deaf and Dumb. Took effect by publication, March 22, 1882.	483
109	An act to amend section 936 of the Code of 1873, relating to road notices. . . . Took effect July 4, 1882.	238
110	An act to repeal section 390 of the Code, chapter 6 of the laws of the Sixteenth General Assembly, chapter 201 of the laws of the Eighteenth General Assembly, and to enact a substitute therefor, in relation to the election of assessors. Took effect July 4, 1882.	89
112	An act to further diminish liability to railroad accidents, and to punish interference with, and injury to, railroad property. Took effect July 4, 1882.	985
113	An act to amend section 1, chapter 194, of the laws of the Eighteenth General Assembly, entitled An act making appropriations for the Iowa State Library. Took effect by publication, March 23, 1882.	536
115	An act to repeal section 573 of the Code, and enact a substitute therefor, in relation to the time of holding general elections. Took effect July 4, 1882.	156
117	An act to provide for the appointment and salary of a deputy clerk of the supreme court. Took effect by publication, March 23, 1882.	183 946
118	An act to include all the territory of an incorporated city or town within the independent school district, or districts, now existing or hereafter to be formed. Took effect by publication, March 23, 1882.	509

NINETEENTH GENERAL ASSEMBLY.—Continued.

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUP- PLE- MENT TO PAGE.
122	An act to amend section one, chapter forty-seven of the acts of the Fifteenth General Assembly, in relation to crossing highways..... Took effect by publication, March 23, 1882.	341
123	An act to repeal chapter 153 of the laws of the Ninth General Assembly, and to amend section 1, of chapter 167, of the laws of the Eighteenth General Assembly Took effect July 4, 1882.	20
124	An act to provide for filling vacancies in offices of incorporated towns..... Took effect by publication, March 23, 1882.	130
128	An act to provide for the publication of city and town ordinances in book or pamphlet form, and for the taking effect thereof..... Took effect by publication, March 23, 1882.	120
133	An act to authorize incorporated towns and cities to procure and donate to rail- way companies sites for depots, machine shops and other buildings..... Took effect by publication, March 23, 1882.	114
136	An act to amend section 463 of the Code of 1873, relating to sales of liquors in cities and incorporated towns..... Took effect July 4, 1882.	108
137	An act to amend sections 4, 10, 11 and 12, of chapter 75, of the acts of the Eighteenth General Assembly, in relation to the practice of pharmacy and the sale of medicine and poisons..... Took effect by publication, March 18, 1882.	449 450
140	An act amending section 3 of chapter 151, acts of the Eighteenth General As- sembly, relating to fees of clerks of District and Circuit Courts..... Took effect by publication, March 23, 1882.	452
144	An act to repeal sections 3201 and 3202 of the Code of 1873, and to provide a substitute therefor in relation to petitions and arguments for rehearing in the Supreme Courts..... Took effect by publication, March 23, 1882.	847
146	An act to amend section 8, of chapter 77, acts of the Seventeenth General As- sembly, making the railroad commissioners' tax payable directly into the state treasury..... Took effect by publication March 23, 1882.	366
147	An act to amend chapter 183 of the acts of the Eighteenth General Assembly, relating to the bonding of county indebtedness..... Took effect by publication, March 23, 1882.	63 64
149	An act to enable boards of directors of independent school districts to insure school property..... Took effect by publication, March 23, 1882.	494
150	An act to amend certain sections of chapter 5, title 12, Code of 1873, relating to the time of holding pupils in the girls' department of the Iowa Reform School..... Took effect by publication, May 2, 1882.	479
151	An act to repeal sections 3786 and 3815 of the Code of Iowa relating to the pay- ment of fees into the county treasury, and to enact a substitute therefor.. } Took effect by publication, March 23, 1882. }	951 962
153	An act to amend section 3764 of the Code, relative to compensation of state printer..... Took effect by publication, March 23, 1882.	944

NINETEENTH GENERAL ASSEMBLY.—Continued.

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUP- PLE- MENT TO PAGE.
154	An act authorizing cities of the second class to erect and maintain city jails.....	136
	Took effect by publication, March 23, 1882.	
158	An act providing for the taxation of certain property for road purposes.....	124
	Took effect July 4, 1882.	
159	An act to repeal section 3791 of the Code of 1873, and to enact a substitute therefor, relating to the compensation of members of boards of supervisors..	954
	Took effect July 4, 1882.	
160	An act to amend chapter 111 of the laws of the Eighteenth General Assembly, in relation to the restoration of territory in school districts.....	509
	Took effect July 4, 1882.	
161	An act to amend sections 1774 and 1776 of the Code, in relation to the duties and compensation of county superintendents of schools.....	503
	Took effect July 4, 1882.	
162	An act apportioning the state of Iowa into senatorial districts.....	1166
	Took effect July 4, 1882.	
163	An act to divide the state into eleven congressional districts, and to provide for the election of congressmen thereunder.....	1166 169
	Took effect July 4, 1882.	
164	An act to amend section 438, title 4, chapter 10, of the Code, relating to the abandonment of the charters of cities and acting under special charters, providing for the term of office of its officers, and the validity of certain ordinances thereof after such abandonment.....	103
	Took effect by publication, March 29, 1882.	
165	An act to repeal chapter 81, laws of the Seventeenth General Assembly, and to enact a substitute therefor, relating to support of convicts in the additional penitentiary.....	1158
	Took effect by publication, March 25, 1882.	
166	An act to amend section 1675 of the Code, and to repeal section 1676 of the Code as amended by chapter 72 of the acts of the Seventeenth General Assembly and chapter 165 of the acts of the Eighteenth General Assembly, and to enact a substitute therefor.....	481
	Took effect by publication, March 25, 1882.	
167	An act to create a state educational board of examiners, and to encourage training in the science and art of teaching.....	460
	Took effect July 4, 1882.	
169	An act to provide for the taxation of leasehold estates in Agricultural College lands.....	469
	Took effect, by publication, March 28, 1882.	
170	An act to prevent and punish the adulteration of articles of food, drink and medicine, and the sale thereof when adulterated.....	1013
	Took effect July 4, 1882.	
173	An act apportioning the state into representative districts, and declaring the ratio of representation.....	1166
	Took effect July 4, 1882.	
174	An act to amend section 1862 and to repeal section 1865 of the Code.....	528
	Took effect by publication, April 4, 1882.	

NINETEENTH GENERAL ASSEMBLY.—Continued.

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUP- PLE- MENT TO PAGE.
175	An act in relation to the reports of public officers and institutions, and to provide for printing and distributing public documents.....	28
	Took effect July 4, 1882.	
-	An act to amend section 8, chapter 75, of the laws of Eighteenth General Assembly; also for an act to repeal section 1527, and to amend section 1529 and section 1537, of the Code of 1873, in relation to the sale of intoxicating liquors.....	450 424 426
	Sent to the governor during the last three days of the session, and on April 15, 1882 (within 30 days after adjournment of the General Assembly) deposited by him in the office of the secretary of state, without approval, or objection filed thereto.	
TWENTIETH GENERAL ASSEMBLY (1884).		
7	An act to provide for the appointment of marshals in cities of the first class. Took effect by publication Feb. 28, 1884.	137
8	An act to repeal section 1555, chapter 6, title XI, of the Code, and to enact a substitute therefor, relating to intoxicating liquors.....	437
	Took effect July 4, 1884.	
9	An act to protect and preserve the fish in the permanent lakes and ponds within the state of Iowa.....	1023
	Took effect by publication, March 8, 1884.	
11	An act to amend section one of chapter 104 of the laws of the Seventeenth General Assembly relating to mutual insurance companies.....	297
	Took effect by publication, March 11, 1884.	
13	An act authorizing Boards of Supervisors to purchase, keep up and maintain bridges over streams dividing their respective counties.....	255
	Took effect by publication, March 19, 1884.	
17	An act to amend section 4746 of the Code, relative to term of office of the warden of the penitentiary at Fort Madison.....	1145
	Took effect by publication, March 19, 1884.	
18	An act increasing the number of Circuit Judges in the Second Judicial District of the state.....	38
	Took effect July 4, 1884.	157
19	An act in relation to the Sixth Judicial Circuit of the state, subdividing the same, providing for the appointment and election of judges of the Circuit Courts therein, and defining the powers and duties thereof.....	38 157 1166
	Took effect by publication, March 19, 1884.	
20	An act granting additional powers to certain cities of the first class, with reference to the improvements of streets, highways, avenues or alleys, and to provide a system for payment therefor.....	111
	Took effect by publication, March 18, 1884.	
21	An act to regulate mines and mining, and to repeal chapter 202 of the Acts of the Eighteenth General Assembly.....	443
	Took effect by publication, March 20, 1884.	
22	An act to amend section 1061, title IX, chapter 1, of the Code of 1873.....	270
	Took effect by publication, April 2, 1884.	
23	An act to exempt from judicial sale the pension money paid to any person by the United States government, and certain of the proceeds and accumulations thereof.....	816
	Took effect by publication, March 23, 1884.	

TWENTIETH GENERAL ASSEMBLY.—Continued.

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUP- PLE- MENT TO PAGE.
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25	An act granting additional powers to certain cities of the first class, with reference to the construction of sewers, and to provide for the payment of the cost of the same, and to amend chapter 162 of the Acts of the Seventeenth General Assembly Took effect by publication, March 28, 1884.	119
27	An act to repeal section 1621 of the Code of 1873 (chapter 4, title XII), and to enact a substitute therefor, relating to a course of study for the State Agricultural College Took effect July 4, 1884.	470
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72	An act to provide for selling, leasing and patenting the lands belonging to the Iowa State Agricultural College and Farm. [Amends ch. 117, acts 10th G. A., and repeals ch. 71, acts 15th G. A.]..... Took effect by publication, April 2, 1884.	468
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153	An act to change the name of the reform schools to industrial schools. [Amendment of Code, ch. 5, title XII.] Took effect by publication, April 10, 1884.	475
158	An act to amend section 4, chapter 47, of the acts of the Sixteenth General Assembly, relating to extension of city limits. Took effect by publication, April 11, 1884.	102

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163	An act to prevent accidents at railroad crossings. Took effect July 4, 1884.	357
164	An act for the protection and preservation of quail. Took effect July 4, 1884.	1021
168	An act to regulate admission to practice as attorneys and counselors in the courts of this state. [Repealing sections 208, 209 and 210 of the Code.] Took effect July 4, 1884.	47
173	An act to amend sections ten and twelve of chapter 151, laws of the Eighteenth General Assembly. Took effect by publication, April 10, 1884.	453
175	An act to amend chapter 58, acts of the Seventeenth General Assembly. Took effect by publication, April 11, 1884.	65
178	An act to provide for the burial of honorably discharged soldiers, sailors or marines, who may hereafter die without leaving means sufficient to defray funeral expenses, and to provide head-stones to mark their graves. Took effect July 4, 1884.	73
179	An act to protect subcontractors for labor performed, and material furnished for public buildings and improvements. [Additional to ch. 100 of the acts of the 16th General Assembly.] Took effect July 4, 1884.	603
180	An act to apportion the state into representative districts and declaring the ratio of representation. Took effect July 4, 1884.	1166
181	An act in relation to the fourth judicial circuit of the state; subdividing the same; providing for the election of circuit judges therein, and defining their powers and duties. [Additional to ch. 56, of the acts of the 16th General Assembly.] Took effect July 4, 1884.	98 157 1166
182	An act to amend chapter 28 of the acts of the 15th General Assembly amending section 796 of the Code of 1873. Took effect July 4, 1884.	189
183	An act amending sections 2086 and 2087 of the Code of 1873, relating to the assignment of non-negotiable instruments and accounts. Took effect July 4, 1884.	586
184	An act in relation to attorney's fees in partition cases of real estate. [Additional to Code, ch. 3, title XX.] Took effect July 4, 1884.	865
185	An act to provide for the inspection and to regulate the sale of petroleum and its products, and to repeal chapter 172 of the acts of the Seventeenth General Assembly and section 3901 of the Code. Took effect by publication, April 18, 1884.	447

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187	An act to change the name of the additional penitentiary at Anamosa; provide for a matron for the female convicts thereof; to authorize the purchase of certain lands; to provide for the house rent of the deputy warden and to sell a piece of land known as the Old State Quarry. [Additional to ch. 2, title XXVI, of the Code.].....	1157
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188	An act to regulate and provide for the construction of tile and other underground drains through the lands of another. [Amendatory of ch. 2, title X, of the Code.]	328
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189	An act for the appointment of a state veterinary surgeon and defining his duties.	409
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190	An act to authorize railway corporations to condemn lands for additional depot grounds. [Additional to Code, ch. 5, title X, of railways.].....	333
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