

NEW

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REVISED AND ANNOTATED

CODE OF IOWA,

EDITION OF 1888,

CONTAINING

ALL THE GENERAL STATUTES OF IOWA

TO JULY 4, 1888 BEING THE IOWA CODE OF 1873 AS AMENDED BY SUBSEQUENT LAWS,
AND INCLUDING ALL THE OTHER GENERAL STATUTES NOW IN FORCE

COPIOUSLY ANNOTATED

FROM THE DECISIONS OF THE SUPREME COURT DOWN TO AND INCLUDING THOSE OF THE
MAY TERM, 1888, WITH AN

APPENDIX

CONTAINING THE ORGANIC LAWS OF MICHIGAN, WISCONSIN AND IOWA, THE CONSTITUTION OF THE
UNITED STATES, CONSTITUTION OF IOWA NATURALIZATION LAWS ORDINANCE
OF 1787, DECLARATION OF INDEPENDENCE AND THE REVISED
RULES OF THE SUPREME COURT, ETC.

BY WILLIAM E. MILLER,

EX-CHIEF JUSTICE OF IOWA, AUTHOR OF "PLEADING AND PRACTICE UNDER THE CODE," ETC.

DES MOINES:
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PREFACE.

THE numerous amendments made to the Code of 1873, at each succeeding General Assembly, together with the many other general statutes, taken in connection with the fact that the State edition of the Code was practically exhausted, seemed to make a revision of the Code almost a necessity, at least much to be desired. In this belief the work of revision and annotation was undertaken.

It has been the object of the editor to revise the Code, so as to show wherein it has been changed in its various provisions, and to present it as it is now in force; and to embody the general and permanent statutes passed by the Fifteenth, Sixteenth, Seventeenth, and Eighteenth General Assemblies in connection with the appropriate matter in the Code. In doing this part of the work amendments to any section of the Code, by way of change or substitution, are included in brackets with marginal references to the chapter and section of the amending act. Statutes of a general or permanent character passed subsequent to the Code, which are not expressed to be amendatory of any specific section thereof, are included entire under sub-headings in their appropriate connection with the text, except the chapter on mechanics' liens, being Chapter 100, Laws of 1876, which is substituted for Chapter 8 of Title IV of the Code, which is repealed by the former act.

In the publication of the State edition of the Code numerous errors occurred, some of which changed the sensé and effect of the law. These have been corrected, so that this work will correctly embody all the general statute law of the State in force on the 4th day of July, 1880. In addition to the matter of the appendix of the Code will be found the various organic acts, the swamp land laws,

rules of the Supreme Court, and notes to the State Constitution, besides other statutes of general interest.

In the first volume following the Analysis will be found a table showing where the various general statutes passed since the Code may be found.

In the work of annotation it has been the aim of the author to give the substance of every decision of the Supreme Court construing any of the provisions of the statute, either directly or remotely, without repetition, and in doing this the opinions themselves have been carefully examined, and not simply the head-note or digests of the case adopted. The notes come down to and include the decisions of the fifty-first volume of Iowa Reports.

Hoping that the labor and care bestowed upon the preparation of the work may materially lighten the labors of the members of the legal profession, and be found useful to all who have occasion to use the book, it is respectfully submitted.

W. E. M.

PREFACE TO EDITION OF 1882.

SINCE the publication of the REVISED AND ANNOTATED CODE in 1880, the Nineteenth General Assembly has intervened, which has made numerous amendments to the Code and to other general statutes, and has also added many new and independent laws, whereby a further revision of the Revised and Annotated Code becomes necessary in order that it shall embrace the entire statute law of the State of a permanent character at the present time.

This has been done on the plan of the original work.

There have been also five volumes of Reports of the Supreme Court decisions published since the summer of 1880, containing many decisions bearing upon the various provisions of the statute. These have been carefully collected and noted, together with many additional decisions found in prior volumes bearing more or less directly on the provisions of the statutes, which will be found in a supplement at the end of the work with convenient and intelligible reference to the statutes passed upon.

Trusting that the profession, and those having occasion to examine or use the statute law of the State, will find this work convenient and helpful, it is respectfully submitted.

W. E. M.

PREFACE TO EDITION OF 1888.

THE purpose of this edition has been to supply the courts and the bar, and all persons using the laws of the State, with a book in which all the statutes as they were in force, July, 1888, may be conveniently found; together with notes of the decisions of the Supreme Court, giving constructions to the statutory questions arising in the course of litigation. The last previous edition was in 1884, since which time we have had two sessions of the General Assembly, which have enacted important and numerous changes in the statute law of the State, some of which are based upon constitutional changes which have made radical changes in our judicial system. These numerous and important changes have made it necessary for an entirely new Revision of the laws, which has been attempted, to which we have added further annotations of the Supreme Court decisions down to and including the May term, 1888, whereby the REVISED AND ANNOTATED CODE has been greatly enlarged and improved.

EXPLANATION OF ABBREVIATIONS.

R. means Revision.

Ch. means Chapter.

C. means Code.

§ means Section.

G. A. General Assembly.

REVISED AND ANNOTATED CODE.

CHAPTER 196, LAWS OF 1880.

AN ACT RELATING TO EVIDENCE.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa:* That the revised and annotated Code of Iowa prepared by WILLIAM E. MILLER, and to be published by MILLS & Co., of Des Moines, Iowa, when so published, and certified by the Secretary of State to embrace the Code of Iowa of 1873 as amended by subsequent statutes, and the general and permanent statutes of the fifteenth, sixteenth, seventeenth, and eighteenth general assemblies, shall be receivable in evidence in all the courts of this state, with like effect as if published by the state.

Approved, March 27, 1880.

CERTIFICATE OF THE SECRETARY OF STATE.

STATE OF IOWA,
OFFICE OF SECRETARY OF STATE, }
DES MOINES, May 28, 1880.

I, J. A. T. HULL, Secretary of State of the State of Iowa, hereby certify that I have examined the "Revised and Annotated Code of Iowa," prepared by Wm. E. MILLER, and published by MILLS & Co., of Des Moines, Iowa, and find that it embraces the Code of 1873 as amended by subsequent statutes, and the general and permanent statutes of the fifteenth, sixteenth, seventeenth and eighteenth General Assemblies.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great
[SEAL.] Seal of the State this twenty-eighth day of May, A. D. 1880.

J. A. T. HULL,
Secretary of State.

STATE OF IOWA—SUPREME COURT.

DES MOINES, OCT. 29, 1888.

We have examined the advanced sheets of Judge Miller's new edition of the Code of Iowa, soon to be issued. We regard it a complete work. It has many improvements which largely add to its value as compared with other and prior editions. We esteem it accurate in the text and in the citation of cases. We recommend it to the profession of the State and elsewhere.

W. H. SEEVERS, *Chief Justice.*

JOSEPH R. REED,
JAS. H. ROTHROCK,
JOSEPH M. BECK,
G. S. ROBINSON, } *Judges.*



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PART FIRST.

PUBLIC LAW.

TITLE I.

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

CHAPTER 1.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE.

SECTION 1. [**Boundaries of state.**]—The boundaries of the state of Iowa are defined in the preamble of the constitution.

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

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

The concurrent jurisdiction of the states of Illinois and Iowa over the Mississippi river attaches to cases, either civil or criminal, arising out of the commerce of such river; but does not authorize the courts of Iowa to abate a nuisance existing in the river on the Illinois side of the main channel thereof. *Gilbert v. The Moline Water Power and Manf. Co.*, 19 Iowa, 319. See *State v. Mullen*, 35 Id., 199.

The courts of this state will take notice that the island of Rock Island is within the state of Illinois. *Ibid.*

A person may be tried in the courts of Iowa for keeping a house of ill-fame on a boat in the Mississippi river, although such boat may, when so used, for a portion of the time, as the water recedes, rest on the soil of an island, and on the east side thereof near the Illinois shore; and the court may abate the nuisance caused by and on such boat when so used. *Ibid.*

SEC. 4. **Exclusive jurisdiction** over all lands situate in the state now or hereafter purchased by the United States on which buildings for public uses are, or shall be erected, is hereby ceded to the United States, and the same shall be

exempt from taxation so long as the same are owned by the United States. Nothing in this section shall be so construed as to prevent on such lands the service of any judicial process issued from or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes committed thereon.

CHAPTER 2.

OF THE GENERAL ASSEMBLY.

SECTION 5. The sessions of the general assembly shall be held at the seat of government, unless the governor shall convene them at some other place in times of pestilence or public danger.

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

SEC. 7. [Certificates of election.]—Such secretary and clerk shall receive and file the certificates of election presented, each for his own house, and make a list therefrom of the persons who appear to have been elected members of the respective houses.

SEC. 8. [Election of temporary officers.]—The persons so appearing to be members shall proceed to elect such other officers for the time being as may be requisite; and when so temporarily organized, shall choose a committee of five, who shall examine and report upon the credentials of the persons claiming to be members.

SEC. 9. [Permanent organization.]—The members reported by the committee as holding certificates of election from the proper authority, shall proceed to the permanent organization of their respective houses by the election of officers.

SEC. 10. Any member may administer oaths necessary in the course of business of the house of which he is a member, and while acting on a committee upon the business of such committee.

SEC. 11. [Freedom of speech.]—No member shall be questioned in any other place for any speech or debate in either house.

SEC. 12. (As amended by ch. 52, 19th g. a.) [Compensation of officers and employes.]—The compensation of the members, officers and employes of the general assembly shall be: To every member for each regular session, five hundred and fifty dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding session, and for every (mile by the nearest traveled route) in going to and returning from the place where the general assembly is held (five cents per mile); but in no case shall the compensation for any extra session exceed six dollars per day exclusive of mileage. To the secretary of the senate and chief clerk of the house, seven dollars per day, each; to the assistant secretaries of the senate and clerks of the house, six dollars per day, each; to the enrolling and engrossing clerks, five dollars per day, each; to the sergeant-at-arms, doorkeepers, janitors, (and) postmasters, four dollars per day, each; and mail-carrier, five dollars

per diem; to clerks of committees, three dollars per day, each, and the necessary stationery for each of the clerks, secretaries, and their assistants aforesaid; to the paperfolders, two dollars and fifty cents per day, each; to the messengers, two dollars per day, each. And no other or greater compensation shall be allowed such officers and employes, nor shall there be any allowance of or for stationery except as above provided, postage, newspapers, or other perquisites in any form or manner or under any name or designation. And this act shall apply to the officers and employes so named of the 19th general assembly for their full term of office.)

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

He shall also issue to each **officer and employe** of the general assembly, upon the certificate of the presiding officer of the house to which such officer or employe belongs, a warrant from time to time, for the amount due said officer or employe for services rendered.

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

Said **warrants shall be paid** out of any moneys in the treasury not otherwise appropriated.]

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

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

The statute confers no power upon a visiting committee of the legislature to the insane hospital, to punish a witness for contempt, and where such power has been exercised and the plaintiff restrained of his liberty upon the order of such committee, for refusing to testify before it, such restraint is illegal, and the plaintiff will be discharged on *habeas corpus*. *Brown v. Davidson*, 59 Iowa, 461.

SEC. 15. **Fines and imprisonment** for contempt shall only be by virtue of an order of the proper house entering it on its journals, stating the grounds thereof. Imprisonment shall be effected by a warrant under the hand of the presiding officer for the time being of the house ordering it, countersigned by the acting secretary

or clerk, running in the name of the state and directed to the sheriff or jailor of the proper county. Under such warrant, the proper officer will be authorized to commit and detain the person. Fines shall be collected by a similar warrant directed to any proper officer of any county in which the offender has property, and executed in the same manner as executions for fines issued from courts of record, and the proceeds paid into the state treasury.

SEC. 16. **Imprisonment for contempt** shall not extend beyond the session at which it is ordered, and shall be in the jail of the county in which the general assembly is then sitting; or if there be no such jail, then in one of the nearest county jails. Punishment for contempt shall not constitute a bar to any other proceeding, civil or criminal, for the same act.

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

SEC. 18. Witnesses shall be entitled to the same **compensation** for attendance under the preceding section as before the district court, but shall not have the right to demand payment of their fees in advance.

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

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

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

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

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

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

SEC. 25. [**Certificates of election.**]-When any person shall have received a majority of the votes as aforesaid, the president shall declare him to be elected, and shall, in the presence of the convention, sign two certificates of such election, attested by the tellers, one of which he shall transmit to the governor, and the other shall be preserved among the records of the convention and entered at

length on the journals of each house. The governor shall issue a commission to the person so elected.

SEC. 26. [**Election of senators.**—Joint conventions for the purpose of electing a senator in the congress of the United States, and canvassing the votes for governor and lieutenant governor, shall be conducted according to the foregoing provisions so far as applicable.

SEC. 27. In the absence of other rules, those of parliamentary practice comprised in Cushing's manual shall govern.

(CHAPTER 1, LAWS OF 1874.)

STATIONERY FOR LEGISLATIVE COMMITTEES.

An Act to authorize the secretary of state to furnish stationery for the use of standing or select committees of the general assembly, or either branch thereof.

SECTION 1. *Be it enacted, etc.,* That it is hereby made the **duty of the secretary of state** to furnish to, and supply, the standing committees of the senate and house of representatives, and any select or special committees that are or may be raised or appointed by the general assembly, or either branch thereof, with all the stationery necessary for the use of such committees.

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

(Took effect by publication in newspapers February 7, 1874.)

CHAPTER 3.

OF THE STATUTES.

SECTION 28. When the **governor approves a bill**, he shall set his name thereto with the date of his approval.

Printed copies of the approval by the governor, of the laws published in a volume issued by authority of the state, are not essential in order that the laws may take effect. Dishon v. Smith, 10 Iowa, 212.

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

SEC. 30. [**When bill not returned in time.**—When a bill has passed the general assembly, and is not returned by the governor within three days, as provided in the constitution, it shall be authenticated by the secretary of state indorsing thereon: "This bill having remained with the governor three days (Sunday

excepted), the general assembly being in session, has become a law this — day of _____, Secretary of State.”

SEC. 31. **The original acts** of the general assembly shall be deposited with and kept by the secretary of state.

SEC. 32. **[Take effect.]**—Acts of a private nature which do not prescribe the time when they take effect, shall do so on the thirtieth day next after they have been approved by the governor, or indorsed as provided in this chapter.

SEC. 33. **[Of public nature: publication.]**—Acts which are to take effect by publication in newspapers, shall be published in at least two papers, one at least of them at the seat of government, and if such papers are not designated in the act, the same may be designated by the secretary of state, and the act published accordingly. All such acts shall take effect on the twentieth day after the date of the last publication, and the secretary of state shall make and sign on the original roll of each of such acts a certificate, stating in what papers it was published, and the date of the last publication in each of them, which certificate and the printing thereof at the foot of the act shall be presumptive evidence of the facts therein stated.

Where a statute contains a provision that it shall take effect from and after its publication in certain newspapers named therein, it will be in force as a law from the date of such publication, notwithstanding the provisions of section 33, above. *Hunt v. Murray*, 17 Iowa, 313; *State v. Donehey*, 8 Id., 396. See also *Thatcher v. Haun*, 12 Id., 303.

The publication of a statute without the direction of the general assembly will give it no effect. *Scott v. Clark et al.*, 1 Iowa, 70; *Calkin v. The State, ex rel.*, 1 G. Greene, 68.

The legislature cannot delegate authority to the governor to determine when a statute shall take effect. Such delegation would be unconstitutional. *Scott v. Clark*, 1 Id., 70.

Where a statute, regularly passed by the general assembly, and approved by the governor, contains provisions for submitting it to a vote of the people, as to whether it shall become a law or not, such provisions are void, and a vote of the people in pursuance with provisions has no legal effect whatever. The act becomes a law by being passed by the two houses of the general assembly, signed by the governor, and at the time fixed in the constitution. *Santo v. The State of Iowa*, 2 Id., 164.

A law can no more be repealed than it can be enacted by a vote of the people. *Geebrick v. The State*, 5 Id., 491.

The case of *Santo v. The State*, 2 Id., is cited and reaffirmed in *The State v. Beneke*, 9 Id., 203; *The State v. Weir*, 33 Id., 134.

The original act on file in the office of the secretary of state is the ultimate proof of a statute, whatever errors there may be in what purports to be a copy thereof; and the appellate court will inform itself, and take cognizance of the true reading of a statute, by referring to the original act on file in the office of the secretary of state. *Clare v. The State of Iowa*, 5 Id., 509.

When the general assembly by law provides that an act shall be published in certain newspapers, and take effect from such publication, and the act is published accordingly, it takes effect from the time of such publication; and where the act published corresponds with the original act, on file in the office of the secretary of state, it is to be deemed in force, although the act, as published in the session laws, may not correspond with it. *The State of Iowa v. Donehey*, 8 Id., 396.

Under the territorial organization it was held that where no time was fixed in a statute as to the time of its taking effect, it took effect from its passage. *Semple v. Hendershott*, Morris, 27.

The validity or taking effect of a law cannot be made to depend on a vote of the people, and a section of an act providing for such vote is unconstitutional. But if the act is complete without such invalid section it will be held valid without regard thereto. *Weir v. Cram*, 37 Id., 649.

Chapter 144 of the acts of 1863, restraining stock from running at large, was accordingly held to be valid and in force, regardless of the section therein providing that the adoption of the act should be dependent on a vote of the people of the different counties. *Id.*

An act of the legislature of 1835 in relation to the taking effect of the general statutes, provided “that the governor of the state, whenever he may deem it necessary that any law or laws of a general nature should take effect at an earlier day than by the general publication and distribution, may, in writing, direct any such law to be published in any paper published in this state, and from such publication thus directed, such law shall be in full force, was held to be unconstitutional. The power conferred upon the general assembly by the constitution, it was held, could not be constitutionally conferred upon the governor or any other person. *Pilley v. Gleason*, 1 Id., 522.

So also the publication of a statute in newspapers, without authority or direction of the gen-

eral assembly, is not sufficient, under the constitution, to give it force or effect. *Calkins v. The State, ex rel. Hampton*, 1 G. Greene, 68.

The legislative power of the state of Iowa is vested in the general assembly and can be exercised alone by that body. *Geebrick v. The State of Iowa*, 5 Id., 491; *The State v. Beneke*, 9 Id., 203; *The State v. Weir*, 33 Id., 134.

Printed copies of the approval by the governor of the several laws, published in a volume issued by authority of the state, are not essential in order that the laws may take effect. *Dishon v. Smith*, 10 Id., 212.

The courts take judicial notice of the time when a statute takes effect. *Id. Allen v. Dunham*, 1 G. Greene, 89.

A statute is not "passed" by the legislature until it is approved by the governor. *The United States, ex rel. Jones, v. Fanning*, Mor., 348.

The act of January 24, 1855, entitled "an act to relocate the seat of government," although it provided that it should take effect from and after its passage, did not take effect until published and distributed under the general law on the first of July following; because it could not take effect, under the constitution, until published by direction of the legislature—the publication by direction of the governor gave it no validity. *Scott v. Clark et al.*, 1 Id., 70.

A note by the secretary of state appended to an act of the general assembly, as published in pamphlet form, stating that the act was published in certain newspapers at a given date, is not evidence of the fact. *Allen v. Dunham*, 1 G. Greene, 80; *Welch v. Battern*, 47 Iowa, 147.

The enrolled bill, signed by the presiding officer of the general assembly and approved by the governor is the ultimate and conclusive proof of the legislative will. *Duncombe v. Prindle*, 12 Iowa, 1.

The recitals in the preamble to an act of the general assembly, embracing statements of fact affecting the rights of third persons, do not import absolute verity or conclusive proof of the truth of such statements. *Duncombe v. Prindle*, 12 Iowa, 1.

Where an act of the general assembly provided that it should take effect from its publication in two certain newspapers, it was held that it would not take effect by publication in but one newspaper. It was also held, that a certificate of the secretary of state that it had been published in one newspaper would not justify the inference that the act had been properly published in another paper. *Welch v. Battern et al.*, 47 Id., 147.

SEC. 34. [**When in force.**—All other acts and resolutions of a public nature passed at regular sessions of the general assembly, shall take effect on the fourth day of July following their passage.

SEC. 35. (*As amended by ch. 132, 16th g. a.*) (Within **twenty days** after the adjournment of each session of the general assembly, the secretary of state shall prepare a manuscript copy of all the laws, joint resolutions, and memorials passed thereat, arranging the same into chapters, with marginal notes and index, to which he shall attach his certificate that the acts, resolutions and memorials therein contained are truly copied from the original rolls, which shall be presumptive evidence of their correctness, and deliver them to the state printer.)

SEC. 36. (The acts of each general assembly shall be **printed** in pages of the same size, and as near as may be of the same style, type and appearance with the edition of this code.)

SEC. 37. The **secretary of state shall superintend the printing** of the laws as above directed. In the absence of any other provision, the number of copies to be printed and bound, and the time within which the same shall be completed, may be fixed by resolution of each general assembly, or, in case no such resolution is passed, shall be determined by the executive council.

SEC. 38. [**Amendments.**—(Every act passed in amendment of, or in addition to, any chapter or section of this code, or in amendment of, or in addition to, any previous act of the same kind, shall contain in the title thereof a reference to the number and name of the chapter so amended or added to, and if such reference be omitted, the secretary of state shall, in preparing such act for publication, supply the omission.)

A subsequent statute does not necessarily repeal a prior one on the same subject. Both may stand where there are no express repealing words, and if so, it is the duty of the court so to construe them as to avoid conflicts. *Robertson v. Young*, 10 Iowa, 291; *Thatcher v. Haun*, 12 Id., 303; *Baker & Griffin v. The Steamboat Milwaukee*, 14 Id., 214; *Yant v. Brooks*, 19 Id., 87; *City of Dubuque v. Harrison*, 34 Id., 163, 168.

Repeals by implication are not favored. *Id.*; *Allen v. Pegram*, 16 Id., 163; *Casey v. Harned*, 5 Id., 1; *Burke v. Jeffries et al.*, 20 Id., 145.

SEC. 39. (*As amended by ch. 123, 17th g. a.*) (The secretary of state shall distribute the laws aforesaid as follows: To the state library, for distribution to other states and territories, and for exchange, two hundred copies. Two copies to each state institution, to each judge of a court of record, and to each state officer. One copy to each member of the general assembly. Ten copies to the library of the law department of the state university. One copy to the state historical society; all of the foregoing to be bound in law sheep. Thirteen thousand copies of the laws, bound in boards, for distribution to county auditors upon their requisition.)

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

(CHAPTER 15, LAWS OF 1874.)

DISTRIBUTION OF COPIES OF THE CODE.

AN ACT to provide state institutions, justices of the peace, and township clerks with copies of the Code.

SECTION 1. [**Distribution by county auditor.**]*—Be it enacted by the General Assembly of the State of Iowa,* That it shall be the duty of the auditor of each county in the state to furnish to any state institution in his county, and to each justice of the peace and township clerk of such county, a copy of the code, and take a receipt therefor, which receipt shall be a sufficient voucher for the county auditor in his settlement with the auditor of state: *Provided,* Such distribution can be made without a reprint of the code.

SEC. 2. In all cases where the county auditors have already furnished copies of the code to the justices of the peace or township clerks or any of them in their respective counties, such action by said county auditor is hereby legalized, and his sworn statement of the number of copies so furnished, shall be a sufficient voucher therefor in his settlement with the auditor of state.

SEC. 3. Should the number of copies of the code in the possession of any county auditor at the time of taking effect of this act be insufficient for the purposes hereinbefore mentioned, it shall be lawful for him to draw upon the secretary of state [for the] number required to make up the deficiency, who shall as soon as practicable thereafter transmit the same to such county auditor, and shall certify to the auditor of state the number of copies so transmitted by him. The auditor of state shall charge to such county auditor the number of copies of the code furnished him by the state, and shall credit him with such as have been or may be disposed of as provided in the first and second section of this act.

SEC. 4. It shall be the duty of every justice of the peace and township clerk, upon the expiration of his term of office, or whenever his office becomes vacant, to deposit with his successor in office, or with the county auditor, such copy of the code as well as all other books and papers which have come into his hands as such justice of the peace or township clerk.

(Took effect by publication in newspapers, March 17th, 1874.)

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

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

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

SEC. 44. The **compensation for the publication of laws** which are ordered by the general assembly to take effect by publication, unless otherwise fixed, shall be audited and paid by the state. Such compensation shall be one-third the rates of legal advertisements allowed by law.

SEC. 45. In the **construction of the statutes**, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly or repugnant to the context of the statute:

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

Under this clause it has been held that the modification of section 779 of the Revision of 1860, by section 13, chapter 173, laws of 1862 (now section 890 of the Code), did not affect the right of the wife to redeem her homestead sold before such change, at any time within one year after the removal of the disability of coverture as provided in that section. *Adams v. Beale*, 19 Iowa, 61; *Myers v. Copeland*, 20 Id., 22.

An indictment found under a statute is not affected by a repeal of such statute. *State v. Shaffer*, 21 Iowa, 486; see, also, *Peoria M. & F. Ins. Co. v. Dickerson*, 28 Id., 274.

An amendment of the statute of limitations will not operate retrospectively and have the effect to revive a right of action that was barred under the former statute. *Thompson v. Read*, 41 Iowa, 48.

The defendant executed his promissory note in Iowa, and resided in Minnesota long enough for the action to be fully barred by the statutes of that state: *Held*, that the enactment of section 10, chapter 167, acts of the Thirteenth General Assembly, did not remove the bar. *Ibid*.

The continuance of a cause and the time in which pleadings in actions should be filed are not "rights accrued" which cannot be affected by the repeal of a statute. And where an original notice was served prior to the taking effect of the Code, but the second day of the term occurred thereafter, it was *held*, that the provisions of the Code would govern respecting the time to plead. *Brotherton v. Brotherton*, 41 Iowa, 112.

Where an action has been commenced under and prior to the repeal of a statute, it is saved by subdivision one of section 45. *Inskeep v. Inskeep*, 5 Id., 204, 221.

Nor will such repeal affect rights of dower which accrued previous to the repealing act. *Burke v. Barron*, 8 Id., 132.

The repeal of that part of the revenue laws imposing penalties for delinquencies will not remove penalties incurred prior to such repeal, unless the intention to do so be clearly expressed. *Bartruff v. Remy*, 15 Id., 257.

The repeal of a statute does not revive a statute previously repealed. *City of Burlington v. Kellar*, 18 Id., 63; *Adams v. Beale et ux.*, 19 Id., 61.

An indictment presented under a statute which is afterward repealed is not affected thereby. *The State v. Shaffer*, 21 Id., 486.

On the repeal of a statute fixing the times for holding courts, and fixing different times by the repealing statute, no saving clause is necessary in order to preserve actions commenced prior to such repeal, and parties who have been served with notice will be held to appear at the term as changed by the new act without further notice. *Peoria M. & F. Ins. Co. v. Dickerson*, 23 Id., 274.

Where an original notice was served before the Code took effect, and the second day of the term occurred after that time, it was held, that the Code would govern in respect to the time to plead. *Brotherton v. Brotherton*, 41 Id., 112.

The continuance of a case and the time in which pleadings should be filed are not "rights accrued" which cannot be affected by the repeal of existing statutes. *Id.* But a sale of real property, made after the taking effect of the Code, under a judgment rendered before that time, should conform to the statute in force at the time the judgment was rendered, and in such case the judgment debtor had the right to elect to have the property appraised or sold subject to redemption. *Holland v. Dickerson*, Id., 367.

The repeal of a statute under which penalties had accrued for the non-payment of taxes, will not affect the liability of the owner for the amount of such penalties. *The C., R. & M. R. R. Co. et al. v. Carroll County*, 41 Id., 153.

The provisions of the Revision relating to a stay of execution govern where the judgments were rendered prior to the taking effect of the Code. *Du Boise et al. v. Bloom*, 38 Id., 512.

The repeal of section 2742 of the Code and its substitution by chapter 145 of the acts of 1878, held to apply only in cases tried in the court below after the taking effect of that statute. *Simondson v. Simondson*, 50 Id., 110; *Trebon v. Zuraff et al.*, Id., 180; see, also, *Schmetz v. Schmetz*, 52 Id., 513, 514; *Shaw v. McHenry*, Id., 186.

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

See *Hinds v. Hinds*, 1 Iowa, 36, 39. The word "assignment" has acquired a peculiar and appropriate meaning in law. It is a technical word, and is to be construed according to its peculiar and technical meaning. *Cowles & Co. v. Ricketts*, 1 Iowa, 582, 585.

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

Language denoting the plural number applies equally to the singular. *The State v. Thomas*, 53 Iowa, 220.

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

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

The words "highway" and "road" do not include a railroad. *Stokes v. Scott County*, 10 Iowa, 166, 175. But the terms "county road" are not broad enough to include a highway by prescription. *The State v. Snyder*, 25 Id., 208.

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

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

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

The terms "real property" include "all rights thereto and interest therein, equitable as well as legal." It is this interest which a *minor* may redeem in lands sold for taxes, after three years

He redeems the interest of a minor, and not that of an adult owner. *Jacobs v. Potter*, 34 Iowa, 341. See also *Adams v. Beale*, 19 Id., 61; *Burton v. Heintrager*, 18 Id., 348; *Stout v. Merrill*, 35 Id., 58; *Stockdale v. Treasurer, etc.*, 12 Id., 536; *Pelan v. De Bevard*, 13 Id., 53, 56; *The Bank, etc., v. Anderson*, 14 Id., 557.

A lease-hold in land having more than two years to run is such an interest in land as to be subject to a judgment lien. *First National Bank v. Bennett*, 40 Iowa, 537; *Cook & Sargent v. Dillon*, 19 Id., 407.

Where under a parol purchase of real property the purchaser erects improvements thereon, he thereby acquires an equitable interest in the land, which interest under our statute is a mortgageable one. *White v. Butt*, 32 Id., 335.

The mortgagee of real property is an owner in such sense as to entitle him to notice of the assessment of damages for a right of way over the mortgaged property. Without such notice the proceedings will not affect his rights. *Severn v. Cole and the R. Co.*, 33 Id., 463.

A lease-hold interest in land is real estate within the meaning of this subdivision of the statute. *Melhop, Son & Co v. Menshart et al.*, 70 Id., 685.

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

A promissory note that has been paid off is the "personal property" of the maker, and he may maintain an action of replevin therefor. *Savery v. Hays*, 20 Iowa, 25. See also *Hatch & Thompson v. Gray*, 21 Id., 29; *Callanan v. Brown*, 31 Id., 333, 337; *The State v. Orwig*, 24 Id., 102, 105.

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

A draft, being personal property, is the subject of larceny, and also of embezzlement under our laws. *State v. Orwig*, 24 Iowa, 102.

An action to recover "dower" is one to recover "real property." *Rice v. Nelson*, 27 Id., 148, 157.

In an action for divorce and alimony, all the property of the parties, both real and personal, and whether the interest be legal or equitable, may be reached by order of the court. *Jolly v. Jolly*, 1 Iowa, 8, 11.

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

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

13. The word "**person**" may be extended to bodies corporate;

When the word "person" is used in a statute, corporations as well as individuals are included. *Wales & Son v. Muscatine*, 4 Iowa, 302.

The word person may include corporations. *Delier v. The Plymouth County Agricultural Society*, 57 Id., 484.

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

Where a seal may be required by law to be affixed to any paper, the word "seal" will include an impression of such seal upon the paper alone, as well as upon wax or wafer thereon. Per BALDWIN, J., in *Gage et al. v. The D. & P. R. Co.*, 11 Iowa, 313.

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

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

The legal signification of the word *town* in this state is collection of houses. *Steyer v. Dwyer*, 31 Iowa, 20.

Parol evidence is admissible for the purpose of showing that certain words used in a contract, have, by known and established usage, acquired a meaning different from their general or popular sense; as that the word "town," used in a contract, included the town and vicinity. *Id.* But the word will not include an unincorporated village. *Truax v. Pool*, 46 Id., 256.

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

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

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

Subdivision 19 of this section does not authorize any person other than the sheriff to serve notices or sell property on execution, but other sections of the Code authorize private persons to serve notices and subpoenas. Such persons, however, are not entitled to charge fees for making such service. *Conaway v. The M. & G. M. R'y Co.*, 43 Iowa, 32.

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

A seal is not essential to the validity of a conveyance in this state. *Pierson v. Armstrong*, 1 Iowa, 282; *Simms v. Harvey*, 19 Id., 273, 290; *Switzer v. Knapps*, 10 Id., 72.

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

While there are no restrictions or limitations of the statute upon the right of the wife to administer upon the estate of her husband, yet that right cannot be regarded as absolute, for she may be insane or otherwise incompetent, and something must be left to the discretion of the court. *Estate of O'Brien*, 63 Iowa, 622.

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

23. In **computing time** the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday;

Unless otherwise expressed, the mode of computing time is by excluding the first day and including the last. *Tencher & English v. Hiatt*, 23 Iowa, 527; *Benkert v. Jacoby*, 37 Id., 273; *Cooper v. The Cedar R. W. P. Co.*, 42 Id., 398.

Where judgment was rendered on the 21st day of October, and ten days were given to file bill of exceptions, a bill filed on the 1st day of November was held to have been too late. It should have been filed on the 31st day of October. *Manning v. Irish*, 47 Id., 650.

Where the statute does not require a specified number of "clear days" notice, the method of computing time is to exclude the first and include the last day. *Bonney v. Cocke*, 61 Id., 304.

24. Degrees of **consanguinity and affinity** shall be computed according to the civil law;

25. The word "**clerk**" means clerk of the court in which the action or proceeding is brought or is pending; and the words "clerk's office" mean his office.

CHAPTER 4.

OF THE CODE AND ITS OPERATION.

SECTION 46. [The Code.]—In the citation of the statutes, this shall not be reckoned as one of the statutes of the present political year, but it may be designated as the "CODE," adding as it may be necessary the title, chapter, or section.

SEC. 47. [Repeal of prior statutes.]—All public and general statutes passed prior to the present session of the general assembly, and all public and special acts, the subjects whereof are revised in this Code, or which are repugnant to the provisions thereof, are hereby repealed, subject to the limitations and with the exceptions herein expressed.

Statutes which are public and *special*, whose subjects are not revised in the Code, are not repealed unless their provisions are repugnant to the enactments of the Code, and in this class are included the statutes in relation to the swamp lands and swamp land funds. *Gray v. Mount*, 45 Iowa, 591. See also, *City of Burlington v. Leebrick et al.*, 43 Id., 252. See also, *The State v. Harris*, 10 Id., 441; *The State v. Jones*, 1 Id., 395.

Where a judgment was rendered in a justice's court in December, 1868, less than five years prior to the taking effect of the code of 1873, and execution was issued thereon in 1877, it was held that the execution was lawfully issued, and was valid; for although section 3911 of the revision, which was in force when the judgment was rendered, provided that in such cases execution should not issue after five years from the entry of the judgment, yet, as that time had not elapsed when section 3569 of the code took effect, that section became the law applicable to the case, and extended the time for issuing execution to ten years from the date of the judgment. *Woods v. Haviland*, 59 Iowa, 476.

This section repealed section 8, of chapter 107, acts of the eleventh general assembly. *Staples v. Plymouth County*, 62 Iowa, 364.

SEC. 48. Local acts are not repealed unless it be herein so expressed, or unless the provisions of this code are repugnant thereto.

SEC. 49. This code shall take effect on the first day of September, A. D. 1873, until which time existing statutes continue in force, and nothing contained in this title in relation to the preparation and publication of the statutes shall be construed as including this code.

SEC. 50. This repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of this code as far as consistent.

The repeal of a statute under which penalties had accrued for the non-payment of taxes, will not relieve the owner of the land from the payment of such penalties. *The C. R. & M. R. R. Co.* and *The I. R. L. Co. v. Carroll Co.*, 41 Iowa, 153.

An act done, a right accruing or accrued, or a suit or proceeding commenced before the repeal of a statute, is not affected thereby. *Fifield v. Chick*, 39 Id., 651.

The provisions of the revision of 1860 relating to the stay of execution, govern in cases of judgments rendered before the code took effect. *DuBoise et al. v. Bloom*, 38 Id., 512.

In an action for a divorce commenced before the code took effect, and tried afterward, either party had the right to demand a jury trial in accordance with the prior law. The right to a jury trial was a right accrued under the law repealed. *Wadsworth v. Wadsworth*, 40 Id., 448.

The rights of a party injured through the negligence of a railroad company are to be governed by the statute in force at the time of the injury received, and he can derive no advantage from a subsequent statute passed before the commencement of the action enlarging the liability of the railroad company. *Payne v. The C., R. I. & P. R. Co.*, 44 Id., 236.

A sale of real property, made after the code of 1873 took effect, under a judgment rendered prior thereto, should conform to the law in force at the time the judgment was rendered, and the judgment debtor had the right to elect to have the property appraised or sold subject to redemption. *Holland v. Dickerson*, 41 Id., 367; *Babcock v. Gurney*, 42 Id., 154.

Where a judgment was rendered in a justice's court in December, 1868, less than five years prior to the taking effect of the code of 1873, and execution was issued thereon in 1877, it was held that the execution was lawfully issued, and was valid; for although section 3911 of the revision, which was in force when the judgment was rendered, provided that in such cases execution should not issue after five years from the entry of the judgment, yet as that time had not elapsed when section 3569 of the code took effect, that section became the law applicable to the case, and extended the time for issuing execution to ten years from the date of the judgment. *Woods v. Haviland*, 59 Id., 476.

SEC. 51. No offense committed, and no penalty or forfeiture incurred under any statute hereby repealed and before the repeal takes effect, shall be affected by the repeal, except that when a punishment, penalty, or forfeiture is mitigated by the provisions herein contained, such provisions shall be applied to a judgment to be pronounced after the repeal.

SEC. 52. No suit or prosecution pending when this repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of this code as far as consistent.

SEC. 53. The terms "heretofore" and "hereafter," as used in this code, have relation to the time when this statute takes effect.

The word "hereafter" in section 1672 of the code of 1851, was held to have had reference to the date of taking effect of that code, and not to the date of its passage. *Bennett v. Bevard*, 6 Iowa, 82.

SEC. 54. [Acts in conflict with code.]—Whenever an act of a general nature passed at the present session of the general assembly, separate from this code, conflicts with or contravenes any of the provisions thereof, the provisions of the code shall prevail.

TITLE II.

OF THE EXECUTIVE DEPARTMENT.

CHAPTER I.

OF THE GOVERNOR.

SECTION 55. **The governor shall keep his office** at the seat of government, in which shall be transacted the business of the executive department of the state, and he shall keep a secretary at said office during his absence.

SEC. 56. He shall cause a **journal to be kept** in the executive office, in which shall be made an entry of every official act done by him at the time when done. If, in cases of emergency, acts are done elsewhere than in such office, an entry thereof shall be made in the journal as soon thereafter as possible.

SEC. 57. He shall cause a **military record to be kept**, in which shall be made an entry of every act done by him as commander-in-chief.

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

Under this section the governor is authorized to offer a reward, in certain cases, for the apprehension of persons charged with the crimes of murder or arson, but the power to offer such reward is not conferred upon a county. The board of supervisors may, however, offer a reward for the recovery of money which has been stolen from the county. *Hawk v. Marion County*, 48 Iowa, 472.

SEC. 59. Whenever the governor is satisfied that an action or proceeding has been commenced which may affect the rights or interest of the state, he may **employ counsel** to protect such rights or interests; and when any civil action or proceeding has been or is about to be commenced by the proper officer in behalf of the state, he may employ additional counsel to assist in the cause.

SEC. 60. **Expenses incurred** under the preceding section and in causing the laws to be executed, may be allowed by the governor and paid from the contingent fund.

CHAPTER 2.

OF THE SECRETARY OF STATE.

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

tion of the state, and all bonds, books, records, maps, registers, and papers which now are or may hereafter be deposited to be kept in his office.

SEC. 62. **All commissions issued by the governor** shall be countersigned by the secretary, who shall register each commission in a book to be kept for that purpose, specifying the office, name of officer, date of commission, and tenure of office.

SEC. 63. He shall **report to the governor**, before each regular session of the general assembly, an abstract for each year of the criminal returns received from the clerks of the several district courts, embracing all the facts contained in such returns.

SEC. 64. He shall furnish the **library of congress** two copies of all legislative journals and reports of state officers immediately upon the publication thereof.

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

CHAPTER 3.

OF THE AUDITOR OF STATE.

SECTION 66. **The auditor shall keep his office at the seat of government.** He is the general accountant of the state, and it is his duty:

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

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

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

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

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

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

7. **To superintend the fiscal affairs of the state**, and secure their management as required by law; to furnish proper instruction, directions, and forms to the county auditors and treasurers, in compliance with which they shall severally keep their accounts relating to the revenue of the state, and perform the duties of their several offices; also forms for the reports required to be made by said officers to such auditor, and of receipts to be given by such treasurers to the tax payers;

and such officers shall conform in all respects to the form and directions thus prescribed;

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

It is the duty of the auditor of state to issue a warrant for money appropriated by the general assembly whenever the appropriation is payable, regardless of the fact that there may be no money in the treasury with which to pay it. *The State v. Sherman*, 46 Iowa, 415.

In the construction of the clause of a statute the context is to be regarded, as well as other statutes *in pari materia*, and the reason and spirit of the law. *Id.*

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

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

11. (*Amended by chap. 82, 22d g. a.*) **To report to the governor** before each regular session of the general assembly, a complete statement of the revenue, funds, income, taxable property, and other resources and property of the state, and of public revenues and expenditures since his last report, up to the first, with a detailed statement of the expenditures to be defrayed from the treasury for the (term following that covered by his report) specifying each expenditure, and distinguished between such as are provided for by appropriations and such as are not, and showing the probable deficiency of any former appropriations;

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

SEC. 67. [**Divide warrants.**]—When the amount due from the state to any person exceeds twenty dollars, the auditor shall, if requested, divide the amount into parcels of not less than ten dollars and issue warrants therefor.

SEC. 68. [**May require information of persons having property of the state.**]—The auditor may at any time require any person receiving money, securities, or property belonging to the state, or having the management, disbursement, or other disposition of the same, an account of which is kept in his office, to render statements thereof, and information in reference thereto. Any such person refusing or neglecting to render such statement or information, shall forfeit twenty-five dollars, to be recovered by civil action in the name of the state.

SEC. 69. Every **claim against the state** shall be presented to the auditor for settlement within two years after it accrues, and if thereafter presented, the same shall not be audited. When a claim is presented, the auditor is authorized to examine the claimant and any other persons under oath, touching such claim, or cause them to verify the same by affidavit or deposition.

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

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

SEC. 72. **The penal provisions in the two preceding sections** are subject to any legal defense which the officer may have against the account as stated by the auditor, but judgment for costs shall be rendered against the officer in the action, whatever be its result, unless he rendered an account within the time named in the two preceding sections.

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

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

CHAPTER 4.

OF THE TREASURER OF STATE.

SECTION 75. [**Office of treasurer.**].—The treasurer shall keep his office at the seat of government, and shall keep an accurate account of the receipts and disbursements at the treasury, in books kept for that purpose, in which he shall specify the names of the persons from whom money is received and on what account, and the time thereof.

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

SEC. 77. **When money is paid him the treasurer shall** execute receipts in duplicate therefor, stating the fund to which it belongs, one of which must be delivered to the auditor in order to obtain the proper credit, and the treasurer must be charged therewith.

SEC. 78. [**Pay warrants in order.**].—He shall pay no money from the treasury but upon the warrants of the auditor, and only in the order of their issuance; or if there is no money in the treasury from which such warrant can be paid, he shall, upon request of the holder, indorse upon the warrant the date of its presentation, and sign it, from which time the warrant shall bear interest at the rate of six per cent per annum, until the time directed in the next section.

If there is no money in the treasury with which to pay a warrant when presented, the treasurer is required to indorse thereon the day of presentation, and therefrom it will draw interest at six per centum per annum. *The State v. Sherman*, 46 Iowa, 415.

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

SEC. 80. Once in each week he shall **certify to the auditor** the number, date, amount, and payee of each warrant taken up by him, with the date when taken up, and the amount of interest allowed; and on the first Monday of January, April and July, and on the first day of October, annually, he is directed to account with the auditor and deposit in his office all such warrants received at the treasury, and take the auditor's receipt therefor.

SEC. 81. (*As amended by chap. 82, 22d g. a.*) [**Report to governor.**] As soon as practicable after the first Monday of November preceding the regular session of the general assembly, he shall report to the governor the state of the treasury up to the first day of July preceding, exhibiting the amount received and paid out by the treasurer since his last report, and the balance remaining in the treasury.

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

CHAPTER 5.

OF THE STATE LAND OFFICE AND REGISTER THEREOF.

[The office of register was abolished by ch. 206, laws of 1881.]

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

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

SEC. 85. **Said tract books shall be ruled in a manner similar** to those used in the United States land offices, so as to record each tract by its smallest legal subdivision, its section, township, and range, to whom sold, and when, the price per acre, to whom patented, and when.

SEC. 86. The state land office shall be kept open during business hours, and shall have the personal supervision of the register; the documents and records therein shall be subject to inspection, in the presence of the register, by parties having an interest therein, and certified copies thereof, signed by said register with the seal of said office attached, shall be deemed presumptive evidence of the fact to which they relate, and on request they shall be furnished by the register for a reasonable compensation.

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

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

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

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

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

SEC. 92. [Governor may in certain cases quitclaim.]—Whenever the governor is satisfied by proper record evidence that any tract of land which may have been deeded by virtue of any donation or sale to the state, is not the land intended to have been described, and that an error has been committed in making out the transfers, in order that such error may be corrected, he is authorized to quitclaim the same to the proper owner thereof, and to receive a deed or deeds for the lands intended to have been deeded to the state originally.

SEC. 93. (As amended by chap. 167, 18th g. a., and chap. 123, 19th g. a.) [Land granted under acts of congress.] In cases where lands have been granted to

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

The forfeiture of the lands granted by congress to the state to aid in the construction of railroads, because of the failure of the railroad company to construct its line within the time prescribed by the grant, can only be insisted upon by the United States. *C., B. & Q. R. Co. v. Lewis*, 53 Iowa, 111.

(CHAPTER 206, LAWS OF 1880.)

TO CONSOLIDATE OFFICE OF REGISTER OF STATE LAND OFFICE WITH OFFICE OF SECRETARY OF STATE.

An Act to consolidate the office of the register of the state land office with the office of secretary of state.

SECTION 1. [State land office transferred to secretary of state.]—*Be it enacted by the general assembly of the state of Iowa*, That on and after the first Monday in January, in the year 1883, the office of register of the state land office shall be transferred to the custody of the secretary of state, and the (present) incumbent of the office of register of the state land office shall then turn over and deliver to the secretary all book, papers, maps, furniture and property of every description held by him as belonging to his office.

SEC. 2. From and after the **first Monday of January**, in the year 1883, all business pertaining to the office of register of the state land office as provided by law, and all duties now required to be performed by the said register shall thereafter be performed by the secretary of state, and he shall have and hold possession and control of all the property turned over to him, as specified in section 1 of this act.

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

SEC. 4. The **salary of the clerk** provided for in this act shall be twelve hundred dollars per annum, to be paid at the end of each month, and the auditor of state shall draw a warrant *in* (on) the state treasury in favor of said clerk on the certificate of the secretary of state stating the amount that may be due.

SEC. 5. The office of register of the state land office is hereby **abolished** from and after the first Monday in January, in the year 1883.

Approved, March 30, 1880.

(CHAPTER 82, LAWS OF 1888.)

STATE PRINTER AND STATE BINDER.

An Act to amend, revise and consolidate the various acts relating to the public printing and binding, and the publication and distribution of the public documents and the journals of the two houses, and relating to the election and duties and compensation of state printer and binder.

SECTION 1. [**Election of.**]*—Be it enacted by the general assembly of the state of Iowa:* The state printer and the state binder shall be elected at each regular session of the general assembly, and shall hold their offices for two years from the time they enter upon the duties of such offices, which time shall be on the first day of May in the year following that in which they are elected; but from and after the year 1893 the term of each of the officers named shall begin on the first day of January in the odd numbered year.

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

SEC. 3. [**Quality of work.**]*—All such work shall be done in a neat, substantial and workmanlike manner and promptly delivered to the proper officer, so that the public business shall not be delayed or suffer from any failure to have the work done in a reasonable and proper time.*

SEC. 4. The state printer shall promptly deliver to the state binder the printed sheets of laws, journals and other publications, as the work progresses, as well as all other work requiring stitching or binding; and the state binder shall, upon completion of the work, as required, deliver the same to the secretary of state, taking his receipt therefor; and it is the duty of the secretary of state to see that the proper number of copies is so delivered. All printing which does not require binding shall be promptly delivered by the state printer to the secretary of state, or the officer ordering the work.

SEC. 5. [**Orders for work.**]*—No work shall be ordered of the state printer except upon a regular form of blank furnished by the secretary of state, and kept in his office. Whenever printing is ordered by either house of the general assembly the secretary or clerk thereof shall immediately notify the secretary of state of such order, and when such printing is done the same shall be delivered to the*

secretary of state for distribution, subject to the instructions of the house ordering the printing.

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

SEC. 7. The auditor of state, upon presentation to him of the foregoing certificate, shall draw his warrant upon the treasurer of state, for the amount therein stated to be due.

SEC. 8. [**Reports of state institutions.**]-The regular biennial reports of the various officers, institutions, commissions, etc., required to be made by law, shall be laid before the governor of the state, in the odd numbered years, at the times following: (a) On or before August 15: Those of all boards of trustees of state institutions, except the agricultural college. (b) On or before September 15: Those of the fish commissioner, the board of health, the commission of pharmacy, the oil inspectors, the mine inspectors, the visiting committee to the hospitals for the insane, the wardens of the penitentiaries, and the board of curators of the state historical society. (c) On or before October 1: Those of the state librarian, and the commission of labor statistics, and that of the secretary of state pertaining to the state land office. (d) On or before November 1: Those of the auditor of state, the treasurer of state, the superintendent of public instruction, the state university and the state normal school. (e) On or before December 1: That of the board of trustees of the agricultural college, that of the adjutant general, and that of the secretary of state pertaining to criminal convictions.

SEC. 9. [**End of fiscal term.**]-The biennial fiscal term of the state ends on the 30th day of June in each odd numbered year, and the succeeding fiscal term begins on the following day, and the reports of officers and institutions shall cover the period thus indicated, and shall show the condition of their offices and institutions respectively on that day; *provided, however*, that the period to be covered by the report of the superintendent of public instruction and the adjutant general shall extend to the 30th day of September inclusive; and, *provided, further*, that this section shall not apply to the agricultural college.

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

SEC. 11. [**Number of copies printed.**]-There shall be printed of the various public documents the number of copies hereinafter designated, to-wit: of the

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

SEC. 12. The **secretary of state shall make distribution** of the various public documents turned over to him, as follows: (a) To the members of the general assembly six thousand copies of the message, fifteen hundred copies of the report of the auditor of state, superintendent of public instruction and agricultural college respectively, two thousand copies of the report of the commissioners of pharmacy, and of the secretary of state pertaining to lands; seven hundred copies of the reports of the joint visiting committees of the general assembly to the several state institutions; five hundred copies of the reports respectively of the state visiting committees to the hospitals for the insane, the state inspector of oils, and the examiners in dentistry; of the report of the state board of health, two thousand copies; of all other reports, fifteen hundred copies. (b) Six hundred copies of the message; two hundred copies of each of the reports of the joint visiting committees, and five hundred copies of each of the other documents to remain with the state for the use of future general assemblies and special calls therefor. (c) Fifteen hundred copies of each report shall be stitched and bound in half sheep, containing a copy of each report, to be arranged as follows: The message, the inaugural address, the reports of the auditor, the treasurer, the secretary pertaining to lands and other reports of officers and commissioners not herein otherwise provided for, in the first volume; in the second volume, the report of the superintendent of public instruction, to be followed by those of the university, the normal school, the agricultural college, the soldiers' orphans' home, the soldiers' home, the institution for the deaf and dumb, the college for the blind, the institution for the feeble minded, the hospitals for the insane, the state visiting committees to the hospitals and state historical society; in the third volume, the message of the governor concerning (concerning) pardons, the secretary's reports of convictions, and the reports of the industrial schools and the penitentiaries; in the fourth volume, the reports of the commissioner of labor statistics and the mine inspectors; in the fifth volume, the reports of the board of health, the veterinary surgeon, the commissioners of pharmacy, the oil inspector, the dental examiners and the weather service; in the sixth volume, the reports of the railway commissioners and those of the executive council concerning the valuation of railroads. Other reports shall be placed with those of a kindred character, and all reports of joint legislative visiting committees to public institutions, etc., must follow those of such institutions respectively, provided that any two volumes may be bound together at the discretion of the secretary of state. Some distinctive mark shall be put on the even numbered pages of each document to indicate its place in the bound document, with the year of the report on each odd numbered page after the manner of the

Iowa documents of 1882, and in each volume shall be placed a table of contents of all the volumes. These fifteen hundred copies shall be distributed as follows: One copy to the lieutenant-governor, to the speaker, to each member of the general assembly, to the secretary of state, and the clerk of the house of representatives; one copy each to the governor of the state and his private secretary, the secretary of state, the auditor of state, the treasurer of state, the attorney-general, the superintendent of public instruction and the clerk and reporter of the supreme court and each of their deputies, the commissioner of labor statistics, the adjutant-general, the custodian of the capitol, the fish commissioner and the director of the weather service, and one copy to each of their several offices to remain therein; one copy to each judge of the supreme and district and superior courts; one copy to the offices of the board of health, the mine inspectors, the commissioners of pharmacy and the railroad commissioners to remain therein; one copy to each railroad commissioner, mine inspector and commissioner of pharmacy; one copy to the state librarian and the secretary of the state board of health respectively; one copy to each officer not hereinbefore enumerated required by law to make annual or biennial reports; one copy to each member of the boards required to make annual or biennial reports; one copy to each state institution to remain therein; one copy to the office of each county auditor to remain therein; eighty copies to the state historical society; one copy to each college and incorporated institution; one copy to each public library and literary institution having a number of books for circulation not less than five hundred; one copy to each ex-governor of the state; one copy to each senator and representative in congress from this state during his term of office; one copy to each of the other states and each territory reciprocating the same, and to each foreign nation or province desiring to exchange like reports; twenty-five copies to the state library. The remaining copies to be placed under the control of the executive council, to be disposed of as that body may see fit, the persons so receiving them to pay express charges thereon. (d) The remaining copies to be distributed to the officers, institutions and committees making report.

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

SEC. 14. [**Printer must correct reports.**]—Upon the return to the printer by the proper officer of each body of the daily proceedings corrected as shall be directed by the house to which they pertain, the printer shall correct the same, the secretary and clerk correcting the written journal when necessary to correspond.

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

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

SEC. 17. The **secretary of state shall make distribution** of the journals of the respective houses, as follows: (a) Of the bound journals of the respective houses five copies of each shall be distributed to each member thereof, five copies each to the secretary of the senate and clerk of the house respectively, and one copy to each officer, employe and reporter of the respective houses. (b) The remaining copies shall be distributed as follows: One copy each to the governor, lieutenant governor, the state officers and deputies as provided in section 12, for the distribution of the documents, also one copy of one journal to each newspaper of general circulation in the state. (c) The undistributed number shall be under the control of the executive council.

SEC. 18. [**Compensation for indexing.**]—The officers making the index shall receive therefor such pay as may be allowed by the general assembly; but in the absence of such provision each shall receive such compensation as may be allowed by the executive council, the auditor drawing his warrant therefor upon certificate of the secretary of state that the work is done.

SEC. 19. The **original journals** of the senate and house shall be filed with the secretary of state by the secretary and clerk respectively.

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

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

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

SEC. 23. **The state printer shall be paid the following prices** for all work done for the state in an acceptable manner, as hereinbefore provided and no more: (a) For composition on laws, journals, reports, circulars and all other printed matter, except blanks, fifty cents per thousand "ems" and seventy cents per thousand for figure work when figures are arranged in columns and three or

more justifications are required, and ninety cents per thousand "ems" for rule and figure work. *Provided*, plain indexes, such as those of the statutes of this state, shall be reckoned as ordinary composition. (b) For book press work the compensation shall be \$2.50 for the first 1,000 impressions of 16 pages, and \$1.50 per thousand for each additional 1,000 impressions from the same form. If in finishing a job of press work it shall be necessary to print an 8 page form the compensation shall be the same as for a 16 page form, and if there shall not be 1,000 impressions in any one book form the compensation shall be the same as for 1,000. No extra charge shall be allowed for dry pressing of sheets which shall be done in all cases when so directed by the secretary of state. (c) For printing blanks on one side of a sheet of folio post or larger paper, \$2.50 for the first 100 impressions, and 75 cents per hundred for each additional 100 impressions up to 500; each additional hundred above 500, 40 cents per 100. On paper smaller than folio post \$2.00 for the first 100 impressions and fifty cents per 100 for each additional 100 impressions up to 500, each additional 100, 30 cents. When both sides of a blank can be printed at once only one impression shall be paid for. *Provided*, that when the blank contains over 1,000 "ems" of composition, pica or smaller measure, such additional composition shall be paid for as provided in subdivision (a) of this section, and when such matter must be adjusted to ruled lines 30 per cent additional shall be allowed on the composition therefor. When two or more blanks or jobs are printed at the same time on the same sheet, they shall be counted as a single impression.

SEC. 24. **No constructive charges** of any kind shall be allowed the state printer. And he shall be allowed only for press work done and type actually set up and imposed, or for paper actually printed, and he shall fill (file) with the secretary of state a copy of each job of work, on which each item of charge is made at the time of rendering his account. Before the secretary can issue him the receipt contemplated by this act, the actual number of "ems" and number of impressions of press work in each job shall be specified with a statement that the law has been strictly complied with, and that no constructive charges are embraced in his account, as rendered, which statement shall be verified by the affidavit of the state printer. Where type set for messages or documents shall be used twice the state printer shall have pay for the same but once, but he shall be allowed \$1.50 for reimpressing each sixteen page form, where it is to be used a second time.

SEC. 25. **The state binder shall be paid** the following prices for all work done for the state in an acceptable manner, as hereinbefore provided:

(a) For folding and trimming all documents, not stitching, ten cents per hundred copies.

(b) For folding, trimming and stitching documents not covered, fifteen cents per one hundred copies.

(c) For folding, stitching and binding in paper covers all messages, reports, documents, not exceeding one sheet, allowing sixteen pages for a sheet, \$1.25 per one hundred copies of sixteen pages or less, and for each additional sheet of sixteen pages or less, twenty-five cents per one hundred copies; the cover to be counted as one sheet.

(d) For folding, sewing and binding in paper covers the journals of the two houses, eighteen cents per copy.

(e) For folding, sewing and binding in muslin or cases with gilt letters, same style as the agricultural report for the year 1886, twenty-five cents per copy for a volume of four hundred pages or less, and for each additional hundred pages or fraction thereof, four cents.

(f) For folding, sewing and binding in half sheep, with gilt letters for title, same style as the Iowa documents for 1886, forty cents per copy for each volume of four hundred pages or less, and four cents for each additional hundred pages or fraction thereof.

(g) For folding, stitching and binding the acts and resolutions of each general assembly in board with muslin backs and paper sides, same as laws of 1886, eleven cents per copy.

(h) For folding, sewing and binding in law sheep, same style as the report of the supreme court, fifty-five cents per copy, for each volume of four hundred pages or less, and four cents for each additional hundred pages or fraction thereof.

(i) For ruling he shall be allowed the sum of seventy-five cents per hour for time actually employed.

SEC. 26. [**Certificate of secretary for compensation.**]-At any time during the progress of the printing or binding of the laws, or the journals of either house, or any other work amounting to more than one hundred pages, the secretary of state may issue his certificate for one-half the value of the work thus far done, to be ascertained by said secretary, and upon said certificate being presented to the auditor of state, he shall draw his warrant for the amount therein named.

SEC. 27. [**Amendment of code.**]-Paragraph 11 of section sixty-six of the code is hereby amended by striking therefrom the words "Monday of November preceding each regular session," and by striking from said paragraph the words "ensuing two years," and inserting in lieu thereof the words, "the term following that covered by his report."

SEC. 28. [**Amendment of code.**]-Section 81 of the code is hereby amended by striking therefrom the words "that date," and inserting in place thereof the words, "the first day of July preceding."

SEC. 29. **Section 1583 of the code** is hereby amended by striking from the beginning thereof the words, "He shall make a report to the general assembly at each regular session thereof," and inserting instead the following: "He shall make to the governor biennially a report." And section 1601 of the code is amended by striking therefrom the words "general assembly," and inserting instead the word "governor."

SEC. 30. **Section 1632 of the code** is hereby amended by striking therefrom the last clause, namely, "to each regular session of the general assembly," and inserting instead the words, "biennially to the governor."

SEC. 31. **Section 1650 of the code** is hereby amended by striking therefrom the word "November," and inserting instead the word "July."

SEC. 32. **Sections 1677 and 1694 of the code** are hereby amended by striking from each the word "November," and inserting in lieu thereof the word "August."

SEC. 33. **Section 1897 of the code** is hereby amended by striking therefrom the last ten words, and inserting instead the words, "to the governor biennially."

SEC. 34. **Section 1906 of the code** is hereby amended by striking therefrom the word "annually," and also by striking therefrom the word "December," and inserting instead the word "August."

SEC. 35. **Section 4750 of the code** is hereby amended by striking therefrom the words "twentieth day of December," and inserting instead the words, "fifteenth day of September."

SEC. 36. **Section 13 of chapter 40 of the acts of the nineteenth general assembly** is hereby amended by striking therefrom the last nine words, and inserting in lieu thereof the words, "to the governor biennially."

SEC. 37. **Section 11 of chapter 151 of the acts of the eighteenth general assembly** is hereby amended by striking therefrom the words, "on or before the first day of December of each year preceding that in which the general assembly meets."

SEC. 38. **Section 5 of chapter 185 of the acts of the twentieth general assembly** is hereby amended by striking therefrom the words "state auditor," and inserting instead the word "governor."

SEC. 39. **Section 4 of chapter 189 of the acts of the twentieth general assembly** is hereby amended by striking therefrom the words "on or before the 30th of June of each year" and inserting the word "biennially."

SEC. 40. **Section 203 of the code** is hereby amended by striking out the word "November" and inserting instead the word "August."

SEC. 41. [**Repeal of statutes.**]-The following named statutes and parts of statutes are hereby repealed: Chapters six (6) and seven (7) title two (2) of the code. Also sections 3764, 3765, 3766, 3767 and 3768 of the code; chapter 159 of the acts of the sixteenth general assembly, chapter 27 and chapter 175 of the acts of the nineteenth general assembly.

SEC. 42. [**Compensation of printer and binder.**]-That nothing in this act shall be so construed as will in any manner affect the compensation of the present state printer and binder during the unexpired term of their office.

SEC. 43. [**Amendment of statute.**]-Section eleven of chapter 74 of acts of the eighteenth general assembly is hereby amended by striking out, in line 23, the word "October" and inserting the word "December."

Approved, April 7, 1888.

CHAPTER 8.

OF THE EXECUTIVE COUNCIL.

SECTION. 111. [**Who composes.**]-The governor, auditor, secretary, and treasurer of state, or any three of them, shall constitute the executive council.

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

SEC. 113. [**How census taken.**]-The township assessor of each township shall, at the time of assessing property in the year eighteen hundred and seventy-five, and every ten years thereafter, take an enumeration of the inhabitants in his township.

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

The total number of males;
The total number of females;
The number of persons entitled to vote;
The number of militia;

The number of foreigners not naturalized;

The total number of children between five and twenty-one years of age;

The number of families and the number of dwelling houses;

The number of acres of improved and unimproved land;

An enumeration of agriculture, mining and manufacturing statistics, including the value of the products of the farm, herd, orchard and dairy, each, and the value of manufactured articles, and of minerals sold, the year preceding the census;

The number of miles of railway finished and unfinished;

The number of colleges and universities, with the number of pupils therein.

SEC. 115. **The executive council may require** such other matters to be ascertained and returned as they deem expedient.

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

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

The burden of proving that a judgment by confession, entered by the clerk in vacation, was not approved by the judge, at the next term, rests upon the party disputing its validity, otherwise it becomes the judgment of the court and is presumptively valid. *Kendig v. Marble*, 58 Iowa, 529.

SEC. 118. **The executive council may require any auditor** failing to make returns as herein provided, to send up the returns as soon as practicable at the expense of the delinquent county.

SEC. 119. The secretary of state shall **keep a journal** in which shall be entered all acts of the executive council.

SEC. 120. (*As substituted by sec. 8, chap. 142, 16th g. a.; as amended by chap. 119, 20th g. a.*) **The executive council shall have the charge,** care and custody of the property of the state, when no other provision is made, and shall procure for the several offices of the governor, secretary of state, auditor and treasurer of state, register of state land office, superintendent of public instruction, attorney-general and state librarian, and clerk [and reporter] of the supreme court, fuel, lights, blank books, postage, furniture, and any other thing necessary to enable such officers to promptly and efficiently perform the duties of their several offices; the accounts for any expenditures under this section, including repairs of the state house and such other necessary and lawful expenses as are not otherwise provided for shall be audited upon the certificate of such council and the warrants drawn therefor paid by the treasurer of state.

The executive council shall report to each regular session of the general assembly the amounts expended, and in general terms what for and how much for each office.

CHAPTER 9.

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

SECTION 121. **The executive council shall make estimates** of all the paper needed for the public printing, and for all the stationery necessary for the general assembly, the public offices, and the supreme court; and the auditor shall advertise for sealed proposals of the quantity, quality, and kinds thereof which may be needed, in two newspapers at the seat of government, and in such other newspapers as they may deem expedient, requiring a delivery of the articles at least ninety days before the same will be wanted, and bids for the same shall be opened by said executive council, at such time as may be fixed by said advertisement; and they shall award the contracts for furnishing such stationery, paper, etc., to the lowest responsible bidders therefor, who shall give security, to be approved by them, for the performance of their contracts; and upon the delivery of the articles contracted for at the office of the secretary of state, in compliance with the terms

of said contracts, and presenting receipts therefor, signed by the secretary to the auditor of state, he shall issue to the contractors his warrants on the treasurer for the amount due, which shall be paid out of any money in the treasury not otherwise appropriated.

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

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

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

SEC. 125. Repealed by § 9, Ch. 159, Acts 16th G. A.

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

SEC. 127. [When prohibited from contracting.]—Any officer who shall be empowered to expend any public moneys, or to direct such expenditures, is

hereby prohibited from making any contract for the erection of any building, or any other purpose which shall contemplate any excess of expenditures, beyond the terms of the law under which said officer was appointed.

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

SECS. 129 and 130. Repealed by § 9, Ch. 159, Acts 16th G. A.

SEC. 131. [**Secretary of state to distribute documents.**]—Whenever any public documents are in the hands of the secretary of state, the distribution of which are not otherwise provided for, he shall transmit one copy of each to every public library in the state which shall be regularly incorporated, and which shall also have filed with the secretary of state an affidavit of its president and secretary, stating that it is in actual operation as a public library within this state, and contains more than two hundred volumes.

SEC. 132. **The books, accounts, vouchers and funds** belonging to, or kept in any state office or institution, or in the charge or under the control of any state officer or person having charge of any state funds or property, shall, at all times, be open or subject to the inspection of the governor or any committee appointed by him, or by the general assembly or either house thereof, and the governor shall see that such inspection of the office of state treasurer is made at least four times in every twelve months.

(CHAPTER 67, LAWS OF 1878.)

An Act making it unlawful for officers of state institutions to contract indebtedness in excess of the appropriations, or divert funds from purposes for which the same were appropriated, and providing a punishment. Additional to code, chapter 9, title II.

SECTION 1. [**Debts not to be contracted beyond the appropriations.**]—*Be it enacted by the general assembly of the state of Iowa:* It shall be unlawful for any trustee, superintendent, warden or other officer, of any of the educational, penal or charitable institutions of this state to contract any indebtedness against said institutions, or the state, in excess of the appropriation made for said institution; *provided*, that nothing herein contained shall prevent the incurring of an indebtedness on account of support funds for state institutions upon the prior written direction of the executive council specifying the items and amount of each indebtedness to be increased, and the necessity therefor.

SEC. 2. [**Funds not to be diverted to other objects.**]—It shall be unlawful for any superintendent, warden, trustee, or other officer of any of the institutions mentioned in section 1 of this act, to divert any money that has been or may be appropriated for the use of said institutions to any other purpose than the specific purpose named therefor in the act appropriating the same.

SEC. 3. [**Penalty for violation of this act.**]—Any person violating any of the provisions of sections one and two of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment.

(Took effect by publication in newspapers, March 26, 1878.)

(CHAPTER 148, LAWS OF 1886.)

PROVIDING FOR CUSTODIAN OF PUBLIC BUILDINGS.

An Act to provide for the appointment and compensation of a custodian of public buildings and property, and prescribing his duties.

SECTION 1. [**Governor shall appoint custodian.**]*—Be it enacted by the general assembly of the state of Iowa:* The governor with the advice of and consent of the senate shall appoint a custodian of public buildings and property, who shall have the care of the capitol, together with all the grounds and premises appurtenant thereto belonging to the state, and such custodian shall, before entering upon the discharge of his duties, qualify as provided by law, and execute and file with the secretary of state a **bond in the penal sum of one thousand dollars**, conditioned for the faithful discharge of his duties, with sureties thereto, to be approved by the governor.

SEC. 2. **His term of office** shall be for two years, which shall expire on the 31st day of March in each even numbered year: *Provided*, that he may be removed at any time for cause by the governor; and *provided further*, that if a **vacancy** should occur in said office when the general assembly is not in session it shall be filled by appointment by the governor, but the person so appointed shall hold his office only until the next general assembly shall have been permanently organized, when the vacancy shall be filled by appointment of the governor by and with the advice and consent of the senate, which appointment shall be for the unexpired portion of the term for which the appointment had been made.

SEC. 3. He shall be paid a **salary of fifteen hundred dollars** a year, which shall be paid on proper vouchers as the salaries of other state officers are paid.

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

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

SEC. 6. He is hereby authorized and empowered to **contract for and have supplied** all fuel, lights, water, ice, telegraph and telephone service required in the convenient and efficient discharge of the duties of the legislative, executive and judicial and other officers of the state at the capitol, or of the state boards or other official boards or representatives of the state at the seat of government, but all contracts and expenditures made by him for any of the purposes enumerated, or for any other purpose must be approved by the executive council. And to employ such labor

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

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

SEC. 8. Nothing in this act shall deprive any officer, board, court or commission to whom official apartments are or may be assigned in the capitol from controlling the same.

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

SEC. 10. **It shall be unlawful for the custodian to have any pecuniary interest**, directly or indirectly, in any contract for supplies or labor provided for by this act or any business enterprise involving any expenditure by the state, and a violation of the provisions of this section shall be deemed a misdemeanor, and on conviction thereof he shall be fined in any sum not exceeding one thousand dollars and be removed from office.

Approved April 10, 1885.

TITLE III.

OF THE JUDICIAL DEPARTMENT.

CHAPTER 1.

OF THE ORGANIZATION OF THE SUPREME COURT.

(Sections 133, 134, 135, 136 and 137 of this chapter are repealed by chapter 59, laws of 1886.)

(CHAPTER 59, LAWS OF 1886.)

ESTABLISHING SUPREME COURT AT SEAT OF GOVERNMENT.

An Act establishing the supreme court at the seat of government, and providing officers therefor.

SECTION 1. (*As amended by ch. 34, 22d g. a.*) [**Supreme court held at seat of government.**] *Be it enacted by the general assembly of the state of Iowa:* That the supreme court shall be held at the seat of government, and shall convene and hold [three] terms each year, one of which shall commence on the [third] Tuesday [in] [January,] one on the [second] Tuesday [in May,] and one on the first Tuesday of October. Each of said terms of court shall be for the submission and determination of causes and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term unless continued or otherwise disposed of by order of the court. The court shall remain in session so far as practicable until it is determined what the opinion of the court shall be in all causes submitted to it except in causes where a re-argument is ordered. Judgment of affirmance, rulings and orders in causes submitted, and orders authorized by law may be made and entered by the court at any time regardless of the terms of court.

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

SEC. 3. (**Causes for transfer.**) All causes and other business pending in said court for the terms now authorized to be held at Council Bluffs, Davenport, and Dubuque, shall be at once transferred for further action and disposition to the term of said court which is to commence on the first Tuesday of October, A. D. 1886.

SEC. 4. **Sections numbered 133, 134, 135, 136, and 137 of the Code,** and all acts and parts of acts in conflict with this act are hereby repealed.

Approved April 1, 1886.

SEC. 138. All bills for **contingent expenses** shall contain the items thereof, and shall be certified to as correct by the chief justice before being audited.

SEC. 139. The **presence of three judges** is necessary for the transaction of business, but one alone may adjourn from day to day, or to a particular day, or until the next term.

SEC. 140. When the **court is equally divided** in opinion, the judgment of the court below shall stand affirmed, but the decision is of no further force or authority.

Prior to the revision it was held that where by reason of the sickness, consanguinity or other cause, one of the judges was unable to set and the decision of the court below stood affirmed by a division of opinion of the other judges, the judgment had the same force and effect as judgments in other cases. *Zeigler v. Vance*, 3 Iowa, 528.

SEC. 141. **If all the judges fail to attend** on the first day of the term, the clerk must enter the fact on record, and the court shall stand adjourned until the next day, and so on until the fourth day; then, if none of the judges appear, the court shall stand adjourned until the next term.

SEC. 142. [**Stand continued.**]-No process or proceeding shall in any manner be affected by an adjournment or failure to hold court, but shall stand continued to the next term, without any special order to that effect.

SEC. 143. [**Opinions filed.**]-The opinions of the court, and those of any judge dissenting therefrom, on all questions reviewed on appeal, as well as such motions, collateral questions, and points of practice as such court may think of sufficient importance, shall be reduced to writing and filed with the clerk.

In *Baker v. Kerr*, 13 Iowa, 384, the supreme court, after recognizing the requirements of the statute, uses this language: "And, therefore, in view of the great press of business, in our anxiety to pass upon and adjudicate the causes submitted with as little delay as possible, we have felt at liberty, and that indeed it was our duty, to announce that a case was affirmed, without filing a written opinion, when it was unimportant, involved no new question, and when an opinion would be but repetition and tend to unnecessarily encumber our published reports."

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

SEC. 145. [**Reports: what included.**]-If the decision, in the judgment of the court, is not of sufficient general importance to be published, it shall be so designated, in which case it shall not be included in the reports, and no case shall be reported except by order of the full bench.

(CHAPTER 34, LAWS OF 1888.)

SUPREME COURT TERMS.

An Act relating to the supreme court and to the terms thereof.

SECTION 1. [**Date of holding terms.**]-*Be it enacted by the general assembly of the state of Iowa:* The supreme court shall hold three terms each year; one of which shall commence on the third Tuesday in January, one on the second Tuesday in May, and one on the first Tuesday in October.

SEC. 2. [**Chapter 59, 21st g. a., applicable.**]-All the provisions of chapter 59 of the laws of the twenty-first general assembly, except as to times of holding terms of said court, are hereby made to apply to this act.

SEC. 3. [**Cases triable May, 1888.**]-All cases heretofore appealed, or which may be appealed, and which under said chapter 59 would have been triable at the the term of said court, by said chapter 59, ordered to convene in March, 1888, are hereby made triable at the May, 1888, term, by this act provided for.

SEC. 4. That part of section 1 of said chapter 59, and all other acts and parts of acts in conflict herewith, are hereby repealed.

Approved February 16, 1888.

Took effect by publication in newspapers February, 1888.

CHAPTER 2.

OF THE CLERK OF THE SUPREME COURT.

SECTION 146. **The office of the clerk** of the supreme court shall be kept at the seat of government, and he shall keep a complete record of all proceedings of the court.

SEC. 147. **He must not allow any written opinion** of the court to be removed from his office except by the reporter, but shall permit anyone to examine or copy the same, and shall, when required, make a copy and certify to the same.

SEC. 148. **He shall promptly announce by letter any decision** rendered to one of the attorneys of each side, when such attorneys are not in attendance at the place of court.

SEC. 149. **He shall record every opinion** rendered by the court as soon as filed, and shall perform all the duties pertaining to his office.

CHAPTER 3.

OF THE ATTORNEY-GENERAL.

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

A criminal case is under the control of the proper district attorney until the supreme court acquires jurisdiction thereof on appeal, after which it is under the sole control of the attorney-general; and an appeal taken with the consent of the district attorney after the time for taking an appeal by law has expired, will be dismissed on motion of the attorney-general. *The State v. Fleming*, 13 Iowa, 443.

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

SEC. 152. **All moneys received by him** belonging to the people of the state, or received in his official capacity, shall be paid into the state treasury.

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

CHAPTER 4.

OF THE SUPREME COURT REPORTER.

SECTION 154. When the opinions filed in any term of the supreme court are recorded by the clerk, the reporter may take and retain the same for a period not exceeding four months to prepare a report therefrom, but within such time they shall be returned to and remain in the office of such clerk.

[Sections 155, 156, 157, and 160, repealed by chapter 60, laws of 1880.]

(CHAPTER 60, LAWS OF 1880.)

An Act to provide for the stereotyping, publishing and sale of the supreme court reports, and to repeal sections 155, 156, 157 and 160, chapter 4, title 3, of the code, and to fix the salary of the supreme court reporter.

[SECTION 1. (*As substituted by chapter 125 20th g. a.*) **Reporter to prepare opinions for publication.**—*Be it enacted by the general assembly of the state of Iowa,* That as soon as practicable after sufficient opinions are announced to make a volume, as herein provided, the supreme court reporter shall furnish and deliver at his office at Des Moines, Iowa, to the person, persons or corporation having the contract with the state for publishing the same, copies of such opinions, and with each opinion a syllabus, a brief statement of the facts involved, and, in all cases where he may deem it of sufficient importance, the legal propositions made by counsel in the argument, with the authorities cited, when the same have been prepared and furnished by counsel in a brief form and in a manner suitable for publication, but the argument shall not be reported at length, and within twenty days after the proof sheets for a volume have been furnished to him by the publishers at his office in Des Moines, Iowa, he shall furnish to such publishers an index and table of cases to such volume. The publishers shall furnish to the reporter without delay, as soon as they shall be issued, two copies of the revised proof sheets of the opinions, head-notes, index and table of cases of each volume, for correction and approval by the reporter and judges of the supreme court, and shall cause such corrections to be made therein as shall be indicated by the reporter or said judges. Each of said volumes shall contain not less than 750, nor more than 800 pages, exclusive of the table of cases and index, and the workmanship and quality of material shall in every particular be equal to the first issue of volume forty of the Iowa supreme court reports, and shall be approved and accepted by a majority of the judges of the supreme court.]

SEC. 2. **The copyright of all the supreme court reports** hereafter published shall vest in the secretary of state for the benefit of the people of this state, but this shall not be construed to prevent the contractor, by whom any volume is published, his representative or assignees, from continuing the exclusive publication and sale of such volume so long as he or they shall, in all respects, comply with the requirements of this act in respect to the character, sale and price of such volume.

SEC. 3. **The supreme court reporter shall have no pecuniary interest** in such reports, but the same shall be published under the contract, to be entered into by the executive council with the person, persons or corporation, who shall agree to publish and sell the same on the terms most advantageous to the people of this state, at a price not to exceed two dollars per volume, of the size and quality as provided for in this act. And if any such volume shall, in any way, or from

any cause, contain more than eight hundred pages, no increased or additional price shall be charged therefor.

SEC. 4. The executive council shall, commencing in the first week in April, 1880, and every eight years thereafter, advertise weekly in six different newspapers in different localities in this state, for the term of six weeks, that sealed proposals will be received at the office of the secretary of state for printing, publishing and selling the said reports for the term of eight years next after the first day of June of said year, at a certain rate per volume, to be stated in said proposal, not exceeding the maximum price fixed by this act, and in accordance with the provisions of this act.

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

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

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

SEC. 8. The contract of the successful bidder required by this act shall contain, among others, the following covenants on his part:

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

Second. That in case it shall be determined in any action upon the bond of such contractor that he has failed in any respect to comply with the provisions of this act or his contract, the executive council may declare the contract forfeited; and that, upon such forfeitures so declared, such contractor will, upon demand, transfer to the secretary of state of this state, for the use of the state, the stereo-

typed plates of each volume of such reports published under such contract, or in default thereof will pay to the treasurer of this state two thousand dollars for each such volume as liquidated damages for a failure to make such transfer, and such failure shall be deemed a breach of the conditions of such bond, and such liquidated damages may be recovered by action on such bond.

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

SEC. 10. [Repeal of statute.]—Sections 155, 156, 157 and 160, of chapter 4, title III, of the code, and all acts and parts of acts conflicting with the provisions of this act are hereby repealed: *Provided*, that the passage of this act shall not be construed to affect the publication of the supreme court reports up to and including volume fifty-one, but in all other respects the provisions of this act shall be in force from the time it takes effect as hereinafter provided.

[Took effect by publication in newspapers March 24, 1880.]

Chapter 133, laws of 1876, authorized three volumes to be published in each of the years 1876 and 1877.

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

SEC. 159. (As amended by chapter 33, 22d g. a.) [Disposition of reports.]—The copies received by the secretary of state shall be disposed of by him as follows: Two copies of each volume to the library of congress and the library of the supreme court of the United States; one copy to the library of each state and territory of the United States, to each judge of the supreme, district and [superior] courts, to the clerk of the supreme court and attorney-general; fifty copies to the state library, to be and remain therein as a part thereof, and one copy to each county in the state, [and two copies to each county where the district court is held in more than one place, one copy to be given to each place where court is held, and one copy to the supreme court reporter], and twenty copies to the law department of the state university, and twenty copies to the state historical society for exchange in such manner as the proper officers thereof think advisable, and the remaining copies, together with all reports now in the office of governor, secretary, auditor, treasurer of state, and register of the land office, and superintendent of public instruction, shall be used by the trustees of the state library in exchange for such books on law or equity, or reports of other states as they may select. All books received by such exchange shall be deposited in and become a part of the state library.

[Section 160 repealed by chapter 60, laws of 1880.]

CHAPTER 5.

OF THE DISTRICT AND CIRCUIT COURT AND JUDGES THEREOF.

SECTION 161. [**Jurisdiction of district court.**].—The district court shall have and exercise general original jurisdiction, both civil and criminal, where not otherwise provided, and appellate jurisdiction in all criminal matters. Such court shall have a general supervision over all inferior courts and officers in all criminal matters, to prevent and correct abuses where no other remedy is provided.

The district court has a general supervision over all inferior courts, to prevent and correct abuses, where no other remedy is provided. *Pierson's Executors*, 13 Iowa, 449.

The jurisdiction is general and original, and can only be taken away by express words or irresistible implication. Mere negative words will not oust the jurisdiction. *Sterritt v. Robinson*, 17 Id., 61. See also *Waples v. Marsh*, 19 Id., 331.

The district court being a court of general original jurisdiction, has power to recall a grand jury to pass upon an offense committed after their discharge and before the adjournment of the term. *The State of Iowa v. Reid*, 22 Id., 413.

It was held that under the revision the district court had not jurisdiction in bastardy proceedings: that the jurisdiction belonged to the circuit court. *The State v. Cook*, 31 Id., 519. But see section 4715 of the code.

Section 162 of the code defined the jurisdiction of the circuit court. Chapter 134, laws of 1886, repealed said section, and also section 163.

Section 162 did not authorize an appeal from the action of the fence-viewers to the circuit court. In the absence of any statute allowing such an appeal, it cannot be taken. *McKeever et al. v. Jenks et al.*, 59 Iowa, 350.

Under the revision the circuit court had no jurisdiction in certiorari proceedings. *Thompson v. Reed*, 29 Id., 117; 48 Id., 679.

Under chapter 86, laws of the twelfth general assembly, as amended by chapter 153, laws of the thirteenth general assembly, the circuit court had exclusive jurisdiction of appeals from the special tribunals organized for contesting elections under chapter 37 of the revision; and of all appeals from inferior tribunals in civil cases. *McKinney v. Wood*, 35 Id., 167.

All appeals from justices of the peace in civil actions, including actions for forcible entry and detainer, must be taken to the circuit court, and an appeal in such cases cannot even by consent be taken to the district court. *Easton v. Fleming*, 51 Id., 305.

All appeals from justices of the peace in civil actions must be taken to the circuit court. *State v. Knapf*, 61 Id., 523.

Where a judgment of a justice of the peace was appealed from to the district court prior to the taking effect of the act creating the circuit court, the appellee afterward filed the transcript in the circuit court, and obtained judgment thereon against the appellant and his sureties on the appeal bond; at the following term the defendant applied to set aside the judgment for certain reasons specified, but made no objection to the jurisdiction of the circuit court; it was held, that by thus appearing and failing to object to the jurisdiction, he was thereby estopped from doing so for the first time in the supreme court. *The I. N. C. R. Co. v. Ritter*, 36 Id., 568.

The circuit court had exclusive jurisdiction of all appeals from justices of the peace in civil cases. When a change of venue was asked of such appeal the change must be to the circuit court of another county, and not the district court. A change of venue to the latter can be had under section 2522, only in cases where the courts have concurrent jurisdiction. *Schuchart v. Lammey*, 62 Id., 197.

The circuit court had exclusive jurisdiction of writs of error to justices' courts; and when such writ was pending in the circuit court, a change to the district court is void, and the case still remains in the circuit court; but lest there should be a failure of justice, the order granting the change, though void, will be reversed on appeal at the costs of the parties moving for the change, though they did not designate the court to which the change should be made. *Sales v. Delukrey*, 64 Id., 109.

(CHAPTER 134, LAWS OF 1886.)

ABOLISHING CIRCUIT COURT AND REORGANIZING JUDICIAL DISTRICTS.

An Act to abolish the circuit court and to enlarge the powers and jurisdiction of the district court, and to provide for additional judges and to reorganize the judicial districts of the state.

SECTION 1. [**Circuit court abolished.**].—*Be it enacted by the general assem-*

bly of the state of Iowa, That on and after the first day of January, A. D. 1887, the circuit court of the state of Iowa shall be abolished.

SEC. 2. [District court reorganized.]—On and after the first day of January, A. D. 1887, the district court shall be constituted and organized as herein provided:

SEC. 3. [Judicial districts.]—For judicial purposes the state is hereby divided into eighteen judicial districts, as follows:

First. [First district 2 judges.]—The first district shall consist of the counties of Lee and Des Moines, and shall have two judges.

Second. [Second district 3 judges.]—The second district shall consist of the counties of Lucas, Monroe, Wapello, Jefferson, Henry, Davis, Van Buren and Appanoose, and shall have three judges.

Third. [Third district 2 judges.]—The third district shall consist of the counties of Wayne, Decatur, Clark, Union, Taylor, Ringgold and Adams, and shall have two judges.

Fourth. The fourth district shall consist of the counties of Cherokee, O'Brien, Osceola, Lyon, Sioux, Plymouth, Woodbury, Harrison and Monona, and shall have three judges.

Fifth. The fifth district shall consist of the counties of Dallas, Guthrie, Adair, Madison, Warren and Marion, and shall have three judges.

Sixth. The sixth district shall consist of the counties of Jasper, Poweshiek, Mahaska, Keokuk, Washington and Louisa, and shall have three judges.

Seventh. The seventh district shall consist of the counties of Muscatine, Scott, Clinton and Jackson, and shall have three judges.

Eighth. The eighth district shall consist of the counties of Johnson and Iowa, and shall have one judge.

Ninth. The county of Polk shall constitute the **ninth district**, and shall have three judges.

Tenth. The tenth district shall consist of the counties of Dubuque, Delaware, Buchanan, Black Hawk and Grundy, and shall have three judges.

Eleventh. The eleventh district shall consist of the counties of Marshall, Story, Boone, Webster, Hamilton, Hardin, Franklin and Wright, and shall have three judges.

Twelfth. The twelfth district shall consist of the counties of Bremer, Butler, Floyd, Mitchell, Worth, Cerro Gordo, Hancock and Winnebago, and shall have two judges.

Thirteenth. The thirteenth district shall consist of the counties of Clayton, Allamakee, Fayette, Winneshiek, Howard and Chickasaw, and shall have two judges.

Fourteenth. The fourteenth district shall consist of the counties of Buena Vista, Clay, Palo Alto, Kossuth, Emmet, Dickinson, Humboldt and Pocahontas, and shall have two judges.

Fifteenth. The fifteenth district shall consist of the counties of Pottawattamie, Cass, Shelby, Audubon, Montgomery, Mills, Page and Fremont, and shall have four judges.

Sixteenth. The sixteenth district shall consist of the counties of Ida, Sac, Calhoun, Crawford, Carroll and Greene, and shall have two judges.

Seventeenth. The seventeenth district shall consist of the counties of Tama and Benton, and shall have one judge.

Eighteenth. The eighteenth district shall consist of the counties of Linn, Jones and Cedar, and shall have two judges. Excepting for the purpose of electing judges the provisions of this section shall not take effect until the first day of January, A. D. 1887.

SEC. 4. The district judge shall be a resident of the district in which he

is elected, and shall hold his office for a term of four years. The first election under the provisions of this act shall be at the general election in the year 1886: *Provided, however*, that the present acting judges of the district courts whose terms of office shall not have expired on or before said first day of January, 1887, shall be by virtue of their said office judges of the district court in and for the districts created by this act in which they may severally reside; and until the terms for which said judges were elected shall expire, only so many additional judges shall be chosen under the provisions of this act as shall be required (if any) to make the number of judges to which such district is entitled, under the provisions of this act.

SEC. 5. (*As amended by ch. 37, 22d g. a.*) [**Terms: where held.**] The judges shall hold the district courts in the several counties of their districts at all the places where district courts or circuit courts are held at the time this act takes effect (and grand jurors and petit jurors shall be drawn and summoned for the terms at all such places, according to law, from the territory from which petit jurors have heretofore been chosen), and the district court shall hold not less than two terms at other places than county seats where the circuit court is authorized to be held, at the time this act takes effect (and the district court shall hear and determine all causes, including civil, probate and criminal, within the territory over which the circuit court has heretofore had jurisdiction), and (grand and petit) jurors shall be drawn thereat, as heretofore provided therefor, and *provided*, that transcripts of all judgments, decrees, and the levy of writs of attachment on real estate, mechanics' liens, *lis pendens*, sales of real estate, redemptions, satisfaction of judgments, mechanics' liens, dismissal or decrees in *lis pendens*, together with all other matters affecting titles to real estate, shall be certified by the deputy clerk at such places other than county seats, forthwith, to the clerk of the district court at the county seats, who shall enter the same upon the records in his office in all respects as if originating and originally filed, begun or entered at the county seat of such counties, and *provided further*, that the provisions of **section 163 of the code**, shall be and remain in full force and effect under the provisions of this act. They shall hold their courts at such times, and in such order as shall best dispose of the business thereof, and as they may arrange among themselves; *provided*, however, there shall be held not less than four terms a year in each county. In case the judges of any district are unable to agree, as to the manner of holding their courts, or as to the counties in which they are severally to preside, they shall refer the matter to the chief justice of the supreme court, who shall assign said judges to such counties as he may determine; and the chief justice of the supreme court shall also have power to assign any district judge when not occupied in holding court in his own district, to hold court in any other district in the state where any judge may be incapacitated from holding court, or there may arise a necessity therefor. But this section shall not be held to affect the right of the judges to interchange holding their terms of court, as now provided by law.

SEC. 6. [**Judges shall fix terms.**]*—*On or before the first day of October in each odd numbered year, the judges shall meet in their respective districts, and determine the times and places of holding their courts during the two succeeding calendar years. The plan or schedule thus agreed upon, or ordered by the chief justice of the supreme court, when they cannot agree, shall before going into effect be published as now required by law for similar orders of the judges of the district and circuit courts. In preparing said plan or schedule they shall so arrange if practicable that each judge shall hold at least one term of court during the year in each of the several counties of his district. The terms of the circuit court which have been set down or assigned for the year 1887 in the several counties of the

state shall be held as terms of the district court, and the judges may determine anew the times and places for holding their courts during the year 1887.

SEC. 7. [Jurisdiction original and exclusive.]—The district court when organized and constituted as contemplated in this chapter, shall have original and exclusive jurisdiction of all actions, proceedings and remedies both civil and criminal, except in cases where exclusive or concurrent jurisdiction is or may hereafter be conferred upon some other court or tribunal by the constitution and laws of the state, and shall have and exercise all the powers usually possessed and exercised by courts of record.

SEC. 8. All the rights, duties, powers and jurisdiction now by law belonging to or vested in, or exercised by the circuit court shall upon and after the first day of January, 1887, be transferred to, conferred upon and exercised by the district court; and all causes, proceedings, and remedies of every kind pending or undetermined in the circuit court at said date shall stand for trial or other disposition in the district court as if originally brought therein.

SEC. 9. [District court has full jurisdiction.]—Upon the abolition of the circuit court, as in this act provided, the district court shall succeed to, and exercise full authority and jurisdiction over the records of the circuit court, and may enforce all judgments, decrees and orders thereof in the same manner and to the same extent as it may exercise like jurisdiction and authority over its own records, and for the purpose of the issuance of process, and of any and all other acts necessary to the due and efficient enforcement of the orders, judgments and decrees of the circuit court, the records thereof shall be deemed records of the district court. Transcripts and process from the judgments, decrees and records of the circuit court, shall be issued by the clerk of the district court, and under the seal of his office.

SEC. 10. When a **change of venue is granted** on the ground of objection made to the judge, such judge may, in his discretion, if there be a judge or judges of the same district, against whom there is no objection, assign the cause to such judge. Or if more than one, to one of them for trial, and if there be no other judge of his district against whom there is no objection, then he may, in his discretion, send the cause for trial to the nearest and most convenient county of another district for trial before a judge of such other district; or he may procure another judge of another district to interchange with him for the trial of such cause.

SEC. 11. The judges of the district court shall have power to prescribe uniform rules of practice for the government of the district courts of the state, and to prescribe rules for making up issues in vacation, and entering, in vacation, judgment in default of appearance or pleading. For that purpose, said judges shall meet in convention in the supreme court room in the capitol at the state capital, on the first Wednesday in January, A. D. 1887, and at such time thereafter as may be designated by the chief justice on the request of a majority of the district judges of the state, and shall organize by selecting a president, vice-president and secretary from their number, and the secretary of state shall, upon requisition of the presiding officer, supply the convention with such stationery as shall be deemed necessary for the dispatch of the business of the convention. When a majority of the convention shall have agreed upon such rules, and the time when they shall go into effect, the same shall be signed by the president and countersigned by the secretary of the convention, and filed with the secretary of state, and the secretary of state shall cause such rules to be printed, and when so printed he shall forward a certified copy thereof to the clerk of the district court in each county of the state. And the clerk shall immediately upon the receipt of such copy of the rules so adopted, spread the same upon the records of said court, and such rules shall continue in force until altered or amended in convention as provided in this act.

SEC. 12. **The salary of district judges** elected or holding office under the provisions of the constitution of the state and this act, shall be \$2,500 per year, to be paid from the state treasury in manner now provided by law for the payment of judges of the district and circuit court.

SEC. 13. [**Powers of clerks of district court.**]—On and after the first day of January, 1887, the clerk of the district court shall have and exercise within his county all the powers and jurisdiction of the court and of the judge thereof in the following matters:

First. **The appointment when not contested of resident administrators, executors and guardians of minors** and the approval of any and all bonds given by administrators, executors, trustees, and guardians in the discharge of their several trusts.

Second. **The examination and approval of all intermediate or interlocutory accounts or reports of administrators, executors and guardians,** but such approval may be disaffirmed or set aside by the court within the time and manner as now provided by law.

Third. **The making of all necessary orders in relation to the personal effects of a deceased person as contemplated in section 2386 of the code,** where no objection is filed, and to do and perform all other acts and duties which are now required by law of clerks of the circuit court and not inconsistent with the provisions of this act.

SEC. 14. [**Appeal.**]—Any person deeming himself aggrieved by any order made or entered by the clerk under the powers herein conferred in the last preceding section may have the same reviewed in court at the next term thereafter upon motion, and upon such notice as the court may prescribe. Upon the filing of such motion the clerk shall place the cause or proceeding on the docket without additional docket fee, and the matter shall stand for hearing on trial *de novo* in open court.

SEC. 15. The records, orders and judgments made and entered by the clerk as hereinbefore provided and not reversed, set aside or modified by the court shall stand and be of the same force, validity and effect, and shall be entitled to the same faith and credit as if made by the court, or by a judge thereof.

SEC. 16. [**Compensation of clerk.**]—From and after the first day of January, 1887, the clerk of the district court in each county, in addition to the compensation now provided by law, shall be allowed to retain from fees collected by him in matters of probate and guardianship, such sum as may be fixed by the board of supervisors, not exceeding the sum of three hundred dollars per year; but such additional compensation shall in no case be allowed to be paid out of the county treasury.

SEC. 17. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved April 10, 1886.

The title to this act complies in all respects with section 29 of article 3 of the constitution, which requires that "every act shall embrace but one subject, and matters properly connected therewith." *State v. Emmons; Emmons v. Woodruff; Manley v. Morgan*, 33 N. W. R., 672.

(CHAPTER 128, LAWS OF 1886.)

RELATING TO HOLDING COURTS.

An Act to regulate the manner of holding courts in the several judicial districts of the state, and to amend section 231 of the code as amended by an act of the twenty-first general assembly relating to trial jurors.

SECTION 1. [**Judges not to sit together.**] *Be it enacted by the general assembly of the state of Iowa*, That in districts in which the district court is com-

posed of more than one judge, the judges shall not sit together in the trial of causes nor upon the hearing of motions for new trial; but may together hold the same term making an apportionment of the business between them; and in districts composed of more than one county they may hold terms in different counties at the same time.

Approved April 10, 1886.

Section 164 repealed by chapter 134, laws of 1884.

SEC. 165. (*As amended by sec. 1, ch. 12, laws 15th g. a.*) [**Judges fix terms.**]—At least [two] terms of each court shall be held in every organized county in each year, and the district and circuit judges of each judicial district shall, on or before the first Monday in December, A. D. 1873, and in each alternate year thereafter, designate and fix by an order under their hands, the times of holding the terms of such courts in each county in their districts for the two years next ensuing the first day of January thereafter, which order shall be forthwith forwarded by the district judge to the secretary of state and the clerk of the district court in each county in such district, and the clerk shall file the same and enter it of record in the journal of each court, and cause such order to be published for four weeks in some weekly newspaper published in such county, if there be any such published. The secretary of state shall, within ten days after receiving said orders, or before the first Monday in January after said orders are made, prepare a tabular statement of the times of holding the several courts as fixed by the several orders in his office, and have printed one thousand copies thereof, which shall be distributed as follows: One copy to each state officer, state library, library of the law department of the state university, each clerk of the district court and sheriff, and the residue to the county auditors in proportion to the population of each county, for gratuitous distribution among the attorneys of the county.

SEC. 166. (*As amended by ch. 12, 15th g. a.*) [**A special term may be ordered** in the county at any regular term of court in that county, or at any other time, by the judge, for the trial of all causes pending at the last regular term of said court held prior to said special term, in which either party shall have served upon the opposite party or his attorney, in the manner provided for the service of original notice, at least twenty days prior to said special term, a notice in writing that such cause will be brought on for trial. When ordering a special term, the court or judge shall direct whether a grand or trial jury or both shall be summoned.]

An indictment found at a special term of the district court held on the day fixed by law for the regular term of court held in another county of the district, was held not invalid on the ground of having been found at such special term. *State v. Clark*, 30 Iowa, 168.

Where a special term of the district court in one county was ordered for the 30th day of November, 1868, which was the day fixed by law for a regular term of the court in another county of the same district, and the special term was adjourned on the 14th of the following month, it was held that an indictment found thereat, to which a grand jury was returned, was not invalid on the ground that it was not found at a legal term of the court. *Id.*

(CHAPTER 13, LAWS OF 1878.)

LEGALIZING SPECIAL TERMS OF COURT.

An Act to legalize certain orders for special terms of court and the proceedings therein.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa.* That all orders heretofore entered at a regular term of any district or circuit court within the state, providing for and ordering a special term of said court, for the trial of causes pending in said court at said regular term, are hereby legalized and made valid. And the holding of any special term that has been or may hereafter be held under said order heretofore entered as aforesaid, is hereby legalized and

authorized, and all proceedings at said special term shall be, and are hereby, made as valid and binding as though the same were made and had at a regular term of said court.

(Took effect February 25, by publication in newspapers.)

SEC. 167. If the judge does not appear on the day appointed for holding the court, the clerk shall make an entry thereof in his record, and adjourn the court till the next day, and so until the third day, unless the judge appears, provided three days are allowed for such term.

It is competent, under this section, for a judge, when the business requires it, to extend a term of his court in one county beyond the time fixed for the commencement of a term in another county, for at least three days, during which adjournments from day to day may be made by the clerk in the latter county. *Cook v. Smith et al.*, 54 Iowa, 636.

Where a motion for a new trial is not determined at the term when made, as it need not be, it will stand continued generally, without any record entry, and may be taken up at the next succeeding term. *Van DeHaar v. Van Domseller*, 56 Id., 671.

The circuit court had exclusive jurisdiction of all appeals from justices of the peace in civil cases. When a change of venue is asked of such appeal the change must be to the circuit court of another county and not to the district court. A change of venue to the latter can be had under section 2592, only in cases where the courts have concurrent jurisdiction. *Schuchraft v. Lammey*, 62 Id., 197.

SEC. 168. [Adjournment.]—If the judge does not appear by five o'clock of the third day, and before the expiration of the time allotted for the term of the court, it shall stand adjourned till the next regular term.

SEC. 169. If the judge is sick, or for any other sufficient cause is unable to attend court at the regularly appointed time, he may, by a written order, direct an adjournment to a particular day therein specified, and the clerk shall, on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed.

It was held under this section prior to the code that where a trial was commenced in the middle of a term, under the belief that it can be concluded before the day when the judge is directed, but not imperatively required, to hold court in another county, he may remain and conclude that case, receive the verdict and pass judgment, even though this may be done on a day, or at a time, when regularly he would be opening or holding court in another county. *State v. Knight*, 19 Iowa, 94.

When at a regular term of the court, a special term has been ordered to be held at a future day fixed, which special term was postponed by the clerk, on the written order of the judge made in vacation, it was held that the postponement was regular under section 1583 of the code of 1851, which was the same as this section. *The State v. Ballenger*, 10 Id., 368.

The judge may, by written order to the clerk, direct an adjournment of the term under this section. *State v. Clark*, 30 Id., 171.

The statute does not fix a day for the ending of a term of court, but it does authorize the judge, for sufficient cause, to adjourn a term before it is begun. So, where the approaching term in another county was adjourned, and the trial of the cause then before the court was prolonged into the time when court would otherwise have been in session in the other county, held not error. *The State v. Stevens*, 67 Id., 557.

SEC. 170. No recognizance, or other instrument or proceeding, shall be rendered invalid by reason of there being a failure of the term; but all proceedings pending in court shall be continued to the next regular term, unless an adjournment be made as authorized in the last preceding section.

The failure of a term of court will not have the effect to discharge the sureties upon an appearance bond. *State of Iowa v. Brown*, 16 Iowa, 314.

SEC. 171. [Parties must appear.]—In cases of such continuance or adjournments, persons recognized or bound to appear at the regular term which has failed as aforesaid, shall be held in like manner to appear at the time so fixed, and their sureties, if any, shall be liable in case of their non-appearance, in the same manner as though the term had been held at the regular time and they had failed to make their appearance thereat.

SEC. 172. Upon any final adjournment of the court, all business not otherwise disposed of, will stand continued generally.

SEC. 173. When a county is not provided with a regular court house

at the place where the courts are to be held, they shall be held at such place as the board of supervisors provide.

SEC. 174. If no suitable place be thus provided, the court may direct the sheriff to procure one.

SEC. 175. The district judges may interchange and hold each others' courts.

Section 1575 of the code of 1851, which was the same in substance as this section, was held not to be inconsistent with the constitution. *The State v. Stingley et al.*, 10 Iowa, 488.

Where judges exchange and hold each other's courts, each judge may, though in vacation, certify the evidence tried before him. *Howe et al. v. Jones et al.*, 66 Id., 156.

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

When by the omission of the clerk judgment was not entered upon a verdict at the term at which it was returned, it was held competent for the court at a subsequent term, both parties appearing and being heard, to order the entry of judgment on the verdict. *Shepherd v. Brenton*, 20 Iowa, 41.

It is not error to permit a jury after having returned a sealed verdict, to correct an error in the verdict which has occurred through inadvertence only. *Hamilton v. Barton*, 20 Id., 505.

Where the record book contained an entry of judgment in an action for — damages and a specified amount of costs, it was held that the judgment could be enforced only for the costs specified, although the judge's calendar contained the entry, "clerk to assess," and the judgment docket showed a judgment for both damages and costs. *Case v. Plato et al.*, 54 Id., 64.

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

The failure of the judge to sign the records does not affect the binding force or effect of an order made during the term, dismissing an appeal. *Ohare v. Leonard*, 19 Iowa, 515.

The provisions of this section are directory, and a failure to sign the records will not affect the validity of the judgments entered therein. *Childs v. McChesney*, 20 Id., 431.

A circuit judge had jurisdiction upon the opening of a term of court to amend or expunge a record entry made by the clerk in vacation, and his action in so doing cannot be reviewed in the supreme court on *certiorari*. *Carpenter v. Zuver*, 56 Id., 390.

The signing by the judge of a draft of a decree prepared by counsel is not the signing of the record required by this section, and though recorded by the clerk, it does not preclude the court from amending or expunging it at any time before the record proper is signed as provided by section 178. *Bosch v. Kassing et al.*, 64 Id., 312.

This provision of the statute, requiring the judge to sign the records, is directory merely, and a non-compliance therewith does not affect the validity of judgments entered on such records. *Childs v. McChesney*, 20 Id., 431.

Where the clerk omitted to enter upon the records of the court a decree which had been duly signed, and, the term of office of the judge before whom the case was tried having expired, his successor directed the case to be referred, it was held that the clerk should have been ordered to spread the decree upon the proper record book, and that it was erroneous to disregard the decree, and order a reference of the cause for trial anew. *Tracey et al. v. Beeson et al.*, 47 Id., 155.

SEC. 178. The record aforesaid is under the control of the court and may be amended, or any entry therein expunged, at any time during the term at which it is made, or before it is signed by the judge.

This section applies to all entries made without authority, or upon a supposed state of facts which is afterward found not to exist. The court may, on its own motion, under this section, correct its record, and it is required to permit nothing to be made or remain of record that is not in accord with truth and within its authority. *Boals v. Shlues*, 29 Iowa, 507.

Under this section it was held that it is competent for the trial court to change its previous rulings upon a demurrer at any time during the term. *Brace v. Grady*, 36 Id., 352.

The court may correct or expunge any entry in the records thereof before the same is read or signed. *Shepherd v. Brenton*, 15 Id., 84.

Where the court has made and entered an erroneous decision, it is not only the right of the court, but its duty, also, under this section, to correct the error on its own motion, if discovered during the term at which it is made, or before the record has been signed. *Wolmerstadt v. Jacobs*, 61 Id., 372.

Where the clerk omitted to record a decree which had been duly signed, and the term of office of the judge before whom the cause was tried having expired, his successor directed that the cause be referred; *held*, that the clerk should have been ordered to spread the decree upon the proper record book, and that it was erroneous to disregard the decree and order a reference of the cause for a trial anew. *Tracy v. Beeson*, 47 Id., 155.

Whether the records are approved or not during the term, is entirely immaterial. The statute on this subject is merely directory. Besides, the statute provides that when it is not practicable to have the records read during the term, they may be read and approved at a succeeding term. *Finch v. Hollinger*, 47 Id., 178.

The court may, in its discretion, allow amendments to the pleadings after a decision has been announced in the case, and a memorandum thereof made on the calendar. *Spink v. McCall*, 52 Id., 432.

Under the decisions of the courts in this country and in England, as well as under this section of the code, a court has authority, after it has entered judgment of a fine against a defendant, at the same term, and before any part of the judgment has been performed, to set the judgment aside and enter another judgment imposing a heavier penalty. *The State v. Dougherty*, 70 Id., 439.

SEC. 179. Entries made, approved and signed at a previous term can be altered only to correct an evident mistake.

Where it is shown that the name of a grand juror has, by mistake of the clerk, been omitted from the record of a prior term, the court may order a correction of the record by the insertion therein of the name of such juror. *The State v. McComb*, 18 Iowa, 43.

Where the record omitted to state that, in an equitable action, by consent the trial was by the second method, it was competent for the district court, by an order *nunc pro tunc*, to so correct the record as to supply the omission, and this may be done after the case has been appealed and is pending in the supreme court. This section does not deprive the court of the power to make such a *nunc pro tunc* entry. *Buckwalter v. Craig*, 24 Id., 215.

So a *nunc pro tunc* order may be made at a term of court subsequent to the finding of an indictment showing that some of the grand jurors were selected from the bystanders upon the failure of some of those named in the precept to appear. *The State v. Munzenmaier*, Id., 87. See further, *Roberts v. Austin Corbin & Co.*, 26 Id., 315.

An alteration in an entry in the records of the court can be made at a subsequent term only to correct an evident mistake. *The State, ex rel. Alderson, v. Jones County, etc.*, 11 Id., 11.

A mistake made by the clerk in entering up a judgment, may be corrected on motion of the plaintiff, within the time and in the manner prescribed by the statute, even after payment and satisfaction by the defendant of the erroneous judgment. *Goldsmith v. Clauson*, 14 Id., 278.

Record entries made, approved and signed at a previous term can be altered only to correct an evident mistake of fact. *Knox v. Mosier et al.*, 72 Id., 154.

SEC. 180. [Judges make rules.]—The judges of the district and circuit court in any district may provide by general rule;

1. That the time of filing pleadings or motions shall be other than provided in this code;
2. That issues in all, or a part of the counties in such district, shall be made up in vacation;
3. Prescribing penalties that shall follow the overruling or sustaining a motion or demurrer;

4. Adopting such other rules as they may deem expedient, not inconsistent with this code. Such rules shall be signed by said judges, and such number published as they deem expedient, and shall be distributed by the district judge as follows: To the secretary of state, to each of the judges of the supreme court, attorney-general, clerk of the supreme court, state library, and law department of the state university, one copy each, to be filed and preserved in the said several offices or departments; and the residue to the clerks of the district court in each county composing such district, in such proportion as such judge deems proper. The expense of publishing and distributing such rules shall be paid by the counties composing the district, as the judges may direct. Such rules may be revised and changed as often as the judges deem proper, and shall be published and distributed in the same manner, but shall not take effect until ninety days after their entry of record.

It was held competent for the district court to adopt and enforce rules limiting the right of witnesses subpoenaed and attending court in several cases at the same time, to fees for mileage and attendance in one case only. *Miffert v. The D. B. & M. R. Co.*, 34 Iowa, 430.

A rule of court requiring a bill of exceptions to be prepared and presented to the judge for signature before the hearing of a motion for a new trial, is inconsistent with sections 2837 and 2838 of the code, and, notwithstanding such rule, the party who files a motion for a new trial in compliance with those sections is entitled to have the same determined on its merits. *Emery et al. v. Emery et al.*, 54 Id., 106.

Under this section the district court has power to make a rule requiring the defendant, when so notified, to appear and plead by noon of the first day of the term, notwithstanding section 2599 of the code, and that upon failing to do so default will be entered against him. *McGrew v. Downs*, 67 Id., 687.

See, however, the provision of chapter 134, laws of 1886, which abolished the circuit court, and thereby repealed all provisions purporting to confer any power upon the judges of that court.

SEC. 181. (*As amended by section 1, chapter 195, 18th general assembly.*) **[May appoint reporter.]** The judge of the district or circuit court may appoint, whenever in the judgment of either of them it will expedite the public business, a short-hand reporter, who shall be well skilled in the art and competent to discharge the duties required, for the purpose of recording the oral testimony of witnesses [in civil cases upon the request of either party thereto, and in all criminal cases which are tried upon indictment, and in other criminal cases and such other matters as the judge may direct. But the judge shall not so direct in any criminal case unless it shall satisfactorily appear to him that the interests of the state or defendant require the reporting of the testimony in said case: *provided*, the defendant in any criminal case may have the testimony therein reported without an order of the judge by first paying or securing to said reporter his fees for reporting the same.]

The short-hand reporter's notes of the evidence and his transcript, or interpretation thereof, must be filed as a part of the records of the case; the first at the close of the examination, the second when prepared at the request of either party, and unless this requirement be complied with, these papers and their contents cannot be regarded as part of the record. *Lowe v. Lowe*, 40 Iowa, 220-226.

See *Hobart v. Hobart*, 45 Id., 503.

SEC. 182. **[Oath: removal.]**—Such reporter shall take an oath faithfully to perform the duties of his office, which shall be filed in the office of the clerk. He shall attend such sessions of the court as the judge may direct, and may be removed by the judge making the appointment, for misconduct, incapacity, or inattention to duty.

SEC. 183. **[Judgment in vacation.]**—With consent of parties, actions, special proceedings, and other matters pending in the courts named in this chapter, may be taken under advisement by the judges, decided and entered of record in vacation, or at the next term; if so entered in vacation, they shall have the same force and effect from the time of such entry as if done in term time.

A judgment cannot be lawfully entered of record in vacation except by consent of parties. *Nat. Bk. of McGregor v. Hostetter*, 61 Iowa, 397.

Where the testimony in a case, being all documentary and in form of depositions, after part of plaintiff's evidence had been submitted, the judge expressed a wish to take the papers and examine them and determine the cause in vacation, to which neither party objected, and two terms of the court intervened before the court finally directed an entry of judgment to be made in vacation, it was held, that the conduct of the parties amounted to an agreement to submit in vacation. *Meyers v. Funk et al.*, 51 Id., 92.

This section does not prevent the determination of a cause which has been taken under advisement, at a later term than that next following its submission. *Trulock v. Merte et al.*, 72 Id., 510.

A motion in arrest, and for judgment notwithstanding the verdict, cannot be filed and considered by the judge in vacation without an express agreement of the parties to that effect. *Scribner, Burroughs & Co. v. Rutherford*, 65 Id., 551.

SEC. 184. **[Court of record.]**—The circuit court shall be held by the circuit judge, and be a court of record; shall have and use its own seal, having on the face thereof the words "circuit court" and the name of the county and state.

See *Hobart v. Hobart*, 45 Iowa, 503.

The court may hear a cause and render a judgment or decree therein in vacation when the parties consent thereto. *Hattenback v. Hoskins*, 12 Id., 109; *O'Hagen v. O'Hagen*, 14 Id., 264.

To constitute the circuit court, the circuit judge must be in the discharge of his official duties

at the time and in the place described by law for the sitting of that court. *Hobart v. Hobart*, 45 Id., 501, 503.

(The circuit court being abolished by ch. 134, laws of 1886, this section is repealed by implication.)

SEC. 185. [**Judgment on verdict.**—In all judicial proceedings in any of the courts of this state where a jury trial has been commenced in any case during any term of court, and where such jury may agree upon a verdict, but not until after the time for holding court in some other county in the same district, and where the jury has agreed upon a verdict and reported the same after the opening of court in another county, and judgment has been rendered thereon, then and in that case such judgment shall not be deemed invalid by reason of the time of receiving such verdict and the rendition of such judgment.

SEC. 186. [**Same.**—In cases provided for in the preceding section, where the verdict has been so received and judgment has not been rendered thereon, as provided for in said section, then the time of the coming in of such verdict shall be no legal objection to the rendition of judgment thereon at the next term of the court in the county where such trial was had, but judgment shall then be rendered thereon; *provided*, there be no other good and sufficient reason why such judgment shall not then be rendered; then the time of the report of the verdict and the provisions of this section shall in all respects have a retrospective effect and operation.

Sections 185 and 186, authorizing the court to receive a verdict and render judgment thereon after the time for holding court in some other county of the district, are not in conflict with the constitution for the reason that they contemplate a retrospective operation. *Tilton v. Swift & Co.*, 40 Iowa, 78.

CHAPTER 6.

GENERAL PROVISIONS.

SECTION 187. **No judge of any court of record shall practice as an attorney or counselor at law, or give advice in relation to any action pending, or about to be brought in any of the courts of this state.**

SEC. 188. **All process issued by the clerk of the court shall bear date the day it is issued, to be attested in the name of the clerk who issued the same, and be under the seal of the court.**

SEC. 189. **All judicial proceedings must be public, unless otherwise specially provided by statute, or agreed upon by the parties.**

SEC. 190. **A judge or justice is disqualified from acting as such, except by mutual consent of parties, in any case wherein he is a party or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding. But this section does not prevent them from disposing of any preliminary matter not affecting the merits of the case.**

SEC. 191. [**Sunday.**—No court can be opened, nor any judicial business transacted on Sunday, except:

1. To give instructions to a jury then deliberating on their verdict;
2. To receive a verdict, or discharge a jury;
3. To exercise the powers of a single magistrate in a criminal proceeding;
4. And such other acts as are provided by law.

In order to avoid a judgment, regular on its face, on the ground that it was rendered after midnight on Saturday, the evidence should establish beyond the doubt naturally arising from the difficulty of determining the precise time of a particular transaction, that it was thus rendered. *Bishop v. Carter, Sheriff, et al.*, 29 Iowa, 165.

SEC. 192. **Courts must be held at the places provided by law**, except for the determination of actions, special proceedings, and other matters not requiring a jury, where they may, by the consent of the parties therein, be held at some other place.

The court may hear a cause and render a judgment or decree therein in vacation when the parties consent thereto. *Huttenback v. Haskins*, 12 Iowa, 109; *O'Hagen v. O'Hagen*, 14 Id., 264.

CHAPTER 7.

OF THE CLERK OF THE DISTRICT COURT.

SECTION 193. The clerk of the district court is, by virtue of his office, clerk of the circuit court.

SEC. 194. **He shall keep his office at the county seat**; shall attend the sessions of the district and circuit courts himself, or by deputy; keep the records, papers, and seals of both courts, and record their proceedings as hereinafter directed under the direction of the judges of each court respectively.

SEC. 195. [**How designated.**—The clerk of the district court shall, while acting as clerk of the circuit court, be known and designated as “clerk of the circuit court;” and in all certificates and records relating to said court, signed by him, he shall so designate himself. The deputy of the clerk of the district court may perform any of the duties required by the clerk of the district court, to be performed in and for said circuit court; and may sign all certificates and records thereof, in the same manner and with the same force and effect as the clerk of the district court.

SEC. 196. **The records of each court** consist of the original papers constituting the causes adjudicated or pending in that court, and the books prescribed in the next section.

An affidavit filed as the basis of an order for publication of the original notice in a suit to foreclose a mortgage becomes a part of the record in the case. *Bradley v. Jamison*, 46 Iowa, 68.

SEC. 197. The clerk is required to keep the following books for the business of the district and circuit courts severally:

1. [**Record book.**—A book containing the entries of the proceedings of the court, which may be known as the “record book,” and which is to have an index referring to each proceeding in each cause under the name of the parties, both plaintiff and defendant, and under the name of each person named in either party;

2. A book containing an **abstract of the judgments**, having in separate and appropriate columns the names of the parties, the date of the judgment, the damages recovered, costs, the date of the issuance and return of executions, with entry of satisfaction and other memoranda; which book may be known as the “**judgment docket**,” and is to have an index like that required for the record book;

3. A book in which to enter in detail the **costs and fees** in each action or proceeding under the title of the same, with an index like that required above, and which may be known as the “fee book.”

4. A book in which to enter the following matters in relation to any judgment under which real property is sold, entering them after the execution is returned—the title of the action, the date of the judgment, the amount of damages recovered, the total amount of costs, and the officer's return in full—which book may be known as the “**sale book**,” and is to have an index like those required above;

5. A book in which to make a **complete record** when required by law;

6. A book to be called the “**incumbrance book**,” in which the sheriff shall enter a statement of the levy of every attachment on real estate, as required by Part III of this code;

7. A book to be known as the "appearance docket," with an index to the same, in which all actions entered in said docket shall be indexed directly in the name of each plaintiff; and reversely in the name of each defendant therein;

The book here denominated the "appearance docket" is not the same as what is called the "bar docket." The latter constitutes no part of the records of the court. It is not known to or recognized by statute, and cannot be used to show that a cause was disposed of out of its order. *Gifford v. Cole*, 57 Iowa, 272.

8. A book in which an **index of all liens** in district or circuit courts shall be kept.

The entry of a judgment in the "record book," and in the "judgment docket," under the title of a single plaintiff and defendant, with the addition of "*et al.*" to the name of the defendant, without an index referring to each defendant, does not operate as notice to third persons who were not included as defendants. *Cummings v. Long*, 16 Iowa, 41.

An entry made by the sheriff in the "incumbrance book," under section 3022 of the code, showing that certain land therein described had been attached, was held to be notice to purchasers, though such entry was not indexed by the clerk in the index of liens required by this provision of the statute. *Blodgett v. Heuscamp Bros. et al.*, 64 Id., 548.

This section requiring the clerk of the district court to keep a book to be known as the "record book," within which to enter the business of the court, is directory merely, and not compulsory; and a decree of a mortgage foreclosure is not void because entered by the clerk in a record book designated, "decree of foreclosure of mortgages," a book not expressly mentioned in the statute. *Carr v. Bosworth*, 72 Id., 530.

The general rule is, that where a record is shown to be lost its contents may be proved by secondary evidence. If such evidence discloses that other and better evidence exists, then the better evidence must be produced. *Conger v. Converse*, 9 Id., 557.

The judge's calendar does not, under sections 196, 197 and 198 of the code, constitute part of the records of the court. *Rogers v. Morton*, 51 Id., 709, 710.

When the sheriff, in pursuance of section 3022 of the code, has made an entry in the "incumbrance book," showing that certain land therein described has been attached, such entry is notice to subsequent purchasers, though the entry is not indexed, notwithstanding the provisions of paragraph 8 of section 197 of the code, requiring the clerk to keep an index of liens in the circuit and district courts. *Blodgett v. Heuscamp Bros. et al.*, 64 Id., 548.

SEC. 198. The clerk shall enter in said appearance docket, each suit that shall be brought in the court, numbering them consecutively in the order in which they shall have been commenced, which number shall not be changed during the further progress of the suit. In entering the suits, the clerk shall set out the full name(s) of all the parties, plaintiffs and defendants, as contained in the petition, or as subsequently made parties by any pleading, proceeding or order, and shall give the date of the filing of the petition.

SEC. 199. When the original notice shall be returned to the office of the clerk, he shall enter in said docket so much of the return thereon as to show who of the parties have been served therewith, and the manner and time of service.

SEC. 200. The clerk shall, immediately upon the filing thereof, make in the appearance docket a memorandum of the date of the filing of all petitions, demurrers, answers, motions, or paper of any other description in the cause; and no pleading of any description shall be considered as filed in the cause, or be taken from the clerk's office, until the said memorandum is made.

When a pleading is delivered to the clerk, and a memorandum of the date of filing thereof made in the appearance docket, it is considered filed. *Haverly v. Alcott et al.*, 57 Iowa, 171, 173.

A paper is not filed unless a memorandum is made thereof in the appearance docket. *Padden v. Moore*, 58 Id., 706.

Where the clerk has neglected to make a memorandum on the appearance docket of the date of the filing of a petition, the action may be dismissed on motion. *Nickson v. Blair*, 59 Id., 531.

The provisions of this section, that no pleading shall be considered as filed until the required memorandum is made upon the appearance docket, does not apply to a bill of exceptions. *Boyer v. Foster*, 62 Id., 322.

Where the appearance docket showed the filing of the petition in a former action, and the decree showed that the present plaintiff, who was then defendant, was mentioned as one of the defendants, but there was no memorandum in the docket of his appearance in that case, the omission of it would not affect the jurisdiction of the court, and the recital of the plaintiff's name in the former decree was sufficient to overcome the omission in the docket. *Toliver et al. v. Morgan et al.*, 34 N. W. R., 858.

SEC. 201. Immediately upon the sustaining or overruling of any demurrer or motion; the striking out or amendment of any pleading; trial of the cause; rendition of the verdict; entry of judgment; issuing of execution, or any other act or thing done in the progress of the cause, the like memorandum thereof shall be made in said docket, giving the date thereof, and the number of the book and page of the record where the entry thereof shall have been made, it being intended that the appearance docket shall be an index from the commencement to the end of a suit.

SEC. 202. The district and circuit judges of any county, may, by a joint order under their hands, direct that the records and minutes of both courts be kept in one set of books. But all matters touching decedent's estates, wills, administrations, guardians and heirs, and all business relating thereto transacted in the circuit court, and also the record of marriage licenses, shall be kept separate, in proper books prepared for that purpose, as heretofore.

SEC. 203. (*As amended by ch. 82, 22d g. a.*) [Report criminal returns.] The clerk of the district court is required to report to the secretary of state, on or before the first Monday in [August] of each year, the number of convictions for all crimes and misdemeanors in that court in his county for the year preceding; and such report shall show the character of the offense and the sentence of punishment, the occupation of the convict, whether he can read and write, his general habits, and also the expenses of the county for criminal prosecutions during the year, including, but distinguishing, the compensation of the district attorney.

SEC. 204. [Not act as attorney.]—The clerk, or deputy clerk of the district court is prohibited from holding the office of justice of the peace, or practicing, directly or indirectly, as attorney or solicitor in the district or circuit court.

CHAPTER 8.

COUNTY ATTORNEY.

(CHAPTER 73, LAWS OF 1886.)

COUNTY ATTORNEYS AND THEIR DUTIES—REPEALS CHAPTER 8, TITLE THREE, AND SECTION 3775 OF CODE.

An Act to provide for the election of county attorneys, define their duties, and fix their compensation, and to repeal chapter 8, title 3, and section 3775 of code of 1873.

SECTION 1. [County attorney elected in each county.] *Be it enacted by the general assembly of the state of Iowa:* That at the general election in 1886, and every two years thereafter, a county attorney shall be elected in each county, who shall hold his office for the term of two years from the first Monday in January next following his election, and until his successor is elected and qualified, who shall, before he enters upon the duties of his office, execute a bond to the state of Iowa, with two or more sureties, in a sum of not less than five thousand dollars, to be approved by the board of supervisors, which bond shall be conditioned for the faithful performance of the duties of the office and the payment to the county treasurer of all moneys which shall come to the hands of such officer by virtue of his office. The bond shall be filed in the office of the county auditor and be recorded as other official bonds.

SEC. 2. [Duties of.]—The county attorney shall appear for the state and county

in all cases and proceedings in the courts of his county to which the state or county is a party, and in the supreme court in all cases in which the county is a party, and shall collect and pay over to the person or officer entitled thereto, all money due the state or county, so far as he is able to collect the same; *provided*, that in criminal cases less than a felony elsewhere than in the district court it shall be his duty to appear unless otherwise engaged in the performance of his official duties. In every criminal case appealed from his county to the supreme court he shall, at least thirty days prior to the term at which the case is to be heard, prepare and deliver to the attorney-general a properly prepared abstract of the case.

SEC. 3. [**Shall give opinions.**—The county attorney shall, without compensation, give opinions and advice to the board of supervisors, and other civil officers of their respective counties, when requested so to do by such board or officers in which the state or county is interested, or relating to the duty of the board or officers in which the state or county may have an interest, but shall not appear before the board of supervisors in the trial of any cause in which the state or county is not interested, or in applications to establish, vacate or alter highways.

SEC. 4. The county attorney may appoint deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties. With the approval of the district court he may procure such assistance in the trial of a person charged with the crime of felony as he shall deem necessary, and such assistant, upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried, certifying to the service rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors. But nothing in this section shall be construed to prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested.

SEC. 5. **In the absence, sickness or disability** of the county attorney and his deputies, the court before whom it is his duty to appear, and in which there may be business for him to attend, may appoint an attorney to act as county attorney by order to be entered upon the minutes of the court, and he shall receive out of the compensation allowed to the county attorney, when such appearance is before a justice of the peace, such sum as the board of supervisors shall determine to be reasonable for the services rendered, and when it is before a court of record such sum as the judge shall determine to be a reasonable compensation, and while acting under said appointment he shall have all the authority and be subject to all the responsibilities herein conferred on county attorneys. But in criminal cases less than a felony, a justice of the peace or magistrate cannot appoint an attorney at the expense of the county or county attorney; *provided*, that a justice of the peace shall not appoint an attorney to act as county attorney in any case unless reasonable notice in writing has been given the county attorney that his services will be required before such justice at a time therein named.

SEC. 6. **No county attorney shall receive any fee or reward** from or on behalf of any prosecutor or other individual, for services in any prosecution or business to which it shall be his official duty to attend, nor be concerned as an attorney or council [sel] for a party other than for the state or county, in any civil or criminal action pending or arising in his county upon the same facts upon which any criminal action or civil action wherein the state or county was a party, has been by such attorney commenced or prosecuted.

SEC. 7. **It shall be the duty of the county attorney** whenever he shall receive any money in his official capacity, to give the person paying the same a receipt and file a duplicate with the county auditor.

SEC. 8. **Whenever required by the grand jury** the county attorney shall attend them for the purpose of examining witnesses in their presence, or of giving

them advice in any legal matter, and to cause subpoenas or other writs of process to issue to bring witnesses and draw up bills of indictment, but he shall not be present with the grand jury when an indictment is considered and found.

SEC. 9. **In case of vacancy in the office** of county attorney by death, resignation or otherwise, the board of supervisors shall appoint a county attorney, who shall give bond and take the same oath, and perform the same duties as the regular county attorney, and shall hold said office until his successor is elected and qualified.

SEC. 10. [**All laws in regard to district attorney shall apply to county attorney.**—Wherever the term district attorney appears in the laws of Iowa, it shall hereafter mean county attorney, and all laws now in force regulating the duties of district attorneys in criminal matters and proceedings, shall apply to county attorneys within their respective counties.

SEC. 11. [**Compensation.**] The county attorneys of the several counties in this state shall be allowed an annual salary to be fixed by the board of supervisors of their respective counties at their June meeting of each even numbered year as follows: In counties of not more than five thousand inhabitants, not to exceed five hundred dollars. In counties of over five thousand and under ten thousand, not exceeding six hundred dollars. In counties of over ten thousand and under fifteen thousand, not exceeding seven hundred and fifty dollars. In counties of over fifteen thousand and under twenty thousand, not exceeding nine hundred dollars. In counties of over twenty thousand and under thirty thousand, not exceeding one thousand dollars. In all counties of over thirty thousand, not exceeding fifteen hundred dollars; said salary to be paid quarterly at the first meeting of the board of supervisors after it shall become due, and in addition thereto for all fines collected (and school fund mortgages foreclosed) the same fees as are now allowed to attorneys for suits on written instruments where judgment is obtained, and shall be entitled to his necessary and actual expenses incurred attending the discharge of his duty at a place other than his place of residence and the county seat, which shall be audited and allowed by the board of supervisors of the county. Population shall be determined by the last preceding national or state census; *provided*, that in no county shall the salary be less than three hundred [dollars] and fees as herein specified.

SEC. 12. The term of office of all district attorneys in the state shall end on the first day of January, A. D. 1887.

SEC. 13. [**Repeals chap. 8, title 3, and section 3775 of code.**—That chapter 8 of title 3 and section 3775 of the code of 1873 be and the same, together with all acts and parts of acts inconsistent herewith, are hereby repealed.

Approved April 5, 1886.

During the existence of the office of district attorney, the district court had no power, when that officer was present, to appoint another attorney to assist him in a criminal trial and thereby bind the county to pay for such assistance. *Seaton v. Polk County*, 59 Iowa, 626.

It was held, however, that, in the *absence* of the district attorney the district court had power to appoint a special prosecutor for the term. *White v. Polk County*, 17 Id., 413. It was also held in the same case that the district attorney was a *state*, and not a county officer.

CHAPTER 9.

ATTORNEYS AND COUNSELORS.

(This chapter is modified by chapter 168, laws of 1884. Sections 208, 209 and 210 repealed by the same act.)

(CHAPTER 168, LAWS OF 1884.)

RELATIVE TO PRACTICE OF LAW.

An Act to regulate admission to practice as attorneys and counselors in the courts of this state. (Repealing sections 208, 209 and 210 of the code.)

SECTION 1. [Supreme]Court.]—*Be it enacted by the general assembly of the state of Iowa:* The power to admit persons to practice as attorneys and counselors in the courts of this state, or any of them, is hereby vested exclusively in the supreme court.

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

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

SEC. 4. **Such examination shall be held in open court**, *provided*, that the graduates of the law department of the state university may be examined at the university, in Iowa City, by a committee of not less than three (3) members of the bar, appointed by the supreme court for that purpose; and on production of his diploma from said law department, and a certificate by such committee that they have examined such applicant, and are of opinion that he possesses the learning and skill requisite for practice of the law, any such graduate may be exempted by the court from further examination.

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

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

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

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

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

(Approved April 5, 1884.)

SEC. 211. [Duties of an attorney.]—It is the duty of an attorney and counselor:

1. To maintain the respect due to the courts of justice and judicial officers;
2. To counsel or maintain no other actions, proceedings or defenses than those which appear to him legal and just, except the defense of a person charged with a public offense;
3. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;
4. To maintain inviolate the confidence, and, at any peril to himself, to preserve the secret of his client.

It is well settled that this privilege is strictly confined to members of the legal profession, as barristers, counselors, attorneys and solicitors, and those whose intervention is necessary to facilitate the communication between attorney and client, as interpreters, etc. (*Poster v. Hall*, 12 Pick., 89; 2 Starkie's Ev., 229; 1 Greenleaf's Ev., Sec. 239; *Wilson v. Rastal*, 4 T. R., 759; cited in *Sample v. Frost*, 10 Iowa, 266.) It was accordingly held in the Iowa case that communications relating to the subject-matter of an action, made by one of the parties thereto, to a person supposed to be an attorney-at-law, and with a view to employ him professionally in the suit, when said person was not an attorney-at-law of any court, but was receiving business as one, and was expecting to be, and was admitted to practice at the next term of the district court, were not privileged under section 2393 of the code of 1851.

In an action by an attorney against the county for legal services alleged to have been rendered under an employment by the board of supervisors, it was held that the plaintiff could not recover on the *quantum meruit*. *Tatlock & Wilson v. Louisa County*, 46 Id., 130.

5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;
6. Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest;
7. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed.

SEC. 212. [When disbarred.]—An attorney and counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court, or judge, or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action.

SEC. 213. An attorney and counselor has power:

1. To execute, in the name of his client, a bond, or other written instrument, necessary and proper for the prosecution of an action or proceeding about to be or already commenced; or for the prosecution or defense of any right growing out of an action, proceeding, or final judgment rendered therein;
2. To bind his client to any agreement, in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is

receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court;

The record of an agreement between attorneys respecting a matter in litigation, based upon testimony or affidavits offered after the agreement was disputed, constitutes no stronger evidence than the testimony or affidavits themselves, and is not conclusive upon the objecting party. *Hiller v. Landis*, 44 Iowa, 223. BECK, J., *dissenting*.

In this case a motion was made to amend the record by adding thereto the statement that, by agreement of counsel, the case was to be heard by the court and a decree rendered in vacation, as of the term at which it was submitted. The motion was supported by affidavits and opposed by counter-affidavits denying the existence of such agreement. The court below sustained the motion. It was held by the supreme court that such a record was not sufficient to establish the agreement, and reversed the judgment.

An attorney employed to secure the possession of real property by legal proceedings cannot bind his client by an agreement to pay the party in possession a sum of money in consideration of the surrender of the possession. *Stuck v. Reese*, 15 Id., 122.

The record of an agreement between attorneys respecting a matter of litigation, based upon testimony or affidavits offered after the agreement is disputed, is no stronger evidence than the testimony or the affidavits themselves, and is not conclusive upon the objecting party. *Hiller v. Landis*, 44 Id., 223.

Where there is a dispute as to an oral agreement of attorneys in a case it cannot be settled by their affidavits. *Dryden v. Wyllis*, 54 Id., 667.

The supreme court is precluded by this section of the statute from finding from affidavits alone that counsel for appellee agreed to appellant's abstract of the evidence. *Preston v. Hale et al.*, 65 Id., 409.

No evidence of an agreement by an attorney is receivable to bind his client, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court. *Sapp & Lyman v. Aiken, Underwood & Co.*, 68 Id., 699.

3. To receive money claimed by his client in an action or proceeding during the pendency thereof, or afterward, unless he has been previously discharged by his client, and upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

SEC. 214. [May be required to prove authority.]—The court may, on motion, for either party and on the showing of reasonable grounds therefor, require the attorney for the adverse party, or for any one of the several adverse parties, to produce, or prove by his own oath or otherwise, the authority under which he appears, and, until he does so, may stay all proceedings by him on behalf of the parties for whom he assumes to appear.

The court has power to require an attorney to produce or prove his authority to appear for a party. If he has *written authority* the court may require him to produce it. *The State, ex rel., etc., v. Tilghman*, 6 Iowa, 500.

SEC. 215. An attorney has a lien for a general balance of compensation upon:

1. Any papers belonging to his client, which have come into his hands in the course of his professional employment;

2. Money in his hands belonging to his client;

3. Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services.

4. After judgment in any court of record, such notice may be given and the lien made effective against the judgment debtor, by entering the same in the judgment docket opposite the entry of the judgment.

The lien of an attorney on the money due to his client and in the hands of the adverse party, is binding from the date of notice to such party, and will have priority over proceedings in garnishment wherein the notice is subsequently served. *Meyers v. McHugh*, 16 Iowa, 335. But where the right to set off a judgment recovered in one action against that recovered in another between the same parties arises before notice of the lien is given, the right of set-off is superior. *Hurst v. Sheets et al.*, 21 Iowa, 501.

At any time before an attorney gives notice to the adverse party of his lien for fees upon money due his client, and in the absence of collusion between the parties to the suit, it is entirely competent for them to settle without reference to the claim of the attorney for his fees. *Casar v. Sargeant*, 7 Id., 317.

An attorney is entitled to a lien for his services in an action by giving notice thereof to the adverse party, against whom the judgment has been rendered, and after such notice the latter cannot escape responsibility to the attorney by paying the money to the clerk, though the attorney have notice thereof, nor do any act to defeat the lien, which can only be discharged by payment or legal proceedings. *Fisher v. The City of Oskaloosa*, 23 Id., 381. See *Cross v. Ackley*, 40 Id., 493.

The claim by an attorney of a lien on the judgment must be in writing to bind the judgment creditor. *Phillips v. Gorman*, 43 Id., 101. See second head-note on page 350, 48 Iowa.

Under this section it was held that a lien of an attorney extends only to the amount which is ultimately found to be due his client after allowing off-sets. *Giffany v. Stewart*, 61 Id., 207.

The right to a lien on money due his client in the hands of the adverse party, given an attorney by this provision of the code, is not confined to actions on contract, but exists in all actions where there is a money liability from the adverse party to his client. *Smith & Bayliss v. The C., R. I. & P. R. Co.*, 56 Id., 720.

The notice of the attorney's claim for a lien served upon an agent of a corporation defendant is a sufficient service to bind the corporation, and such notice may be inserted in the original notice and served with it, and a single notice is sufficient to cover all services rendered in the action by the claimants, whether before or after the service of the notice. *Id.*

A contract between an attorney and his client that the former shall have for his compensation one-third of the amount that may be ultimately recovered in the action, the attorney to pay no costs, except his own personal expenses, is not champertous. *Winslow v. Central R'y of Iowa*, 71 Id., 197.

SEC. 216. Any person interested may release such lien, by executing a bond in a sum double the amount claimed, or in such sum as may be fixed by a judge, payable to the attorney, with surety to be approved by the clerk of the supreme or district court, conditioned to pay an amount finally found due the attorney for his services, which amount may be ascertained by suit on the bond. Such lien will be released, unless the attorney, within ten days after demand therefor, files with the clerk a full and complete bill of particulars of the services and amount claimed for each item, or written contract with the party for whom the services were rendered.

A, an attorney, claimed a lien upon a judgment which he had recovered for his client, C, and subsequently the latter filed a bond, in conformity with section 216 of the code, to discharge the lien. *Held*, that the lien was not kept in force by the filing of a bond by the attorney in compliance with sections 225 and 226 of the code. *Cross v. Ackley*, 40 Iowa, 493.

SEC. 217. Any court of record may revoke or suspend the license of an attorney or counselor at law to practice therein, and a revocation or suspension in one county operates to the same extent in the courts of all other counties.

In order to revoke or suspend the license of an attorney there must be an accusation and charges—a notice and a “day in court”; and it cannot be done summarily by order of the court. *The State of Iowa v. Start*, 7 Iowa, 499.

SEC. 218. [Causes for revocation.]—The following are sufficient causes for revocation or suspension:

1. When he has been convicted of a felony, or misdemeanor involving moral turpitude, in either of which cases the record is conclusive evidence;
2. When he is guilty of a willful disobedience or violation of the order of the court, requiring him to do or forbear an act connected with, or in the course of his profession;
3. For a willful violation of any of the duties of an attorney or counselor as hereinbefore prescribed;
4. For doing any other act to which such a consequence is, by law, attached.

SEC. 219. The proceedings to remove or suspend an attorney may be commenced by the direction of the court, or on motion of any individual. In the former case, the court must direct some attorney to draw up the accusation; in the latter, the accusation must be drawn up and sworn to by the person making it.

It is probable that the district court, in the exercise of its inherent authority, could require a

member of the bar to prosecute charges, filed under this section, against a practicing attorney, looking to his disbarment, but the exercise of such authority rests in the sound discretion of the judge. *Byington v. Moore*, 70 Iowa, 206.

A proceeding upon charges preferred by a private prosecutor to disbar an attorney is a special proceeding wherein a change of venue on account of the prejudice of the judge may be granted on the same conditions and upon compliance with the same rules as in ordinary actions. *The State v. Clarke*, 46 Id., 155.

SEC. 220. [**Same.**]—If the court deem the accusation sufficient to justify further action, it shall cause an order to be entered requiring the accused to appear and answer on a day therein fixed, either at the same or a subsequent term, and shall cause a copy of the accusation and order to be served upon him personally.

SEC. 221. [**Trial.**]—To the accusation he may plead or demur, and the issues joined thereon shall, in all cases, be tried by the court, all the evidence being reduced to writing, filed and preserved.

SEC. 222. [**Judgment.**]—If the accused plead guilty, or fail to answer, the court shall proceed to render such judgment as the case requires.

SEC. 223. [**Appeal.**]—In case of a removal or suspension being ordered by a district or circuit court, an appeal therefrom lies to the supreme court, and all the original papers, together with a transcript of the record, shall thereupon be transferred to the supreme court, to be there considered and finally acted upon. A judgment of acquittal by the district or circuit court is final.

SEC. 224. [**Misdemeanor: when guilty.**]—An attorney who receives the money or property of his client in the course of his professional business, and refuses to pay or deliver it in a reasonable time after demand, is guilty of a misdemeanor.

SEC. 225. When the attorney claims to be entitled to a lien upon the money or property, he is not liable to the penalties of the preceding section until the person demanding the money proffers sufficient security for the payment of the amount of the attorney's claim when it is legally ascertained.

SEC. 226. [**Same.**]—Nor is he in any case liable as aforesaid, provided he gives sufficient security that he will pay over the whole, or any portion thereof, to the claimant when he is found entitled thereto.

See note *y*, ante, p. 49.

CHAPTER 10.

OF JURORS.

SECTION 227. All qualified electors of the state, of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, are competent jurors in their respective counties.

The failure of a defendant in a criminal action to object to a juror on the ground of incompetency is not cured by verdict. If the defendant knew at the time the jury was sworn that any of them were not qualified to act as such, he would have waived his right to object thereafter, but not otherwise. *The State v. Groome*, 10 Iowa, 308, 316.

The defendant may consent to go to trial with but eleven jurors, and a trial in this manner, with such consent, is not in conflict with the constitution. The defendant may with the consent of the state and the court waive a statutory provision in his favor. *The State v. Kaufman*, 51 Id., 578.

SEC. 228. The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States or of this state; all practicing attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or other institution of learning; and all persons disabled by bodily infirmity, or over sixty-five years of age.

SEC. 229. Any person may be excused from serving on a jury when his

own interests or those of the public will be materially injured by his attendance, or when the state of his own health, or the death, or the sickness of a member of his family, requires his absence.

SEC. 230. [**Time to appear.**]-Unless the judge otherwise orders, jurors shall be summoned to appear at ten o'clock A. M. of the second day of the term, at which time they shall be called and all excuses heard and determined by the court. If any person summoned fail to appear without furnishing a sufficient excuse, the court shall issue a rule returnable at that or the succeeding term, requiring him to appear, and show cause why he should not be fined for contempt, and unless he renders a sufficient excuse for such failure, the court may fine him in any amount not exceeding ten dollars, and shall require him to pay the costs, and stand committed until the fine and costs are paid.

SEC. 231. (*As amended by ch. 42, 21st g. a., and by ch. 128, 21st g. a.*) [**Grand jury consists of five.**]-That from and after the first day of January, A. D. 1887, the grand jury shall be composed as follows: In counties having a population of sixteen thousand inhabitants or less, the grand jury shall be composed of five members; and in counties having a population of more than sixteen thousand inhabitants the grand jury shall be composed of seven members. The trial jurors in the counties containing less than fifteen thousand inhabitants shall consist of fifteen, unless the judge otherwise orders, but in counties containing fifteen thousand inhabitants or over, the number of trial jurors shall be twenty-four. Such population shall in each case be determined by the last preceding national or state census. (*Provided, that where a single county constitutes a district, the court may increase the number of such trial jurors not to exceed twenty-two.*)

SEC. 232. [**Failure of trial jurors to attend.**]-Should there not be the number of trial jurors in attendance, as provided in the preceding section, by reason of a failure of the persons summoned to attend, or because excused as provided in section two hundred and thirty of this chapter, the requisite number of persons to supply the deficiency shall be drawn in the same manner as provided in sections two hundred and forty and two hundred forty-one of this chapter. The persons so drawn shall be forthwith summoned to appear, and serve as trial jurors during the term.

Where there were three jurors of the panel failed to attend and one was excused, and the sheriff by order of the court called a bystander to serve for the term, it was held that a party not satisfied with this mode of filling up the jury with a talesman should have challenged the talesman and thus compelled an additional showing under this section, and that a challenge to the panel was bad. *Buford & Co. v. McGetchel*, 60 Iowa, 298.

The court is not obliged to delay the trial of a cause in order to fill the panel of the jury, when exhausted, from the body of the county, as provided in this section, but may direct the panel to be filled from the bystanders, this section being directory only. *The State v. Harris*, 64 Id., 287.

Where the district judge ordered twenty persons to be summoned as trial jurors for the term, but two of them failed to appear, and one was excused, and after the defendant had peremptorily challenged four of those present and the panel was exhausted, held that the court was not obliged to delay the trial until the panel could be filled from the jury lists and summoned from the body of the county, as provided by this section, but might direct the panel to be filled from the bystanders—this section being directory only. *The State v. Harris*, 64 Id., 287.

SEC. 233. [**Discharge of.**]-If, in the judgment of the court, the business of the term does not require the attendance of all, or a portion of the trial jurors, they, or such portion as the court deems proper, may be discharged. Should it afterwards appear that a jury is required, the court may direct them to be resummoned, or impanel a jury from the bystanders.

SEC. 234. **Two jury lists**, one consisting of seventy-five persons to serve as grand jurors, and one consisting of one hundred and fifty persons, or, in counties containing more than twenty thousand inhabitants, of two hundred and fifty persons, to serve as trial jurors, and composed of persons competent and liable to serve as jurors, shall annually be made in each county from which to select jurors for the year commencing on the first day of January.

That the lists of grand and petit jurors selected under section 234, and accompanying the proper election returns, are not authenticated by formal certificate, is not, in the absence of fraud, sufficient cause for setting aside an indictment. *The State v. Ansaleme*, 15 Iowa, 43. See *State v. DeLong*, 12 Id., 453.

Jurors for the circuit and district courts may be drawn from the same list. A separate list is not required for the circuit court. *The State v. Lawrence*, 38 Id., 51.

Where there were three jurors of the panel failed to attend and one was excused, and the sheriff, by order of the court called a bystander to serve for the term, it was held that a party not satisfied with this mode of filling up the jury with a talesman, should have challenged the talesman and thus compelled an additional showing under this section, and that a challenge to the panel was bad. *Buford & Co. v. McGetchel*, 60 Id., 298.

It is no valid objection to a grand jury that the judges of election in the various townships of the county returned in all *eighty-five* instead *seventy-five* names from which to select grand jurors. Neither does the fact that the names of the persons selected to compose the jury were not entered upon the election book, affect the validity of the jury. *The State v. Knight*, 19 Id., 94.

Under sections 234 and 239 grand jurors are selected for the first term of the district court in the year at which jurors are required, commencing next after the first day of January in each year, and to serve for one year, or until the corresponding term of the succeeding year. Consequently, where a term of the district court began on the 8th day of December, 1884, and continued into January, 1885, the grand jury impaneled in 1884 was competent to find an indictment during the term in January, 1885. *The State v. Winebrenner*, and 3 other cases, 67 Id., 230.

SEC. 235. Should there be less than the required number of such persons in any county, the list shall comprise all those who answer the above description in the same proportion.

SEC. 236. On or before the first Monday in September in each year, the county auditor shall apportion the number to be selected from each election precinct, as nearly as practicable in proportion to the number of votes polled therein at the last general election, and shall deliver a statement thereof to the sheriff.

The statute in relation to the mode of obtaining jurors was held to be directory, and a substantial compliance with its provisions sufficient. *The State v. Corney et al.*, 20 Iowa, 82.

In *The State v. Brandt*, 41 Id., 593, it was held by a majority of the court that an indictment will be set aside where there is a departure from the requirements of the statute affecting the substantial rights of the defendant; following *State v. Carney, supra*.

SEC. 237. **The sheriff shall cause a written notice** to be delivered to one of the judges of election in each precinct of the county, on or before the day of the general election in each year, informing them of the number of jurors apportioned for the ensuing year to their respective precincts.

SEC. 238. [**Duty of judges of election.**—The judges shall thereupon make the requisite selection, and return lists of names as selected to the auditor with the returns of the election, and in case the judges of election shall fail to make and return said lists as herein required, the county canvassers shall, at the meeting to canvass the votes polled in the county, make such lists for the delinquent precincts, and the auditor shall file said lists in his office and cause a copy thereof to be recorded in the election book.

SEC. 239. [**Term of service.**—Grand jurors shall be selected for the first term in the year at which jurors are required, commencing next after the first day of January in each year, and shall serve for one year. Trial jurors shall be selected for each term wherein they are required; but no person shall be required to attend as a trial juror more than two terms in the same year, and in counties containing a population of more than five thousand inhabitants, it shall be a cause of **challenge** that the person has served on a jury in a court of record within one year, unless he be a member of the regular panel.

See as to conflict between this section and section 2723 of the Revision of 1860.

SEC. 240. (*As amended by ch. 184, 17th g. a.*) **At least twenty days prior to the first day of any term** at which a jury is to be selected, the auditor or his deputy must write out the names on the lists aforesaid which have not been previously drawn as jurors during the year, on separate ballots, and the clerk of the district court, or his deputy, and sheriff [or his deputy] having compared said bal-

lots with the lists, and corrected the same, if necessary, shall place the ballots in a box provided for that purpose.

SEC. 241. (*As substituted by chap. 42, 21st g. a.*) [**Duty of judge of election.**]—(After thoroughly mixing the same, the clerk or his deputy shall draw therefrom the requisite number of jurors to serve as aforesaid, and shall, within three days thereafter, issue a precept to the sheriff commanding him to summon the said jurors to appear before the court as provided in section two hundred thirty of the code. When the grand jury shall be composed of five members only, the number drawn shall be eight, and when the grand jury shall be composed of seven members the number of grand jurors to be drawn shall be twelve; *provided*, that in drawing such jury not more than one person shall be drawn as a grand juror from any civil township, excepting where the grand jury is by law required to be drawn from a district containing fewer civil townships than the number of grand jurors required to be summoned; in which case, if the number of civil townships in such district be not less than one-half of the number of jurors required, not more than two persons shall be drawn as grand jurors from any such township; and if the number of civil townships be less than one-half of the number of jurors required, not more than three persons shall be drawn as grand jurors from any such township. If more persons shall be drawn from any civil township than are hereby authorized it shall be the duty of the officer drawing such grand jury to reject all superfluous names so drawn, and to proceed with the drawing until the required number of jurors shall be secured. No person shall serve as grand juror for two consecutive years.)

SEC. 242. **The sheriff shall immediately obey such precept, and, on or before the day for the appearance of said jurors, must make return thereof, and on failure to do so, without sufficient cause, is liable to be fined for a contempt in any amount not exceeding fifty dollars.**

The precept issued to the sheriff may be served by the deputy sheriff or a special constable appointed for the purpose. *The State v. Arthur*, 39 Iowa, 631.

SEC. 243. [**Grand jurors to attend.**]—Except when required at a special term which has been called in vacation, the grand jury need not be summoned after the first term, but must appear at the next term without summons, under the same penalty as though they had been regularly summoned.

SEC. 244. [**When precept is set aside.**]—Where, from any cause, the persons summoned to serve as grand or trial jurors fail to appear, or when from any cause the court shall decide that the grand or trial jurors have been illegally elected or drawn, the court may set aside the precept under which the jurors were summoned, and cause a precept to be issued to the sheriff commanding him to summon a sufficient number of persons from the body of the county, to serve as jurors at the term of court then being holden, which precept may be made returnable forthwith, or at some subsequent day of the term, in the discretion of the court.

Where, in a civil action, after all of the regular jurors but one had been excused by the court, a party demanded and insisted upon having the regular jury, and the court, after the one remaining juror was called, ordered the sheriff to fill up the panel with talesmen, and the cause being tried by one regular juror and eleven talesmen, it was *held* that there was no such abuse of the discretion vested in the court below as to the manner of obtaining the requisite number of petit jurors, as to warrant the interference of the supreme court. *Emerick v. Sloan*, 18 Iowa, 139.

Where a challenge, for the cause that the juror was not of the regular panel, and had served as a juror in a court of record within one year before that time, is overruled, and the party making the challenge fails to exhaust his peremptory challenges, the action of the court, though erroneous, will be held to be error without prejudice. *Barnes v. The Incorporated Town of Newton*, 46 Id., 567.

When the list of jurors had been destroyed by fire, it was held competent under this section for the district court to cause a precept to be issued to the sheriff, directing him to summon a new panel from the body of the county. And where, in such case, twenty-four jurors were selected from ten of the twenty townships of the county, it was *held* to be a sufficient compliance with this section requiring their selection from the body of the county. *The State v. Arthur*, 39 Id., 631.

It is competent for the court to direct in what form evidence shall be presented upon the trial of a challenge to a panel of jurors. *The State v. Linde et al.*, 54 Id., 139.

Where, on the challenge of a person held to answer a criminal charge, the court sustained the same and discharged the grand jury and another jury was summoned and impaneled as provided in this section, the defendant being indicted by the new grand jury moved to quash the indictment on the ground that the first grand jury was illegally discharged, and consequently, that the second one was illegally drawn. *Held*, that the order discharging the first grand jury could not be thus collaterally attacked. *The State v. Hart*, 67 Id., 142.

SEC. 245. (*As amended by ch. 16, laws of 1874.*) [**How paid.**].—(At the close of each term the clerk of the court must make out a certificate to each juror of the amount to which he is entitled for his services, which certificate shall authorize the county auditor to issue a warrant to each juror for the said amount on the county treasurer without the same being audited by the board of supervisors.)

CHAPTER 11.

OF SECURITIES AND INVESTMENTS.

SECTION 246. [**Form of security.**].—Whenever security is required to be given by law, or by order on judgment of a court, and no particular mode is prescribed, it shall be by bond.

SEC. 247. [**For whose benefit.**].—Such security, when not otherwise directed, may, if for the benefit of individuals, be given to the party intended to be thereby secured. If in relation to the public matters concerning the inhabitants of one county, or part of a county, it may be made payable to the county; if concerning the inhabitants of more than one county, it may be made payable to the state. But a mere mistake in these respects will not vitiate the security.

A mistake as to the name of the obligee in a sheriff's bond will not operate to render it invalid. *Charles v. Haskins*, 11 Iowa, 329.

Where a guardian's bond was made payable to the county instead of to the parties interested, it was held not invalid as to the latter, and that suit might be brought thereon in the name of any one intended to be secured who has sustained an injury by a breach thereof. Nor will the fact that the bond is thus made payable, or the failure of the proper officer to enter of record the approval thereof, invalidate the title derived under the guardian's sale. *Pursley v. Hayes*, 22 Id., 11.

SEC. 248. **No defective bond or other security, or affidavit**, in any case, shall prejudice the party giving or making it, provided it be so rectified within a reasonable time after the defect is discovered, as not to cause essential injury to either party.

The power given to the court to allow an amendment to a defective bond or other security, under section 248 above, was held not to authorize the affixing of an omitted stamp to an appeal bond in a case appealed from a justice of the peace. *Hughes v. Strickler*, 19 Iowa, 413, 418.

The jurat of an affidavit, offered in evidence, may be amended by adding thereto a reference to the notarial seal of the notary before whom the affidavit was made, which reference was omitted in the original jurat. *Hallet v. The C. & N. W. Ry Co.*, 22 Id., 259.

The affidavit may be amended in substance as well as in form. *Langworthy v. Waters et al.*, 11 Id., 432.

Where the penalty in an attachment bond is for too small an amount, the same may be amended by filing a new bond in the proper amount. *Gourley v. Carmody*, 23 Id., 212; *Elliott v. Stevens & Co.*, 10 Id., 418.

So, also, where an attachment bond recited that the proceedings were being had in the district court of a county which was not the one in which the action was in fact commenced; *held*, that the defect could be cured by an amended bond being filed. *Holmes & Avery v. Budd*, 11 Id., 126.

An affidavit for an attachment may be amended, and the plaintiff will not be prejudiced by the defect corrected; nor is it necessary to issue and levy a new writ upon the property attached. *Wadsworth & Wells v. Cheney & Stinson*, 13 Id., 576.

SEC. 249. **The surety in every bond** provided for by this code, must be a

a resident of this state, and worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured. Where there are two or more sureties in the same bond, they must, in the aggregate, have the qualification prescribed in this section.

The sureties in the aggregate, if more than one, must have the qualifications required by the statute. Per DILLON, J., in *Wasson v. Mitchell*, 18 Iowa, 154.

SEC. 250. **The officer whose duty it is to take a surety** in any bond provided for by this code shall require the person offered as surety to make affidavit of his qualification, which affidavit may be made before such officer, or other officer authorized to administer oaths. The taking of such an affidavit shall not exempt the officer from any liability to which he might otherwise be subject for taking insufficient security.

A justice of the peace may refuse to accept the surety on an appeal bond, unless he will justify that he is worth the required amount over and above his liabilities and property exempt from execution. *Lane & Wilson v. Goldsmith*, 23 Id., 240.

The act of the clerk in passing upon the sufficiency of a stay bond is not a judicial one, and he is liable to any damages accruing to the judgment creditor by reason of his negligence in approving an insufficient bond. *Hubbard v. Switzer*, 47 Id., 681.

SEC. 251. **Where investments of money are directed** to be made, and no mode of investment is pointed out by statute, they must be made in the stocks or bonds of this state, or of those of the United States, and upon bond or mortgage of real property of the clear unincumbered value of at least twice the investment.

SEC. 252. [**When discharged.**].—When such investment is made by order of any court, the security taken shall in no case be discharged, impaired, or transferred, without an order of the court to that effect entered on the minutes thereof.

SEC. 253. [**Reinvestment.**].—The clerk or other person appointed in such cases to make the investment must receive all moneys as they become due thereon, and apply or reinvest the same under the direction of the court, unless the court appoint some other person to do such acts.

SEC. 254. Once in each year, and oftener if required by the court, the person so appointed must, on oath, render to the court an account in writing of all moneys so received by him, and of the application thereof.

SEC. 255. [**Delivery of property or deposit of money.**].—When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or property capable of delivery, which is in any degree the subject of litigation, and which is held by him as trustee for another party, the court, or judge thereof, may order the same to be deposited in the office of the clerk, or delivered to such party, with or without security, subject to the further direction of the court; or may order such money to be deposited in a bank with the consent of the parties in interest, to the credit of the court in which the action is pending, and the same shall be paid out by such bank, only upon the check of the clerk annexed to the certified order of the court directing such payment.

Money paid to the clerk of the courts, upon a judgment recorded in his office, is received by him in virtue of his office, and upon his failure to pay the same over to the judgment creditor, an action may be maintained on his official bond. *Morgan v. Long*, 29 Id., 434.

SEC. 256. [**Obedience compelled.**].—Whenever a court, or judge, in the exercise of its or his authority, has ordered the deposit or delivery of money or other property, and the order is disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff to take the money or property, and deposit or deliver it in conformity with the directions of the court or judge.

SEC. 257. **The sheriff has the same power** in such cases, as when acting under an order for the delivery of personal property.

(CHAPTER 157, LAWS OF 1886.)

RELATING TO GIVING OF SECURITY BONDS.

An Act to facilitate the giving of bonds required by law, and authorize the acceptance of fidelity surety companies as sureties upon such bonds, and prescribing the rights and liabilities of such companies as such sureties.

SECTION 1. [**Persons required to give bonds.**]*—Be it enacted by the general assembly of the state of Iowa:* Whenever any person who now or hereafter may be required or permitted by law to make, execute and give bond or undertaking with security conditioned for the faithful performance of any duty, or of the doing or not doing of any thing in said bond or undertaking specified, any officer who is now or shall hereafter be required to approve the sufficiency of any such bond or undertaking may, in the discretion of such officer, in lieu of the securities now required by law, upon satisfactory evidence, accept such bond or undertaking and approve the same whenever the conditions of such bond or undertaking are guaranteed by a company or corporation duly organized or incorporated within this state, under the laws thereof, or authorized by law to do business in this state, and authorized to guarantee the fidelity of persons holding positions of public or private trusts; and which company shall have an unimpaired paid up capital of not less than one hundred and fifty thousand dollars; *provided*, that nothing herein contained shall apply to bonds in criminal cases.

SEC. 2. [**Release of surety.**]*—Such company may be released from its liability as such surety on any bond on the same terms and conditions, and in the same manner, as is by law prescribed for the release of individual persons as such sureties, it being the true intent and meaning of this act to enable companies created, incorporated or chartered for the purpose of insuring the fidelity of persons holding places of public or private trust, to become surety on bonds required by law, subject to all the rights and liabilities of private persons.*

SEC. 3. [**Notice given.**]*—Whenever suit is required to be brought on any bond given by such company, service shall be had upon any agent of such company in this state, and if there is no agent in the state, then service may be had by serving the auditor of state thirty days before the term of court in which the suit is sought to be brought, and it shall be the duty of the auditor of state to immediately, upon service being made upon him, mail a copy of such notice to such company at their principal place of business, and any notice so served shall be deemed to be good and sufficient service on any such company.*

SEC. 4. Any company which shall execute any bonds as surety, under the provisions of this act, shall be estopped in any proceeding to enforce the liability which it shall have assumed to incur, to deny its corporate power to execute such instrument or assume such liability; and *provided*, that private property of stockholders shall be liable for debts of the corporation to the full amount of capital stock held by such stockholders.

SEC. 5. Section 679, of the code, shall not apply to bonds executed by fidelity surety companies, in accordance with the provisions of this act.

SEC. 6. All acts or parts of acts inconsistent with this act are, and the same are hereby, repealed.

Approved April 10, 1886.

CHAPTER *12.

OF NOTARIES PUBLIC.

SECTION 258. [For what time appointed.]—The governor may appoint and commission one or more notaries public in each county, and may at any time revoke such appointment. The commissions of all notaries public heretofore or hereafter issued prior to the fourth day of July, A. D. 1876, shall expire on that day, and commissions subsequently issued shall be for no longer period than three years, and all such commissions shall expire on the fourth day of July in the same year. The secretary of state shall, on or before the first day of June, A. D. 1876, and every three years thereafter, notify each notary when his commission will expire.

The certificate of acknowledgment of a notary public must be in the county for which he is a notary, or the acknowledgment will be defective. *Willard v. Cramer*, 36 Iowa, 22.

Affixing his seal with the county engraven thereon, does not cure the defect. *Id.*

The record of a bill of sale or other instrument thus defective acknowledged does not impart notice. *Id.*

A notary public is a public officer, and while acting *de facto*, his acts affecting third persons cannot be assailed. *Keeney v. Leas & Lyons*, 14 Id., 464.

Where a notary was duly appointed by the governor, but failed to file a bond as required by law, held, that he was an officer *de facto*, but not *de jure*. *Id.*

The certificate of a notary public must be authenticated by an impression thereon of his notarial seal containing the name of the state, and in the absence of such authentication, a deposition will be suppressed. *Stephens v. Williams*, 46 Id., 540.

The clerk of the county in and for which a notary public is appointed may certify to the fact of his appointment, but cannot certify to the genuineness of the notary's signature, which can only be evidenced by the proper notarial seal. *Id.*

Where the only seal attached to the notary's certificate was a wafer with the name and residence of the notary written thereon with a pen, it was held to be insufficient as a seal. *Id.*

A certificate of acknowledgment of a notary public which fails to show the county for which he is such notary, is fatally defective, and affixing his seal upon which the name of the county is engraven, will not cure the defect. *Willard v. Cramer*, 36 Id., 22.

SEC. 259. Before any such commission is delivered to the person appointed, he shall:

1. Procure a seal upon which shall be engraved the words "notarial seal" and "Iowa," with his surname at length, and at least the initials of his christian name;

2. Execute a bond to the state of Iowa in the sum of five hundred dollars, conditioned for the true and faithful execution of the duties of his office, which bond shall be approved by the clerk of the district court of the proper county;

3. Write on said bond, or a paper attached thereto, his signature, and place thereon a distinct impression of his official seal;

4. File such bond with attached papers, if any, in the office of the secretary of state;

5. Remit to such secretary the fee required by law. [When the secretary of state is satisfied that the foregoing particulars have been fully complied with, he shall deliver the commission to the person appointed.]

A notary public is a public officer, and while acting *de facto*, his acts affecting third persons cannot be assailed. *Keeney v. Leas & Lyon*, 14 Iowa, 464.

Where a notary was duly appointed by the governor, but failed to file a bond as required by law; held, that he was an officer *de facto*, but not *de jure*. *Id.*

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SEC. 260. (*Amended by ch. 100, 22d g. a.*) [**Secretary to forward copy.**]—When the secretary of state delivers the commission to the person appointed, he shall make a (certificate of such appointment) and forward the same to the clerk of the district court of the proper county, who shall file and preserve the same in his office, and it shall be deemed sufficient evidence to enable such clerk to certify that the person so commissioned is a notary public during the time such commission is in force.

SEC. 261. [**Revocation.**]—Should the commission of any person appointed notary public be revoked by the governor, the secretary of state shall immediately notify such person, and the clerk of the district court of the proper county, through the mail.

SEC. 262. [**Powers.**]—Each notary is invested with the powers and shall perform the duties which pertain to that office by the custom and law of merchants.

SEC. 263. [**Keep record of notices sent.**]—Every notary public is required to keep a true record of all notices given or sent by him, with the time and manner in which the same were given or sent, and the names of all the parties to whom the same was given or sent, with a copy of the instrument in relation to which the notice is served, and of the notice itself.

The certificate of a notary public, showing the manner in which notice of protest was served upon parties, is not rendered inadmissible as evidence because it was not made at the time of the presentation and protest. *Chatham Bank v. Allison*, 15 Iowa, 357.

SEC. 264. **On the death, resignation, or removal** from office, of any notary, his records, with all his official papers, shall, within three months therefrom, be deposited in the office of the clerk of the district court in the county for which such notary shall have been appointed; and if any notary, on his resignation or removal, neglects for three months so to deposit them, he shall be held guilty of a misdemeanor and be punished accordingly, and be liable in an action to any person injured by such neglect; and if an executor or administrator of a deceased notary willfully neglects for three months after his acceptance of that appointment, to deposit the records and papers of a deceased notary which came into his hands in said clerk's office, he shall be held guilty of a misdemeanor and punished accordingly.

SEC. 265. If a notary remove his residence from the county for which he was appointed, such removal shall be taken as a resignation.

SEC. 266. [**Duty of clerk.**]—Each clerk aforesaid shall receive and safely keep all such records and papers of the notary in the cases above named, and shall give attested copies of them under the seal of his court, for which he may demand such fees as by law may be allowed to the notaries, and such copies shall have the same effect as if certified by the notary.

CHAPTER 13.

OF COMMISSIONERS IN OTHER STATES.

SECTION 267. **The governor may appoint** and commission in each of the United States and territories, one or more commissioners, to continue in office for the term of three years from the date of commission, unless such appointment shall be sooner revoked by the governor; such commissioners, when qualified as hereinafter provided, shall be empowered to administer oaths, take depositions and

affidavits to be used in the courts of this state, and to take acknowledgments of proof of deeds and other instruments to be recorded and used in this state.

SEC. 268. Each commissioner, exercising the authority conferred upon him by this chapter, shall have an **official seal**, on which shall be engraved the words, "COMMISSIONER FOR IOWA," with his surname at length, and at least the initials of his christian name; also the name of the state in which he has been commissioned to act, which seal must be so engraved as to make a clear impression on wax or wafer.

The seal of a commissioner of this state, resident in another state, is entitled to credit as evidence only where the names of the commissioner and of the state for which he acts are so engraved upon it that they appear in the impression of the same upon paper. An impression of a seal giving only the name of the commissioner, upon which the name of the state is written with a pen, should not be admitted in evidence. *Gage et al. v. The Dubuque & P. R. Co. et al.*, 11 Iowa, 310.

SEC. 269. **A signature and impression of such seal** of any commissioner, qualified as herein provided, and corresponding with that on file in the office of the secretary of state, shall be entitled to the same credit as evidence in the courts and public offices of this state, as the signature and seal of a clerk of the district court or notary public of this state.

SEC. 270. [**Compensation.**]—Such commissioner is authorized to demand for his services the same fee as may be allowed for similar services by the laws of the state in which he is to exercise his office.

SEC. 271. [**Effect of local acts.**]—Oaths administered by any such commissioner, affidavits and depositions taken by him, and acknowledgments as aforesaid certified by him over his official signature and seal, are made as effective in law to all intents and purposes, as if done and certified by a clerk of the district court or justice of the peace of this state.

SEC. 272. [**Qualification.**]—Before such commissioner can perform any of the duties of his office, he is required to take and subscribe an oath that he will support the constitution of the United States and the constitution of the state of Iowa, and that he will faithfully perform the duties of such office; which oath shall be taken and subscribed before some judge or clerk of a court of record in the state in which the commissioner is to exercise his appointment, and certified under the hand of the person taking it, and the seal of his court, or before a duly authorized commissioner for Iowa, resident in said state, which certificate shall be filed in the office of the secretary of state of this state, and on which shall be the official signature and a clear impression of the official seal of such commissioner.

SEC. 273. [**Duty of secretary of state.**]—The secretary of state, upon the reception of the certificate as provided in section two hundred and sixty-nine of this chapter, shall examine the same, and if this chapter has been strictly complied with, it shall be his duty to forward to said commissioner a certificate properly attested, that he has been duly commissioned a commissioner for Iowa; and that he is duly qualified as required by the laws of Iowa authorizing the appointment of commissioners in other states; and it shall be the further duty of the secretary of state to forward a duplicate of said certificate to the secretary of state in which said commissioner may have been appointed.

SEC. 274. [**List to be published.**]—The secretary of state shall cause to be published, with the session laws of each general assembly, a full and complete list of all commissioners for Iowa who are duly qualified, and whose commissions do not expire on or before the fourth day of July of the year in which such publication is made, which list shall give the post office address, date of qualification, and date of expiration of the commission of each commissioner.

SEC. 275. [**Power of commissioners of other states in this state.**]—Commissioners of the like nature appointed in this state, under the authority of any other of the United States or territories, are hereby invested with the au-

thority of a justice of the peace to issue subpoenas, requiring the attendance of witnesses before them to give their testimony by deposition or affidavit, in any matter in which such deposition or affidavit may be taken by the law of such other state, and they are also authorized to administer oaths in any matter in relation to which they are required or permitted by such law of the other states; and false swearing in such cases is hereby made subject to the penal laws of this state relating to perjury; provided that such commissioner shall cause to be filed in the office of the secretary of state a certificate of the secretary of the state or territory for which he claims to act, that he is properly appointed and qualified as required by the laws of said state, and has in his possession a certificate that this section has been complied with.

SEC. 276. [**Record of appointments to be kept.**—The secretary of state shall keep in his office a complete record of all appointments made by the governor, pursuant to the provisions of this chapter.

CHAPTER 14.

OF THE ADMINISTRATION OF OATHS.

SECTION 277. (*As amended by ch. 126, 21st g. a.*) [**When authorized.**—The following officers are authorized to administer oaths, and take and certify the acknowledgment of instruments in writing: Each judge of the supreme court; each judge of the district court; *each judge of the circuit court*; the clerk of the supreme court; [the deputy clerk of the supreme court;] each clerk of the district court as such, or as clerk of the circuit court; each deputy clerk of the district and circuit courts; each county auditor; each deputy county auditor; each sheriff and his deputies, in cases where they are authorized by law to select commissioners or appraisers, or to impanel jurors for the view or appraisal of property, or are directed as an official duty to have property appraised, or take the answers of garnishees; each justice of the peace within his county;

(*As amended by ch. 62, 18th g. a.*) [**Who authorized.**—[The governor of the state, the secretary of state, the auditor of state, and the treasurer of the state, are authorized to administer oaths in any matter pertaining to the business of their respective offices, or that may come before them for consideration and action as members of the executive council.]

(Took effect by publication in newspapers, March 30, 1880.)

SEC. 278. [**Affirmation.**—Persons conscientiously opposed to swearing may affirm, and shall be subject to the penalties of perjury as in case of swearing.

TITLE IV.

RELATING TO COUNTY, TOWNSHIP, TOWN, AND CITY GOVERNMENT.

CHAPTER 1.

OF COUNTIES.

SECTION 279. Each county is a body corporate for civil and political purposes only, and as such may sue and be sued; shall keep a seal such as provided by law; may acquire and hold property, and make all contracts necessary or expedient for the management, control, and improvement of the same; and, for the better exercise of its civil and political powers, may make any order for the disposition of its property, and may do such other acts and exercise such other powers as may be allowed by law.

Counties are not held liable to private actions for the neglect of their officers in respect to highways, unless the statute has by express provision created the liability. *Soper v. Henry County*, 26 Iowa, 264.

Counties are corporations for political purposes, and as such are clothed with the attribute of perpetual succession. *Prescott v. Gonser*, 34 Id., 175, 177.

A county as a municipal corporation, having authority to hold and dispose of lands granted to it, possesses the incidental power, the same as a natural person, to do, through its proper officers, whatever in their judgment may be necessary to preserve and protect its interests in and title to the same. It was accordingly held that a county, through its board of supervisors, in view of the fact that its interests and claims in respect to the swamp lands under congressional and state grants were involved in doubt, might make a valid contract with an individual to the effect that in case he should succeed through his efforts and labor in having the claims of the county established and allowed by the general government, he should be entitled to receive, as compensation for his services, one-half the land, or the indemnity granted in lieu thereof. *Allen v. Cerro Gordo County*, 34 Id., 54. Nor is it necessary that such a contract should be submitted to a vote of the people. *Id.*

The approaches to a bridge constitute a part of the bridge itself, and the county is bound to so construct its bridges, including approaches, and maintain the same, that they shall be safe for travelers, and is liable for damages caused by any defects in the bridges or approaches thereto. *Albee v. Floyd County*, 46 Id., 177.

In an action against a county for injuries caused by the falling of a bridge, the records of the board of supervisors are not admissible to show that they appropriated money for repairing or reconstructing the bridge. *Titler v. Iowa County*, 48 Id., 90.

To establish the liability of the county it must be shown that prior to the accident the county had assumed control of the bridge, or made appropriations for building or repairing it. *Id.*

SEC. 280. [Jurisdiction.]—Counties bounded by a stream or other waters, have concurrent jurisdiction over the whole of the waters lying between them.

SEC. 281. [County seat relocation.]—Whenever the citizens of any county desire the relocation of their county seat, they may petition their board of supervisors respecting the same at any regular session.

A petition for the submission of the question of the relocation of a county seat must be presented at a regular session of the board of supervisors. The board is not authorized to entertain such petition at an adjourned session. *Ellis v. Board of Supervisors of Harrison County*, 40 Iowa, 301.

SEC. 282. Such petition shall designate the place at which the petitioners

desire to have the county seat relocated, and shall be signed by none but legal voters of said county, and shall be accompanied by affidavits sufficient to satisfy said board that the signers are all legal voters of said county, and that the signatures on said petition are all genuine.

Under this section it is a compliance therewith to show by affidavit that the signers of the petition were legal voters of the county at the time of signing the same. *Stone v. Miller*, 60 Iowa, 243, 248.

SEC. 283. Remonstrances, signed by legal voters of the county only, and verified in like manner as the petition, may also be presented to the board. If the same persons petition and remonstrate they shall be counted only on the remonstrance, and if a greater number of legal voters remonstrate against the relocation than petition for it, no election shall be ordered.

In determining the sufficiency of a petition for removal of a county seat, and the genuineness of the signatures thereto, the board of supervisors act in a judicial capacity, but their jurisdiction is limited to a determination of the matters prescribed by the statute, upon the evidence therein specified; they have no power to consider evidence other than the affidavits which accompany the petition and remonstrance. *Herrick v. Carpenter et al.*, 54 Iowa, 340. See, also, *Baker v. The Board, etc.*, 40 Id., 226; *Bennett et al. v. Hetherington et al.*, 41 Id., 142.

SEC. 284. Sixty days' notice of the presentation of such petition shall be given by three insertions in a weekly newspaper, if there be one printed in the county; if no paper be therein printed, by posting the same in every township in the county, and on the door of the court house therein.

It was held in *Dishon v. Smith, County Judge*, 10 Iowa, 212, that the provisions of chapter 46, laws of 1855, prescribing the time and manner of giving notices of the presentation of a petition for holding an election on the question of removing a county seat, were directory merely, and the absence of such notice did not invalidate an election of which the electors had due notice.

The notice of the presentation of a petition respecting the removal of a county seat, required by section 284 of the code, is sufficient if one of the three publications be made sixty days before the petition is presented. *Bennett v. Hetherington*, 41 Id., 142.

After a petition and remonstrance have been presented to the board of supervisors, respecting the removal of the county seat, the board is not authorized to hear and consider an application of signers asking that their names be stricken from the remonstrance. *Loomis v. Bailey*, 45 Id., 400.

Names appearing on the petition and also on the remonstrance are not to be counted on the former. *Duffees v. Sherman*, 48 Id., 287.

SEC. 285. [When vote may be taken.]—Upon the presentation of such petition, signed by at least one-half of all the legal voters in the county as shown by the last preceding census, if the notice hereinbefore prescribed shall have been given, the board shall order that at the next general election a vote shall be taken between said place and the existing county seat, and shall require a constable of each township in the county to post notices of such order in three public places in such township at least fifty days before said election, and shall also publish a notice of such election in some newspaper, if there be one published in the county, for four consecutive weeks, the last publication to be at least twenty days before said election.

To entitle the applicants to a submission of the question to the people, the number of signers to the petition must not only be at least one-half the legal voters of the county, but should also be greater than the number of remonstrants. *Loomis et al. v. Bailey et al.*, 45 Iowa, 400.

SEC. 286. [How conducted.]—Such election shall be conducted as elections for county officers. The ballot shall state that it was cast for the county seat, and name the place voted for.

The language of a ballot on the removal of a county seat, as in ordinary elections, is to be construed in the light of all the facts connected with the election, and if the ballot expresses the intention of the voter beyond a reasonable doubt, it is sufficient without regard to technical inaccuracies. *Hawes v. Miller et al.*, 56 Iowa, 395.

SEC. 287. [Removal of.]—If the point designated in the petition obtain a majority of all the votes cast, the board of supervisors shall make a record thereof, and declare the same to be the county seat of said county, and shall remove the records and documents thereto as early as practicable thereafter.

SEC. 288. [How often.]—The vote for re-location above provided for, shall not take place in any county oftener than once in three years.

It was held under revision, section 231, and chapter 49, laws of 1862, that these did not provide the only remedy by which a controversy relative to the relocation of a county seat can be settled, but an injunction will be granted to restrain the removal of the records and offices to a new point, where the petition alleges fraud and illegality sufficient to invalidate the proceedings, and prays for a decree declaring the election void on account thereof. *Sweatt v. Faviile*, 23 Iowa, 321.

SEC. 289. (As amended by ch. 80, 20th g. a. and ch. 91, 22d g., a.) [When bonds may issue.]—In any county, the outstanding indebtedness of which, on the first day of January, (1888,) exceed the sum of five thousand dollars, the board of supervisors, by a vote of two-thirds of all the members thereof, are empowered, if they deem it for the public interest, to fund the same and issue bonds of the county therefor, in sums not less than one hundred dollars, nor more than one thousand dollars, each having not more than ten years to run, and bearing a rate of interest not exceeding (six) per cent per annum, payable semi-annually, which bonds shall be substantially in the following form:

No.

The county of, in the state of Iowa, for value received, promises to pay, or order, at the office of the treasurer of said county in, on the first day of, 18 ..., or at any time before that date, at the pleasure of the county, the sum of dollars, with interest at the rate of per cent per annum, payable at the office of said treasurer semi-annually, on the first days of and in each year on presentation and surrender of the interest coupons hereto attached. This bond is issued by the board of supervisors of said county under the provisions of chapter ... of the code of Iowa, and in conformity with a resolution of said board dated day of, 18....

In testimony whereof, the said county, by its board of supervisors, has caused this bond to be signed by the chairman of the board, and attested by the auditor, with the county seal attached, this day of, 18....



.....,
Chairman of the board of supervisors.

Attest:

.....
Auditor.

And the interest coupon shall be in the following form:

\$..... The treasurer of county, Iowa, will pay the holder hereof, on the day of, 18...., at his office in,dollars, for interest on county bond No, issued under provisions of chapter..... of the code of Iowa.

.....,
County auditor.

SEC. 290. (As amended by ch. 80, 20th g. a., and ch. 71, 22d g. a.) [Disposition of bonds.]—(Whenever bonds, issued under this chapter, shall be duly executed, numbered consecutively and sealed, they shall be delivered to the county treasurer and his receipt taken therefor, and he shall stand charged on his official bond with all bonds delivered to him and the proceeds thereof, and he shall sell the same, or exchange them, on the best available terms for any legal indebtedness of the county, outstanding on the first day of January, (1888), but in neither case for a less sum than the face value of the bonds and all interest accrued on them at the date of such sale or exchange. And if any portion of the said bonds are sold for money, the proceeds thereof shall be applied exclusively for the payment of liabilities existing against the county at and before the date above named. When they are exchanged for warrants and other legal evidences of county indebtedness, the treasurer shall at once proceed to cancel such evidences of indebtedness, by endorsing on

the face thereof the amount for which they were received, the word "canceled" and the date of cancellation. He shall also keep a record of bonds sold or exchanged by him by number, date of sale, amount, date of maturity, the name and postoffice address of purchasers, and, if exchanged, what evidences of indebtedness were received therefor, which record shall be open at all times for inspection by the public. Whenever the holder of any bond shall sell or transfer it, the purchaser shall notify the treasurer of such purchase, giving at the same time the number of the bond transferred and his postoffice address; and every such transfer shall be noted on the record. The treasurer shall also report, under oath, to the board at each regular session, a statement of all bonds sold or exchanged by him since the preceding report, and the date of such sale or exchange, and when exchanged, a list or description of the county indebtedness exchanged therefor, and the amount of accrued interest received by him on such sale or exchange, which latter sum shall be charged to him as money received on bond fund, and so entered by him on his books; but such bonds shall not be exchanged for any indebtedness of the county except by the approval of the board of supervisors of said county.)

SEC. 291. [**Tax levied to pay bonds.**].—The board of supervisors shall cause to be assessed and levied each year upon the taxable property of the county, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds issued in conformity with the provisions of this chapter accruing before the next annual levy, and such proportion of the principal that at the end of three years the sum raised from such levies shall equal at least twenty per cent of the amount of bonds issued; at the end of five years at least forty per cent of the amount; and at and before the date of maturity of the bonds, shall be equal to the whole amount of the principal and interest; and the money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest-coupons, and for no other purpose whatever; and the treasurer shall open and keep in his books a separate and special account thereof, which shall at all times show the exact condition of said bond fund.

SEC. 292. [**How paid or redeemed.**].—Whenever the amount in the hands of the treasurer belonging to the bond fund, after setting aside the sum required to pay interest maturing before the next levy, is sufficient to redeem one or more bonds, he shall notify the owner of such bond or bonds that he is prepared to pay the same, with all interest accrued thereon, and if not presented for payment or redemption within thirty days after the date of such notice, the interest on such bonds shall cease, and the amount due thereon shall be set aside for its payment whenever presented. All redemptions shall be made in the exact order of their issuance, beginning at the lowest or first number; and the notice herein required shall be directed to the post office address of the owner, as shown by the record kept in the treasurer's office.

SEC. 293. [**When executive council may levy tax.**].—If the board of supervisors of any county which has issued bonds under the provisions of this chapter shall fail to make the levy necessary to pay such bonds, or interest-coupons, at maturity, and the same shall have been presented to the county treasurer, and the payment thereof refused, the owner may file the bond, together with all unpaid coupons, with the auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office; and the executive council shall, at their next session as a board of equalization, and at each annual equalization thereafter, add to the state tax to be levied in said county, a sufficient rate to realize the amount of principal or interest past due, and to become due prior to the next levy, and the same shall be levied and collected as a part of the state tax, and paid into the state treasury, and passed to the special credit of such county as bond tax, and shall be paid by warrant, as the payments mature, to the holder of such registered obligations, as shown by the register in the office of the state auditor, until the

same shall be fully satisfied and discharged; any balance then remaining being passed to the general account and credit of said county.

(CHAPTER 23, LAWS OF 1874.)

LIENS UPON PROPERTY OF POLITICAL CORPORATIONS.

An Act to provide for the creation and enforcement of liens in certain cases where corporations have issued bonds in excess of the amount allowed by law.

SECTION 1. [**Lien of holders where bonds have been issued in excess of lawful amount.**]*—Be it enacted by the general assembly of the state of Iowa:* That where a corporation has issued bonds in payment of an indebtedness exceeding five per centum on the value of the taxable property of such corporation, for labor upon and materials furnished in the erection and furnishing a building, and making improvements for such corporation, the holders of said bonds, or any of them, including the assignees thereof, shall have a lien upon such building and furniture and fixtures therein, and upon the land of such corporation on which such building and improvements are situated, to the amount of such indebtedness.

SEC. 2. [**Enforcement of lien.**]*—*Any person having a lien by virtue of this act, may enforce the same by equitable proceedings in any district or circuit court of the county where the property is situated, at any time before the maturity of said bonds, as though the action was for the labor done and material furnished and used in and about the erection of said building. All persons owning such bonds shall be made parties plaintiffs and defendants, and if the names of such owners are unknown they shall be made parties defendant, as provided by section twenty-six hundred and twenty-two of the code. The plaintiff shall set forth, and the court shall ascertain and determine the entire amount of the indebtedness on such bonds, and order that the property be sold to pay such indebtedness, and the proceeds of the sale shall be paid to the court to be by it distributed *pro rata* among the holders of such indebtedness; but no money judgment shall be rendered against such corporation, and the clerk shall not pay the proceeds of such sale to the holders of such indebtedness until they deliver him their bonds, which shall be by him canceled.

This chapter, assuming to give holders of bonds in excess of the constitutional limit a lien on the materials furnished, is unconstitutional and invalid. *Mosher v. The Ind. School District of Ackley*, 44 Iowa, 122.

CHAPTER 2.

OF THE BOARD OF SUPERVISORS.

SECTION 294. [**Number: election.**]*—*The board of supervisors in each county shall consist of three persons, except where the number may heretofore have been, or hereafter be, increased in the manner provided by section two hundred and ninety-nine of this chapter. They shall be qualified electors, and be elected by the qualified voters of their respective counties, and shall hold their office for three years.

SEC. 295. At the **general election** in each year, there shall be at least one supervisor elected in each county, who shall not be a resident of the same township with either of the members holding over, and who shall continue in office three years.

SEC. 296. [**Meetings of.**]—The members of the board shall meet at the county seat of their respective counties on the first Mondays of January, April, June, September, and the first Monday after the general election in each year, and such special meetings as are provided for by law.

SEC. 297. [**Quorum.**]—A majority of the board of supervisors shall be a quorum to transact business, but should a division take place on any question when only two members of the board are in attendance, the question shall be continued until there is a full board of supervisors.

SEC. 298. [**Resignation.**]—The absence of any supervisor from the county for six months in succession shall be a resignation of his office.

SEC. 299. [**Number: How increased.**]—The board of supervisors of any county may, and when petitioned to do so by one-fourth of the electors of said county, shall, submit to the qualified voters of the county at any regular election, the question, "Shall the number of supervisors be increased to 'five,' or 'seven,'" as the board shall elect in submitting the question. If the majority of the votes cast shall be for the increase of the number, then, at the next ensuing election for a supervisor, the requisite additional supervisors shall be elected, whose terms of office shall be determined by lot in such a manner that one-half of the additional members shall hold their office for three years, and one-half for two years. In any county where the number of supervisors has been increased to "five" or "seven," the board of supervisors, on petition of one-fourth of the legal voters of the county, shall submit to the qualified voters of the county at any regular election the question, "Shall the number of supervisors be reduced to 'five,' or 'three?'" If a majority of the votes cast shall be for the decrease, then the board of supervisors shall be reduced to the number indicated by such vote, and thereafter there shall be annually elected the number requisite to keep the board full.

As to the form of ballots for additional supervisors, see *Bradfield v. Wart*, 36 Iowa, 294.

(CHAPTER 39, LAWS OF 1874.)

SUPERVISOR DISTRICTS.

An Act to divide counties into supervisor districts [amendatory of code, title IV, chapter 2, "*of the board of supervisors*"].

SECTION 1. (*As amended by ch. 68, 17th g. a.*) [**District divided.**]—*Be it enacted by the general assembly of the state of Iowa:* That the board of supervisors of each county may, at their regular meeting in June, A. D. 1874 [or at their regular June meeting in any even numbered year thereafter], divide their respective counties by townships into a number of supervisor districts corresponding to the number of supervisors in their respective counties; [or at such regular meeting they may abolish supervisors' districts and provide for electing supervisors for the county at large.]

SEC. 2. Such districts shall be as nearly equal in population as possible, and shall each embrace townships as nearly contiguous as practicable, each of which said districts shall be entitled to one member of such board, to be elected by the electors of said district.

SEC. 3. [**Election of member.**]—In case such division, or any subsequent division, shall be found to leave any district or districts without a member of such board of supervisors, then at the next ensuing general election a supervisor shall be elected by and from such district having no member of such board; and if there be two such districts or more, then the new member or members of said board shall be elected by and from the district or districts having the greatest population ac-

ording to the last state census, and so on until each of said districts shall have one member of such board.

SEC. 4. Any county may be re-districted as provided by the preceding sections of this act, once in each and every two years, and not oftener, and nothing herein contained shall be construed or have the effect to lengthen or diminish the term of office of any member of such board.

(Took effect by publication in newspapers April 9, 1874.)

SEC. 300. [**Organization: powers.**]—The board of supervisors, at their first meeting in every year, shall organize by choosing one of their number as chairman, who shall preside at all the meetings of the board during the year. Every chairman of the board of supervisors shall have power to administer an oath to any person concerning any matter submitted to the board or connected with their powers.

SEC. 301. **Special meetings** of the board of supervisors shall be held only when requested by a majority of the board, which request shall be in writing, addressed to the county auditor, and shall specify the object for which such special meeting is desired. The auditor shall thereupon fix a day for such meeting, not later than ten days from the day of the filing of the petition with him, and shall immediately give notice in writing to each of the supervisors personally, or by leaving a copy thereof at his residence, at least six days before the day set for such meeting. The notice shall state the time and place where the meeting will be held and the object of it, as stated in the petition; and at such special meeting no business other than that so designated in the petition and notice shall be considered or transacted. The auditor shall also give public notice of the meeting by publication in not exceeding two newspapers published in the county, or, if there be none, by causing notice of the same to be posted on the front door of the court house of the county, and in two other public places therein, one week before the time set therefor.

A meeting of the board of supervisors held for the *special purpose* of canvassing the votes cast at an election, necessarily carries with it the power to declare the result of the election, and where such election was upon the subject of removing the county seat, and the result thereof, the board could also at such meeting order the removal of the records to the new county seat. *Cole v. Board of Supervisors of Jackson County*, 11 Iowa, 552

It is not necessary to the validity of a contract on part of the county that it should be entered into at a *regular* session of the board of supervisors. The board can exercise its powers at a special meeting called by a majority of its members, and in the absence of a contrary showing the meeting will be deemed to be regular. *Allen v. Cerro Gordo County*, 34 Id., 54.

The board of supervisors have no power to levy a tax at any other than the regular meetings appointed by statute, or at a special meeting called in the manner provided by this section. *Scott v. Union County*, 63 Id., 583.

SEC. 302. [**Failure of duty.**]—If any supervisor shall neglect or refuse to perform any of the duties which are, or shall be, required of him by law as a member of the board of supervisors, without just cause therefor, he shall, for each offense, forfeit one hundred dollars.

SEC. 303. [**Powers.**]—The board of supervisors at any regular meeting shall have the following powers, to-wit:

1. To appoint one of their number chairman, and also a clerk in the absence of the regular officers;
2. To adjourn from time to time, as occasion may require;
3. To make such orders concerning the corporate property of the county as they may deem expedient;
4. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all just claims against the county unless otherwise provided for by law.

A justice of the peace is entitled in criminal cases to cost of stationery used therein, to be paid from the county treasury, and it is the duty of the board of supervisors to "settle and allow" such claims. *Evans v. Story County*, 35 Iowa, 126.

The board of supervisors has no right to prescribe the rule that bills for medical services rendered a pauper shall only be allowed at a regular meeting of the township trustees. *Hunter v. Jasper County*, 40 Id., 568.

The district attorney cannot render the county liable for the services of an attorney requested by him to conduct a prosecution. A claim is not a just claim against the county unless the law somewhere either requires or authorizes its payment. *Foster et al. v. Clinton County*, 51 Id., 541.

A citizen and taxpayer of a county has sufficient interest in the subject matter to entitle him to maintain an action to enjoin the refunding of certain taxes illegally ordered by the board of supervisors. *Hospers v. Wyatt*, 63 Id., 264.

The sworn statement of the county superintendent, giving the time he has been occupied in the discharge of his official duties, and his expenses, is not conclusive upon the board of supervisors, and they may refuse to allow the claim if they deem it unreasonable or unjust. *Bean v. The Board of Supervisors of Carroll County*, 51 Id., 53.

The ordering of the erection of a bridge at a cost of more than \$5,000, by a board of supervisors, without first submitting a proposition therefor to the voters of the county, is the doing of an act prohibited by statute within the meaning of section 3966 of the code, and renders the members of the board voting for such order indictable under the section for misdemeanor. *The State v. Conlee et al.*, 25 Id., 237.

The necessary expense incurred by the township trustees in providing and furnishing a place in which to hold the general state election is not a just claim against the county. *Turner & Co. v. Woodbury County*, 57 Id., 440.

The allowance of a claim against a county by the board of supervisors is not the rendition of a judgment; and, where such allowance is illegal, a tax-payer may enjoin the payment of the same, and is not required to proceed by appeal or *certiorari*. *Hospers v. Wyatt et al.*, 63 Id., 264.

5. **To build and keep in repair** the necessary buildings for the use of the county and of the courts;

6. **[To insure.]**—To cause the county buildings to be insured in the name of the county, or otherwise, for the benefit of the county as they shall deem expedient, and in case there are no county buildings, to provide suitable rooms for county purposes;

7. **[Change boundaries.]**—To set off, organize and change the boundaries of townships in their respective counties, designate and give names thereto, and define the place of holding the first election;

8. **[Ferries.]**—To grant licenses for keeping ferries in their respective counties as provided by law;

9. **[Purchase real estate for county.]**—To purchase for the use of the county any real estate necessary for the erection of buildings for county purposes, to remove or designate a new site for any county buildings required to be at the county seat, when such removal shall not exceed the limits of the village or city at which the county seat is located;

10. **[Control officers.]**—To require any county officer to make a report, under oath, to them, on any subject connected with the duties of his office, and to require any such officer to give such bonds, or additional bonds, as shall be reasonable or necessary for the faithful performance of their several duties; and any such officer who shall neglect or refuse to make such report or give such bonds within twenty days after being so required, may be removed from office by the board by a vote of a majority of the members elected;

Boards of supervisors are not personally liable for honest mistakes or errors of judgment, whether of law or fact, in the approval of official bonds, but they are liable for carelessness and official misconduct. *Wasson v. Mitchell*, 18 Iowa, 153.

11. **[County agents.]**—To represent their respective counties, and to have the care and management of the property and business of the county in all cases where no other provision shall be made;

This provision gives the board of supervisors power, if acting in good faith, to compromise a judgment in favor of the county. *Collins v. Welch et al.*, 58 Iowa, 72; *Haislett v. Howard Co.*, Id., 377.

The board of supervisors of a county have power to compromise an action pending against the county. *Grimes v. Hamilton County*, 37 Id., 290.

This provision imposes upon the board of supervisors the care and management of the county property. *Call v. Hamilton County*, 62 Id., 448.

12. **To manage and control the school fund** of their respective counties as shall be provided by law;

13. [**Highways.**]-To appoint commissioners to act with similar commissioners duly appointed in any other county or counties, and to authorize them to lay out, alter, or discontinue any highway extending through their own and one or more other counties, subject to the ratification of the board;

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

The board of supervisors has no authority to offer a reward for the arrest of persons charged with the commission of crime, but they may offer a reward for the recovery of money which has been stolen from the county. *Hawk v. Marion County*, 43 Iowa, 472.

The board of supervisors may employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty. *Wilhelm v. Cedar County*, 50 Id., 254.

Where the compensation of a county or township officer is provided for by statute, the board of supervisors have no power to increase or change such compensation. *Fawcett v. Woodbury County*, 55 Id., 154.

The board of supervisors have no power under this subdivision of the statute to provide an entire fee bill for all officers whose fees have not been fixed by law. The power of the board is restricted to cases in which the fees are to be paid out of the county treasury. *Ripley v. Gifford*, 11 Id., 367.

15. **To authorize the taking of a vote** of the people for the relocation of the county seat as provided by law;

16. **To alter, vacate, or discontinue any state or territorial highway** within their respective counties;

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

The county authorities alone have the power to establish highways, and the general supervision thereof, including bridges. *Bell v. Foutch*, 21 Iowa, 119, 127. See, also, *Kennedy v. The D., C. & M. R. Co.*, 34 Id., 431.

A county has the power to grade and improve its public highways, to make contracts therefor, and issue warrants in payment thereof. *Soper v. Henry County*, 26 Id., 264; *Long v. Boone County*, 32 Id., 181.

It is the duty of the counties in Iowa in which "county bridges" are situated, to construct and maintain in proper condition for public use upon the public highways all county bridges, and this duty involves the corresponding liability for injuries resulting from defects in their construction or neglect to keep them in repair. *Chandler v. Fremont County*, 42 Id., 58; *Wilson v. Jefferson County*, 13 Id., 181; *Brown v. Jefferson County*, 16 Id., 339; *McCullom v. Black Hawk County*, 21 Id., 409; *Soper v. Henry County*, 26 Id., 264; *Morland v. Mitchell County*, 40 Id., 394; *Taylor v. Davis County*, Id., 233; *Davis v. Allamakee County*, Id., 217.

Counties are liable for injuries resulting from defective bridges upon public highways erected and maintained by them. *Krause v. Davis County*, 44 Id., 141. This liability exists in the absence of statute. *Huston v. Iowa County*, 43 Id., 456. Nor can the county escape liability by showing, in a given case, that the accident occurred through the unsoundness of a plank which the road supervisor might have replaced. *Id.*

The approaches to a bridge constitute a part of the bridge itself, and the county is bound to so construct its bridges, including approaches, and maintain the same, that they shall be safe for travelers, and is liable for damages caused by any defects in the bridges or approaches thereto. *Albee v. Floyd County*, 46 Id., 177.

In an action against a county for injuries caused by the falling of a bridge, the records of the board of supervisors are not admissible to show that they appropriated money for repairing or reconstructing the bridge. *Titler v. Iowa County*, 48 Id., 90.

To establish the liability of the county it must be shown that prior to the accident the county had assumed control of the bridge, or made appropriations for building or repairing it. *Id.*

"County bridges," to which county liability attaches, are such only as require for their erection an extraordinary expenditure of money—such bridges as cannot be constructed with the limited means under the control of the respective road districts of the county, or such as have been constructed by the county. *Chandler v. Fremont County*, 42 Id., 58.

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

The power of county supervisors to erect bridges under this provision of the code applies to bridges across streams in cities. This power is not limited by section 527 of the code, which confers upon cities the control of bridges and streets within their limits, and authorizes them to aid in the construction of county bridges within their limits. *O. S. E. W. v. Potawattamie County*, 72 Iowa, 134.

19. [**Bounty.**]—To determine what bounties, in addition to those already provided by law, if any, shall be offered and paid by their county on the scalps of such wild animals taken and killed within their county as they may deem it expedient to exterminate. But no such bounty shall exceed five dollars;

20. [**Poor house.**]—To purchase for the use of the county any real estate necessary for the erection of buildings for the support of the poor of such county, and for a farm to be used in connection therewith;

21. To have and exercise all the powers in relation to the poor given by law to the county authorities;

22. **To make such rules and regulations**, not inconsistent with law, as they may deem necessary for the government of their body, the transaction of business, and the preservation of order;

23. The board of supervisors shall constitute the board of county canvassers;

24. (*As amended by ch. 80, 16th g. a.*) [**Submit to vote: proposition to erect buildings or bridges.**] (It shall not be competent for said board of supervisors to order the erection of a court house, jail, poor house, or other building or bridge, where the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding two thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all voting for and against such proposition, at a general [or special] election, notice of the same being given for thirty days previously in a newspaper, if one is published in the county, and if none be published therein, then by written notice posted in a public place in each township in the county; *provided*, that the board of supervisors of any county having a population of more than ten thousand, may appropriate for the construction of any one bridge, which is, or may hereafter become a county charge within the limits of such county; or may appropriate towards the construction of any bridge across any unnavigable river, which is the dividing line between any two counties in this state, and between one county in this state and another state, such sum as may be necessary, not exceeding the sum of forty dollars a lineal foot for superstructure; but in no case shall they appropriate for said purpose, including superstructure and approaches, a sum exceeding fifteen thousand dollars. *Provided, however*, that in any county having a population exceeding fifteen thousand, said board may appropriate as aforesaid, not to exceed twenty-five thousand dollars. *Provided*, that no county shall expend a sum exceeding fifteen thousand dollars in aid of the construction of a bridge across a stream which is the dividing line between two counties.)

The board of supervisors has no power to bind the county for the erection of a public building, the probable cost of which will exceed \$5,000, unless authorized to do so by a majority vote of the legal voters of the county; and then only to the extent of the sum authorized by the vote. *Reichard v. Warren County*, 31 Iowa, 381.

And since the county cannot be made liable on an *express* contract by the board in excess of the amount authorized by the vote, so it cannot be made liable on an *implied* one. *Id.*

The occupancy of a public building by a county will not render it liable to pay an amount in excess of the sum voted. *Id.*

The board of supervisors has power to order the erection of a public building, the cost of which does not exceed \$5,000, and may also order the purchase of grounds on which to erect the same, the cost of which does not exceed \$2,000. The cost of the building and the cost of the grounds are not to be estimated together. *Merchant v. Tama County*, 32 Id., 200.

The appropriation of \$7,000 out of the swamp land moneys of the county, to aid in the construction of a bridge, authorized by a vote of the electors of a county, imposes no restriction upon the power of the board to make an additional appropriation under the statute. *Bell v. Fouch*, 21 Id., 119.

The authority of the board of supervisors to lay out, establish, alter or discontinue roads was not abridged or taken away by the provisions of chapter 160, acts of the twelfth general assembly. *Payne v. Brooks et al.*, 38 Id., 263.

The board has no power to submit a proposition to raise money by taxation for the construction of bridges at a *special* election. *Yant v. Brooks*, 19 Id., 87.

But it may submit a proposition for appropriating the swamp land fund to the erection of a county high school building at a special election. *Gray et al. v. Mount et al.*, 45 Id., 591; *Allen v. Cerro Gordo County*, 34 Id., 54. The board of supervisors alone is authorized to submit this question. *Id.*

In the submission to the electors of a proposition for the outlay of money, two distinct objects, each calling for a certain specified amount of funds, cannot be included in one proposition, so that the voter shall be unable to vote for the one against the other. *Id.*

Where a county owns a jail building, its supervisors cannot, without an approving vote of the electors, enter into a valid contract for the erection of movable iron cells for use in such building, at a cost exceeding \$5,000. Such cells cannot be regarded as repairs to the building, within the meaning of the statute. *Cook v. Des Moines County*, 70 Id., 171.

SEC. 304. Repealed by chapter 197, 20th g. a.

SEC. 305. [**Majority of whole board required.**].—No tax shall be levied, no contract for any public buildings entered into, no settlement with the county officers made, no real estate purchased or sold, no new site designated for any county buildings, no changes made in the boundaries of townships, and no money appropriated to aid in the construction of highways and bridges, without a majority of the whole board of supervisors voting therefor and consenting thereto.

SEC. 306. [**County officers control advertisements.**] The clerk of the district court, sheriff, auditor, treasurer and recorder shall designate the newspapers in which the notices pertaining to their several offices shall be published, and the board of supervisors shall designate the papers in which all other county notices shall be published; and in counties having a population exceeding eighteen thousand inhabitants the board shall designate as one of such papers a paper published in a foreign language, if there be such in its county.

The notices referred to in this section are "county notices," and not notices of sales under execution. *Herman v. Moore*, 49 Iowa, 171.

SEC. 307. (*As amended by ch. 197, 20th g. a.*) [**Newspapers selected to publish proceedings.**].—The board of supervisors shall, at its January session of each year, select two newspapers published within the county, or one if there be but one published therein, having the largest number of bona fide yearly subscribers within the county, which circulation shall be determined as follows: In case of contest the applicants shall each deposit with the county auditor on or before a day named by the board of supervisors, a certified statement, subscribed and sworn to before some competent officer, giving the names of the several postoffices and the number and the names of the bona fide yearly subscribers receiving their papers through each of said offices, living within the county, such statements to be in sealed envelopes and opened by the county auditor upon direction by the board of supervisors to do so, and the two applicants thus showing the greatest number of bona fide yearly subscribers living within the county shall be the county official papers, in which all the proceedings of the county board of supervisors, the schedule of bills allowed and the reports of the county treasurer, including a schedule of the receipts and expenditures, shall be published at the expense of the county during the ensuing year, and the cost of such publication shall not exceed one-third the rate allowed by law for legal advertisements, and (*as amended by ch. 86 21st g. a.*): *Provided*, that in counties having a population of seventeen (17) thousand inhabitants or more, three papers (not more than two of which shall be published in the same town) may be selected in which such proceedings shall be published, with the same limitation as to compensation, etc. *Provided*, that in counties having ten thousand inhabitants or more, a newspaper printed in each foreign language, if published within the county, may also be selected, in which such proceedings shall be published under the same limitations as to compensation. *Provided*, that

in counties having two county seats each district shall be regarded as a county for that purpose. In case charges of fraud are made by an aggrieved publisher, the board shall seek other evidence of circulation, and the aggrieved publisher shall have the right of appeal to the circuit court for redress of grievance. Said appeal shall be taken as in ordinary actions, and in case of appeal, neither publisher to the contest shall receive pay for publishing such proceedings until the case is disposed of in the circuit court.

The provisions of this section do not entitle the publisher of the newspaper designated to publish the proceedings of the board of supervisors, to publish the schedule of receipts and expenditures as required by section 304, and he cannot recover therefor. *McBride v. Hardin County*, 58 Iowa, 219.

A board of supervisors has power to award the printing required by section 307 of the code, to the two newspapers having the largest circulation in the county, at 33½ cents per square, and to designate two newspapers to do the printing required by section 304, at a rate not exceeding \$1 per square. *Sperry v. Kretchner et al.*, 65 Iowa, 525.

The provisions of this section do not entitle the publisher of the newspaper, designated to publish the proceedings of the board of supervisors, to publish the schedule of receipts and expenditures as required by section 304 of the code, and he cannot recover therefor. *McBride v. Hardin County*, 58 Id., 219.

The proprietor of a newspaper has no such private or personal interest in the publication of the laws of the state and proceedings of the board of supervisors as that he can maintain an action or proceeding in his own name to compel the board of supervisors to order the publication thereof in his paper. *Welch v. Board of Supervisors*, 23 Id., 199; *Smith v. Zoram et al.*, 37 Id., 89.

SEC. 308. [Books kept: minute book.]—The board is authorized and required to keep the following books:

1. A book to be known as the “minute-book,” in which shall be recorded all orders and decisions made by them, except those relating to highways. All orders for the allowance of money from the county treasury shall state on what account and to whom the allowance is made, dating the same and numbering them consecutively through each year;

2. A book to be known as the “highway record,” in which shall be recorded all proceedings and adjudications relating to the establishment, change or discontinuance of highways;

3. A book to be known as the “warrant book,” in which shall be entered in the order of their issuance the number, date, amount, name of drawee of each warrant drawn on the treasury, and the number of warrants as directed in relation to the minute book.

SEC. 309. [Submit questions to people.]—The board of supervisors may submit to the people of the county at any regular election, or at any special one called for that purpose, the question whether money may be borrowed to aid in the erection of any public buildings, whether any species of stock, not prohibited by law shall be permitted to run at large, and at what time it shall be prohibited, and the question of any other local or police regulation not inconsistent with the laws of the state. And when the warrants of a county are at a depreciated value, they may, in like manner, submit the question whether a tax of a higher rate than that provided by law shall be levied, and in all cases when an additional tax is laid in pursuance of a vote of the people of any county, for the special purpose of repaying borrowed money, or constructing, or aiding to construct, any highway or bridge, such special tax shall be paid in money, and in no other manner.

See notes, *ante*, page 1.

It was held in *Dalby v. Wolf*, 14 Iowa, 228, that section 114 of the code of 1851, authorizing the people of the several counties of the state to decide by a majority vote to restrain swine and sheep from running at large, was not inconsistent with article 1, section 6 of the constitution of 1857. See, also, *Long v. Boone County*, 36 Iowa, 60.

In order to avoid, on the ground of fraud, the result of a submission to the voters of a county of a question involving the purchase of a public building, there must be some showing of artifice to conceal material facts peculiarly within the knowledge of the board of supervisors ordering the submission, and not open to and attainable by others. *Starr & Brand v. Board of Supervisors, etc.*, 22 Id., 491.

A submission by the board of supervisors to the voters of a county, of a question involving the expenditure of money in the purchase of a public building, is of no effect unless accompanied by proposition to levy a tax for the payment thereof, and the adoption of the same, together with the proposition of expenditure. *Starr v Board of Supervisors*, 22 Id., 491.

SEC. 310. The mode of submitting such questions to the people shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and penalty for its violation, if there be one, shall be published at least four weeks in some newspaper printed in the county. If there be no such newspaper, the publication shall be by being posted up in at least one of the most public places in each township in the county, and in addition, in at least five among the most public places in the county, one of them being the door of the court house, for at least thirty days prior to the time of taking the vote. All such notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election.

When the board of supervisors are satisfied that the requirements of sections 309 and 310 of the code have been substantially complied with, in respect to levying a tax of a higher rate than that provided by law, and that a majority of votes has been cast in favor of the proposition, they are empowered to levy such tax in pursuance of the vote. *The Iowa R. R. Land Co. v. Sac County et al.*, 39 Iowa, 124.

Where the board of supervisors resolved to submit the question of issuing bonds for the construction of a court house, and of levying a tax to pay the same, and prescribed that the form of the ballot should be: "For Court House Bonds," and "Against Court House Bonds," it was held that a majority of votes in favor of the proposition included the adoption of the proposition to levy the tax. *Milwaukee & St. Paul R. R. Co. v. Kossuth County*, 41 Id., 57.

As to the appropriation of the swamp lands, the question may be submitted by the board of supervisors at a special election. *Gray v. Mount et al.*, 45 Id., 591.

SEC. 311. [When to borrow or expend money.]—When a question so submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof in addition to the usual taxes, as directed in the following section, and no vote adopting the question proposed will be of effect unless it adopt the tax also.

A submission by the board of supervisors to the voters of a county, of a question involving the expenditure of money in the purchase of a public building, is of no effect unless accompanied by a proposition to levy a tax for the payment thereof, and the adoption of the same, together with the proposition of expenditure. *Starr v. Board of Supervisors*, 22 Iowa, 491.

In order to render the vote of any validity, or to confer any authority by it, all the requisites of the statute must be complied with in reference to each question or proposition submitted to vote. *McMillen et al. v. Lee County*, 3 Id., 311.

The submission of three several propositions at the same time to a vote of the people will not of itself render the proceedings invalid under such submission, if each proposition submitted in other respects meet the requirements of the law. *Id.*

It is not required, under the law, that there should be a distinct provision levying the tax, in the proposition submitted to the people, to be voted for separately from the question of subscribing stock (or whatever the main question is), but to render the vote to adopt the proposition to subscribe, etc., of any effect, the proposition, and each of them, if more than one is submitted, must be accompanied by a provision for levying a tax to pay the same. *Id.*

SEC. 312. The rate of tax shall in no case be more than one per cent on the county valuation in one year. When the object is to borrow money for the erection of public buildings, as above provided, the rate shall be such as to pay the debt in a period not exceeding ten years. When the object is to construct, or to aid in constructing, any highway or bridge, the annual rate shall not be less than one mill on the dollar of valuation, and any of the above taxes becoming delinquent shall draw the same interest with the ordinary taxes.

Under this section a county has power to grade and improve its public highways, make contracts therefor, and issue warrants in payment thereof. *Long v. Boone County*, 32 Iowa, 181, explaining *Soper v. Henry County*, 26 Id., 264.

SEC. 313. [Levy to continue.]—When it is supposed that the levy of one year

will not pay the entire amount, the proposition and the vote must be to continue the proposed rate from year to year, until the amount is paid.

SEC. 314. [**When question adopted.**].—The board of supervisors, on being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the proposition and the result of the vote to be entered at large in the minute book, and a notice of its adoption to be published for the same time and in the same manner as above provided for publishing the preliminary notice, and from the time of entering the result of the vote in relation to borrowing or expending money, and from the completion of the notice of its adoption in the case of a local or police regulation, the vote and entry thereof on the county records shall be in full force and effect.

See *The Iowa R. L. Co. v. Sac County*, 39 Iowa, 124.

SEC. 315. [**May be rescinded.**].—Propositions thus adopted, and local regulations thus established, may be rescinded in like manner and upon like notice by a subsequent vote taken thereon, but neither contracts made under them, nor the taxes appointed for carrying them into effect, can be rescinded.

SEC. 316. **The board shall submit** the question of the adoption or rescission of such a measure when petitioned therefor by one-fourth of the voters of the county, unless a different number be prescribed by law in any special case.

SEC. 317. **The record** of the adoption or rescission of any such measure shall be presumptive evidence that all the proceedings necessary to give the vote validity have been regularly conducted.

SEC. 318. [**Excess of tax.**].—In case the amount produced by the rate of tax proposed and levied exceeds the amount sought for the specific object, it shall not, therefore, be invalid, but the excess shall go into the ordinary county funds.

SEC. 319. [**Distinct fund.**].—Money so raised for such purposes is specially appropriated, and constitutes a fund distinct from all others in the hands of the treasurer until the obligation assumed is discharged.

(CHAPTER 54, LAWS OF 1882.)

RELATIVE TO APPROPRIATION OF INSURANCE RECEIVED FOR PUBLIC BUILDINGS.

An Act authorizing boards of supervisors to appropriate amounts received as insurance thereon in reconstructing public buildings destroyed by fire, wind, or lightning [additional to chap. 2, title IV, of the code, relating to boards of supervisors].

SECTION 1. [**Money received on insurance.**].—*Be it enacted by the general assembly of the state of Iowa:* That in any county in this state where the public buildings thereof or any of them, have been or may hereafter be destroyed by fire, wind, or lightning, the board of supervisors of such county, for the purpose of reconstructing the same, may appropriate, in addition to the amount now authorized by law, the amount received by way of insurance on such building or buildings so destroyed.

(CHAPTER 48, LAWS OF 1880.)

An Act to authorize boards of supervisors to compromise judgments against county treasurers and their sureties in certain cases.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* **Where judgment has been heretofore rendered against any county treasurer**

and his sureties in favor of any county in this state, which judgment exceeds the sum of forty thousand dollars (\$40,000), and remains unsatisfied, and the board of supervisors of such county are satisfied that the full amount thereof cannot be collected on execution, such board of supervisors shall have full power, and are hereby authorized to compromise said judgment, and to enter full satisfaction thereof under the terms of such compromise.

SEC. 2. [**Release.**]—In all cases referred to in section one of this act, if the principal debtor and every one of the sureties shall, in writing, execute a written consent to a compromise, with any one or more of the sureties, and to a release of such surety, or sureties, and in such writing shall agree that such compromise, or release shall not release any of the sureties who shall not compromise and be released from payment of the unpaid judgment; then, in that case, upon the filing of such written consent with the county auditor of such county, the board of supervisors of such county shall have full power, and are hereby authorized, to compromise with any one or more of such sureties, and to release such surety or sureties upon the terms which may be agreed upon in such compromise.

SEC. 3. [**Money used.**]—In case of any compromise as herein provided made under section one of this act, or made under section two of this act, the money received by the county shall be paid to the various funds of the county, in proportion to the amount of each fund in default, as the same existed at the time the judgment was rendered, as nearly as the same can be ascertained, so that each fund shall receive its *pro rata* share as the same shall be determined by the board of supervisors thereof, and no more.

Approved March 16, 1880.

(CHAPTER 13, LAWS OF 1884.)

TOLL-BRIDGES OVER STREAMS DIVIDING COUNTIES.

An Act authorizing boards of supervisors to purchase, maintain and keep up bridges over streams dividing their respective counties.

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

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

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

Approved March 14, 1884.

(Took effect by publication in newspapers.)

(CHAPTER 47, LAWS OF 1888.)

An Act to authorize boards of supervisors to levy a tax to pay interest upon certain outstanding bonds.

SECTION 1. [Tax may be levied.]—*Be it enacted by the general assembly of the state of Iowa:* That in all counties wherein county bonds have been issued in pursuance of a vote of the people to obtain money for the erection of any public building, and wherein the annual tax named in the proposition so submitted to the people for the purpose of paying the annual interest accruing upon such bonds, is insufficient to pay the same as it matures, the boards of supervisors are hereby authorized to levy for said purpose, and no other, a tax of one and one-half mills for the year 1888 and a tax of one mill on the dollar for the year 1889, 1890 and 1891, and thereafter a tax of one-half mill on the dollar until said bonds are paid; provided that this act shall not prevent the levy of a greater tax than above mentioned, if any such proposition so submitted to the people authorize such greater levy.

Approved March 23, 1888.

CHAPTER 3.

OF THE COUNTY AUDITOR.

SECTION 320. **The county auditor shall:**

1. Record all the proceedings of the board in proper books provided for that purpose;
2. Make full entries of all their resolutions and decisions on all questions concerning the raising of money, and for the allowance of money from the county treasury;
3. Record the vote of each supervisor on any question submitted to the board, if required by any member present;
4. Sign all orders issued by the board for the payment of money, and record, in a book provided for the purpose, the reports of the county treasurer of the receipts and disbursements of the county;
It is the specific duty of the auditor to sign and issue warrants as directed by the board of supervisors. *Prescott v. Gonser*, 34 Iowa, 175, 178.
5. Preserve and file all accounts acted upon by the board, with their action thereon, and perform such special duties as are or may be required of him by law;
6. Designate upon every account on which any sum shall be allowed by the board, the amount so allowed, and the charges for which the same were allowed;
7. Deliver to any person who may demand it, a certified copy of any record or account in his office on payment of his legal fees therefor.

SEC. 321. [When to sign warrants.]—The auditor shall not sign or issue any county warrant except upon the recorded vote or resolution of the board of supervisors authorizing the same, except for jury fees, and every such warrant shall be numbered, and the date, amount, and number of the same, and the name of the

person to whom issued, shall be entered in a book to be kept by him in his office for the purpose.

Where a claim against a county was examined by the board of supervisors and marked "allowed" by one of them, with the consent of all, in accordance with the usual course of business, and the auditor issued warrants for the amount, it was held, that the allowance was legal and bound the county, although no formal vote was taken or appeared of record. This section of the code is directory. *Griggs v. Kimball*, 42 Iowa, 512.

County warrants are not negotiable instruments under the law merchant. While they are assignable under the statute, and the assignee may sue thereon in his own name, they are subject to any defense which might be made against the payee. *Clark v. Polk County*, 19 Id., 248.

SEC. 322. [**School fund.**].—Whenever the auditor of the county shall receive from the state auditor notice of the apportionment of the school moneys to be distributed in the county, he shall file the same in his office and transmit a copy thereof to the county treasurer, and he shall also lay a certified copy thereof before the board at its next regular meeting.

SEC. 323. **The county auditor shall have the general custody and control** of the court house in each county respectively, subject to the direction of the board of supervisors.

SEC. 324. [**Report to secretary of state.**].—The county auditor shall report to the secretary of state the name, office, and term of office of every county officer elected or appointed, within ten days after their election and qualification, and the secretary of state shall record the same in a book to be kept for that purpose in his office.

SEC. 325. [**Who eligible.**].—The clerk of the district court and county recorder shall each be eligible to the office of county auditor, and may discharge the duties of both offices.

SEC. 326. [**Cannot be treasurer.**].—The offices of county auditor and county treasurer shall not be united in the same person. The auditor and his deputy are prohibited from acting as attorney, either directly or indirectly, in any matter pending before the board of supervisors.

CHAPTER 4.

OF THE COUNTY TREASURER.

SECTION 327. [**Duties of.**].—The treasurer shall receive all money payable to the county, and disburse the same on warrants drawn and signed by the county auditor and sealed with the county seal, and not otherwise; and shall keep a true account of all receipts and disbursements, and hold the same at all times ready for the inspection of the board of supervisors.

The treasurer of the county is authorized to disburse the funds of the county upon warrants drawn, signed and sealed with the county seal, and not otherwise. *Prescott v. Gonser*, 34 Iowa, 175, 178.

A county warrant is of no validity unless it has the seal of the county attached thereto. The seal of the district court is insufficient. *Springer v. Clay County*, 35 Id., 241.

The principal and interest of loans from the school fund are payable to the county treasurer, and the payment of the proceeds of a judgment in favor of such fund to the county auditor by the clerk of the district court is unauthorized. *Mahaska County v. Searle et al.*, 44 Id., 492.

SEC. 328. [**When no funds.**].—When the warrant drawn by the auditor on the treasurer is presented for payment and not paid for want of money, the treasurer shall endorse thereon a note of that fact and the date of presentation, and sign it, and thenceforth it shall draw interest at the rate of six per cent; and when a warrant which draws interest is taken up, the treasurer is required to indorse upon it the date and amount of interest allowed, and such warrant is to be considered as canceled and shall not be reissued.

There is no provision of the statute to the effect that upon giving notice that the county is ready to redeem its warrants, the interest thereon shall cease. *Rooney v. Dubuque County*, 44 Iowa, 128.

SEC. 328½. (*Added by ch. 84, 21st g. a.*) [Additional sec. 328 1-2 code.]—The treasurer shall keep a record of the number and amount of the warrants presented and endorsed for non-payment, which shall be paid in the order of such presentation when there are funds in the treasury for their payment to an amount sufficient to render it advisable; he shall give notice to what number of warrants the funds will extend, or the number which he will pay, by posting a written notice in his office, and at the expiration of thirty days from the date of such posting, interest on the warrants so named as being payable shall cease.

SEC. 329. [Warrants: when divided.]—When a person wishing to make a payment into the treasury presents a warrant of an amount greater than such payment, the treasurer shall cancel the same and give the holder a certificate of the overplus, upon the presentation of which to the county auditor, he shall file it and issue a new warrant of that amount, and charge the treasurer therewith, and such certificate is transferable by delivery, and will entitle the holder to a new warrant, which, however, must be issued in the first drawee's name.

Where the treasurer received a county warrant in payment of taxes which was in excess of the amount due, and instead of issuing a certificate of overplus issued warrants, which were void for want of authority to make them, it was held, that the treasurer was authorized to receive the warrant from plaintiff, and that the county was liable for the excess beyond his debt to the county. *Barney v. Buena Vista County*, 33 Iowa, 261.

SEC. 330. [Warrant book.]—The treasurer shall keep a book, ruled so as to contain a column for each of the following items in relation to the warrants drawn on him by the auditor—the number, date, drawee's name, when paid, to whom, original amount, and interest paid on each.

SEC. 331. [Keep separate accounts.]—The treasurer shall keep a separate account of the several taxes for state, county, school and highway purposes, opening an account between himself and each of those funds, charging himself with the amount of the tax, and crediting himself with the amounts paid over severally, and with the amount of delinquent taxes when legally authorized so to do.

SEC. 332. [Warrants cancelled.]—The warrants returned by the treasurer shall be compared with the warrant book, and the word "canceled" be written over the minute of the proper numbers in the warrant book, and the original warrant be preserved for at least two years.

Where a county treasurer neglected to cancel warrants upon receiving them, in the manner prescribed by law, and they were afterward abstracted from his office, and again put into circulation, it was held that he was liable to the county, on his official bond, for the amount of the warrants abstracted, although he was guilty of no fault or negligence other than his failure to cancel the warrants. *Johnson County v. Hughes et al.*, 12 Iowa, 360.

SEC. 333. [Returns of.]—The treasurer is required to make weekly returns to the auditor of the number, date, drawee's name, when paid, to whom paid, original amount and interest, as kept in the book before directed.

SEC. 334. [Accounts each term.]—A person re-elected to, or holding over, the office of treasurer, shall keep separate accounts for each term of his office.

Where, under the code of 1851, a county treasurer was re-elected and continued in office during his second term after the time fixed for qualification, it was held that he did not legally hold over, but remained treasurer *de facto* only, and that the sureties on his official bond for the first term were not liable for his delinquencies in office after the expiration of that term. *The County of Wapello v. Bigham*, 10 Iowa, 39.

(CHAPTER 22, LAWS OF 1880.)

An Act further defining the duties of county officers, and amending section 203 of the code.

SECTION 1. [To furnish information to governor or general assembly.]
—Be it enacted by the general assembly of the state of Iowa: It is hereby made

the duty of each county officer, when called upon by the governor or either house of the general assembly so to do, to communicate to the governor, or such house, any information that may be in his possession as such officer, and to furnish any statistics at his command when thus called upon.

SEC. 2. [**Auditor to report to clerk criminal expenses.**]—In order to enable the clerk of the district court to comply with the provisions of section two hundred and three (203) of the code, it is made the duty of the county auditor to report to said clerk, before the first day of November, in each year, the expenses of the county criminal prosecutions, during the year ending the thirtieth day of September preceding, including, but distinguishing, the compensation of the district attorney.

SEC. 3. [**To what time report to come.**]—It is hereby made the duty of the clerk of the district court in preparing the report required by said section 203 of the code, to make such report for the year ending the 30th day of September, preceding.

SEC. 4. [**Failure punished.**]—Failure on the part of any officer to perform any duty required of him by this act, shall render him liable to prosecution and punishment for a misdemeanor.

Approved March 4, 1880.

(CHAPTER 103, LAWS OF 1882.)

An Act enabling county treasurers to pay outstanding warrants. (Additional to code, chapter 4, title IV, relating to the county treasurer.)

SECTION 1. [**Treasurer may call in county warrants.**]—*Be it enacted by the general assembly of the state of Iowa:* That county treasurers are authorized to issue calls for outstanding warrants at any time he may have sufficient funds on hand for which such warrant(s) *was* (were) issued; and from and after such calls have been made public, interest shall cease on all warrants included in said call.

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

(Took effect March 23, 1882.)

(CHAPTER 84, LAWS OF 1876.)

RELATING TO TRANSFER OF FUNDS RAISED BY SPECIAL LEVY.

An Act to provide for the transfer of moneys raised by special levy to county fund for general purposes. (Additional to code, chapter 4, title IV: "Of board of supervisors.")

SECTION. 1. [**Special taxes uncalled for transferred to general fund.**] *Be it enacted by the general assembly of the state of Iowa:* That in any county of this state, where any special levy has been made to pay any claim, bond or other indebtedness, and the same shall have remained in the treasury of the county uncalled for, for a period of three years, the board of supervisors of such county may authorize such unclaimed fund to be transferred to the general county fund.

(Took effect March 16, 1876, by publication in newspapers.)

CHAPTER 5.

OF THE COUNTY RECORDER.

SECTION 335. [Duties of.]—The recorder shall keep his office at the county seat, and he shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law.

SEC. 336. [Treasurer eligible.]—The same person may be eligible to, and hold the office of county recorder and county treasurer; *provided*, the number of inhabitants in such county does not exceed ten thousand.

(CHAPTER 40, LAWS OF 1880.)

An Act extending the right to hold the office of county recorder to women.

SECTION 1. [Sex does not disqualify.]—*Be it enacted by the general assembly of the state of Iowa:* That no person shall be disqualified for holding the office of county recorder on account of sex.

Approved March 12, 1880.

In the case of *Huff v. Cook*, 44 Iowa, 639, it was held that there is no constitutional inhibition upon the right of a woman to hold the office of county superintendent of schools. The case was an appeal from Warren circuit court, wherein the plaintiff was contesting the right of a woman to hold that office to which she had been duly elected. While this case was pending in the supreme court on appeal, the sixteenth general assembly passed an act as follows:

“SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* That no person shall be deemed ineligible by reason of sex, to any school office in the state.

“SEC. 2. No person who may have been or shall be elected or appointed to the office of county superintendent of common schools, or school director in the state of Iowa, shall be deprived of the office by reason of sex.”

It will be observed that neither by this act nor by chapter 40 of the laws of 1880 does the legislature undertake to *confer* upon women the right to hold these offices, probably for the reason that the rights exist without legislation.

CHAPTER 6.

OF THE SHERIFF.

SECTION 337. [Duties of.]—The sheriff shall by himself or his deputies, execute according to law, and return all writs and other legal process issued by lawful authority and to him directed or committed, and shall perform such other duties as may be required of him by law.

The deputy acts in place of the sheriff, and the special constables mentioned in section 341 are to assist the sheriff in the discharge of his duties at and during the sessions of the court, which includes the service of process issued during the session in the transaction of the business of court. *The State v. Arthur*, 39 Iowa, 631, 633.

A deputy sheriff has the same power as his principal to administer an oath to a garnishee, when directed so to do by the plaintiff, under an attachment or execution. *Conable & Smith v. Hylton*, 10 Id., 593.

A sheriff and his sureties are liable on his official bond for trespasses committed by him in attempting to discharge his official duties. *Charles v. Haskins et al.*, 11 Id., 329.

For a failure of a deputy sheriff to pay over money collected by him on execution, the action should be brought against the sheriff and his sureties on his official bond, and not against the deputy. *Brayton v. Town et al.*, 12 Id., 347.

A judgment obtained against a sheriff for malfeasance in office is assignable, and the assignee may sue thereon in his own name. *Charles v. Haskins et al.*, 11 Id., 329.

The determination upon the merits of issues joined on the allegations of a bill filed by a judg-

ment debtor against the sheriff and a purchaser of certain real property sold at judicial sale to satisfy the judgment, is binding as a prior adjudication of such issues, upon the debtor, the creditor and those claiming through them. *Campbell v. Ayers et al.*, 18 Id., 252.

A judgment against the sheriff on his official bond is *prima facie* evidence against his sureties. The sureties may show fraud or collusion in obtaining the judgment against their principal, or a mistake in the amount of the judgment, or that it has been paid; but they cannot go behind the judgment, and re-litigate the question already determined. *Charles v. Haskins*, 14 Id., 471.

SEC. 338. **His disobedience** of the command of any such process is a contempt of the court from which it issued, and may be punished by the same accordingly, and he is further liable to the action of any person injured thereby.

SEC. 339. **He has the charge and custody of the jail** or other prison of his county, and of the prisoners in the same, and is required to receive those lawfully committed, and to keep them himself, or by his deputy or jailor, until discharged by law.

A sheriff is not entitled to additional compensation for personal attention rendered to prisoners in the jail beyond payment for their board. The fees and salary of the officer include compensation for such services. *Grubb v. Louisa County*, 40 Iowa, 314.

SEC. 340. [**Conservators of the peace.**]—The sheriff and his deputies are conservators of the peace, and to keep the same, or to prevent crime, or to arrest any person liable thereto, or to execute process of law, may call any person to their aid, and, when necessary, the sheriff may summon the power of the county.

SEC. 341. **The sheriff shall attend upon the district** and circuit courts of his county, and while either remains in session he shall be allowed the assistance of such number of bailiffs as either may direct. They shall be appointed by the sheriff, and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible.

SEC. 342. [**Not appear as attorney or counsel.**]—No sheriff, deputy sheriff, coroner, or constable, shall appear in any court as attorney or counsel for any party, nor make any writing or process to commence, or to be in any manner used in the same, and such writing or process made by any of them shall be rejected.

This section does not prohibit peace officers from making complaint of the violation of the criminal laws of the state. *Santo v. The State*, 2 Iowa, 165, 221.

SEC. 343. [**Shall not purchase.**]—No sheriff, deputy sheriff, coroner, or constable, shall become the purchaser, either directly or indirectly, of any property by him exposed to sale under any process of law, and every such purchase is absolutely void.

SEC. 344. [**Execute process when out of office.**]—Sheriffs and their deputies may execute any process which may be in their hands at the expiration of their office, and, in case of a vacancy occurring in the office of sheriff from any cause, deputies shall be under the same obligation to execute legal process then in his or their hands, and to return the same as if the sheriff had continued in office, and he and they will remain liable therefor under the provisions of law, as in other cases.

SEC. 345. [**Deliver to successor.**]—Where a sheriff goes out of office, he shall deliver to his successor all books and papers pertaining to the office, and property attached and levied upon, except as provided in the preceding section, and all prisoners in the jail, and take his receipt specifying the same, and such receipt shall be sufficient indemnity to the person taking it.

The failure of the outgoing sheriff to take a receipt from his successor for property turned over to him, would not, necessarily, continue his liability for the keeping of the property. If the property is actually delivered to his successor, it is sufficient to devolve the responsibility on the latter. *McKay v. Leonard*, 17 Iowa, 569. And so an offer on the part of a sheriff, on the expiration of his term of office, to deliver attached property to his successor, discharges the former from future responsibility for the safe keeping of the property attached, and devolves this duty upon his successor. *Fockler v. Martin et al.*, 32 Id., 117.

SEC. 246. **If the sheriff die** or go out of office before the return of any process then in his hands, his successor, or other officer authorized to discharge the

duties of the office, may proceed to execute and return the same in the same manner as the outgoing sheriff should have done, but nothing in this section shall be construed to exempt the out-going sheriff and his deputies from the duty imposed on them by section three hundred and thirty-seven of this chapter, to execute and return all process in their hands at the time the vacancy in the office of sheriff occurs.

SEC. 347. On the election or appointment of a new sheriff all new process shall be directed to him.

SEC. 348. If the sheriff, who has made a sale of real estate on execution, die, or go out of office before the period of redemption expires, his successor shall make the necessary deed to carry out such sale.

CHAPTER 7.

OF THE CORONER.

SECTION 349. **It is the duty of the coroner** to perform all the duties of the sheriff when there is no sheriff, and in cases where exception is taken to the sheriff as provided in the next section.

The sureties on the official bond of the coroner are liable for his acts while he is acting *ex officio* as sheriff. *Fieinan v. Shaw*, 49 Iowa, 312.

To render the service of process by a coroner valid, the partiality, consanguinity, or interest of the sheriff either as a party to the action or otherwise, must be made to appear by the record. If the service of the writ is insufficient, the writ alone abates, not the action. *Beard v. Smith*, 9 Id., 50. See also *Minott v. Vineyard*, 11 Id., 90.

SEC. 350. [**To serve process.**—In all proceedings in the courts of record, where it appears from the papers that the sheriff is a party to the action, or where, in any action commenced or about to be commenced, an affidavit is filed with the clerk of the court, stating that the sheriff and his deputy are absent from the county, and are not expected to return in time to perform the service needed; or stating a partiality, prejudice, consanguinity or interest on the part of the sheriff, the clerk or court shall direct process to the coroner, whose duty it shall be to execute it in the same manner as if he were sheriff.

This section applies to criminal as well as civil cases. Accordingly, when the accused shall file an affidavit to the effect that, by reason of partiality or prejudice, he believes the sheriff will not act fairly in the selection of talesmen, the duty of filling up the jury should be taken by the court from the sheriff. *The State v. Hardin et al.*, 46 Iowa, 623.

To render the service of process by a coroner valid, the partiality, consanguinity, or interest of the sheriff either as a party to the action or otherwise, must be made to appear by the record. If the service of the writ is insufficient, the writ alone abates, not the action. *Beard v. Smith*, 9 Id., 50. See also *Minott v. Vineyard*, 11 Id., 90.

SEC. 351. [**Same.**—When there is no sheriff, deputy sheriff or coroner qualified to serve legal process, the clerk of the court may, by writing under his hand and the seal of the court certifying the above fact, appoint any suitable person specially in each case to execute such process, who shall be sworn, but he need not give bond, and his return shall be entitled to the same credit as the sheriff's when the appointment is attached thereto.

The credit given to a return of a writ of attachment made by a person specially appointed by the clerk to serve the same, must depend upon the validity of the appointment, which must accompany the return. *Currens v. Ratcliffe*, 9 Iowa, 309.

Where the clerk in making the appointment recited that it had been shown him by affidavit that there was "no sheriff, deputy sheriff, or coroner at the county seat of the county, nor in the county, competent to serve attachment process in the suit, but that they, and each of them, are absent from the county seat, and that several miles additional travel would be necessary in order to serve the process of attachment aforesaid by said officers," it was *held* that the showing was insufficient, and the appointment invalid.

SEC. 352. [**Inquest.**]¹⁸⁷¹—The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means. When he has notice of the dead body of a person supposed to have died by unlawful means, found or being in his county, he is required to issue his warrant to a constable of his county, requiring him to summon forthwith three electors of the county to appear before the coroner at a time and place named in the warrant.

SEC. 353. **The warrant** may be in substance as follows:

STATE OF IOWA, }
County. }

To any constable of the said county: In the name of the state of Iowa you are hereby required to summon forthwith three electors of your county, to appear before me at (name the place), at (name the day and hour or say forthwith), then and there to hold an inquest upon the dead body of, there lying, and find by what means he died.

Witness my hand this day of, A. D. 18...

A. B., coroner of county.

SEC. 354. [**Service.**]¹⁸⁷¹—The constable shall execute the warrant, and make return thereof at the time and place named.

SEC. 355. [**Jurors.**]¹⁸⁷¹—If any juror fails to appear, the coroner shall cause the proper number to be summoned or returned from the bystanders, immediately, and proceed to impanel them and administer the following oath in substance:

[**Form of oath.**]¹⁸⁷¹—“ You do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, when, how, and by what means the person whose body lies here dead came to his death, according to your knowledge and the evidence given you.”

SEC. 356. **The coroner may issue subpoenas** within his county for witnesses, returnable forthwith, or at such time and place as he shall therein direct, and witnesses shall be allowed the same fees as in cases before a justice of the peace, and the coroner has the same authority to enforce the attendance of witnesses, and to punish them and jurors for contempt in disobeying his process, as a justice of the peace has when his process issues in behalf of the state.

SEC. 357. **An oath** shall be administered to the witnesses in substance as follows:

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

SEC. 358. **The testimony** shall be reduced to writing under the coroner's order, and subscribed by the witness.

SEC. 359. [**Verdict.**]¹⁸⁷¹—The jurors having inspected the body, heard the testimony, and made all needful inquiries, shall return to the coroner their inquisition in writing, under their hands, in substance as follows, and stating the matters in the following form suggested, as far as found:

STATE OF IOWA, }
 County. }

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

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

(which shall be attested by the coroner.)

SEC. 360. [**Secret.**]¹⁸⁷¹—If the inquisition find that a crime has been committed on

the deceased, and name the person whom the jury believe has committed it, the inquest shall not be made public until after the arrest directed in the next section.

SEC. 361. [**Arrest.**]-If the person charged be present, the coroner may order his arrest by an officer or any other person present, and shall then make a warrant requiring the officer or other person to take him before a justice of the peace.

SEC. 362. [**Warrant.**]-If the person charged be not present, and the coroner believes he can be taken, the coroner may issue a warrant to the sheriff and constables of the county, requiring them to arrest the person and take him before a justice of the peace.

SEC. 363. The **warrant of a coroner** in the above case shall be of equal authority with that of a justice of the peace, and when the person charged is brought before the justice, such justice shall cause an information to be filed against him, and the same proceedings shall be had as in other cases under information, and he shall be dealt with as a person held under an information in the usual form.

SEC. 364. [**Form of warrant.**]-The warrant of the coroner shall recite substantially the transactions before him, and the verdict of the jury of inquest leading to the arrest, and such warrant shall be a sufficient foundation for the proceeding of the justice instead of an information.

SEC. 365. [**Return.**]-The coroner shall then return to the district court the inquisition, the written evidence, and a list of the witnesses who testified to material matter.

SEC. 366. [**Body of deceased.**]-The coroner shall cause the body of a deceased person which he is called to view to be delivered to his friends, if any there be, but if not, he shall cause him to be decently buried and the expense to be paid from any property found with the body, or, if there be none, from the county treasury, by certifying an account of the expenses, which, being presented to the board of supervisors, shall be allowed by them, if deemed reasonable, and paid as other claims on the county.

SEC. 367. **When there is no coroner**, and in case of his absence or inability to act, any justice of the peace of the same county is authorized to perform the duties of coroner in relation to dead bodies, and in such case he may cause the person charged to be brought before himself by his warrant, and may proceed with him as a justice of the peace.

SEC. 368. (*As amended by ch. 64, 20th g. a.*) [**Surgeons.**]-In the above inquisition by a coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, [who, instead of witness fees, shall receive such reasonable compensation as may be allowed by the county board of supervisors.]

The coroner, or justice acting in his absence, is charged with the duty of fixing the compensation to the physician or surgeon making a scientific examination upon a deceased person in view, and his decision respecting the amount is in the nature of an adjudication, preventing the physician from suing the county in an original action for his services. *Cushman v. Washington County*, 45 Iowa, 255; *Sanford v. Lee County*, 49 Id., 143.

CHAPTER 8.

OF THE COUNTY SURVEYOR.

SECTION 369. [**Duties of.**]-The county surveyor shall make all surveys of land within his county, which he may be called upon to make, and his surveys shall be held as presumptively correct.

SEC. 370. **The field notes and plats** made by the county surveyor shall be

transcribed into a well bound book under the supervision of the surveyor, when desired by a person interested and at his expense.

SEC. 371. [**Field notes.**].—Previous to making any survey, he shall furnish himself with a copy of the field notes of the original survey of the same land, if there be any in the office of the county auditor, and his survey shall be made in accordance therewith.

SEC. 372. [**Corners.**].—He is required to establish the corners by taking bearing trees and noting particularly their course and distance, but if there be no trees within reasonable distance, the corners are to be marked by stones firmly placed in the earth, or by mounds.

SEC. 373. [**Rules.**].—In the resurvey and subdivisions of lands by county surveyors, their deputies, or other persons, the rules prescribed by acts of congress and the instructions of the secretary of the interior shall be in all respects followed.

SEC. 374. [**Plat and copy evidence.**].—The county surveyor shall, when requested, furnish the person for whom the survey is made with a copy of the field notes and plat of the survey, and such copy certified by him, and also a copy from the record, certified by the county auditor, with the seal, shall be presumptive evidence of the survey and of the facts herein required to be set forth, and which are stated accordingly, between those persons who join in requesting it and any other person then concerned who has reasonable notice that such a survey is to be made and the time thereof.

SEC. 375. [**Book furnished.**].—The board of supervisors is required to furnish a substantial, well bound book, in which the field notes and plats made by the county surveyor may be recorded.

SEC. 376. **The plat record** shall show distinctly of what piece of land it is a survey; at whose personal request it was made, the names of the chainmen, and that they were approved and sworn by the surveyor, and the date of the survey; and the courses shall be taken according to the true meridian, and the variation of the magnetic from the true meridian stated.

SEC. 377. The necessary **chainmen** and other persons must be employed by the person requiring the survey done, unless otherwise agreed; but the chainmen must be disinterested persons and approved by the surveyor, and sworn by him to measure justly and impartially to the best of their knowledge and ability.

SEC. 378. [**Surveyor may administer oaths.**].—County surveyors, when establishing defaced or lost land corners or lines, may issue subpoenas for witnesses and administer oaths to them, and all fees for service of officers and attendance of witnesses shall be the same as in proceedings before justices of the peace.

(CHAPTER 8, LAWS OF 1874.)

An Act to provide for the permanent survey of lands.

SECTION 1. [**Surveys upon agreement of owners of adjacent lands.**].—*Be it enacted by the general assembly of the state of Iowa:* That whenever the owner or owners of adjacent tracts of land shall desire to establish permanently the lines and corners thereof between them, he, she, or they may enter into a written agreement to employ and abide by the survey of some surveyor; and after said survey is completed, a plat thereof with a description of all corners and lines plainly marked and described thereon, together with the written agreement of the parties, shall be recorded in the recorder's office of the county where the lands are situated; or, after any survey of lands is completed and the parties interested therein as owners are satisfied with such survey; or, when the owners of adjoining lands desire to perpetuate existing lines and corners heretofore made between them, it shall be lawful

for them to cause a plat thereof to be made with a description of all such lines and corners made thereon, which plat shall be acknowledged before some officer authorized to take the acknowledgment of deeds, and signed by each of said owners as an agreement between them so far as relates to such lines and corners; all of which shall be recorded in the recorder's office of the county in which the lands are situated; and the lines and corners so made, and described and recorded, shall be binding upon the parties entering into said agreement and signing said plats, their heirs, successors, and assigns, and shall never be changed.

SEC. 2. [Mode of obtaining survey where owners do not agree.]—Whenever one or more proprietors of land in this state, the corners and boundaries of whose lands are lost, destroyed, or are in dispute, or who are desirous of having said corners and boundaries permanently established, *and who* will not enter into agreement as provided by section first of this act, it shall be lawful for said proprietor or proprietors that they shall cause a notice in writing to be served on the owner or owners of adjacent tract or tracts, if known and residing in the county where said lands are situated, or if not known and residing in such county, by publishing in a newspaper published in such county, and if no newspaper shall be published, then by putting up in four different public places in said county, a written or printed notice to the effect that on a day named therein, he, she, or they will make application to the district court of the county in which said lands are situated, at its next succeeding term, for the appointment of a commission of one or more surveyors to make survey of and permanently establish said corners and boundaries, which notice shall be posted up at least four weeks before the time appointed for said application; and one of said notices shall be in the precinct or township in which said corners and boundaries are situated.

A proceeding to establish a lost corner under this chapter is a special proceeding, triable as an ordinary action, and reviewable by the supreme court upon errors assigned. *In matter of the application, etc.*, 54 Iowa, 33.

The action of fence viewers in locating and apportioning division lines of fence is not conclusive, and it is competent for a land owner to show, in a proper action, that a fence was located upon his land, and not upon the division line, and he may recover damages therefor. *Peschongs v. Mueller*, 50 Id., 237.

This section providing a summary proceeding for determining and locating the true boundary line between land owners, without any issue made in court, or jury trial, is not in conflict with section 9, article 1, of the constitution, which provides that the right of trial by jury shall remain inviolate, and that no person shall be deprived of life, liberty or property without due process of law. *Gates v. Brooks et al.*, 59 Id., 510.

SEC. 3. [District court to appoint commission to survey and report.]—Upon the filing of proper petition and proof of due notice aforesaid, the said court shall appoint a commission of one or more surveyors, entirely disinterested, to make said survey, who shall proceed to make said survey and report his or their proceedings to that or the next term of said court, accompanied by a plat and notes of said survey; and each of said surveyors shall be authorized to administer an oath to any of the assistants necessary in the execution of said survey, to faithfully and impartially perform their respective duties, and take the evidence under oath administered by the surveyor, and incorporate the same with his or their survey, of any person or persons, who may be able to identify any original government corner, or witness thereto, or government line, tree, or other noted object, or any other legally established corner, or other corners that have been recognized as such by the adjoining proprietors for over ten years.

SEC. 4. [Objections to report may be made.]—Upon the filing of said report, any person whose interests may be affected by said survey, shall be at liberty to enter his objections to said report, and the court shall hear and determine said objections, and enter an order or judgment either approving or rejecting said report, or modifying or amending the same according to the rights and interests of the parties, or may refer the same back to said commission to correct their report

and survey in conformity with the judgment of the court; or the court may, for good reason, set aside said commission and appoint a new one, who shall proceed anew, and determine the boundaries and corners of the lands in question. The corners and boundaries established in said survey, as approved in the final judgment of the court, if not appealed from within thirty days, shall be held and considered as permanently and unalterably established according to said survey. The expenses and costs of the surveys and suit shall be apportioned among all the parties according to their respective interests.

Where division lines between adjoining owners of lands are in dispute, proceedings may be instituted by any one, such owners to have the same established under chapter 8, of the laws of 1874, even though the lines have been previously fixed by the county surveyor. *Strait et al. v. Cook et al.*, 46 Iowa, 57.

On an appeal from a proceeding to establish a lost corner under this act no bill of exceptions is necessary to preserve the evidence on which the commissioner's report is based, for such evidence must accompany the report and is thus part of the record. *Davis v. Curtis et al.*, 68 Id., 66.

As to duty of commissioners in proceedings to establish lost corner, see opinion in same case.

CHAPTER 9.

OF TOWNSHIPS AND TOWNSHIP OFFICERS.

SECTION 379. [Supervisors may divide county into townships.]—The board of supervisors of each county shall divide the same into townships, as the convenience of the citizens may require, accurately defining the boundaries thereof, and may from time to time make such alterations in the number and boundaries of the townships as it may deem proper; *provided*, however, that if the congressional township lines are not adopted and followed, the board of supervisors shall not change the lines of any civil township so as to divide any school district or sub-district, unless a majority of the voters of such district or subdistrict shall petition therefor.

The board of supervisors has power under this section of the code to divide townships and create new ones whenever the public convenience requires it, and the question of the political existence of a new township so created is in no manner affected by any irregularity in the first election of its officers; nor does such irregularity in any way affect the validity of subsequent elections of officers, or of the sets of officers subsequently elected. *Lones v. Harris et al.*, 71 Iowa, 478.

SEC. 380. [Must be ten voters.]—No township shall be organized in which at the time of organization there shall not be at least ten legal voters; *provided*, that each county shall have one civil township.

SEC. 381. [Changes recorded.]—The description of the boundaries of each township, and of all alterations in them, and of all new townships, shall be recorded in full in the records of the board of supervisors and of the township.

SEC. 382. (As amended by ch. 106, 20th g. a.) [When township contains a city or town.]—When any township has within its limits an incorporated city or town (with a population exceeding fifteen hundred inhabitants), the electors of such township residing without the limits of such city or town, may, at the January, April or June session of the board of supervisors of the county, petition to have such township divided into two townships; the one to embrace the territory without, and the other the territory within such corporate limits; which petition shall be accompanied by the affidavit of three individuals to the effect that all the signatures to such petition are genuine, and that the signers thereof are all legal voters of said township, residing outside said corporate limits. (Remonstrances signed by such legal voters may also be presented on the hearing before the board of supervisors hereinafter provided for, and, if the same persons petition and remonstrate they shall be counted on the remonstrance only.)

Under this section the board of supervisors has no discretion, and must divide a township where all the prerequisites of the law have been complied with, and the petition therefor is presented at the time authorized by statute. *Henry et al. v. Taylor et al.*, 57 Iowa, 72, 74.

SEC. 383. **Notice of the time** when such petition will be presented, shall be given by two publications in a weekly newspaper published in the township, the last of which publications shall be at least ten days prior to the time fixed for the presentation of such petition; or if no paper is printed in such township, or the papers therein printed refuse to make such publication, the notice herein contemplated shall be given by posting in five places in the township; two of which shall be without and three within such corporate limits.

SEC. 384. (*As amended by ch. 48, 21st g. a.*) **If such petition is signed** by a majority of the electors of such township residing without the corporate limits of such city or town, the board of supervisors shall divide such township into two townships, as prayed therein, but except for election purposes, including the appointment of all judges and clerks of election rendered necessary by the change, such division shall not take effect until the first Monday of January next ensuing. (*Provided*, that when the citizens of any township so set off desire to dissolve their township organization and return again to the township from which they were taken, they may do so by the same procedure as in sections 382 and 383 for the division, except that said petition shall be signed by a majority of the electors of both townships.)

In this section, relating to the division of a township containing a city or incorporated town, the words "for election purposes," refer only to the election of the officers for the new township, and as the old township organization in such a case continues to exist until the first day of January following the order of the supervisors for the division of the township, all other elections to be held before the first of January must be by the original township as it was before the division. So held, in a case where a tax in aid of a railway was voted by the whole original township in December, prior to the January when the division of the township, previously ordered, took effect under the statute. *Williams et al. v. Poor et al.*, 65 Iowa, 410.

SEC. 385. [**First election.**]-When a new township is formed, the board of supervisors shall call the first township election, to be held at such place as it may designate, on the day of the next general election.

SEC. 386. The auditor shall issue a **warrant** for such first election, stating the time and place of the same, the officers to be elected, and any other business which is to be attended to; and no other business shall be done than such as is so named.

SEC. 387. **Such warrant may be directed** to any constable of the county, or to any citizen of the same township, by name, and shall be served by posting up copies thereof in three of the most public places in the township, fifteen days before the day of the election; the original warrant shall be returned to the presiding officer of the election, to be returned to the clerk when elected, with a return thereon of the manner of service, verified by oath if served by any other than an officer.

SEC. 388. [**Election.**]-The election shall be conducted as other township elections, and the electors shall proceed to elect the officers named in this chapter.

SEC. 389. [**Township officers.**]- (In each township there shall be elected three trustees, one clerk, one assessor, two constables, and two justices of the peace, but where a city or incorporated town is situated in a township, the trustees of the township may order the election of one or two additional justices and constables, and at least one justice and constable shall reside within the limits of such city or town.

SEC. 390. (*As amended by ch. 110, 19th g. a.*) [**Assessors in townships containing cities or towns to hold for two years.**]-At the general election in the year 1882, and biennially thereafter, there shall be elected in each township, a part of which is included within the incorporate limits of any incorporated city or town, by the qualified voters of such township residing without

the corporate limits of such city or town, one assessor in the same manner as provided by law for the election of township assessors, and at the regular municipal election of each town or city in the year 1882, and biennially thereafter, whether such city or town embraces one or more townships or parts of townships, there shall be elected by the qualified voters of such city or town one or more assessors for such city or town, and such assessors shall be restricted in the discharge of their official duties to the limits within which they are elected, and shall hold their offices for the term of two years from the first day of January next ensuing. The city council of any incorporated city having a population of ten thousand or over, may, by a resolution to be adopted at least five weeks before the time for any regular municipal election, determine whether it shall be necessary to elect more than one assessor, and fix the number thereof, not exceeding three, and thereupon the mayor of such city shall make proclamation of such determination in like manner and at the same time that he shall proclaim the election of other city officers to be elected at the municipal election next ensuing, and such resolution shall also divide such city into districts for assessment purposes; and the county auditor of the county in which such city is situate, upon being notified of such division, shall provide a separate assessment book for each of said assessment district(s); said assessors when so elected shall give bond and qualify, receive the same compensation, be under like penalties, and perform the same duties in like manner as township assessors, except as herein provided. In case there should be a failure to elect, (or) a vacancy shall occur in the office of assessor within such incorporated city, the city council may elect some suitable person to perform the duties of such office for the unexpired term. It shall be the duty of such assessors, if more than one shall have been elected, to meet at least once a week, and oftener if they shall deem it necessary, and carefully compare valuations in order to secure a uniform assessment of all the property of such city, and when so met they shall constitute a board of assessment, a majority of whom shall determine the value of any property as to which difference may arise in such board: *Provided*, that the city council of any city or town, having a population as aforesaid, shall have power in the year 1882, by resolution, to increase the number of assessors not exceeding three, and to appoint the additional number provided for; and each assessor so appointed shall qualify and act, and hold *their* (his) office for the term provided for in this act).

An assessor elected in accordance with section 390 of the code of 1873, providing for the election of assessors in townships containing a city or incorporated town: *held*, a township and not a city officer. *Kinne v. City of Waverly*, 42 Iowa, 486.

Under this section, as amended by chapter 6 of the laws of 1876, the assessor in a township whose limits are the same as those of a city acting under a special charter, is an officer of the township and not of the city, and he should be elected at the general township election. *The State v. Finger*, 46 Id., 25.

(CHAPTER 50, LAWS OF 1876.)

RELATING TO DUTY OF TOWNSHIP CLERKS.

An Act to compel township clerks to post up statement of receipts and disbursements at each general election. [Additional to code, chapter 9, title IV, "Of townships and township officers."]

SECTION 1. [Township clerks to post statement of the receipts and disbursements at place of election.]—*Be it enacted by the general assembly of the state of Iowa:* That hereafter it shall be the duty of township clerks in each county in the state, on the morning of the day of each general election, and before the hour for opening the polls, to post up at the place where such general election is

to be held in his township, a statement in writing, showing all receipts of money and disbursements in his office, for the preceding year, such statement to be certified by the trustees of said township.

Approved, March 8, 1876.

(CHAPTER 90, LAWS OF 1876.)

CITY ASSESSORS.

An Act providing for the election of city assessors in cities organized and existing under special charters.

SECTION 1. [**One assessor to be elected in cities organized under special charters.**]—That the qualified electors of all cities organized and existing under special charters shall, at their regular annual election, elect one city assessor, who shall hold his office for the term of one year and until his successor is elected and qualified.

(Took effect by publication in newspapers March 16, 1876.)

SEC. 391. [**Place of election.**]—The trustees shall designate the place where elections will be held, and whenever a change is made from the usual place of holding elections in the township, notice of such change shall be given by posting up notices thereof in three public places in the township, ten days prior to the day on which the election is to be held.

SEC. 392. They shall cause a record to be kept of all their proceedings.

SEC. 393. **The township trustees** are the overseers of the poor, fence viewers, and the township board of equalization and board of health, and shall have charge of all cemeteries within the limits of their township dedicated to public use when the same is not controlled by other trustees or incorporated bodies.

SEC. 394. [**Refusing to serve.**]—Any person elected to a township office and refusing to qualify and serve shall forfeit the sum of five dollars, which may be recovered by action in the name of the county, to the use of the school fund in the county, but no person shall be compelled to serve as a township officer two terms in succession.

Refusing to qualify and serve in a township office when elected thereto is not a *crime*. *Polk County v. Heib*, 37 Iowa, 361, 367.

Civil townships are not corporations, under the statutes of Iowa, but merely legal subdivisions of a county for governmental purposes, and are not capable of being sued. *The Township, etc. v. Munch*, 52 Iowa, 132.

SEC. 395. **The township clerk** shall keep accurate records of the proceedings and orders of the trustees, and perform such other acts as may be required of him by law.

It is not necessary that a complaint to the fence viewers of the insufficiency of a partition fence should be in writing. *Tables v. Ogden*, 46 Iowa, 134.

SEC. 396. (*As amended by ch. 110, 16th g. a.*) He is authorized to administer **the oath of office** to all the township officers, and he shall make a record thereof, and also of all who file certificates of their having taken the oath before any other officer authorized to administer the same. [The clerk shall also have power to administer oaths to township officers, judges of election, clerks of election, and highway supervisors, for services rendered in their respective townships.]

SEC. 397. [**Notify auditor.**]—The clerk, immediately after the election of officers in his township, shall send a written notice thereof to the county auditor, stating the names of the persons elected, and the time of the election, and shall enter the time of the election of each officer in the township record.

SEC. 398. **Constables: duty.**]—The constables shall serve all warrants, notices,

and other process lawfully directed to them by the trustees or clerk of the township or any court, and perform such other duties as are or may be required by law.

SEC. 399. [Same.]—Constables are ministerial officers of justices of the peace.

To support the acts of one on the ground that he is an officer *de facto*, they must have been done under color of the office, the duties of which should have been discharged by the person filling it. *Barley v. Fisher*, 38 Iowa, 229.

If one holds himself out as a public officer, or acts as an officer *de facto*, he is estopped to deny that he was an officer *de jure*, even when indicted for malfeasance. *The State v. Stone*, 40 Id., 547.

All acts of public officers are to be regarded as *prima facie* correct; and when an act has been shown to have been done by an officer pursuant to law, it will be deemed lawful and valid until the contrary be established by affirmative proof. *Smith v. The District Township of Knox*, 42 Id., 522.

Until the contrary is shown, it will be presumed that public officers have acted in compliance with law. *Spitler v. Scofield*, 43 Id., 571; *Brown v. Lamb*, 4 G. Greene, 465; *Barney v. Buena Vista County*, 33 Id., 261; *Dollarhide v. The Board of Commissioners*, 1 G. Greene, 158; *Cole v. Porter*, 4 Iowa, 510; *McGuffie v. Dervine*, 1 G. Greene, 251; *Barney v. Crittenden*, 2 Iowa, 165; *Neally v. Redman*, 5 Id., 387.

In relation to officers, civil and municipal, when the question arises between third parties, parol evidence is admissible to show that they were officers at a given time, and perhaps to show that they acted as such. *Gourley v. Hankins*, 2 Id., 75.

Before one can claim to be an officer *de facto*, there must be a law creating the office. The office itself must be *de jure*; the officer may then be *de facto*. *The Town of Decorah v. Bullis*, 25 Id., 12.

As an action against a justice of the peace for false imprisonment, evidence on the part of the defendant that he was and had been acting as a justice of the peace *de facto* is admissible, and when given it will be presumed that he has been duly appointed to the office until the contrary shall appear. *Londegan v. Hammer*, 30 Id., 508.

When an assessor has filed an official bond and taken the oath of office he is an officer *de facto*, and a party refusing to take the required oath in the assessment of his property, cannot escape liability by showing that the bond was informal, or any other mere irregularity in qualifying. *Washington County v. Miller*, 14 Id., 584.

The official acts of an alderman *de facto* of a city will be held valid in collateral proceedings. *Cochran v. McCleary*, 22 Id., 75.

A constable who has been re elected and continues to act without filing a new bond or taking the official oath anew, is an officer *de facto*, and is competent to make arrests. *The State v. Bates*, 23 Id., 96.

A public officer duly elected or appointed, but who has failed to qualify in the manner prescribed by law, acts *de facto*, and his acts as to third persons are entitled to credit. *Keeny v. Leas & Lyon*, 14 Id., 464.

While, for some purposes, a constable is considered a county officer, he is, nevertheless, to be generally classed as a township officer. *The State v. Bevans*, 37 Id., 178.

Courts will take judicial notice of the time of elections established by law. *Davis et al. v. Best*, 2 Id., 96.

In this country all offices are public, except such as, though called offices, are nevertheless employments of a private nature, like the offices of a bank or other private corporation. *Keeny v. Leas & Lyon*, 14 Id., 464.

As between third persons, when the question arises whether a person in doing an act was an officer, it is sufficient to show him to be such *de facto*; and it is not required of the person claiming or justifying under the act of the officer to show that he is such, by the highest and best evidence. This, however, is required when the officer himself is a party, and he justifies, or claims, by virtue of his office. *Id.*

A usurper is one who intrudes himself into or undertakes to exercise the duties of an office without any claim or color of right or authority. An officer *de jure* is one who has a complete legal title to his office against the world; and an officer *de facto* is one who comes in by the forms of an election or appointment, and who thus acts under claim or color of right, but who, in consequence of some informality, omission or want of qualification, could not hold the office, if his right were tried in a direct proceeding, by an information in the nature of a *quo warranto*. *Ex parte Stahl*, 16 Id., 369.

There is a clear distinction between an act done by an officer *by virtue of his office*, and an act done *by color of his office*. The first implies that it is lawful, either by the common law or by statute; the second, that it is unlawful and unauthorized, and that the legal right to act is a mere color or pretense. *Sheppard et al. v. Collins*, 12 Id., 570, 573.

Incompatibility in office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. It does not

necessarily arise when the incumbent places himself for the time being in a position where it is impossible to discharge the duties of both offices. *Bryan v. Cattell*, 15 Id., 538.

(CHAPTER 161, LAWS OF 1880.)

ELECTION OF TOWNSHIP OFFICERS.

An Act to further amend section 591, chapter one (1), title five (5) of the code, relating to the election of township officers.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* That at the general election in the year 1880, and biennially thereafter, there shall be elected in each civil township of the state by the qualified electors thereof in the manner prescribed by law, one township clerk, one assessor, and one highway supervisor for each highway district, who shall hold their offices for the term of two years, and until their successors are elected and qualified.

SEC. 2. All acts and parts of acts inconsistent herewith are hereby repealed.
Approved March 26, 1880.

(CHAPTER 74, LAWS OF 1884.)

ASSESSORS IN CITIES ACTING UNDER SPECIAL CHARTERS.

An Act providing for the election of assessors for state and county purposes in cities organized and existing under special charters. (Additional to code, ch. 10, title IV.)

SECTION 1. [**Cities to elect: duties.**]*—Be it enacted by the general assembly of the state of Iowa:* That the qualified voters of all cities, organized and existing under special charters, having a population of not less than 12,000 nor more than 13,000, as shown by the census of Iowa, 1880, shall, at their regular annual election, in addition to the city assessor, elected in accordance with chapter ninety (90) of the acts of the sixteenth general assembly, also elect an assessor whose duty it shall be to assess the property within said city, for state and county purposes, in the manner provided by law. Such assessor shall hold his office for the term of one year from the first day of January next ensuing after their election.

SEC. 2. The assessment made as aforesaid shall be equalized by the city council of such city, who shall have the same powers in relation thereto as are delegated by law to the township trustees.

Approved March 28, 1884. (Took effect by publication in newspapers.)

(CHAPTER 106, LAWS OF 1878.)

An Act for the protection of cemeteries in the state of Iowa.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* That the trustees, board of directors, or other officers, having the **custody and control** of any cemetery in this state, shall have power, subject to the by-laws and regulations of said cemetery, to enclose, improve and adorn the grounds of such cemetery, to construct avenues in the same, to erect proper buildings for the use of said cemetery, to prescribe rules for improving or adorning the lots therein, or for the erection of monuments or other memorials of the dead upon such lots; to prohibit any use, division, improvement or adornment of a lot which they may deem improper.

SEC. 2. [**Penalty for injuring or defacing graves, etc.**].—Any person who shall willfully and maliciously destroy, mutilate, deface, injure or remove any tomb, vault, monument, gravestone or other structure placed in any public or private cemetery in this state, or any fences, railing or other work for the protection or ornamentation of said cemetery, or of any tomb, vault, monument, or gravestone, or other structure aforesaid, on any cemetery lot within such cemetery, or shall willfully and maliciously destroy, cut, break or injure any tree, shrub, plant or lawn within the limits of said cemetery, or shall drive at unusual and forbidden speed over the avenues or roads in said cemetery, or shall drive outside of said avenues and roads and over the grass or graves of said cemetery, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof before any court of competent jurisdiction, be punished by a fine of not less than five dollars, nor more than one hundred dollars, or by imprisonment in the county jail for a term of not less than one nor more than thirty days, in the discretion of the court; and such offender shall also be liable in an action of trespass in the name of the person or corporation having the custody and control of said cemetery grounds, to pay all such damages as have been occasioned by his unlawful act or acts, which money, when recovered, shall be applied by said person or corporation to the reparation and restoration of the property so injured or destroyed, if the same can be so repaired or restored.

SEC. 3. [**Trustees may appoint watchmen.**].—It shall be lawful for the trustees, directors or other officers having the custody and control of any cemetery in this state, to appoint as many day and night watchmen of their grounds as they may think expedient, and such watchmen, and also their sextons, superintendents, gardeners and agents, stationed upon or near said grounds, are hereby authorized to take and subscribe before any mayor of a city, or justice of the peace of the township where such cemetery is situated, an oath of office similar to that required by law of constables, and upon the taking of such oath such watchmen, sextons, superintendents, gardeners and agents, shall have, exercise and possess all the powers of police officers within or adjacent to the cemetery grounds, and they and each of them shall have power to arrest any and all persons engaged in violating the laws of this state in reference to the protection, care and preservation of cemeteries, and of the trees, shrubbery, plants, structures, grass and adornments therein, and to bring such person so offending before any justice of the peace within such township to be dealt with according to law.

(Took effect April 3, 1878, by publication in newspapers.)

SEC. 400. There shall be **elected at the general election** in every year, a township collector in and for each organized township in every county, except the township in which the county seat is located, who shall hold office for one year; *provided*, the board of supervisors of the county shall order the election of township collectors as in this chapter hereinafter provided.

SEC. 401. **He shall qualify** as other elective officers, and give a bond to the county in a penal sum equal to double the amount of tax to be by him collected, which shall be presented to and approved by the board of supervisors of the county and recorded the same as the bond of county officers.

SEC. 402. [**Auditor's duty.**].—The auditor, in counties where township collectors are elected, shall make out a duplicate tax list of each township, and deliver the same, with the original, to the county treasurer.

SEC. 403. [**Treasurer's duty: powers of collector.**].—The county treasurer shall deliver to each township collector in the county, as soon as he has qualified, such duplicate tax list of his township and take his receipt therefor, specifying the the total amount of the tax charged in such list, and charge the same over to each township collector in a book to be kept for that purpose; and such duplicate tax list, when so made out and delivered to the township collectors, may be used as an

execution, and shall be sufficient authority for them to collect the taxes therein charged in any township in the county by distress and sale or otherwise, as now provided by law for the collection of taxes by the county treasurer; and the county treasurer shall not receive or collect any of the taxes charged in any duplicate tax list so delivered, except the tax of the non-residents of the township, until the same has been returned to him, as hereinafter provided. The said county treasurer shall procure for and deliver to each township collector with said tax list, a tax receipt-book, with a blank margin or stub, upon which the said township collector shall enter the number and date of the tax receipt given to the tax payer, the amount of tax and by whom paid, which said tax receipt-book shall be returned to the county treasurer, with the said duplicate tax as hereinafter provided.

SEC. 404. [**To give notice.**]-Upon the receipt of said tax lists, each township collector, immediately, shall cause the notice of the reception thereof to be posted up in some conspicuous place in every school district in the township, and in every ward of any city therein, so located as will be most likely to give notice to the inhabitants thereof, and also publish such notice for four weeks in one or more weekly papers, if any published in the township, designating in such notice a convenient place in such township where he will attend from nine o'clock A. M. to four o'clock P. M., at least once in each week, on a day to be specified in said notice, until March first following, for the purpose of receiving payment of taxes, and each collector shall attend accordingly, and he shall proceed to collect and receipt for all taxes therein charged, in the same manner as now provided by law for the collection of taxes by the county treasurer, and all the laws which apply to and govern the collection of taxes by county treasurers shall apply to and govern the collection of taxes by said township collector, when not inconsistent with the provisions of this chapter.

SEC. 405. [**Demand taxes: distress and sale.**]-Every collector, after the first of March in each year, shall call at least once on each person whose tax remains unpaid, or at the place of his usual residence, if in the township for which such collector has been chosen, and shall demand the payment of taxes charged to him on his property. In case any person shall attempt to remove from the township property on which tax is due, without leaving sufficient to pay such tax, at any time after the duplicate comes into his hands, the collector shall attach such property and hold the same until the tax is paid, or make the tax out of such property. In case any person refuse or neglect to pay the tax, or shall have removed from said township, the collector shall levy the same by distress and sale of the goods and chattels of the person who ought to pay the same, or of any goods and chattels on which the said tax was assessed, wheresoever the same may be found within the county. The collector shall give public notice of the time and place of sale, and of the property to be sold, at least six days previous to the sale, by advertisements to be posted up in at least three public places in the township where such sale shall be made. The sale shall be made by public auction, and if the property shall be sold for more than the amount of the tax, penalty and costs, the surplus shall be returned to the person in whose possession the property was when the distress was made.

SEC. 406. The township collectors shall make **monthly statements** to the county treasurer of the amount of tax collected by them on each fund, and pay the same over to the county treasurer and take his receipt therefor; and they shall complete the collection of the tax charged in the said duplicate tax lists, by distress and sale or otherwise, on or before the first Monday in May next after the receipt of said duplicate tax list, and pay over the amount so collected to the county treasurer and return to him the said tax lists and receipt books, and make a full and complete settlement for the taxes so collected with the county treasurer, which

settlement shall be subject to the examination and correction by the board of supervisors of the county at its next session.

A temporary surrender by the township collector of the tax list to the county treasurer for the purpose of having it laid before the board of supervisors, in connection with a question relating to a disputed tax, will not operate to deprive the collector of the power of resuming his duties in the collection of taxes upon a re-delivery of the tax list to him. *Shaw v. Orr*, 30 Iowa, 355.

SEC. 407. [**Compensation.**].—Each township collector shall receive for his services the following compensation: 1. Two per cent of all sums collected by him on the first two thousand dollars, and one per cent on all sums in excess thereof collected by him otherwise than by distress and sale, to be paid out of the county treasury; 2. Five per cent upon all taxes collected by him by distress and sale, which percentage and costs shall be collected of the delinquent tax-payer, and the same fees in addition to the said five per cent as constables are entitled to receive for the sale of property on execution.

SEC. 408. [**Unpaid taxes.**].—After the return of said duplicate tax lists and settlement as provided above, the county treasurer shall receive, receipt for, and collect any unpaid taxes in the county, and shall proceed to advertise and sell all the real estate in the county upon which the taxes have not been paid, for the unpaid taxes thereon as provided by law.

SEC. 409. [**When there is failure to collect.**].—If any of the taxes mentioned in the tax list shall remain unpaid, and the collector shall not be able to collect the same, he shall deliver to the county treasurer an account of the taxes so remaining due; and upon making oath before the county auditor, or in case of his absence before any justice of the peace, that the sums mentioned in such account remain unpaid, and that he has not, upon diligent inquiry, been able to discover any goods or chattels belonging to or in the possession of the person charged with or liable to pay such sums, whereon he could levy the same, he shall be credited by the county treasurer with the amount thereof, but such oath and credit shall only be presumptive evidence of the correctness thereof.

SEC. 410. [**Liability.**].—Such collector and his sureties shall be liable for the loss, by theft or otherwise, of any money collected by him and in his possession.

SEC. 411. [**When election of collector ordered.**].—The board of supervisors of each county in the state having a population exceeding seven thousand inhabitants, as shown by the last preceding census, are hereby authorized and empowered to order an election of a township collector in each organized township in their county, by a resolution to that effect, passed at their regular meeting in June in any year by a two-thirds vote of the board, which shall be spread upon the records of the board, and the first election of township collectors in such county shall be held at the next general election after the passage of such resolution, and every year thereafter until the said resolution is repealed by the board, by a like vote, at their regular meeting in June in any year. They shall be voted for and elected in the manner of the other township officers, and in all counties in the state where such resolution is not in force, as provided in this section, then sections four hundred and one to four hundred and eleven inclusive, of this chapter, shall be inoperative and of no effect.

SEC. 412. [**How changed.**].—Any township desirous of changing its name may petition the board of supervisors of the county in which such township is situated, and if it shall appear to said board that a majority of the actual resident voters of such township are in favor of such change, such board shall cause three notices to be posted up in three of the most public places of such township for at least thirty days previous to the next session of said board, which notice shall state the fact that a petition has been presented to said board by the citizens of said township, praying for a change of the name of the same, and the name prayed for in said petition, and that unless those interested in the change of such name shall appear at the next regular session of said board and show cause why

said name shall not be changed, there will be an order made granting such change, which notice shall be attested by the auditor.

SEC. 413. If, at the time fixed for the hearing of said petition, said board is satisfied that there is a majority in favor of such change of name, said board shall make an order granting such change, which shall be attested by the auditor and recorded in the office of the recorder of the county where such township is situated.

SEC. 414. The cost of such change and recording shall be paid by the petitioners. But should it appear to said board that a majority of the citizens of such township are opposed to such change, such petition shall be dismissed and the cost of the proceeding taxed against the petitioners.

SEC. 415. [**Board of health.**].—The township trustees shall have power to make whatever regulations they deem necessary for the protection of the public health, and respecting nuisances, sources of filth, and causes of sickness within their respective townships: *provided*, that their jurisdiction shall not extend to any city or incorporated town situated therein.

SEC. 416. [**Regulations published.**].—Notice shall be given of all regulations made, by publishing the same in a newspaper published in the township, or, where there is no newspaper, by posting in five public places therein.

SEC. 417. [**Power: how executed.**].—The trustees may order the owner or occupant, at his own expense, to remove any nuisance, source of filth, or cause of sickness found on private property within such time as they deem reasonable, and if such person neglects to do so, he shall forfeit a sum of not exceeding twenty-five dollars for every day during which he knowingly permits such nuisance or cause of sickness to remain after the time prescribed for the removal thereof. The order shall be in writing, and served by any constable of the town in the usual way of serving notices in civil suits. If the owner or occupant fails to comply with such order, the trustees may cause the nuisance, source of filth, or cause of sickness to be removed, and all expenses incurred thereby shall be paid by such owner or occupant.

SEC. 418. [**Use means necessary.**].—The trustees shall have power to employ all such persons as shall be necessary to carry into effect the regulations adopted and published according to the powers vested in the trustees, and to fix their compensation; to employ physicians in case of poverty, and to take such general precautions and actions as they may deem necessary for the public health.

(See chapter 151, laws of 1880, establishing a state board of health.)

SEC. 419. [**Violation: punishment.**].—Any person who shall willfully violate any of the regulations so made and published by the trustees, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine or imprisonment, such fine not to exceed one hundred dollars, and such imprisonment not to exceed thirty days.

SEC. 420. [**Expenses: how paid.**].—All expenses, now or hereafter incurred by the trustees of a township in the exercise of the powers heretofore or herein conferred, shall be borne by the township. The trustees shall certify the amount required to pay such expenses to the board of supervisors of the county, and that board shall, at the time it levies the general taxes, and in addition thereto, levy on the property of such township a sufficient tax to pay the amount so certified by the trustees. The tax so levied shall be collected by the county treasurer with the other taxes, and be paid over to the township clerk.

(CHAPTER 130, LAWS OF 1876.)

RELATING TO CEMETERIES.

An Act to provide for condemning, surveying and platting cemeteries, and authorizing all transfers of lots therein to be filed with and recorded by the township clerk. (Additional to code, chapter 9, title IV.)

SECTION 1. [**Cemeteries may be platted.**]*—Be it enacted by the general assembly of the state of Iowa:* That where there is located in any township one or more cemeteries, the owner or owners of the same, or any party or parties owning any interest therein, may cause the same to be surveyed, platted and laid out into subdivisions and lots, numbering the same by progressive numbers, giving the dimensions, length and breadth thereof, with reference to known or permanent monuments to be made; and which plat shall accurately describe all the subdivisions of the tract of land used, or designed to be used, as a cemetery; said plat shall be recorded in the office of the county recorder, and filed with and recorded by the township clerk and preserved by him among the records of his office.

SEC. 2. [**Lots to be conveyed by deed to be recorded by township clerk.**]*—*All conveyances of subdivisions or lots of a cemetery thus platted shall be by deed from the proper owner, which deed shall be recorded with the township clerk in a book kept by him for that purpose, for the recording of which the said clerk shall be entitled to a fee of fifty cents for each instrument recorded, to be paid by the party desiring the record made.

SEC. 3. [**Trustees may condemn lands.**]*—*The township trustees are hereby empowered to condemn or purchase and pay for out of the general fund, and enter upon and take any lands within the territorial limits of such township for use of cemeteries in the same manner as is now provided for incorporated cities and towns.

SEC. 4. [**Shall levy tax to pay lands condemned.**]*—*They shall at the regular meeting in April levy a tax sufficient to pay for any such lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established. They shall have power to control any such cemeteries, or appoint trustees for the same, or sell it to any private corporation for cemetery purposes.

(Took effect March 29, 1876, by publication in newspapers.)

(CHAPTER 120, LAWS OF 1884.)

AUTHORIZING TOWNSHIP TRUSTEES TO EMPLOY ATTORNEYS.

An Act to authorize township trustees to employ attorneys in certain cases.

SECTION 1. [**Trustees may employ counsel when made parties to certain suits.**]*—Be it enacted by the general assembly of the state of Iowa:* That whenever litigation shall arise involving the right or duty of township trustees to certify or levy taxes which have been authorized upon expressed conditions, then in such cases, if the trustees are made parties to said litigation, they shall have authority to employ attorneys in behalf of said township, and are further authorized to levy the necessary tax to pay for said legal services, and to defray the unavoidable expenses of said litigation.

CHAPTER 10.

OF CITIES AND INCORPORATED TOWNS.

SECTION 421. (*As amended by ch. 79, 18th g. a.*) [**How incorporated.**]*—*When the inhabitants of any part of any county not embraced within the limits of any city or incorporated town shall desire to be organized into a city or incorporated town, they may apply by petition in writing, signed by not less than (twenty-five) of the qualified electors of the territory to be embraced in the proposed city or incorporated town, to the circuit court of the proper county, which petition shall describe the territory proposed to be embraced in such city or incorporated town, and shall have annexed thereto an accurate map or plat thereof and state the name proposed for such city or incorporated town, and shall be accompanied with satisfactory proofs of the number of inhabitants within the territory embraced in said limits.

SEC. 422. [**Commissioners appointed: election notice.**]*—*When such petition shall be presented, the court shall forthwith appoint five commissioners who shall at once call an election of all the qualified electors residing within the territory embraced within said limits as described and platted, to be held at some convenient place within said limits, the notice for which shall be given by publication in some newspaper published within said limits, if any there be, for three successive weeks, and by posting notices in five public places within said limits; said posting and the first publication to be not less than three weeks preceding such election. Such notice shall specify the place and time of such election, and a description of the limits of said proposed town or city, and that a description and plat thereof are on file in the office of the clerk of the circuit court.

Said commissioners shall act as judges and clerks of the election, and shall qualify as required by law for judges and clerks of township elections, and shall report the result of the ballot to the court aforesaid. The ballots used at said election shall be, "For incorporation," "Against incorporation."

SEC. 423. [**Result of election published: papers, where filed.**]*—*If a majority of the ballots cast at such election be in favor of such incorporation, the clerk shall, immediately on the return of the commissioners being filed in his office, give notice of the result by publication in a newspaper, or, if no newspaper be published in the county, by posting in five public places within the limits of the proposed city or town; and in such notice he shall designate to which of the classes of incorporation hereinafter prescribed such city or town shall belong. A copy of the notice, with proper proof of its publication, shall be filed with the papers, and a certified copy of all papers and record entries relating to the matter on file in the clerk's office shall be filed in the recorder's office of the county and in the office of the secretary of state.

SEC. 424. [**When complete.**]*—*When certified copies are made and filed as prescribed by the preceding section, and officers are elected and qualified for such city or town as hereinafter provided, the incorporation thereof shall be complete; whereof notice shall be taken in all judicial proceedings.

The courts of record will, under this section, when the requirements of this and the preceding section are complied with, take judicial notice in what county a given incorporated town is situated. *State v. Reeder*, 60 Iowa, 527, 529.

SEC. 425. [**First election of officers: notice to be given.**]*—*When the incorporation of such city or town is completed, the commissioners shall give notice for two consecutive weeks of the time and place of holding the first election of officers therefor, by publication in a newspaper, or, if none be published within the limits of such city or town, by posting in five public places within the limits

of the same. At such election the qualified electors residing within the limits of such city or town shall choose officers therefor, to hold until the first annual election of officers according to its grade, as hereinafter in this chapter prescribed. The commissioners shall act as judges and clerks of the election, and otherwise it shall be conducted and the officers elected thereat shall be qualified in the manner prescribed by law for the election and qualification of township officers.

SEC. 426. [**Mode of procedure.**]—When the inhabitants of a part of any county adjoining any city or town shall desire to be annexed to such city or town, they may apply by petition in writing to the circuit court of the proper county, signed by not less than a majority of the electors residing within the territory proposed to be annexed; which petition shall state at whose instance it is presented, and shall be accompanied by an accurate plat or map of such territory.

□It is not competent for the inhabitants of a town and territory adjoining to exempt, by the petition of incorporation, property from municipal taxation which would otherwise be subject thereto by law. *Hayzlett v. City of Mount Vernon*, 33 Iowa, 229.

SEC. 427. **Like proceedings**, as nearly as applicable, shall be had on such petition as are prescribed in sections four hundred and twenty-two and four hundred and twenty-three of this chapter, *provided*, that notice of the election shall also be served on the mayor or other presiding officer of the town or city to which the annexation is proposed, and such election shall be held in the territory proposed to be annexed.

SEC. 428. [**Proposition to be submitted to the people.**]—The council or trustees of said city or town may give the consent thereof to such annexation, or they may, in their discretion, provide by ordinance or resolution for submitting to the electors at the next annual election of municipal officers the question whether such annexation shall be made; and if such consent be given, or if a majority of the electors of such city or town voting at such election shall vote in favor of annexation, then on the return of such vote to the proper authority of such city or town a resolution or ordinance shall be adopted or passed declaring that the territory described in the petition has been annexed to and is a part of such city or town; and the clerk or recorder of the said city or town shall make out two copies of the petition, plat, orders of the circuit court, abstract of votes, and resolutions or ordinances in relation to such annexation, with a certificate that the same are correct, attested by the seal of such city or town, and he shall deliver one of said copies to the recorder of the county, who shall, having first made record thereof in the proper books of record, file and preserve the same, and the other of said copies shall be forwarded by the clerk or recorder of said city or town to the secretary of state.

SEC. 429. [**Annexation: when complete.**]—So soon as said resolution or ordinance declaring such annexation has been adopted, and the said copies transmitted, delivered and recorded, the said territory shall be deemed and taken to be a part and parcel of the said city or town, and the inhabitants residing therein shall have and enjoy all the rights and privileges of the inhabitants within the original limits of such city or town.

SEC. 430. [**Mode of annexing territory.**]—When any municipal corporation shall desire to annex any contiguous territory thereto, not embraced within the limits of any city or town, it shall be lawful for the trustees or council of the corporation, by an ordinance passed for that purpose at least one month before the regular annual election, to submit the question of annexation to the qualified electors of such corporation; and if a majority of the electors of the corporation voting on the question shall vote in favor of such annexation, the council or trustees of such corporation shall present to the circuit court a petition praying for such annexation, which petition shall describe the territory proposed to be annexed to such municipal corporation, and have attached thereto an accurate map or plat thereof, and like proceedings shall be had upon said petition as are provided in

sections four hundred and twenty-two and four hundred and twenty-three of this chapter, so far as the same may be applicable; and if the result of the election be favorable to the proposed annexation, the same record shall be made as provided in said sections, and thereupon the said contiguous territory proposed to be annexed shall be in law deemed and taken to be included in, and shall be a part of said municipal corporation, and the inhabitants thereof shall in all respects be citizens thereafter of the said municipal corporation.

SEC. 431. [**Same.**—When any incorporated city shall desire to annex to such corporation any abutting or contiguous territory thereto, which is not embraced within the limits of any city, and which territory has been laid out in lots or parcels containing two acres or less, the council of such corporation may present to the circuit court of the county in which such city is situate, a petition setting forth the facts and describing the territory that is desired to be annexed, and that the same has been laid out as above mentioned, together with the names of each owner of any portion of such territory, without describing at length, if there is more than one such owner, the particular portion of such territory owned by each, which petition shall have attached thereto a map or plat of such territory. A notice of the filing of such petition shall be served by publication in one daily or weekly newspaper published in such city, and by posting in five public places in the territory outside of said city for the period of four weeks; and the corporation shall be plaintiff and said owners defendants, and issues joined and the cause tried in the ordinary manner as far as applicable, except that no judgment for costs shall be rendered against any defendant who does not make any defense. If the court find the allegations of the petition to be true, and that justice and equity require that said territory, or any part thereof, should be annexed to such corporation, a decree shall be entered accordingly, and from the time of entering such decree, the territory therein described shall be included in and become a part of such corporation. The powers conferred under the provisions of this section shall also apply to cities acting under special charters.

This section, with respect to its operation upon cities acting under special charters, is not controlled by section 531 of the code. Its provisions apply as well to cities organized under special charters as to those organized under the general law. *City of Burlington v. Leebrick et al.*, 43 Iowa, 252.

SEC. 432. (*As amended by ch. 3, 17th g. a.*) [**When corporations desire to unite with each other.**—When any city or incorporated town shall desire to be annexed to another and contiguous city or incorporated town, the council or trustees of each of such cities or towns shall appoint three commissioners to arrange and report to such council or trustees respectively the terms and conditions on which the proposed annexation can be made; and if the council or trustees of each of such cities or towns approve of the terms and conditions proposed, they shall, by proper ordinance, so declare; and thereupon the council or trustees of each of such cities or towns, by ordinance passed [and one publication had thereof at least ten days] prior to the general and annual election therein, may submit the question of such annexation, upon the said terms and conditions so proposed, to the electors of their respective cities or towns, and if a majority of the electors of each vote in favor of such annexation, the council or trustees of each shall, by proper ordinance, so declare; and a certified copy of the whole proceedings for annexation of the city or town to be annexed being filed with the clerk or recorder of the city or town to which the annexation is made, the latter shall file with the secretary of state, and in the recorder's office of the county, a certified copy of all proceedings had by both of such cities or towns in the matter of such annexation.

SEC. 433. (*As amended by ch. 3, 17th g. a.*) [**Proceedings of annexation.**—When certified copies of the proceedings for annexation are filed as contemplated in the preceding section, the annexation shall be deemed complete, [and the terms and conditions mentioned in section four hundred and thirty-two of the code shall

be a part of the law for the government for the city or town] to which annexation is made, and said city or town shall have power to pass such ordinances, not inconsistent with law, as will carry into effect and maintain the terms of such annexation; and thereafter the city or town annexed shall be governed as a part of the city or town to which annexation is made; and any citizen of the annexed city or town may institute and maintain legal proceedings to compel the city or town, and council or trustees thereof, to which annexation is made, to execute such terms and conditions; *provided*, that such annexation shall not affect or impair any rights or liabilities then existing for or against either of such cities or towns, and that they may be enforced the same as if no such annexation had taken place; [*and provided, further*, that a city or town separated from another city or town by an intervening city or town or territory, may be annexed to such city or town in the manner herein provided, but such annexation shall not be consummated and completed until such intervening city, town or territory is also annexed. Any proceedings which may have been commenced under said sections as amended under the provisions of this act prior to the taking effect of this act for the annexation of a city or town, are hereby declared valid and legal, and such proceedings may be completed in accordance with said section and the provisions of this act.]

(CHAPTER 47, LAWS OF 1876.)

RELATING TO THE EXTENSION OF CITY LIMITS.

An Act empowering cities to extend their corporate limits. [Additional to the code, chapter 10, title IV.]

SECTION 1. (*As amended by ch. 169, 17th g. a.*) [**Additional mode of extending limits.**—*Be it enacted by the general assembly of the state of Iowa:* That in addition to the methods now provided by law, any city or incorporated town in this state may have its limits enlarged in the manner hereinafter prescribed.

SEC. 2. **The council may fix the boundaries** of the city or incorporated town as enlarged to the proposed extent, which boundaries shall, as far as practicable, be terminated by straight lines drawn parallel to the corresponding lines of the government survey.

SEC. 3. [**Extension to be submitted to vote.**—The question of making such extension must then be submitted to a vote of all the qualified electors inhabiting the whole city or town as thus proposed to be enlarged. A day must be fixed for such election by resolution of the council of the city or town whose limits are proposed to be enlarged, and notice thereof must be given by proclamation of the mayor of said city or town of the time of holding such election, and setting forth the exact question to be presented to the electors for determination; which proclamation shall be published for four weeks consecutively prior to said election in some newspaper published in said city or town, which notice shall be deemed sufficient notice of said election and its purposes to all the inhabitants of the city or town as proposed to be enlarged; and if at such election the number of legal votes cast for such extension shall exceed those cast against it, the mayor shall issue his proclamation announcing that fact, and from henceforth the limits of said city or town shall be enlarged as proposed.

SEC. 4. (*As amended by ch. 169, 17th g. a., and ch. 158, laws 20th g. a.*) [**Certain lands within limits not taxable except for road tax.**—No lands included within said extended limits which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less, by the extension of streets or alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be tax-

able for any city or town purpose, except that they may be subjected to a road tax to the same extent as though they were outside of the city or town limits, which said tax shall be paid into the city treasury. (The provisions of this chapter shall apply to cities organized and acting under special charters.)

(Took effect March 10, 1876, by publication in newspapers.)

This chapter as amended by chapter 153 of the laws of 1884, *held* to confer upon cities acting under special charters the power to extend their boundaries, as therein provided, by including territory not laid off into lots of two acres or less, as contemplated by section 431 of the code. *Glass et al. v. City of Cedar Rapids*, 68 Iowa, 207.

Although a tract of land of 13.42 acres, used for agricultural purposes, was annexed to the city of Burlington, at a time when chapter 47, laws of 1876, did not exempt agricultural tracts of less than twenty acres from taxation for city purposes, *held* that chapter 169, laws of 1878, amending said chapter 47, exempting all such tracts of more than ten acres, applied to land already included within the city limits, and that thereafter said tract was exempt from taxation by the city. *Winzer v. City of Burlington*, 68 Id., 279.

(CHAPTER 54, LAWS OF 1874.)

RE-SURVEY OF TOWN PLATS.

An Act to authorize the re-survey and platting of city or town plats, or additions thereto, in cases where the original plats have been lost and not acknowledged or recorded.

SECTION 1. [Where town plat is lost a re-survey may be made.] *Be it enacted by the general assembly of the state of Iowa:* That in all cases where the original town plat of any city, town or village of this state, or any of the additions to any such city, town or village, shall have been heretofore, or may hereafter be, lost, mislaid or destroyed, after the sale and conveyance of any subdivision, block or lot thereof, by the original owner or proprietor, to any person or persons, before the same shall have been recorded, it shall be lawful for any three persons interested in such city, town, village or addition thereto, to have such original city, town, village or addition to any such city, town or village, re-surveyed and re-platted, and such plat made a matter of record, as hereinafter set forth; *provided*, that in no case shall such re-plat be made a matter of record without the consent in writing indorsed thereon, of the original owner or proprietor of such city, town, village or addition thereto, if he be alive and his residence known to those who desire such re-plat recorded.

SEC. 2. [Duty of county surveyor.]—The county surveyor of any county of this state in which is situate any such city, town, village, or addition thereto, as contemplated in section one of this act, is hereby authorized, empowered, and upon payment to him of his legal fees by the person interested, required to re-survey any such city, town, village, or addition thereto, and shall make out a plat of such city, town, village, or addition so re-surveyed, which plat shall in all respects, as near as possible, conform to the original lines of said city, town, village, or any addition thereto that may be re-surveyed, and it shall in all respects be made out as required by section 559 of the code. And in order to the perfect completion of such re-survey and plat, the said surveyor is empowered and authorized to subpoena witnesses, administer oaths, and to take evidence touching said original plat, lines, subdivisions of said city, town, village, or addition thereto sought to be surveyed and re-platted; also as to whether the original proprietor be dead or living, and touching all things necessary to enable him to accurately establish the lines and boundaries of said city, town, village, or addition thereto, and the various subdivisions thereof; *provided*, that in all cases, before any such re-survey shall be made, the county surveyor of the proper county shall give four weeks' notice in some newspaper published in the county, if there be any, of such contemplated

re-survey, and, in case there is no such paper published in the county, then by posting up four written notices in four of the most public places in the county, one of which shall be in said district proposed to be re-surveyed.

SEC. 3. [**County surveyor to re-plat: certify to plat.**]—When the surveyor shall have completed said plat, as hereinbefore contemplated, he shall attach his certificate thereto, to the effect that said plat is a just, true and accurate plat of said city, town, village, or addition so surveyed by him; and the said plat and certificate thereto shall be filed for record in the office of the recorder of deeds for the proper county, and from the date of such filing it shall be regarded and treated in all courts of law and equity in this state, as though the same had been made by the original owners or proprietors of said land so re-surveyed and re-platted; *provided*, that any person or persons deeming themselves aggrieved by said re-survey or re-platting may at any time, within six months from the date of filing said plat for record, commence action by bill in chancery in the circuit or district court against the person employing the surveyor as aforesaid and setting up their causes of complaint, and asking that said record be canceled.

SEC. 4. [**Trial of cause.**]—If it shall appear on the trial of said cause that said city, town, village, or addition thereto was originally laid out and platted, that the original owner or proprietor had sold any and all the lots in such city, town, village, or addition, or that he intended to dedicate to the public streets, alleys or public squares of such city, town, village or addition, that the plat thereof has never been recorded, but was lost or mislaid, that the owner or proprietor is dead, or his residence unknown, and that the re-survey and re-plat so filed for record is a substantially accurate survey and plat of the original plat of such city, town, village, or addition thereto, then said bill shall be dismissed at the costs of the complainants; otherwise the court shall set aside said re-plat and cancel the same of record at the costs of defendants.

SEC. 434. [**Corporations may abandon and adopt this chapter.**]—Any city or town incorporated by special charter, or in any other manner than that provided by this chapter, may abandon its charter and organize itself under the provisions of this chapter with the same territorial limits by pursuing the course hereinafter prescribed.

The general provisions of the law for the incorporation of cities and towns do not apply to cities incorporated under special charters. *Deborah v. Bullit*, 25 Iowa, 12.

SEC. 435. [**Petition to be presented: election ordered.**]—Upon the petition of fifty legal voters in any city or town to the council or trustees thereof, praying that the question of abandoning its charter be submitted to the legal voters, the council or trustees shall immediately direct a special election to be held, at which the question shall be decided, specifying at the same time, the time and place of holding the same, and appointing the judges and clerks of the election.

SEC. 436. [**Proclamation: notice of election given.**]—The mayor, or in case there is no mayor, the president of the council or board of trustees, shall at once issue a proclamation giving notice of such election, of the question submitted to the electors, and of the time and place of holding the election; which proclamation shall be published for four consecutive weeks in some newspaper published in such city or town; and if there is none published therein, then such proclamation shall be published by posting a copy thereof in five public places within the corporate limits of such city or town, one of which shall be on the door of the mayor's office.

SEC. 437. [**Manner of voting.**]—At such election, those who desire to vote in favor of the abandonment of the charter shall deposit a ballot with the words "in favor of abandonment;" those desiring to vote against the abandonment shall deposit a ballot with the words "against abandonment." The election shall be conducted in other respects as elections for city officers are conducted under the

charter. The abstract of votes shall be returned to the city council or board of trustees, who shall canvass the same and declare the result, which shall be entered on the journal.

SEC. 438. (*As amended by ch. 164, 19th g. a.*) [**Special charter abandoned.**]—If a majority of the votes cast at such election be in favor of the abandonment of the charter, the council or trustees shall immediately call a special election for the election of officers for such corporation according to its class as defined by this chapter; and from and after the election and qualification of such officers, the former charter of such city or town shall be considered as abandoned, and such city or town shall be considered as organized, and shall have all the rights and be subject to all the liabilities of the class to which it belongs, but the officers so elected shall hold their offices only until the next annual municipal election in such city or town. (Except in cities of the first class, where such special election is or shall have been held on the first Monday of March of an even year, when they shall hold their offices for the term of two years thereafter. All ordinances of such city or town in force at the time of the abandonment of such special charter, not inconsistent or in conflict with the general incorporation laws of the state, shall be and remain in force until otherwise altered, amended or repealed by the council or trustees of such new organization.) If a majority of the votes be against abandonment, that question cannot be again submitted until after the expiration of one year from the time of such election.

SEC. 439. [**Vested rights not affected.**]—All rights and property of every description which were vested in any municipal corporation under its former organization, shall be deemed and held to be vested in the same municipal corporation under the organization herein contemplated; and no right or liability, either in favor of or against such corporation existing at the time, and no suit or prosecution of any kind shall be affected by such change; *provided*, that when a different remedy is given by this chapter which can properly be made applicable to any right existing at the time such change is made, the same shall be deemed cumulative to the remedies before provided, and may be used accordingly.

Where a city organized under a special charter abandoned its organization and reorganized under the general law, the special charter remains in full force for a time after the election, and the officers under such charter continue also. The special charter laps over and covers a portion of the time which is covered by the term for which the new officers are elected, to-wit: that time between the election and the qualification of the officers elected. *Cox v. the City of Burlington*, 43 Iowa, 612.

Where in such case the city marshal under the old organization was elected under the new, and continued without interruption to discharge the duties of the office, *held*, that it was not competent for the city council, after the re-incorporation, to diminish the salary of the officer for the term for which he was first elected. *Id.*

SEC. 440. [**Application: how made.**]—When the inhabitants of a part of any town or city shall desire to have the part of the territory of such city or town in which they reside severed from, or stricken out of the limits of such city or town, they may apply by petition in writing, signed by a majority of the resident property holders of that part of the territory of such city or town, to the circuit court of the county, which petition shall describe the territory proposed to be thus severed or stricken out of the limits of such city or town, and have attached thereto an accurate map or plat thereof, and shall also name the person or persons authorized to act in behalf of the petitioners in the prosecution of said petition.

Territory within the limits of a city should not be severed therefrom in a proceeding under sections 440, *et seq.*, on the ground that it receives no benefits from the municipal improvements, and is not needed for present municipal purposes, if it is manifest, from the facts in the case, that it will soon be required for such purposes in the extension and growth of the city in that direction. *Mosier v. City of Des Moines*, 31 Iowa, 174. See *McKean v. Mount Vernon*, 51 Id., 306.

SEC. 441. [**Notice of the filing**] of the same shall be given by publication in a newspaper published in said city or town, or by posting a notice of the same in five public places in said city or town for four weeks previous to the succeeding term

of said court, which notice shall contain the substance of said petition and state the term of court at which the hearing thereof will be had.

SEC. 442. **The hearing of such petition** may be had by the court, or either party may demand a jury, and the proper authorities of such city or town, or any person interested in the subject matter of said petition, may appear and contest the granting of the same; and affidavits in support of or against said petition may be prepared and submitted, and may be examined by the court or jury, and the court may, in its discretion, permit the agent or agents named in the petition to amend or change the same, except that no amendment shall be permitted whereby the territory embraced in said petition shall be increased or diminished without continuing the case to the next term, and requiring new notice to be given as above provided.

SEC. 443. **If the court or jury**, after hearing the petition and evidence, shall be satisfied that said petition has been signed by a majority of the property holders residing within the limits of the part of the city or town described in the petition and plat, and that the limits have been accurately described and a correct map or plat thereof made and filed, and if the court or jury shall be further satisfied that the prayer of the petitioners should be granted, the court shall appoint three disinterested persons commissioners to adjust the terms upon which such part shall be so stricken out as to any liabilities of such city or town that have accrued during the connection of such part with such corporation.

SEC. 444. [**Commissioners to take an oath: hear parties.**]—The commissioners so appointed shall take and subscribe an oath that they will impartially perform their duties as such, and shall, at a time by them fixed, hear the agent named in the said petition and also the proper authorities of the city or town in regard to the subject matter to them submitted, and report to the next succeeding term of said court their doings and judgment in the premises, and upon the filing of said report the court shall decree in accordance therewith and with the prayer of said petition; *provided*, that for good and sufficient cause, and upon a proper showing, the court may reject or set aside said report, and appoint new commissioners, and continue the cause for further action to be had thereon.

SEC. 445. [**Transcript filed.**]—The clerk shall forthwith file a certified transcript of such decree, together with the petition and map, in the office of the recorder of the county and in the office of the secretary of state.

SEC. 446. [**When complete: costs.**]—When such certified transcripts are filed, the severance shall be deemed complete. The costs shall be paid by the petitioners, but each party shall pay their own witness fees.

Where a small village became incorporated, and included territory two miles long and one mile wide, and a rival village afterwards sprang up in another portion of the territory so included, and the interests of the villagers, whose centers were about a mile apart, were antagonistic, and the land lying between them was not platted or used for town purposes, *held* that a petition by the people of the new village, under sections 440, 446 of the code, for a severance of their territory from the corporation, was properly granted. *Ashley et al. v. The Town of Callope*, 71 Iowa, 466.

SEC. 447. Whenever **one-fourth of the legal voters** of any city or incorporated town in this state shall petition the circuit court of the county wherein such corporation is situated for the discontinuance of the same, the said court shall cause to be published for at least thirty days, a notice stating that the question of discontinuing such corporation will be submitted to the legal voters of the same at the next annual corporation election.

SEC. 448. **The form of the ballot** shall be, "For the incorporation," and "Against the incorporation."

SEC. 449. **If a two-thirds majority** of all the legal votes cast for and against such proposition shall be cast "against the incorporation," then the same may be discontinued. The vote provided for in this and the two preceding sections shall not be construed to discontinue any corporation until the said corporation shall

have made ample provisions for the payment of all its indebtedness, and for the faithful performance of all its contracts and obligations, and shall have levied the requisite tax therefor.

SEC. 450. [**Canvass: limitation.**]—The vote for this purpose shall be taken, canvassed and returned in the same manner as other municipal elections, and all expenses of the same paid by the corporation so voting. No more than one such election shall be held in the same year.

SEC. 451. [**The books, documents, records, papers,** and corporate seal of any city or town so discontinued shall be deposited with the county auditor of the county for safe keeping and reference in future; and all court records of any mayor or other officer shall be deposited with the nearest justice of the township, who shall have authority to execute and complete all unfinished business standing on the same.

SEC. 452. [**Auditor to publish fact.**]—Whenever the incorporation of any city or town shall have been discontinued under the provisions of the four preceding sections, the auditor of the county wherein such corporation was situated shall publish such fact for thirty days in a county paper, if one is published in the county; if not, shall post three notices for the same length of time, and also to certify the fact to the secretary of state.

SEC. 453. [**Warrants to issue: tax collected.**]—For the payment of its indebtedness, the corporation shall issue warrants in cases where there is no money in the treasury, and the county treasurer shall collect the tax which shall be levied to pay such indebtedness as hereinbefore contemplated and prescribed as he collects other taxes, and pay the said warrants; and any surplus of this fund shall be passed over to the temporary school fund of the district where the same was levied.

SEC. 454. [**Powers enumerated.**]—Cities and towns organized as provided in this chapter shall be bodies politic and corporate under such name and style as they may select at the time of their organization, and may sue or be sued; contract or be contracted with; acquire and hold property, real and personal; have a common seal, which they may change and alter at pleasure, and have such other privileges as are incident to municipal corporations of like character or degree not inconsistent with the laws of the state.

SEC. 455. [**General powers.**]—All municipal corporations organized under this chapter shall have the general powers and privileges, and be subject to the rules and restrictions granted and prescribed in the succeeding section.

SEC. 456. [**Prevent nuisances: riots: gaming houses: establish markets.**]—They shall have power to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated; to regulate the transportation and keeping of gunpowder and other combustibles, and to provide and license magazines for the same; to prevent and punish fast or immoderate riding or driving of horses through the streets; to regulate the speed of trains and locomotives on railways running over the streets or through the limits of the city or incorporated town by ordinance, and enforce the same by a fine not exceeding one hundred dollars; to establish and regulate markets; to provide for the measuring or weighing of hay, coal, or any other article of sale; to prevent any riots, noise, disturbance, or disorderly assemblages; to suppress and restrain disorderly houses, houses of ill-fame, billiard tables, nine or ten-pin alleys, or tables and ball alleys, and to authorize the destruction of all instruments and devices used for purposes of gaming, and to protect the property of the corporation and its inhabitants and to preserve peace and order therein.

A city is not liable for the negligence of its officers or agents in exercising sanitary regulations, adopted for the purpose of preventing the spread of a contagious disease, or in taking the care and custody of persons afflicted with such disease, or the houses in which such persons are kept. In executing these legislative functions the city acts as a *quasi sovereign*, and is not

responsible to individuals for the negligence or non-feasance of its officers or agents. *Ogg v. The City of Lansing*, 35 Iowa, 495.

In the exercise of the power granted in this section to cities "to suppress and restrain * * * billiard tables * * *," it is competent for municipal governments to license the same, under proper conditions. *The City of Burlington v. Laurence*, 42 Id., 631.

Under this section incorporated cities and towns have power to *abate* nuisances, but in the exercise of this power they have no authority to provide by ordinance for the punishment by fine of persons guilty of creating a nuisance. *Incorporated Town of Nevada v. Hutchins*, 59 Id., 506.

Under the power conferred by this section to repress and restra^m disorderly houses, a city has authority by audience to make it an offense to visit such houses. *The State, ex rel., v. Botkin*, 71 Id., 87.

Under this section cities and towns have power to *abate* nuisances; but the nuisance must be such in fact, and must in fact exist; and if the thing *abated* be not a nuisance, the declaration of the city council that it is does not make it so, and is not conclusive upon the owner of the property interfered with, and he may test the action of the council by *certiorari* or he may have the question determined in an action against the city and its officers for damages. *Cole v. Keigler et al.*, 64 Id., 59.

The provision of this section giving cities the power to "establish and regulate markets" does not empower them to pass an ordinance forbidding the peddling of meats; and an information charging a violation of such an ordinance, is bad on demurrer. *City of Burlington v. Dankwardt*, 84 N. W. R., 801.

The power to suppress and restrain disorderly houses, etc., conferred upon cities by this section, does not authorize the passage of an ordinance declaring the keeping of such a misdemeanor, and imposing a punishment by fine and imprisonment for the offense. *The City of Chariton v. Barber*, 54 Iowa, 360.

It is competent for a municipal corporation, under the authority conferred by this section and section 482, to provide by ordinance for the arrest and punishment of persons found in a state of intoxication. *Town of Bloomfield v. Trimble*, Id., 399.

An ordinance of a city which declares the keeping of a house, where loud and unusual noises are permitted, to be a nuisance, and provides for the punishment of any person convicted thereof, is valid under this section. It does not define an offense punishable by the state statutes. *The City of Centerville v. Muller*, 57 Id., 56.

Under this section, a town has the power to erect scales, appoint a weighmaster and regulate their use by reasonable ordinances. *Davis v. Town of Anita*, 35 N. W. R., 244.

Under this section incorporated cities and towns have power to *abate* nuisances, but in the exercise of this power they have no authority to provide by ordinance for the punishment by fine of persons guilty of creating a nuisance. *Incorporated Town of Nevada v. Hutchins*, 59 Iowa, 506.

Cities and towns have the power to *abate* nuisances, but the nuisance must in fact exist; and if the thing *abated* be not a nuisance, the declaration of the city council that it is does not make it so, and is not conclusive upon the owner of the property interfered with; but he may either test the validity of the action of the council by *certiorari*, or he may have a determination of the same question in an action against the city and its officers for damages thus sustained. *Cole v. Keigler et al.*, 64 Id., 59; citing *Clark v. Mayor*, 13 Barb., 32; *Welch v. Stowell*, 2 Doug., (Mich.) 332; *Underwood v. Green*, 42 N. J., 140; *Yates v. Milwaukee*, 10 Wall., 497; *Haskell v. New Bedford*, 108 Mass., 208; *Wreford v. The People*, 14 Mich., 41; *Everett v. Council Bluffs*, 46 Iowa, 66; *City of Salem v. Eastern R'y Co.*, 98 Mass., 431.

A city or town council has power under this section to cause any nuisance to be *abated*, and a person who has erected a hay scales upon the street without leave of the council cannot enjoin the marshal from removing the same therefrom on the order of the city council. *Emerson v. Babcock, Marshal*, 66 Iowa, 257.

SEC. 457. [Regulations against fires.]—They shall have power to make regulations against danger from accidents by fire, to establish fire districts, and, on petition of the owners of two-thirds of the ground included in any square or block, to prohibit the erection thereon of any building or addition to any building, unless the outer walls thereof be made of brick and mortar or of iron and stone and mortar, and to provide for the removal of any buildings or additions erected contrary to such prohibitions.

The destruction of private property to prevent the spread of a conflagration is not a taking of private property for public use, entitling the owner to compensation therefor. *Field v. The City of Des Moines*, 39 Iowa, 575.

That the officers of a municipal corporation are authorized by ordinance to direct the destruction of private buildings and other property to prevent the spread of fire, does not make the corporation liable to the owners of the property thus destroyed, in the absence of an express statute or provision in the charter creating such liability. *Id.*

A municipal corporation is not liable for the acts of its officers done under an ordinance which it had no power to pass. *Id.*

Where a power granted to a municipal corporation is directed to be exercised through certain means or in a particular manner, there is implied an inhibition upon doing it through other means or in a different manner. Accordingly, a city cannot prohibit the erection of wooden buildings within certain limits, except on petition of the owners of two-thirds of the grounds included in any square or block, as provided in this section of the code. *The City of Des Moines v. Gilchrist et al.*, 67 Id., 210.

SEC. 458. [**Burial of the dead.**]—They shall have power to regulate the burial of the dead, to provide without the limits of the corporation places for the interment of the dead, to prevent any subinterments within such limits, and to cause any body interred contrary to such prohibition to be taken up and buried without the limits of the corporation.

SEC. 459. [**Animals running at large.**]—They shall have power to restrain and regulate the running at large of cattle, horses, swine, sheep, and other animals within the limits of the corporation, and to authorize the distraining, impounding, and sale of the same for the penalty incurred and costs of the proceeding, to prevent the running at large of dogs and injuries therefrom, and to authorize the destruction of the same when at large contrary to any prohibition to that effect.

The power to regulate does not include the power to license. *City of Burlington v. Bumgardner*, 42 Iowa, 673.

An ordinance of a municipal corporation can have no extra-territorial force, but persons and property coming within the territorial limits of the corporation come under its authority. *Gosse-link v. Campbell*, 4 Iowa, 296.

SEC. 460. [**Theatrical exhibitions.**]—They shall have power to regulate or prohibit all theatrical exhibitions of whatever name or nature, for which money or any other reward is in any manner demanded or received; but lectures on scientific, historical or literary subjects shall not come within the provisions of this section.

SEC. 461. [**Public library established.**]—The establishment and maintenance of a free public library is hereby declared to be a proper and legitimate object of municipal expenditure; and the council or trustees of any city or incorporated town may appropriate money for the formation and maintenance of such a library, open to the free use of all its inhabitants under proper regulations, and for the purchase of land and erection of buildings, or for the hiring of buildings or rooms suitable for that purpose, and for the compensation of the necessary employes; *provided*, that the amount appropriated in any one year for the maintenance of such a library shall not exceed one mill upon the dollar of the assessed valuation of such city or town. Any such city or incorporated town may receive, hold, or dispose of any and all gifts, donations, devises, and bequests that may be made to such city or incorporated town for the purpose of establishing, increasing, or improving any such public library; and the city or town council thereof may apply the use, profits, proceeds, interests, and rents accruing therefrom in such manner as will best promote the prosperity and utility of such library. Every city or incorporated town in which such a public library shall be maintained shall be entitled to receive a copy of the laws, journals, and all other works published by authority of the state after the establishment of such library, for the use of such library, and the secretary of state is hereby authorized and required to furnish the same from year to year to such city or incorporated town. But no appropriation of money can be made under this section, unless the proposition is submitted to a vote of the people; and at the municipal election of such city or town, the question, "Shall the city (or town council, as the case may be) accept the benefits of the provisions of this section?"

SEC. 462. [**Auctioneers and transient merchants.**]—They shall have power to regulate and license sales by auctioneers and transient merchants within their corporate limits, *provided*, that the exercise of the power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians,

assignees of insolvent debtors or bankrupts, or any other person required by law to sell real or personal property.

A city of the second class has no power under the general law, nor under chapter 97, laws of the ninth general assembly (from which this section is taken), to pass an ordinance requiring a resident merchant engaged in the ordinary business of selling goods at retail, to pay a certain per cent on the amount arising from the sale of a portion of his merchandise which he employs an auctioneer to sell. The section applies only to auctioneers and transient merchants. *City of Oskaloosa v. Tullis & Faxon*, 25 Iowa, 440.

SEC. 463. (*As amended by ch. 136, 19th g. a.*) (They shall have power to regulate, license or prohibit the sale of horses or other domestic animals at auction in the streets, alleys or public places; to regulate, license or tax all carts, wagons, drays, coaches, hacks, omnibuses and every description of conveyance kept for hire; to regulate, license and tax taverns, restaurants, eating-houses; to regulate, license, tax or prohibit beer and wine saloons; (but no license issued therefor shall extend beyond the first day of May following the grant thereof); to regulate, license and tax or prohibit billiard saloons, pool tables, and all other tables kept for hire; ten-pin or other ball alleys, shooting galleries or places; to regulate and license pawnbrokers and peddlers; to regulate, license or prohibit circuses, menageries, theatres, shows, and exhibitions of all kinds, except such as may be exempted by the general laws of the state; and to regulate or prohibit the sale of intoxicating liquors, not prohibited by the laws of the state).

The power to regulate does not include the power to license. *City of Burlington v. Bumgardner*, 42 Iowa, 673.

The power to prohibit the sale of intoxicating liquors, conferred upon cities having special charters by section 2, of chapter 154, laws of 1868, includes the power to license such sale. *The City of Keokuk v. Dressell*, 47 Id., 597. This statute held not unconstitutional in *The State v. King*, 37 Id., 462.

A city incorporated under the general law of the state has no authority to pass an ordinance authorizing the forfeiture or destruction of liquors kept for sale in violation of an ordinance of such city. *Henke v. McCord et al.*, 55 Id., 378.

Under authority to license, taxes cannot be imposed, and the power to tax does not confer the authority to license, the objects to be obtained in the exercise of these powers not being the same. *The City of Burlington v. Bumgardner*, 42 Id., 673; *Same v. Putnam Ins. Co.*, 31 Id., 102; *The State v. Herod*, 29 Id., 123; *The State, for the use, etc., v. Smith*, 31 Id., 493.

A city or town organized under the general incorporation law has no power to enact provisions in an ordinance intended to regulate the sale of wine and beer, making it a condition of the granting of a license therefor that the person to whom it is granted shall not sell liquors the sale of which is prohibited by the laws of the state, nor suffer or permit gambling on the premises occupied by him, and imposing penalties for the violation of such conditions, to be collected by action on the bond of the licensee. An ordinance so providing is void, and no action can be maintained on the bond to recover penalties. *The Town of New Hamilton v. Conroy et al.*, 56 Id., 498.

Chapter 119, laws of 1873, prohibiting the sale of malt or vinous liquors within two miles of the corporate limits of any municipal corporation, and authorizing such corporations to "regulate, license, tax, or prohibit" the same is not unconstitutional. *The State v. Schroeder*, 51 Id., 197.

Under this section, cities and towns have power to provide by ordinance for licensing peddlers; but if an ordinance passed for that purpose is such that a court, upon a mere examination of its terms, must declare it unreasonable, it is void. In this case it was held that an ordinance requiring a peddler to pay as a license, "not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor," was void for unreasonableness. *State Center v. Barenstien*, 66 Id., 249.

(CHAPTER 93, LAWS OF 1886.)

GRANTING POWERS TO CITIES UNDER SPECIAL CHARTERS.

An Act to grant additional authority to cities organized under special charters and to make certain provisions of law applicable thereto.

SECTION 1. [Provisions of code made applicable.] *Be it enacted by the general assembly of the state of Iowa:* That sections 454 to 463 inclusive, and sec-

tion 3720 of the code of Iowa, 1873, and all the provisions of chapter 89 of the nineteenth general assembly are hereby made applicable to the cities acting under special charters, the same as if such cities were therein specially enumerated.

SEC. 2. That nothing in section one of this act shall be construed or considered as repealing any law now in existence granting authority to any cities incorporated under special charters, but wherever authority on any of the subjects mentioned in foregoing laws is now in existence the provisions of said section shall be deemed merely cumulative thereto.

SEC. 3. All cities organized under special charters are hereby authorized to provide by ordinance for the election of mayor and city marshal, for such terms as the city council may deem expedient. *Provided*, that no such term of office shall exceed two years.

SEC. 4. That cities organized under special charters are hereby authorized to prohibit, or regulate, the piling or depositing of any kind of wood, lumber or timber upon any lot or property within the city limits within a distance of one hundred yards of any dwelling house.

SEC. 5. Cities organized under special charters are hereby authorized to provide by ordinance for the repair of any building which is dangerous, or which may be liable to fall, and to levy and collect a special tax against the property and owner thereof for the expense thereof as other special taxes are levied and collected.

Approved April, 1886.

SEC. 464. (*As amended by ch. 6, 15th g. a.*) [Streets, alleys, public grounds and railways.]—They shall have power to lay off, open, widen, straighten, narrow, vacate, extend, establish and light streets, alleys, public grounds, wharves, landing, and market places; and to provide for the condemnation of such real estate as may be necessary for such purposes. They shall also have the power to authorize or forbid the location or laying down of tracks for railways and street railways on all streets, alleys and public places; but no railway track can thus be located and laid down until after the injury to the property abutting upon the street, alley or public places upon which such railway track is proposed to be located and laid down has been ascertained and compensated in the manner provided for (taking private property for works of internal improvement, in chapter four of title X of the code of 1873.)

Prior to the code of 1873, railroad companies had the right to construct their roads, subject to equitable control, upon the streets of cities and incorporated towns, without their consent and without making compensation therefor. *The City of Clinton v. The Cedar Rapids & M. R. R'y Co.*, 24 Iowa, 455; *The C., N. & S. W. R. Co. v. The M. & T. of Newton*, 36 Id., 299; *Ingram, Kennedy & Day v. The C., D. & M. R. Co.*, 38 Id., 669; *Hine v. The K. & D. M. R. Co.*, 42 Id., 636.

This section confers upon municipal corporations power to vacate streets and alleys. *Marshalltown v. Forney*, 61 Id., 583.

Where under a right granted by a city ordinance, the defendant had, prior to the taking effect of this section, surveyed, staked out and located its railroad along the city street, but did not lay down its track until after the taking effect of this section, it was held that it was properly restrained from operating its road along the street until it should compensate the plaintiff, whose dwelling was situated thereon, for his damages as provided in this section. Following *Mulholland v. D. M., A. & W. R'y Co.*, 60 Id., 740; *Hanson v. The Ch., Mil., & St. Paul R'y Co.*, 61 Id., 583.

The exercise of the power conferred upon cities and towns, by this section, to establish streets, will not be reviewed by the courts upon the ground that it is in conflict with the public interest. the decision of the city or town authorities upon that question being conclusive. *Cherokee v. The S. C. & F. Town Lot and Land Co.*, 52 Id., 279.

For a discussion of the power of a city council to vacate streets in a city organized under a special charter, but even afterwards incorporated under the general incorporation law of the state, see *Stubenrauch v. Neuenesch et al.*, 54 Id., 567.

The compensation provided for by this section, as amended by chapter 6 of the laws of the fifteenth general assembly, cannot be limited to damages for change of grade, but includes all legitimate damages, and where the occupancy of the street is unlawful, a person, who is injured thereby, may maintain an action for the trespass before the permanent damages are assessed. *Drady v. The D. M. & Ft. D. R. Co.*, 57 Id., 393, 408.

This section is in terms applicable to all railway tracks which may be constructed in the streets of a city after its passage. *Id.*, 404.

The provisions of this section, with reference to the rights of a railroad company over the streets of cities and incorporated towns, do not apply to actions commenced prior to the time when it took effect. *Ingram, Kennedy & Day v. The C., D. & M. R'y Co.*, 38 Id., 669.

The power conferred by this section upon cities acting under the general incorporation law, to authorize or forbid the laying of street railway tracks on the streets is, by chapter 96, laws of 1880, extended to and applicable to cities acting under special charters, and such cities have no power to authorize a railway company to use the streets for railway purposes, without compensation to the owners of lots abutting upon the streets to be used. *Stange et al. v. The City of Dubuque*, 62 Id., 303.

Under this section not all of the owners of lots abutting upon a street on which a railroad is laid, may recover damages, but only those owning lots on that portion of the street which is so used, and owners of lots abutting upon a street crossed only by a railroad, are, consequently, not entitled to damages under the statute. *Morgan v. Des Moines & St. Louis R'y Co.*, 64 Id., 589.

This section makes a distinction between railways proper and street railways—the former being such as are operated by steam, and the latter those operated by horses, and under this section it is only where a railway operated by steam is built along a street that an abutting lot-owner is entitled to damages. Such right does not arise upon the construction of a railway operated by horses. *Sears v. The Marshalltown Street R'y Co.*, 65 Id., 742.

Parol testimony that a street has been abandoned is not admissible to prove that it has been vacated, for that is properly matter of record under this section. *Lathrop v. The Central Iowa R'y Co.*, 69 Id., 105.

Defendant's railway was built on its own ground along one side of a street in a city, and the road-bed, but not the ties or rails, encroached a little upon the street, but not so as to cause any actual damage to plaintiff's property situated on the opposite side of the street. Held that such encroachment did not entitle him to recover for damages to his property on account of the building and operation of the road in such close proximity thereto on the company's own land. *Rinard v. The Burlington & Western R'y Co.*, 66 Id., 440.

Where the bed of defendant's railway was partly on plaintiff's land, and partly on the city street adjacent to the land, plaintiff was entitled, in the proceeding to assess damages, to be compensated, not only for the appropriation of the portion of his land taken for the right of way, but also for the injury he would sustain on account of laying down of the railroad track in the street on which his property abutted. *McLean v. The C. I. & D. R'y Co.*, 67 Id., 563.

Where a railway company, prior to the enactment of section 464 of the code, commenced the use of the street for its tracks, it did so free from any claim for damages by abutting lot-owners, but where, since such enactment, the company built another track on the same street, under authority from the city, without making compensation to lot-owners, the occupancy of such second track is a trespass upon which the owner or his grantee may recover damages. *The Mer. U. B. Wire Co. v. The C., B. & Q. R. R. Co.*, 70 Id., 105.

The damages contemplated by this section to which abutting lot-owners are entitled by the construction of a railroad being full and permanent, there can be but one recovery, and that only in favor of the abutter who owned the property when the road was built, or the assignee of his claim. A purchaser from such abutter, under a warranty deed, who bought after the road was put in operation, cannot recover. *Pratt et al. v. Des Moines N. W. R'y Co.*, 72 Id., 249.

Where the damages to which the abutting lot-owner has not been ascertained and paid at the time of the occupation of the street by the railroad, an action therefor will be barred in five years. *Id.*

In *Williams et al. v. Carey, Mayor, et al.*, 34 N. W. R., 813, it was held that under section 464 of the code the city of Des Moines had authority to vacate 12 feet of Madison street for the benefit of the general public, although the lots fronting thereon were somewhat depreciated thereby.

The owners of lots abutting on a city street on which a railway has been built, cannot have their damages ascertained by a sheriff's jury in the method prescribed for the condemnation of right of way. *Stough v. The C. & N. W. R'y Co.*, 71 Id., 641; *Mulholland v. Des Moines & N. W. R'y Co.*, 60 Id., 740.

SEC. 465. [Grading of streets: construction of sewers.]—They shall have power to provide for the grading and repairs of any street, avenue, or alley, and the construction of sewers, [and shall defray the expenses of the same out of the general funds of such city or town], but no street shall be graded except the same be ordered to be done by the affirmative vote of two-thirds of the city council or trustees.

The provisions of this section with reference to the rights of a railroad company over the streets of cities and incorporated towns, do not apply to actions commenced prior to the time when it took effect. *Ingram, Kennedy & Day v. The C. D. & M. R'y Co.*, 38 Iowa, 669.

The words in brackets in this section repealed as to alleys by section 5, chapter 51, 15th g. a.

A city not only has the right to make improvements upon a street and reimburse itself for the expense thereby incurred by levying a special tax upon abutting property owners, but it has also the right to prescribe the mode in which such tax shall be assessed. *The City of Burlington v. Quick*, 47 Iowa, 222.

If a city, in grading its streets, causes the work to be done in a careful and skillful manner, it will not be liable, in the absence of a statute to that effect, for injury resulting therefrom. *Ellis v. Iowa City*, 29 Iowa, 229.

Where, by raising the grade of a street, the drainage which had before existed is destroyed, the city is liable in an action by an adjacent property owner for failing to provide a temporary means of escape for the surface water, where such provision is practicable. *Ross v. The City of Clinton*, 46 Id., 606.

A municipal corporation is liable for the negligence or carelessness of its agents in the construction of public works on the same principle that a natural person is liable for damages resulting from his carelessness, unskillfulness or wrong doing. *Cotes & Patchin v. The City of Davenport*, 9 Id., 227; *Templin v. Iowa City*, 14 Id., 59.

For further cases upon the liability of municipal corporations for injuries resulting from defective streets and sidewalks, see notes to section 527, *post*.

As to what is an improvement of a street, see *Koons v. Lucas*, 52 Iowa, 177. This section confers on incorporated towns full control over their streets, and the town cannot escape liability for an injury sustained by reason of the unsafe condition of its streets on the ground that they were put in such condition by the supervisor of the road district. *Clark v. Town of Epworth*, 56 Id., 462.

Where a street has been paved at the expense of the owners of abutting property, and the pavement has been torn up in the construction of a sewer, it cannot be repaired at the expense of abutting property owners, but the restoration of the pavement must be accounted as part of the work of constructing the sewer, and the expense thereof must be paid out of the general fund of the city. *The City of Burlington v. Palmer*, 67 Id., 681.

The costs of grading a city street, as distinguished from paving it, cannot be assessed to the owners of abutting lots; but where grading is necessary to secure a proper foundation for a pavement, and the grading is done as incident to the paving, the cost may be regarded as part of the cost of paving, for which the owners of abutting lots may be taxed. But whether in such case the cost of grading may be considered as a part of the cost of paving, depends upon the actual necessity of the grading in order to secure a proper foundation for the pavement, and the fact that the city council sees fit to regard the grading and paving as essentially one work is not conclusive of the question.

SEC. 466. They shall have power to construct sidewalks, to curb, pave, gravel, macadamize, and gutter any highway or alley therein, and to levy a special tax on the lots and parcels of land fronting on such highway or alley to pay the expenses of such improvement. But unless a majority of the resident owners of the property subject to assessment for such improvement petition the council or trustees to make the same, such improvements shall not be made until three-fourths of all the members of such council or trustees shall, by vote, assent to the making of the same.

Under this section cities are authorized to pass an ordinance assessing upon a corner lot the cost of macadamizing one-fourth of the square formed by the intersection of streets. *Wolf v. City of Keokuk*, 48 Iowa, 129.

Where a city charter authorized the corporation to require the owners of lots "to pave and repair one-half the width of the streets contiguous to their respective lots,—it was held, that the word "pave," as used in this connection, included all things necessary to make a level and convenient surface for horses, carriages and foot passengers. *Buell v. Ball*, 20 Id., 232.

Authority in a city to "pave" its streets confers power to macadamize them and to provide for their proper drainage by the construction of gutters. *Warren v. Henley*, 31 Id., 31.

Authority conferred upon a city to require abutting lot owners to pave the streets, includes authority to require them to build sidewalks. *Id.*

The legislature has constitutional authority to require streets in municipal corporations to be paved, and the cost of the same assessed upon the abutting lots. *Id.* To the same effect is *Morrison v. Hershire*, 32 Id., 271.

A corner lot having a frontage on two different streets may be properly assessed for the cost of improving both fronts. *Id.*

The power to macadamize the streets of a city includes the power to "trim" and "gutter." *McNamar v. Estes et al.*, 22 Id., 246.

While the danger of giving elasticity to words conferring upon municipal corporations power to levy taxes is admitted, they must nevertheless receive such a reasonable construction as will truly reflect the legislative will. *Id.*

This section does not empower a city council to pass an ordinance for the construction of a sidewalk and for the levying of a tax upon abutting property to pay the cost thereof, unless a petition therefor is presented to the council, signed by a majority of the resident owners of the property abutting the street to be improved; without such petition the improvement cannot be ordered or the tax levied unless three-fourths of the whole number of the council by vote assent to the same. *Tallant v. The City of Burlington*, 39 Id., 543, 547.

Where a city is authorized to make street improvements on the petition of not less than two-thirds of the abutting owners, a person who joins in such petition is thereby estopped from afterwards claiming that the assessment of the tax for such improvement petitioned for was unauthorized and illegal on the ground that two-thirds of the abutting owners had not joined in the petition. *City of Burlington v. Gilbert*, 31 Id., 356.

It is competent for a city council to delegate to a committee the requisite authority to construct a sidewalk. *Brewster v. The City of Davenport*, 51 Id., 427.

Where the records of a city council show the adoption of a resolution, it will be presumed to have been adopted by the requisite majority. *Id.*

A street railway company having a right of way for its track over a street cannot be taxed for the cost of an improvement of the street under section 466 of the code. *Koons v. Lucas*, 52 Id., 177.

A city has power to levy and collect a special tax upon the property of a school district situated within its limits which is used solely for school purposes. The exemption of such property from taxation, provided in title 6 of the code, extends only to taxation authorized by that title. *The City of Sioux City v. The Ind. School Dist. of Sioux City*, 55 Id., 150.

Where a city, under sections 466 and 478, passed a general ordinance providing for the construction of gutters in the streets, prescribing the mode in which the charge on the respective owners of lots or lands and on the lots and lands, should be assessed and determined, and providing that the ordinance should take effect five days after its publication, and providing also, the city council may at any time hereafter, by resolution, direct and provide for guttering any of the streets of said city, it was held that the word "hereafter" referred to the date of the passage, and not to the date of taking effect of the ordinance, and that a resolution passed between these dates was valid. *Kendig v. Knight*, 60 Id., 29.

Where in such case the resolution passed pursuant to the ordinance provided that the expense of the gutters "shall be paid by the property holders along each side of said streets in proportion to the frontage each may own;" it was held the tax was valid although it was not provided that it should be assessed as a charge on the *abutting property*; such provision was unnecessary, as section 478 of the code makes it a lien on the real estate. *Id.*

Under section 466 of the code, a city may pave a street and assess the cost thereof upon the owners of abutting lots. Such paving, it would seem, may include the changing of grade preparatory to paving, provided the whole improvement constitutes but one undertaking, and the assessment is made for the whole work. But it is not competent, under said section, to charge the owners of abutting lots for the *grading* of a street, though such grading is done with reference to paving the same at another time, and as a separate and further improvement. Statutes of this kind are usually construed strictly. See opinion for cases distinguished. *Bucroft v. City of Council Bluffs*, 63 Id., 646.

SEC. 467. (*As amended by ch. 15, 22d. g. a.*) [**Expense assessed on property.**]-They shall have power to repair sidewalks, and to assess the expense thereof on the property in front of which such repairs are made.

SEC. 468. [**Temporary sidewalks: expense limited.**]-They shall have power to provide for the laying of temporary plank sidewalks upon the natural surface of the ground without regard to grade, on streets not permanently improved, at a cost not exceeding forty cents a lineal foot, and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid.

SEC. 469. [**When grade of streets is changed after buildings are erected: damages to be assessed and paid.**]-When any city or town shall have established the grade of any street or alley, and any person shall have built or made any improvements on such street or alley according to the established grade thereof, and such city or town shall alter such established grade in such a manner as to injure or diminish the value of said property, said city or town shall pay to the owner or owners of said property so injured the amount of such damage or injury, which shall be assessed by three persons—one of whom shall be appointed by the mayor of such city or town, one by the owner of the property, and one by the two so appointed, or in case of their disagreement, by mayor and

owner, or in case of their disagreement, by the city council or town trustees. If the owner of such property shall fail to appoint one such appraiser in ten days from the time of receiving notice so to do, then the city council or town trustees shall appoint all such appraisers, and no such alteration of grade shall be made until said damages so assessed shall have been paid or tendered to the owner of the property so injured or damaged. The appraisers shall be sworn to faithfully execute their duties according to the best of their ability. Before entering upon their duties, they shall give notice by publication for three weeks in one or more newspapers printed in such city, of the time and place of their meeting for the purpose of viewing the premises and making their assessment. They shall view the premises, and, in their discretion, receive any legal evidence, and may adjourn from day to day. When the appraisal shall be completed, the appraisers shall sign and return the same to the city council or town trustees within thirty days of their appointment. The city council or town trustees shall have power, in their discretion, to confirm or annul the appraisal, and if annulled, all the proceedings shall be void, but if confirmed, an order of the confirmation shall be entered. Any person interested may appeal from the order of confirmation to the circuit court of the county in which such city or town is situated, by notice in writing to the mayor at any time before the expiration of twenty days after the entering the order of confirmation. Upon the trial of the appeal, all questions involved in the proceedings, including the amount of damages, shall be open to investigation, and the burden of proof shall, in all cases, be upon the city or town to show that the proceedings are in conformity with this section. The cost of any proceedings incurred prior to the order of such city council or trustees confirming or annulling the appraisal, shall in all cases be paid by such city or town.

The owner of property which is depreciated permanently in value by carelessness in the improvement of a street, may recover damages of a city making the same, even though the property at the time was occupied by tenants. He may also recover where he held the injured premises under a contract for a deed which was ultimately executed. *Coles & Patchen v. City of Davenport*, 9 Iowa, 227.

At common law or without a statute a municipal corporation is not liable, in the absence of negligence, for damages resulting from grading or changing the grade of its streets. *Cole v. The City of Muscatine*, 14 Id., 296; *Ellis v. Iowa City*, 29 Id., 229; *Russell v. The City of Burlington*, 30 Id., 262; *The City of Burlington v. Gilbert*, 31 Id., 356; *Slatten v. The D. V. R. Co.*, 29 Id., 148.

Where the statute gives damages resulting from the change of grade, they must be ascertained strictly in the manner provided in the statute. *The City of Burlington v. Gilbert*, 31 Id., 356; *Cole v. The City of Muscatine*, 14 Id., 296.

Under this section a city is liable in damages for injury caused by changing the established grade of streets, to adjoining property improved with reference to the former grade, whether the injury is direct and caused by negligence of the city, or consists in a general depreciation in value in consequence of the change of grade. *Hempstead v. The City of Des Moines*, 52 Id., 303.

Where the established grade of a street is changed, resulting in injury to adjacent property, recoverable under this section, the measure of damages is the difference in value of the property resulting from the change, and the city is entitled to have set off against the amount of the damages any enhancement in value of the property by reason of the change. *Meyer v. The City of Burlington*, 52 Id., 560.

The right of action for damages caused by a change of grade, as provided in this section, does not accrue upon the passage of an ordinance providing for such change of grade, but when the physical change is made. *Hempstead v. The City of Des Moines*, 63 Id., 36.

Before a city can make a physical change in the established grade of a street, it must, under section 469 of the code, have the damages to abutting lot owners assessed, and must pay or tender such damages. This section of the code is made applicable to cities acting under special charters by section 479, and its provisions are not repealed as to such cities by sections 8, 9 and 10 of chapter 106, of the laws of 1876—the provisions thereof running parallel with, and not contrary to, the provisions of said section. *Phillips v. The City of Council Bluffs*, 6 Id., 576.

Where the defendant city had established the grade of a street, and plaintiff had made improvements upon her abutting lot to conform to such established grade, and afterwards the city passed an ordinance to change such established grade, and did actually change the grade from curb to curb, and afterwards cut down the sidewalk to the last established grade, without at any time

causing the damages to plaintiff occasioned by such changes of grade to be appraised and paid, held, *first*, that under section 469 of the code, plaintiff had a right of action against the city to recover such damages; *second*, that such right of action arose, not upon the passage of the ordinance to change the grade, but upon the actual change of the grade; *third*, that the right of action for cutting down the street and sidewalk was one and indivisible; and, *fourth*, that plaintiff, having a former action recovered of the city for cutting down the street from curb to curb, cannot now maintain this action for damages for cutting down the sidewalk, as these damages were incidental to, and essentially connected with, the subject matter of the prior suit, and must be held to have been adjudicated therein. *Hempstead v. The City of Des Moines*, 63 Id., 36.

When a notice of appeal from the commissioner's appraisal of damages in proceedings to change the grade of streets under this section of the code is properly given to the mayor of the city, it is not material that his official character is not designated therein. *Conklin v. City of Keokuk*, 35 N. W. R., 444.

SEC. 470. They shall have power to **purchase or condemn**, and pay for, out of the general fund, and enter upon and take any lands within or without the territorial limits of such city or town, for the use of public squares, streets, parks, commons, cemeteries, hospital grounds, or any other proper and legitimate municipal use, and to enclose, ornament and improve the same. They shall have entire control of the same, and shall have power, in case such lands are deemed unsuitable or insufficient for the purpose for which they were originally granted, to dispose of and convey the same; and conveyances executed in accordance with this chapter shall be held to extinguish all rights and claims of any such town or city to such lands existing prior to such conveyance. But when such lands are disposed of and conveyed, enough thereof shall be reserved for streets to accommodate adjoining property owners.

When a portion of ground is dedicated by the original proprietors of a town or city for the purpose of a "public square" therein, the municipal authorities have no authority to sell the same or divert it to uses and purposes foreign to those for which the dedication was made. *Warren v. The Mayor of Lyons*, 22 Iowa, 351.

SEC. 471. (As amended by ch. 11, 22d g. a.) They shall have power to erect **water works** [or to establish and maintain gas works or electric light plants, with all the necessary poles, wires, burners and other requisites of said gas works or electric light plants], or to authorize the erection of the same; but no such works shall be erected or authorized until a majority of the voters of the city or town, at a general or special election, by vote approve the same.

An ordinance of a city providing that in the consideration of the premises, the supply of water in the city, etc., the franchise of the water company and all its property actually required for the management of its works, shall be exempt from city taxation, is not invalid. Such provision, in effect, applies the taxes as they become due in part payment of or in consideration for the water rent, and, hence, is not objectionable as an exemption from taxation. *Grant v. The City of Davenport*, 36 Iowa, 396.

A water company which supplies the city with water, whose rates are regulated by the city council, and which, by the terms of the ordinance conferring its powers, may be purchased at a fixed price by the city, is, nevertheless, a private corporation, and its property is subject to taxation. *Appeal of the Des Moines Water Co.*, 48 Id., 324.

A city council has no power to contract for the publication of its general proceedings at the cost of the city, and the owner of a newspaper publishing such proceedings at the instance of the council cannot recover therefor against the city. *Stidger v. The City of Red Oak*, 64 Id., 465.

SEC. 472. (As amended by ch. 26, 22d g. a.) [**Extent of jurisdiction.**]-They shall have power to construct or authorize the construction of such works without their limits, and for the purpose of maintaining and protecting the same from injury, and the water from pollution, their jurisdiction shall extend over the territory occupied by such works and all reservoirs, streams, trenches, pipes and drains, used in, and necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken; and to enact all ordinances and regulations necessary to carry the power herein conferred into effect.

SEC. 473. [**When privilege granted to individuals.**]-When the right to build and operate such works is granted to private individuals or incorporated

companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individual or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corporation so building said works, and said city or town; and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties.

The validity of an ordinance giving to a company the exclusive privilege for a term of years of laying water pipes in the streets, etc., can be contested only by some other company or individual afterward claiming such right. *Grant v. City of Davenport*, 36 Iowa, 396.

An ordinance authorizing a corporation to construct water works in the city upon conditions prescribed therein, and providing that the city shall have the right, whenever its financial condition will permit, to purchase and control the works, is not an "incurring of indebtedness" within the prohibition of the constitution. It is only the assuming of an obligation which, without further action on the part of the city, will not ripen into a debt, that is thus forbidden. *Burlington W. W. v. Woodward*, 49 Id., 58.

SEC. 474. [May condemn private property.]—Said cities or towns are hereby authorized to condemn and appropriate so much private property as shall be necessary for the construction and operation of said water works; and when they shall authorize the construction and operation thereof by individuals or corporations, they may confer, by ordinance, upon such person or corporation the said power to take and appropriate private property for said purpose.

(CHAPTER 11, LAWS OF 1888.)

ESTABLISHMENT OF WATERWORKS, GAS AND ELECTRIC LIGHT PLANTS.

An Act to amend section 471 of the code of 1873, relating to the power of establishing waterworks by cities and towns, and making the powers granted in section 472, 473, 474 and 475 of the code of 1873, applicable to establishment of gas works or electric light plants, and providing for the payment for the same by the issuing of bonds.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa: That section 471 of the code of 1873 be and the same is hereby amended by inserting in the first line thereof after the word "works" the following words: "Or to establish and maintain gas works or electric light plants, with all the necessary poles, wires, burners and other requisites of said gas works or electric light plants."*

SEC. 2. That sections 472, 473, 474 and 475 of the code of 1873, shall be held to apply to the establishment and maintenance (maintenance) of gas works and electric light plants as fully as they do the erection of waterworks.

SEC. 3. [Cities may issue bonds for light plants.]—That incorporated cities and towns for the purpose of establishing such gas works or electric light plant shall have the power to issue their bonds running for not more than twenty years at a rate of interest not higher than six per cent; *provided*, that the total amount of indebtedness for all purposes in said cities shall not exceed the five per cent of the assessed valuation of said cities as provided by the constitution.

SEC. 475. [Assess water rents as a special tax: collection of: amount.]—All cities and incorporated towns constructing such works are authorized to assess from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water, such water rents as may be agreed upon; and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the taxes now

authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water rents hereby authorized, shall be sufficient to pay the expenses of running and operating such works, and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water for any purpose, such city shall levy each year, and cause to be collected, a special tax as provided for above sufficient to pay off such water rents so agreed to be paid to said individual or company constructing said works; *Provided, however*, that said tax shall not exceed the sum of five mills on the dollar for any one year, nor shall the same be levied upon the taxable property of said city or town which lies wholly without the limits of the benefit or protection of such works, which limit shall be fixed by the city council or board of trustees each year before making said levy.

SEC. 476. [**Proceedings when private property is condemned.**]—When it shall be deemed necessary by any such corporation to enter upon or take private property for any of the above uses, an application in writing shall be made to the circuit court, which application shall describe, as correctly as may be, the property to be taken, the object proposed, and the owners of the property, and of each lot or parcel thereof known, and notice of the filing thereof shall be given as is required to commence a civil action in said court. After such notice shall have been given, the court shall proceed to determine the compensation to be paid for the taking of the property, and for that purpose shall impanel a jury, and the mode of procedure therein shall be the same, so far as applicable, as in an action by ordinary proceedings. The assessment shall be made so that the amount payable to each owner may be ascertained either by allotting to each owner by name or on each lot or parcel of land, and the inquiry and assessment shall in other respects be made by the jurors under such instructions as shall be given by the court. The jurors shall be sworn to make the whole inquiry and assessment, but may be allowed to return a verdict as to part and be discharged as to the rest in the discretion of the court, and in case they shall be discharged from rendering a verdict in whole or in part, another jury may be impaneled at the earliest convenient time, which shall make the whole inquiry and assessment, or the part not made, as the case may be.

The destruction of private property to prevent the spread of fire is not a taking of private property for public use, entitling the owner to compensation from the city. *Field v. The City of Des Moines*, 39 Iowa, 575.

The diversion of travel from other streets, following the opening of a new street in a city, is but a remote consequence of the appropriation of the land taken for the new street, and is not an element of damages. *Cherokee v. The S. C. & I. F. Town Lot Co.*, 52 Id., 279.

A proceeding in court under this section to condemn land for the extension of a city street is a "suit" within the meaning of section 3419 of the code, and may be submitted to arbitrators, by an order of court, upon agreement of parties. *The City of Marion v. Ganby et al.*, 68 Id., 142.

SEC. 477. [**Payment or deposit of damages.**]—When the amount of compensation due to any of the owners of the property to be taken shall be ascertained, the court shall make such order as to its payment or deposit as may be deemed just and proper, and may require adverse claimants to any part of the money or property to interplead, so as to fully settle their rights and interests, and may direct the time and manner in which possession of the property shall be taken or delivered, and may, if necessary, enforce an order giving possession. But none of the property shall be actually taken or occupied until the compensation thus ascertained shall have been paid, or secured to be paid. The costs occasioned by the inquiry and assessment shall be paid by the corporation, and as to the other costs which may arise, they shall be charged or taxed as the court, in its discretion, may direct; no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interest of the respective owners; but in such cases the court shall require the deposit of the money allowed as compensation for the

whole of the property, or the part in dispute; and in all cases as soon as the corporation shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken and the public work or improvement progress.

SEC. 478. [Assessment on lots: how enforced.]—Each municipal corporation may, by a general ordinance, prescribe the mode in which the charge on the respective owners of lots or lands, and on the lots or lands, shall be assessed and determined for the purposes authorized by this chapter; such charge, when assessed, shall be payable by the owner or owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land from the time of the assessment. Such charge may be collected and such lien enforced by a proceeding in law or in equity, either in the name of such corporation or of any person to whom it shall have directed payment to be made. In any such proceedings, where pleadings are required, it shall be sufficient to declare generally for work and labor done, and materials furnished on the particular street, alley or highway. Proceedings may be instituted against all the owners, or any of them, to enforce the lien against all the lots, or land, or each lot or parcel, or any number of them embraced in any one assessment, but the judgment or decree shall be rendered separately for the amount properly chargeable to each. Any proceedings may be severed, in the discretion of the court, for the purpose of trial, review or appeal.

Cities may, by ordinance, if they so elect, cause a special tax, assessed for street improvements against lots and parcels of lands fronting on the streets improved, to be certified to the county auditor to the end that it may be collected as other taxes. *The City of Sioux City v. the Ind. School Dist., etc.*, 55 Iowa, 150.

Under this section the corporation may institute but one suit against all the owners of lots against which an assessment was made for the construction of sidewalks; but the court may, in its discretion, compel the plaintiff to sever and file a separate petition against each defendant. The proceedings in cases of this character are governed by this and the next section. *City of Des Moines v. Stephenson*, 19 Id., 507.

This section (478) making the liability for a special tax a lien upon the property of the abutting owner, is not in conflict with the constitution. *The City of Burlington v. Quick*, 47 Id., 222.

Where a city, under sections 466, 478, passed a general ordinance providing for the construction of gutters in the streets, prescribing the mode on which the charge on the respective owners of lots or lands and on the lots or lands should be assessed and determined, and providing that the ordinance should take effect five days after its publication, and providing also, the city council may at any time hereafter, by resolution, direct and provide for guttering any of the streets of said city, it was held that the word "hereafter" referred to the date of the passage, and not to the date of taking effect of the ordinance, and that a resolution passed between these dates was valid. *Kendig v. Knight*, 60 Id., 29.

Where in such case the resolution passed pursuant to the ordinance provided that the expense of the gutters "shall be paid by the property holders along each side of such streets in proportion to the frontage each may own," it was held the tax was valid although it was not provided that it should be assessed as a charge on the abutting property, such provision was unnecessary, as section 478 of the code makes it a lien on the real estate. *Id.*

In *McInerney v. Reed*, 23 Iowa, 410, it was held that the power to levy and collect a special tax, given in a city charter, does not carry with it the power to collect such tax by a sale of the property upon which it is assessed. The collection of such tax is effected in a court of equity.

It was also held in the same case that such special tax was not assignable so as to enable the person claiming as assignee thereof to enforce its collection.

It was further held in *Morrison v. Hershire*, 32 Id., 271, that a municipal corporation, organized under the general incorporation law, had authority under the general law as amended by chapter 14 of the acts of the thirteenth general assembly, to certify special assessments or taxes levied upon lots for the purpose of street improvements abutting thereon, to the county auditor, to be collected and paid over by the treasurer the same as other taxes are; and that to this end the treasurer is empowered, in case of non-payment, to sell the lots on which the assessments are made, the same as other property is sold for the non-payment of taxes.

SEC. 479. [Recovery had or charge enforced with penalty.]—In any such proceeding, where the court trying the same shall be satisfied that the work has been done, or materials furnished, which, according to the intent of the act, would be properly chargeable upon the lot or land through or by which the street,

alley or highway improved, repaired or lighted, may pass, a recovery shall be permitted, or a charge enforced, to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or land, notwithstanding any informality, irregularity or defect in any such municipal corporation or any of its officers. But in such case the court may adjudge as to costs as may be deemed proper, and in cases where an assessment shall have been regularly made, and payment shall have been neglected or refused at the time when the same was required, any municipal corporation may be entitled to demand and recover, in addition to the amount assessed and interest thereon at ten per cent from the time of the assessment, five per cent to defray the expenses of collection, which shall be included in any judgment or decree which may be rendered. The provisions and powers conferred in this chapter from section four hundred and sixty-five to section four hundred and seventy-nine, inclusive, shall apply to cities acting under special charters.

The last clause of this section, making sections 465 to 479, inclusive, applicable to cities acting under special charters, is new, and was not a part of section 1069 of the revision. It was held under that section that a city organized under a special charter could not recover from the owners of lot the cost of improvements of adjacent streets, "notwithstanding any irregularity or defect in the proceedings" under which the work was ordered. *Starr v. City of Burlington*, 45 Iowa, 87.

It was further held in that case that this provision was not retroactive so as to apply to proceedings for improvements ordered or contracts for work entered into prior to the taking effect of the code of 1873.

It is competent for a city, when not inconsistent with its charter, to prescribe by ordinance the steps to be taken in order to acquire jurisdiction over particular subjects. If these steps are not taken when the requirements of the ordinance are mandatory, the act of the city in an attempt to exercise authority is void. *Id.* See also *City of Dubuque v. Wootton*, 28 Id., 571.

The discretionary power vested in municipal corporations by the general authority to levy and collect taxes, in respect to the imposing of penalties for their non-payment when due, extends only to taxes levied for general purposes, and in cases of special assessments only such penalties can be collected as are fixed by statute. *Ankeny v. Henningsen*, 54 Id., 29.

An ordinance directing that improvements shall be ordered by resolution describing the streets and improvements, and that notice shall be given by publication of the resolution, is not directory but mandatory. *Id.*

Where the proceedings for the levy of the assessment of a special tax for street improvements are void for want of jurisdiction, the property owner is not estopped to deny their validity by the fact that he made no objection while the improvement was in progress. *Id.*

The fact that a gutter in an incorporated city was constructed under sections 466 and 478 of the code, upon two streets and under different resolutions, and that in making the assessments the entire work on both streets was taken into consideration; it was held that this was not such an irregularity as would, under section 479, render the tax illegal. *Kendig v. Knight*, 60 Id., 30. Following *City of Burlington v. Quick*, 47 Id., 222. See also *City of Hampton v. Holliday*, 60 Id., 391.

The limit of penalty upon special assessments is fixed by this section (479) at five per cent in addition to ten per cent from the date of the assessment, and no greater amount can be collected. The penalties provided in section 866 do not apply to such special assessments, and sections 481 and 495 relate only to the mode of collection. *Ankeny v. Henningsen*, 54 Id., 29.

In collecting special assessments under this section, only such penalties can be collected as are designated therein. *Id.*

SEC. 480. [Stagnant water: drained: lots filled.]—Municipal corporations shall have power to cause any lot of land within their limits on which water at any time becomes stagnant to be filled up or drained in such manner as may be directed by a resolution of the council or trustees; and such owner or his agent, shall, after service of a copy of such resolution, or after a publication of the same in some newspaper of general circulation in such corporation for two consecutive weeks, comply with the directions of such resolutions within the time therein specified; and in case of a failure or a refusal to do so, it may be done at the expense of said corporation; and the amount of money so expended shall be a debt due to said corporation from the owner of said lot, and shall, moreover, from the time of the adoption of such resolution, be a lien on such lot or lots.

It was held in *Morrison v. Hershire*, 32 Iowa, 271, that chapter 65 of the laws of 1870 was not intended as a limitation upon the power conferred by chapter 51 of the revision, as to the manner of levying a special tax for street improvements, and that the assessment and levy might lawfully be made under authority of a resolution of the city council as well as by an ordinance.

A city may, by resolution of its council, require the owners of lots within its limits, upon which water becomes stagnant, to fill the same, and publication of the resolution in a newspaper of general circulation in the corporation is sufficient notice of the resolution to enable the city to recover for filling up the lots, in case the owner fails to do it, in a personal action against him therefor. *The City of Independence v. Purdy*, 46 Id., 202.

SEC. 481. [Delinquent charges and assessments certified to auditor.]—Any municipal corporation may, in addition to the means provided by the three preceding sections, if, by ordinance, it so elects, cause any or all delinquent charges, assessments, and taxes made or levied under and by virtue of, and for the purpose specified in said section or referred to therein, to be certified to the county auditor of the county, and be collected and paid over by the treasurer of the county in the same manner as taxes are authorized to be by this chapter.

SEC. 482. [Make and publish ordinances: enforce penalties and fines.]—Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this chapter, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.

The reorganization of a city government under the general incorporation law does not have the effect to repeal an ordinance lawfully enacted under a former charter, making the council the tribunal for the trial of contested municipal elections. *Ex parte Stahl*, 16 Iowa, 369.

The revocation by a municipal corporation of a license to sell intoxicating liquors upon certain specified conditions, a violation of which, according to the express terms of the license, should have the effect to revoke it, is not a forfeiture beyond the powers of the corporation. *Harber v. Baugh*, 43 Id., 514.

The general assembly may delegate to municipal corporations the power to enact ordinances, which, when authorized, have within the corporate limits the force and effect of laws passed by the state legislature. *Des Moines Gas Co. v. City of Des Moines*, 44 Id., 505.

An ordinance of a city which declares the keeping of a house, where loud and unusual noises are permitted, to be a nuisance, and provides for the punishment of any person convicted thereof, is valid under this section. It does not define an offense punishable by the state statutes. *The City of Centerville v. Miller*, 57 Id., 56.

That a city has passed an ordinance professing to give to a gas company an exclusive right to lay pipes through its streets and light the same for a specified compensation, does not deprive it of the right to charter another gas company before the first franchise shall have expired, conferring upon it similar rights and privileges, and such rights cannot be restrained by injunction. *Id.*

This section, which authorizes the passage of ordinances, by cities, to improve the morals and order of the community, does not confer the power to pass an ordinance declaring the keeping of a house of ill-fame a misdemeanor, and imposing a punishment of fine and imprisonment. *The City of Chariton v. Barber*, 54 Id., 360.

It is competent for a municipal corporation, under the power conferred by sections 456 and 482 of the code, to provide by ordinance for the arrest and punishment of persons found in a state of intoxication. *Town of Bloomfield v. Trimble*, Id., 399.

An ordinance providing for the punishment of an offense which is also punishable by the state law is not for that reason invalid. The same act may constitute an offense against both the state and the municipal corporation and may be punished under both without any violation of constitutional principle. *Id.* See also *Henke v. McCord*, 55 Id., 378, noted under sec. 463, *ante*.

SEC. 483. [Fines recovered by action.]—Fines may, in all cases, and in addition to any other mode provided, be recovered by suit or action before a justice of the peace, or other court of competent jurisdiction, in the name of the proper municipal corporation and for its use. And in any such suit or action where pleading is necessary, it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the ordinance, referring to its title

and the date of its adoption or passage, and showing as near as may be the facts of the alleged violation.

A justice of the peace does not have jurisdiction to hear and determine a criminal prosecution for a violation of a city ordinance under this section of the statute, nor under the general law for the incorporation of cities and towns. *Goodrich v. Brown*, 30 Iowa, 291.

SEC. 484. [**Offender committed to jail.**]—Whenever a fine and costs imposed for the violation of any city ordinance are not paid, the person convicted may, by the officer having jurisdiction of the case, be committed until the fine and costs are paid, not to exceed thirty days.

Where a judgment against a defendant in a prosecution under a city ordinance, directed that the defendant be imprisoned until the fine and costs were paid, which judgment was according to the ordinance, it was held to be in harmony with section 484 of the code. *The State v. Wells*, 46 Iowa, 662.

SEC. 485. [**May use county jail.**]—Any city or town shall have the right to use the jail of the county for the confinement of such persons as may be liable to imprisonment under the ordinances of such city or town, but it shall be liable to the county for the cost of keeping such prisoners.

SEC. 486. [**Suits: when barred.**]—All suits for the recovery of any fine, and prosecutions for the commission of any offense made punishable as herein provided, shall be barred in one year after the commission of the offense for which the fine is sought to be recovered, or the prosecution is commenced.

SEC. 487. [**Municipal corporations may require male residents between the ages of 21 and 45 to work on streets, alleys, or highways.**]—All municipal corporations are hereby empowered to provide that all able bodied male residents of the corporation between the ages of twenty-one and forty-five years shall, between the first day of April and the first day of September each year, either by themselves or satisfactory substitute, perform two days' labor upon the streets, alleys, or highways, within such corporation, at such times and places as the proper officer may direct, and upon three days' notice in writing given. They may further provide that, for each day's failure to attend and perform the labor as required at the time and place specified, the delinquent shall forfeit and pay to the corporation any sum not exceeding three dollars for each day's delinquency, and in case of failure to pay such forfeit within ten days the supervisor of highways or street commissioner of said corporation shall recover the same by an action in the name of the supervisor of highways or street commissioner of said corporation; and no property or wages belonging to said person shall be exempt to the defendant on execution; said judgment to be obtained before the mayor of said corporation, or any justice of the peace within the proper township, which money, when collected, shall be expended upon the streets of the corporation; and that all such sums remaining unpaid on the first day of September in each year may be treated and collected as taxes on property, and the same shall be a lien on all the real property of the delinquent that may be listed for taxation, and assessed and owned by him on the first day of November of the same year. (*This section is as amended by ch. 32, 19th g. a.*)

SEC. 488. [**May aid in construction of highways outside corporate limits.**]—Any city or incorporated town may aid in the construction and repair of any highway leading thereto, by appropriating therefor a portion of the highway tax belonging to said city or incorporated town, not exceeding fifty per cent thereof, annually, as hereinafter provided. When a petition shall be presented to the council or trustees, signed by one-third of the resident taxpayers of said city or town, asking that the question of aiding in the construction or repair of any highway leading thereto be submitted to the voters thereof, the council or trustees, immediately, shall give notice of a special election by posting notice in five public places in said town at least ten days before said election, which notice shall specify the time and place of holding said election, the particular highway proposed to be

aided, the proportion of the highway tax then levied and not expended, or next thereafter to be levied, to be appropriated; at which election the question of "appropriation" or "no appropriation" shall be submitted, and if a majority of votes polled be for appropriation, then the council or trustees may aid in the construction and repair of said highway to the extent of said appropriation, in the same manner as they otherwise would if said highway was within the corporate limits of said city or town; but no part of such highway tax shall be expended more than two miles from the limits of such city or town. [*Provided*, that in incorporated towns, and cities of the second class, whether organized under a special charter or under the general incorporation law, with a population under ten thousand inhabitants, whenever one-third of the resident taxpayers of such incorporated town or city shall petition the trustees or council or such incorporated town or city, asking that a portion of the highway tax of such incorporated town or city may be used to aid in the construction or repair of highways outside and within three miles of the limits of such incorporated town or city, such trustees or council may, upon the presentation of such petition, order a part of the highway tax of such incorporated town or city, not exceeding twenty-five per cent thereof, to be used and expended to aid in the construction or repair of highways outside and within three miles of the limits of such incorporated town or city.] (*This section is as amended by ch. 52, 18th g. a.*)

SEC. 489. (*As amended by ch. 146, 18th g. a.*) [**Passage of ordinances.**—All ordinances and resolutions, or orders for the appropriation or payment of money, shall require for their passage or adoption the concurrence of a majority of all the trustees of any municipal corporation; ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rule; no ordinance shall contain more than one subject, which shall be clearly expressed in its title, and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section reviewed or amended, and the ordinance or section so amended shall be repealed. (*Provided*, that in incorporated towns, ordinances and resolutions, or orders for the appropriation or payment of money, shall require for their passage or adoption a concurrence of four trustees, or of three trustees and the mayor).

A resolution introduced at a meeting of the city council proposing a change in the boundaries of the city, does not require for its adoption the concurrence of a majority of the whole number of trustees. *Strohm v. Iowa City*, 47 Iowa, 42.

When the city council amends an ordinance by enacting an entire section which embraces and reviews the whole subject-matter of an existing ordinance, a clear implication arises of an intention that the new shall repeal and take the place of the old section. And in such case, only the section amended, and not the entire ordinance, need be set out. *Town of Decorah v. Dunstan Bros.*, 38 Id., 96.

The council of an incorporated town consists of seven members, including the mayor and recorder, and the rules cannot be suspended for the passage of an ordinance of a general nature by an affirmative vote of four members. *Horner v. Rowley et al.*, 51 Id., 620.

Where the town ordinance was entitled "*Regulating the use and sale of intoxicating liquors*," but the ordinance, as set forth in the body of it, was entirely *prohibitory*, with no pretense of *regulation*, it was held invalid for want of compliance with this section, in that the subject of the ordinance was not clearly expressed in the title. *Town of Cantril v. Sainer*, 59 Id., 26.

Where an ordinance was read the first time at a regular meeting of the city council, and was read a second and third times at adjourned meetings held on different days, it was held a sufficient compliance with this section, and that the ordinance was legally passed. *Cutcomp v. Utt, Mayor, etc.*, 60 Id., 156.

Where the record of the proceedings of a town council fails to show the vote upon a motion to dispense with the second and third readings of an ordinance, it will be presumed that it received the requisite three-fourths vote of all the members, and an ordinance passed in such case by the unanimous vote of the six members present will be valid. *The State v. Vail*, 53 Id., 550.

The provisions of this section, requiring a city ordinance revising or amending another to contain the entire ordinance revised or amended, repeals another by reason of its being on the same subject and repugnant thereto. *City of Des Moines v. Hillis et al.*, 55 Id., 643.

There is no rule of the common law nor provision of statute making it necessary, as a condition precedent to a right of action against a city or town upon a claim arising upon tort, that the claim should be first presented to the city or town council. *Green v. The Town of Spencer*, 67 Id., 410.

If there be a sense in which there is a succession of city councils, there is such immediate succession as to involve a substantial continuity, when taken with the fact that half of the aldermen hold over. And where a proposed ordinance was read on two separate days before the election of a new mayor and alderman, and was read the third time after the newly elected mayor and aldermen had taken their seats, held that this section of the code was sufficiently complied with, and that the ordinance was not for that reason invalid. *McGraw v. Whitson*, 69 Id., 348.

A city ordinance which contains more than one subject is void under this section, but an ordinance in two sections, by the first of which an alley is vacated, and by the second of which the ground covered by the vacated alley is granted to a private person—the main purpose of the ordinance being to transfer the title to such person—does not contain more than one subject within the meaning of this section. *Dempsey et al. v. The City of Burlington et al.*, 66 Id., 657.

SEC. 490. [Councilmen and trustees not eligible to office; or interested in contract.]—No trustee or member of any council shall, during the time for which he has been elected or for one year thereafter, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased during the term for which he shall have been elected, except in the cases provided in this chapter; nor shall any such trustee be interested, directly or indirectly, in the profits of any contract or job of work, or services to be performed for the corporation.

SEC. 491. [Salary not increased or diminished during term of office.]—The emoluments of no officer whose election or appointment is required by this chapter shall be increased or diminished during the term for which he shall have been elected or appointed; nor shall any change of compensation affect any officer whose office shall be created under the authority of this chapter during his existing term, unless the office be abolished; and no person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed when during the same time the emoluments had been increased.

Where a city organized under a special charter abandoned its organization and reorganized under the general law, its former marshal was elected under the new organization, and continued without interruption to discharge the duties of the office: *Held*, that it was not competent for the city council, after the reorganization, to diminish the salary of the officer for the term for which he was elected. *Cox v. The City of Burlington*, 43 Iowa, 612. See also, *Bryan v. The City of Des Moines*, September term, 1879.

This section, providing that a city officer's salary cannot be diminished during his term, is not repealed by chapter 55, laws of 1878. *Bryan v. City of Des Moines*, 51 Iowa, 590; *City of Des Moines v. McHenry*, Id., 710.

SEC. 492. [Ordinances recorded and published.]—All ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose and be authenticated by the signature of the presiding officer of the council and the clerk, and all by-laws of general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published in some newspaper of general circulation in the municipal corporation, and it shall be deemed a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture, to show that no such publication was made: *Provided, however*, that if no such newspaper is published within the limits of the corporation, then and in that case, such by-laws may be published by posting up three copies thereof in three public places within the limits of the corporation, two of which places shall be the postoffice and the mayor's office of such town or city; and such by-laws and ordinances shall take effect and be in force at the expiration of five days after they have been published.

SEC. 493. (As amended by ch. 146, 18th g. a.) [Yeas and nays called on passage of ordinances.]—On the passage or adoption of every by-law or ordinance, and every resolution or order to enter into contract by any council of any municipal corporation, the yeas and nays shall be called and recorded; and to pass or adopt any by-law, ordinance, or any such resolution or order, a concurrence of

a majority of the whole number of members elected to the council shall be required; all appointments of officers by any council shall be made *viva voce*, and the concurrence of a like majority shall be required and the names of those, and for whom they voted, on the vote resulting in an appointment, shall be recorded. No money shall be appropriated by the council except by ordinance. (*Provided*, that in incorporated towns, by-laws, ordinances, resolutions or orders to enter into any contract, shall require for their passage or adoption a concurrence of four trustees, or of three trustees and the mayor.)

The provisions of this section providing for the manner of appointment to office by the city council applies to all appointments, and, in accordance with its provisions, a majority of all the members of the council, and not simply a majority of those who may be present at the meeting, must vote for a candidate to fill a vacancy in the office of city auditor. *The State v. Dickie*, 47 Iowa, 629.

This section does not take away the power of a city to make parol contracts through its agents. *City of Indianola v. Jones*, 29 Id., 232; *Duncombe v. Fort Dodge*, 38 Id., 281.

It is essential to the validity of an ordinance of an incorporated city or town, organized under the general law, that the yeas and nays shall be called on its passage and recorded. The provisions of this section are mandatory. *The Town of Olin v. Meuers*, 55 Id., 209.

This section does not require the yeas and nays to be called and recorded on a resolution directing the construction of a sewer that does not provide for letting a contract for the same. *Grimmell v. City of Des Moines*, 57 Id., 148.

SEC. 494. [Two-thirds vote required to make improvements.]—No street or highway shall be opened, straightened or widened, nor shall any other improvement be made which will require proceedings to condemn private property without the concurrence, in the ordinance or resolution directing the same, of two-thirds of the whole number of the members elected to the council, and the concurrence of a like majority shall be required to direct any improvement or repair of a street or highway, the cost of which is to be assessed upon the owners of the property, unless two-thirds of the owners to be charged therefor shall petition in writing for the same.

Where a rule of a city council forbade members from voting upon questions in which they were directly interested, an ordinance came up at a meeting of the council for adoption, which, under this section, required a two-thirds vote of all the members, there being nine, only six of which voted for the passage of the ordinance, one of whom was directly interested in its passage; *held*, that the ordinance was not legally passed, and was invalid. *Buffington Wheel Co. v. Burnham et al.*, 60 Iowa, 493.

SEC. 495. [Tax certified to auditor and collected as other taxes by county treasurer.]—The council or trustees, as the case may be, of each municipal corporation, is required to cause to be certified to the county auditor, on or before the first Monday of September of each year, the percentage or number of mills on the dollar of tax levied for all city purposes by them on the taxable property within said corporation for the year then ensuing, as shown by the assessment roll of said city for said year, and the said auditor is required to place the same on the tax books of the county in the same manner as county taxes are placed thereon, which tax for municipal purposes shall be collected by the county treasurer; and in all things relating to the collection of the same, and the sale of real or personal property, he is authorized and required to proceed according to the provisions of the statutes regulating the sale of property for delinquent state and county taxes, and in all sales for such, or any delinquent taxes for municipal purposes, if there be other delinquent taxes due from the same person, or lien on the same property, the sale shall be for all the delinquent taxes; and such sales, and all sales made under or by virtue of this section, or the provisions of law herein referred to, shall be of the same validity, and, in all respects, be deemed and treated as though such sales had been made for the delinquent state or county taxes exclusively. And in any city or town incorporated under or by special charter, which now is, or hereafter may be regulated by or subject to the general incorporation laws, all delinquent taxes, except such as were levied to pay indebtedness created to take stock or aid in the building of railways, remaining unpaid upon the tax books of

such city or town, shall be certified at the time, collected and paid over as above directed. And the county treasurer shall include said delinquent taxes so certified with the delinquent state and county taxes on his books, and collect the same by sale of real or personal property in the same manner as is by statute required for delinquent state and county taxes; and all sales of property for such delinquent municipal taxes shall be valid, and, in all respects be deemed and treated as though such sales had been made for delinquent state and county taxes.

It was held in *Burke v. Jeffries et al.*, 20 Iowa, 145, that there was no provision of the general law for the incorporation of cities and towns for the levy and collection of taxes, and for sales for delinquent taxes in cities incorporated under special law; that this section, as in the revision, applied only to cities and towns organized under the general law. This defect is obviated in the section as it now stands.

The deed of the county treasurer for land sold for state and county taxes does not divest, in the hands of the purchaser, the lien of the city for unpaid taxes on the same property. *Ford v. Bruce et al.*, and *Dennison v. The City of Keokuk*, 45 Id., 266.

A sale for city taxes of one year does not divest the lien of the city for the unpaid taxes of prior years. The lien of the tax purchaser is subject to the lien of the city for the taxes of prior years. *Id.*

This section and section 481 relate only to the mode of collection, and do not make the penalties provided in section 866 applicable to special assessments. *Ankeny v. Henningsen*, 54 Id., 29.

SEC. 496. [Taxes limited.]—The amount which may be certified, assessed and collected shall not exceed ten mills on the dollar, to defray its general and incidental expenses.

SEC. 497. For the purpose of creating a **sinking fund** for the gradual extinguishment of the bonds and funded debt of any municipal corporation, the council thereof may, in their discretion, annually, levy and collect, in addition to the other taxes of said corporation, a tax of not more than two mills on the dollar upon the assessed value of said property appraised and returned as aforesaid, which shall be paid into said treasury and be applied by order of the city council toward the extinguishment of the said bonds and funded debt, and to no other purpose whatever.

By chapter 59 of the laws of 1876, it is provided that the city council of any city of the second class organized under the existing, or any prior incorporation law of the state, which has heretofore contracted a bonded indebtedness reaching the limit then prescribed by the law for loans, and in which the amount of taxable property as shown by the assessment for the year 1875, is less than it was for the year 1876, are hereby authorized and empowered to levy, in addition to the taxes now authorized, and at the same time, a tax for the year 1876 of ten mills, for the year 1877 of five mills, for the year 1878 of two and a-half mills, and for the year 1879 of one mill on the dollar of taxable property within said city during said year. This act is vulnerable to the constitutional objection of having no enacting clause.

The levy of a tax of eight mills by a city to pay a judgment against it, after a tax of ten mills had been levied for general city and road purposes, was held not to have been illegal. *Rice v. Walker*, 44 Iowa, 458.

SEC. 498. The treasurer of the county shall pay over to the treasurer of any municipal corporation, all moneys received by him arising from taxes levied belonging to such municipal corporation, on or before the first day of March in each year; and such moneys as said county treasurer may receive after that time, for delinquent taxes belonging to such corporation, he shall pay over to the treasurer thereof when demanded.

SEC. 499. [May tax dogs and domestic animals.]—The council of any municipal corporation shall have power, whenever in their opinion the interests of the corporation require it, to lay and collect a tax on dogs and other domestic animals not included in the list of taxable property, for the state and county purposes; which said tax shall be collected by the collector of such corporation and paid into the treasury thereof.

SEC. 500. (*As amended by ch. 79, 20th g. a., and ch. 108, 21st g. a.*) **Loans may be negotiated** by any municipal corporation in anticipation of the revenues thereof, but the aggregate amounts of such loans shall not exceed the sum of [five per cent upon the taxable property of any city or town, having a population of

not less than (one thousand) nor more than six thousand, and in all other cases such loans shall not exceed the sum of three per cent on such property.]

The issuance, by a municipal corporation, of its bonds to a judgment creditor, although not strictly a loan, amounts to the same thing as borrowing money on its bonds to pay the judgment, and is authorized under this section. *City of Sioux City v. Weare et al.*, 59 Iowa, 95.

SEC. 501. [Annual election, places for holding: qualification of voters.]—The first Monday of March shall be the regular annual period for the election of municipal officers, and all officers whose election is provided for in this chapter, or may be provided for by ordinance, shall be elected on that day. The trustees or council of every municipal corporation shall direct the place or places for holding elections for municipal officers, and whenever the corporation is divided into wards or precincts, there shall be one such place in each ward and precinct, and any person who, at the time of any election of municipal officers, would be a qualified elector under the laws of the state for county officers, and shall have actually resided in the ward or precinct in which he offers to vote for the ten days last preceding the election, shall be deemed a qualified voter; and all elections shall in all respects be held and conducted in the manner prescribed by law in case of township elections.

SEC. 502. At all elections in cities and incorporated towns which are not divided into election districts or wards, the mayor and trustees, any three of whom shall be a quorum, shall serve as judges, and the recorder shall serve as clerk, and after canvassing the votes which may be given at such election they shall declare the result, and the recorder shall make out and deliver to each person elected to any office in such city or town a certificate of such election.

SEC. 503. The returns of all municipal elections in cities and incorporated towns which are divided into election districts or wards, shall be made to the clerk or recorder of the corporation, and shall be opened by him on the third day after election. He shall call to his assistance the mayor of the corporation, or if there be no mayor, or the mayor shall have been a candidate at such election, then any justice of the peace of the county, and shall, in his presence, make out an abstract and ascertain the candidates elected in all respects as required by law for the canvass of the returns of county elections, and shall, in like manner, make out a certificate as to each candidate so elected, and cause the same to be delivered to him or to be left at his place of abode.

SEC. 504. [Oath of office: bond: vacancy.]—All officers elected or appointed in any municipal corporation shall take an oath or affirmation to support the constitution of the United States and the constitution of the state of Iowa, and the trustees or council of any municipal corporation may require from such officers, as they may think proper, a bond, with proper penalty and surety, for the faithful discharge of the duties of their office; and such trustees or council shall have the power to declare the office of any person appointed or elected to any office who shall fail to take the oath of office, or give bond when required, for ten days after he shall have been notified of appointment or election, vacant, and proceed to appoint as in other cases of vacancy.

SEC. 505. The compensation of the council or trustees shall not exceed one dollar to each member for every regular or special meeting of the board, and shall not exceed fifty dollars to each in any one year.

SEC. 506. [Jurisdiction of mayor.]—The mayor of each city or incorporated town shall be a magistrate and conservator of the peace, and, within the same, have the jurisdiction of a justice of the peace in all matters, civil and criminal, arising under the laws of the state or the ordinances of such city or town; and the rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor; but the criminal jurisdiction hereby conferred shall be co-extensive with the county in which such city or town is situated.

This section has reference to mayors of cities of the second-class and incorporated towns, and

does not apply to police courts in cities of the first-class. In the latter a party arrested and brought to trial for the violation of a city ordinance cannot demand a change of venue to a justice of the peace, nor is he entitled to a jury trial. *Zelle v. McHenry*, 51 Iowa, 572.

The mayor of a city is not entitled to recover fees from the county for services rendered as a magistrate in state cases under this section. *Upton v. Clinton County*, 52 Id., 311.

An appeal lies to the district court from the judgment of a mayor of a town incorporated under the general law rendered in a prosecution for the violation of an ordinance of the town. *The State, for the use, etc., v. Hoag*, 46 Id., 337.

A change of venue may be taken from the court of a mayor of a city or incorporated town to that of a justice of the peace. *Finch v. Marvin*, Id., 384.

This section gives the mayor the same jurisdiction in civil cases as a justice of the peace, and therefore, his jurisdiction extends to a case brought before him by a resident of his incorporated town, against a resident of the county, though not of the corporation or township in which it is situated, by a notice served on the defendant within his township, but out of the corporation and of the township including the town. *Weber v. Hamilton et al.*, 34 N. W. R., 424.

The rule that a mayor of a city or incorporated town may properly take judicial notice of the city ordinances was not changed by this section of the code. *The Town of Laporte City v. Goodfellow*, 47 Iowa, 572.

The jurisdiction of mayors of cities and incorporated towns over persons guilty of violations of municipal ordinances, is not exclusive, and a justice of the peace may issue a warrant for the arrest of one charged with such offense, and detain him in custody until the day of trial. *Jaquith v. Royce*, 42 Id., 496.

SEC. 507. [**How classified.**—In respect to the exercise of certain corporate powers and duties of certain officers, municipal corporations are divided into cities of the first and cities of the second class, and incorporated towns.

SEC. 508. [**Defined by population.**—Every municipal corporation having a population of fifteen thousand and upward shall be a city of the first class; every municipal corporation having a population exceeding two thousand, but not exceeding fifteen thousand, shall be a city of the second class; and every municipal corporation having a population not exceeding two thousand shall be deemed an incorporated town.

SEC. 509. [**Governor, auditor and secretary to classify.**—The governor, auditor, secretary of state, or any two of them, within six months after the returns of any census, (taken by the authority of the state or any town or city council,) have been filed in the office of secretary of state, shall ascertain what cities of the second class are entitled to become cities of the first class, and what incorporated towns are entitled to become cities of their proper class. And the governor shall cause a statement thereof to be prepared by the secretary of state, which statement he shall cause to be published in some newspaper published in the city of Des Moines, and also in some newspaper printed in each of the cities and incorporated towns the grade of which shall have been so advanced, and a copy of said statement shall also be transmitted by the secretary of state to the next general assembly, and any such city or incorporated town shall, at the next regular annual period for the election of municipal officers, proceed to organize according to its new grade, by the election of officers properly belonging thereto, and on their election and qualification the term of service of any any former officer expires.

SEC. 510. [**When class is changed, the proper ordinances to be passed.**]—So soon as the statement shall be published, as above provided, showing that any city or incorporated town will be entitled, at the next regular annual period for the election of municipal officers, to be organized into a city of the first or second class, as the case may be, the proper authority of such city or incorporated town shall make and publish such ordinances as may be necessary to perfect such organization in respect to the election, duties and compensation of officers or otherwise.

OF INCORPORATED TOWNS.

SEC. 511. (*As amended by ch. 9, laws 17th g. a.*) [**Officers of incorporated towns.**—(The corporate authority of incorporated towns, organized for general purposes, shall be vested in one mayor, one recorder, and six trustees, to be elected by the people, who shall be qualified electors residing within the limits of the corporation, and who shall constitute the council of the incorporated town, any five of whom shall constitute a quorum for the transaction of business. The mayor and recorder shall hold their offices for one year, and the trustees shall hold their office for three years. At the first election after this law is in force six trustees shall be elected, two of whom shall serve for one year, two for two years, and two for three years, to be determined by lot at the first meeting of the council after the trustees are qualified, and thereafter two trustees shall be elected annually.)

SEC. 512. (*As substituted by chap. 146, 18th g. a.*) [**The mayor shall preside** at all meetings of the council, and shall have the right to vote upon all questions coming before the council. In the absence of the mayor the council shall elect one of their number to preside *pro tempore*. The recorder shall be clerk of the corporation and shall attend all meetings of the council, and shall make a fair and accurate record of all proceedings, rules and ordinances made and passed by the council, and the same shall at all times be open to the inspection of the electors of the corporation, but in no event shall the recorder have the right to vote on any question before the council.)

SEC. 513. [**Vacancies.**—The council shall have power to order special elections to fill vacancies, which may happen in the board, from the qualified electors of the corporation, who shall hold their office until the next annual election and until their successors are elected and qualified, and in the absence of the mayor and recorder from any meeting of the council the council shall have power to appoint any two of their number to perform the duties of mayor and recorder for the time being.

SEC. 514. [**Election of officers.**—The council of any incorporated town shall have power to provide by ordinance for the election of a treasurer, and such subordinate officers as they may deem necessary for the good government of the corporation, to prescribe their duties and compensation, or the fees they shall be entitled to receive for their services, and to require of them an oath of office, and a bond, with surety, for the faithful discharge of their duties. The election of any such officer shall be at the regular annual election, and no appointment of any officer shall endure beyond one week after the qualification of the members of the succeeding council.

SEC. 515. [**A marshal shall be appointed by the trustees,** and shall be the principal ministerial officer of the corporation, and shall have the same power that constables have by law, co-extensive with the county, for offenses committed within the limits of the corporation. He shall execute the process of the mayor, and receive the same fees for his services that constables are allowed in similar cases.

SEC. 516. [**Officers may be removed.**—By the concurrent vote of five members of the council, the mayor, recorder, or any member of the council, or any officer of the corporation, may be removed from office; but no such removal shall be made without a charge in writing being made and an opportunity of hearing being given, unless the officer against whom the charge is made shall have removed out of the limits of the corporation, and when any officer shall cease to reside within the limits of the corporation, it shall be deemed a good ground for removal from office.

OF CITIES.

SEC. 517. [Corporate authority of cities: in whom vested.]—The corporate authority of cities organized under this chapter shall be vested in a mayor and a board to be denominated the city council, together with such officers as are in this chapter mentioned, or may be created under its authority.

A municipal corporation possesses and can exercise the following powers, and none others: 1. Those granted in express words; 2. Those necessarily implied, or necessarily incident to the powers expressly granted; 3. Those absolutely essential to the declared objects and purposes of the corporation—and not simply convenient, but not indispensable; and any fair doubt as to the existence of a power will be resolved by the courts against the corporation and the existence of the power. *Ham v. Miller*, 20 Iowa, 450, 453; *Merriam v. Moody's Executors*, 25 Id., 163; *The State v. Smith*, 31 Id., 493; *Logan & Sons v. Payne*, 43 Id., 524; *Carter v. The City of Dubuque*, 35 Id., 416; *The City of Keokuk v. Scroggs*, 39 Id., 477.

The power is to be strictly construed and closely pursued. *The City of Burlington v. Keller*, 18 Id., 59.

Municipal corporations have and can exercise only such powers as are expressly granted, and such as are incidental and necessary to make the granted powers available, and are essential to effectuate the purposes of the corporation, and these powers are to be strictly construed. *Clark v. The City of Des Moines*, 19 Id., 199.

The attempted exercise of powers not conferred is equally illegal with the exercise of a prohibited power. *Id.*

The subsequent recognition by a municipal corporation of acts done in the exercise of a prohibited power will not estop the corporation to afterward deny the validity of the acts. *Id.*

The general assembly may delegate to municipal corporations the power to enact ordinances which, when authorized, have within the corporate limits the force and effect of laws enacted by the state legislature. *The Des Moines Gas Company v. The City of Des Moines*, 44 Id., 505.

Municipal corporations are the creatures of the legislature, and can acquire no rights in antagonism to those of their creator. They can possess no vested right to an uncollected tax, authorized by a general law and for a general purpose, which shall deprive the legislature of the right to alter and repeal the general law, thereby defeating the collection of the tax. With respect to private corporations the rule is otherwise, but the doctrine of exemption from legislative authority should not be extended. Per COLE, J., in *The City of Dubuque v. The Ill. Central R'y Co.*, 33 Id., 56.

A municipal corporation may set up the plea of *ultra vires* or its own want of power or authority under the law or its charter to enter into a given contract, or to do a given act in excess of its corporate power. *Id.*

When the officers of a city have no express power to issue, for ordinary current expenses or debts, negotiable paper which shall be free from equities in the hands of purchasers, and is not necessary as an incident to those granted, or to carry out the purposes and objects of the corporation, it cannot be held to exist by implication. *Id.*

The power to borrow money, conferred upon a corporation, does not authorize the loan of the credit of the city. And if bonds are issued by a municipal corporation which show upon their face the authority under which they are executed, and such authority is insufficient, they are void even in the hands of third parties. *Chamberlain v. The City of Burlington*, 19 Id., 398.

The powers of municipal corporations are created only by positive enactment, and any act done in the exercise of a power not thus created, is of no validity. *McPherson v. Foster Brothers*, 43 Id., 48.

Although a municipal corporation may be divested of its corporate powers, and they are in no sense vested rights as against the state, yet it may not be lawfully deprived of its right to collect taxes which have been legally levied, because, 1. A municipal corporation has a private character in which it may acquire property and make contracts; 2. There is no such distinction as *public rights* and *private rights*, the same rights being common to both corporations and natural persons. Corporations, however, may be clothed with *powers* which cannot be conferred upon the natural person, and these may be abrogated, while rights cannot; 3. While the legislature can control the corporate property, its power is limited in this respect, to the purposes for which the city exists; 4. A release of municipal taxes, which have already been levied, by a statute which provides for a different kind of taxation, is not a commutation of taxes within legislative authority. Per BECK, J., in *The City of Dubuque v. The Ill. Central R'y Co.*, 39 Id., 56. Dissenting opinions.

The term "municipal corporations" includes and especially refers to cities and towns, counties, and school districts, etc. *Hull v. Marshall County*, 11 Id., 142; *The State v. Wapello County*, 13 Id., 389; *Iowa Railroad Land Co. v. Carroll County*, 37 Id., 152.

A municipal corporation having authority to hold and dispose of lands granted to it, possesses the incidental powers the same as individuals, to do, through its proper officers, whatever in their

judgment may be necessary to preserve and perfect its interests in and to the same. *Allen v. Cerro Gordo County*, 34 Id., 54.

It is a well settled principle that a municipal corporation cannot exercise the power or right of taxation unless such power is expressly given to it by the legislature. *Clarke, Dodge & Co. v. The City of Davenport*, 14 Id., 494; *The State v. Smith*, 31 Id., 493.

No property can be taxed until the legislature authorizes it to be done, and when the act requires it to be done in a particular manner, that manner alone can be pursued. *The City of Davenport v. The M. & M. R'y Co.*, 12 Id., 539.

SEC. 518. (*As amended by ch. 58, 16th g. a.*) [**Election of mayor: term: qualification: duties.**].—The mayor shall be elected biennially in cities of the first class, and annually in cities of the second class, by the qualified voters of the city. He shall be a qualified elector and reside within the limits of the city, and shall hold his office for the term for which he shall have been elected and qualified. He shall keep an office at some convenient place in the city, to be provided by the council, and shall keep the corporate seal of the city in his charge; [he shall act as president of the council;] he shall sign all commissions, licenses, and permits granted by the authority of the city council, and such other acts as by law or ordinance may require his certificate. (*As amended by ch. 141, 21st g. a.*) [His term of office shall be for two years, the first term dating from the first Monday in March, 1887.]

Prior to the amendment of this section the mayor of cities of the second class was not *ex officio* a member of the city council, nor had he a right to preside over the same. *Cochran v. McCleary*, 22 Iowa, 75.

SEC. 519. **In case of the mayor's death**, disability, resignation, or other vacation in his office, the city council shall order a special election, as soon as practicable, to fill the vacancy for the remainder of the time of office, and may appoint some qualified elector to act as mayor until such special election. The mayor of the city shall be its chief executive officer and conservator of the peace, and it shall be his special duty to cause the ordinances and the regulations of the city to be faithfully and constantly obeyed; he shall supervise the conduct of all the officers of the city, examine the grounds of all reasonable complaints made against any of them, and cause all the violations of their duty, or their neglect, to be promptly corrected or reported to the proper tribunal for punishment and correction; he shall have and exercise within the city limits the powers conferred upon the sheriffs of counties to suppress disorders and keep the peace; he shall also perform such other duties, compatible with the nature of his office, as the council may from time to time require; he shall receive such salary, payable quarterly out of the city treasury, as may be provided by ordinance; but the amount of such salary shall neither be increased nor diminished during an incumbent's term of office.

SEC. 520. [The numbers, divisions, and boundaries of the several wards of all cities heretofore incorporated, shall remain as fixed when this code goes into operation, until changed by the city council. Said council may, at any time, create new wards, or alter those now established, or the boundaries thereof, as may be deemed expedient; but in cities of the second class the number of wards now existing shall not be increased to a greater number than seven, nor decreased to a less number than three.] (*As substituted by ch. 26, 18th g. a.*)

SEC. 521. [**Election of members of council.**].—[In cities of the second class the qualified electors of each ward shall, on the first Monday of March of each year, elect by a plurality of votes one member of the city council, who shall at the time be a resident of the ward and a qualified elector therein. His term of office shall be two years, so that there may always be in the council two members from the same ward whose time of office shall expire in different years; but at the first election held on the organization of a new city government under this chapter, two members of the city council shall be elected in each ward, and the city

council shall determine by lot their time of service, so that one trustee from each ward may serve for two years, and one for one year.

(*As amended by ch. 25, 19th g. a.*) [**Same: cities of first class.**—[In cities of the first class the qualified electors of each ward shall, on the first Monday of March of the year 1882, elect, by a plurality of votes, one member of the city council, who shall at the time be a resident of the ward and a qualified elector thereof. And in the same year the qualified electors of cities of this class shall also elect two members at large of such city council, each of whom shall be a resident and qualified elector of the city in which he shall be elected. But, in order that their term of service expire in different years, the council, at the first regular meeting, shall determine by lot which of the alderma[e]n at large shall serve one, and which two years. The term of service of the other aldermen shall be determined in the same way, time and manner; in cases where the number is uneven the majority shall serve one year. On the first Monday of March of each year thereafter the qualified electors shall elect for the term of two years one alderman at large and one in each ward where the term of *their* [its] alderman expires. *Provided*, that when any city of the first class embraces within its corporate limits the whole or parts of two or more different townships, two of which townships or parts thereof contain one thousand electors each, that only one of the alderma[e]n at large herein provided for shall be elected from any one of such townships or parts of townships.

SEC. 522. [**Organization of council: duties: shall choose clerk.**—The members elected for each city shall, on the second Monday after their election, assemble together and organize the city council. A majority of the whole number of members shall be necessary to constitute a quorum for the transaction of business; they shall be judges of the election returns and qualifications of their own members; they shall determine the rule of their proceedings and keep a journal thereof, which shall be open to the inspection and examination of any citizen; they may compel the attendance of absent members in such manner and under such penalties as they shall think fit to prescribe, and shall elect from their own body a temporary president; they shall also appoint, from the qualified electors of the city, a city clerk who shall have the custody of all the laws and ordinances of the city, and shall keep a regular and correct journal of the proceedings of the council, and shall perform such other duties as may be required by the ordinance of the city. The clerk in office at the expiration of the term of service of any council, shall continue in office until his successor shall be appointed and qualified.

Prior to the act of the eighteenth general assembly, chapter 120, it was held that in the organization of the city council in cities of the second class the mayor was not *ex officio* a member of, and was not entitled to preside over the city council. *Cochran v. McCleary*, 22 Iowa, 75. But see section 531, *post*.

SEC. 523. [**Provide seal for clerk: fees of.**—Each city council shall cause to be provided for the clerk's office a seal, in the center of which shall be the name of the city, and around the margin the words "city clerk," which shall be affixed to all transcripts, orders, or certificates which may be necessary or proper to authenticate under the provisions of this chapter or any ordinances of the city. For all attested certificates and transcripts other than those ordered by the city council, the same fees shall be paid to the clerk as are allowed to county officers for the same services.

SEC. 524. [**Powers of council enumerated: compensation of officers.**—The city council shall possess all the legislative powers granted in this chapter and other corporate powers of the city not herein, or by some ordinance of the city council, conferred on some officer of the city; they shall have the management and control of the finances, and all the property, real and personal, belonging to the corporation; they shall determine the times and places of holding their meetings, which shall at all times be open to the public; and the mayor, or any three mem-

bers, may call special meetings by notice to each of the members of the council personally served, or left at his usual place of abode; they shall appoint or provide by ordinance, that the qualified electors of the city, or of the wards or districts, as the case may require, shall elect all such city officers as may be necessary for the good government of the city, and for the due exercise of its corporate powers, and which shall have been provided for by ordinance, as to whose election or appointment provision has not herein been made; and all city officers whose term of service is not prescribed, and whose powers and duties are not defined by this chapter, shall perform such duties, exercise such powers, and continue in office such term of time, not exceeding one year, as shall be prescribed by ordinance; but all officers to be elected shall be elected at the regular annual election for municipal corporations. The officers of cities shall receive such compensation and fees for their services as the council shall by ordinance prescribe.

Where neither the duties nor the compensation of a city solicitor are prescribed by the city council, it is the duty of such solicitor, unless otherwise instructed, to perform such services as the interests of the city require, and he may recover therefor what they are reasonably worth. *Kinne v. The City of Waverly*, 42 Iowa, 486.

A city is not liable for the negligence of its officers or agents in executing sanitary regulations, adopted for the purpose of preventing the spread of contagious diseases, or in taking the care and custody of persons afflicted with such disease, or the houses in which such persons are kept. In executing these legislative functions the city acts as a *quasi* sovereignty, and is not responsible to individuals for the negligence or nonfeasance of its officers or agents. *Ogg v. City of Lansing*, 35 Id., 495.

(Section 525 repealed by sections 13 and 25 of chapter 151, eighteenth general assembly.)

SEC. 526. [**Regulates markets, etc.**].—No charge of assessment of any kind shall be made or levied on any wagon or other vehicle, or the horses thereto attached, or on the owner thereof, bringing produce or provisions to any of the markets in the city, for standing in or occupying a place in any of the market spaces of the city, or in the streets contiguous thereto, on market days and evenings previous thereto; but the city council shall have full power to prevent forestalling, to prohibit or regulate huckstering in the markets, to prescribe the kind and description of articles which may be sold, and the stands or places to be occupied by the vendors, and may authorize the immediate seizure and arrest, or removal from the markets of any person violating its regulations as established by ordinance, together with any article of produce in their possession, and the immediate seizure and destruction of tainted or unsound meat or other provisions.

SEC. 527. [**Control highways, bridges, streets and public squares.**].—The city council shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair, and free from nuisances; all public bridges exceeding forty feet in length, over any stream crossing a state or county highway, shall be constructed and kept in repair by the county: *provided*, that the city council may appropriate a sum not exceeding ten dollars per lineal foot to aid in the construction of any county bridge within the limits of such city, or may appropriate a like sum to aid in the construction of any bridge contiguous to said city on a highway leading to the same, or any bridge across any unnavigable river which divides the county in which said city is located from another state; and that no street or alley which shall hereafter be dedicated to public use by the proprietor of the ground in any city, shall be deemed a public street or alley, or to be under the use or control of the city council, unless the dedication shall be accepted and confirmed by an ordinance especially passed for such purpose.

A city is liable for lumber furnished to repair a bridge situated on a county road, but within the corporate limits of the city. *Tubbs v. The City of Maquoketa*, 32 Iowa, 564.

A city is liable for injuries resulting from the defective condition of the streets, bridges and sidewalks within its corporate limits when such defects are caused by the negligence of the city. *Rusch v. The City of Davenport*, 6 Id., 443; *Manderschid v. The City of Dubuque*, 39 Id., 73;

Collins v. City of Council Bluffs, 32 Id., 324; *Rice v. The City of Des Moines*, 40 Id., 638; *Van Pelt v. The City of Davenport*, 42 Id., 308; *Coates v. City of Davenport*, 9 Id., 227; *Ellis v. Iowa City*, 29 Id., 229; *Koester v. City of Ottumwa*, 34 Id., 41; *City of Ottumwa v. Parks*, 43 Id., 119; *Townsend v. The City of Des Moines*, 42 Id., 677; *City of McGregor v. Boyle*, 34 Id., 268; *Wales v. City of Muscatine*, 4 Id., 302; *Rowell v. Williams*, 29 Id., 210.

Burden of proof.—In an action for damages resulting from an injury caused by a defective street or bridge, the plaintiff, in order to be entitled to recover, must not only show negligence on the part of the city, but must show that he was exercising ordinary care and diligence on his own part. *Rusch v. The City of Davenport*, 6 Id., 443; *O'Laughlin v. The City of Dubuque*, 42 Id., 539; *Murphy v. The C., R. I. & P. R. Co.*, 45 Id., 661; *Cramer v. The City of Burlington*, 42 Id., 315.

Reasonable care.—The reasonable care to be shown by the plaintiff is such care as persons of common prudence generally exercise, and whether he has exercised such degree of care is a question of fact, or a mixed question of law and fact, to be determined by the jury under the direction of the court. *Rusch v. The City of Davenport*, 6 Id., 443; *Cramer v. The City of Burlington*, 42 Id., 315.

Negligence is the omitting to do something that a reasonable person would do, or the doing of something that a reasonable person would not do. *Rusch v. The City of Davenport*, 6 Id., 443.

A city is not released from liability for negligence in the construction of a culvert within its limits by the fact that the money for its construction was appropriated by the board of supervisors of the county. *Van Pelt v. The City of Davenport*, 42 Id., 308.

Where a city has employed a competent engineer in the construction of a culvert, and he, in the honest exercise of his judgment, has failed to make it of sufficient capacity to avoid injury to property, the city is not liable for the injurious results of his error in judgment. *Id.*

The city is, nevertheless, bound to the exercise of reasonable care, judgment and skill in the construction of culverts rendered necessary by the extension of its streets, and, upon a failure to do so, liability attaches. *Id.*

One who could have protected his property from injury by a reasonable expenditure cannot recover from another, by whose negligence he has suffered the injury, more than the amount which would have been expended in securing such protection. *Id.* See, also, *Simpson v. Simpson*, 34 Id., 568.

The mere existence of a defect in a sidewalk of a city, not resulting from defective construction, is not sufficient to establish negligence on the part of the corporation, and in order to render it liable for an injury caused thereby, express notice of the defect must be brought home to the city, or the defect must have been so notorious as to be observable by all passers by. *Donlan et ux v. The City of Clinton*, 33 Id., 397; *Cramer v. City of Burlington*, 39 Id., 512.

The knowledge of two or more of the citizens of a city that a sidewalk is in a dangerous condition is not notice thereof to the city. To render it liable for resulting injuries it must either have express notice of a defect not in the original construction, or the fact must be notorious. *Cramer v. The City of Burlington*, 39 Id., 512.

Where the officers of a city have knowledge of the construction of improvements in a negligent manner, it is no defense against the consequences of such negligence that it was not authorized by the city council, which was charged with the duty of making the improvements. *Powers v. The City of Council Bluffs*, 50 Id., 197.

Section 527 of the code which provides that the county shall construct and maintain all bridges over forty feet in length over streams crossing the public highways, does not change section 303 of the code, which requires the board of supervisors to build all bridges which may be needed in their counties; so in an action against a county to recover damages caused by a defective bridge, the liability does not depend upon the length of the bridge. *Casey v. Tama County*, 37 N. W. R., 138.

The negligent permission of an obstruction in a street from snow and ice being deposited there from natural causes, whereby injury results to a traveler, will render the city liable. *Collins v. Council Bluffs*, 32 Iowa, 324, 328.

What is or is not a "negligent permission" of an obstruction caused by ice and snow, does not appear in the report of the case last cited. The facts do not appear in the report, but by reference to the printed abstract we find that it was alleged and proved without conflict that the snow had fallen from time to time, which was trodden upon and not removed until a ridge of trodden snow was formed in the middle of the sidewalk; that water had flowed over the walk and frozen. This ridge was from sixteen to eighteen inches wide, and varied in height from three to six inches, and formed a series of hummocks. It was very slippery and uneven on the surface. We have been unable to find any case holding the corporation liable for the results of mere slipperiness of a sidewalk arising from a smooth surface of ice or snow accumulated upon it. On the contrary, all the cases of that kind, so far as we have been able to discover, hold that there is no liability on the part of the city. See *Stone v. The Town of Hubbardson*, 100 Mass., 50; *Stanton v. City of Springfield*, 12 Allen (Mass.), 566; *Cook v. The City of Milwaukee*, 24 Wis., 270; *Ward v. Jefferson*, Id., 342; and see cases cited in Dillon on Munic. Corp., Sec. 789, under "snow and ice."

Damages—In the case of *Collins v. The City of Council Bluffs*, as reported in 32 Iowa, 324, the court held that the verdict of \$15,000 damages was not excessive. But on a rehearing on this question it was held otherwise, and a majority of the court required the plaintiff to remit \$5,000 and accept \$10,000, or a new trial would have been granted. BECK, J., dissenting. See the report of the case in 35 Iowa, 432. It will be seen that COLE, J., was of the opinion that any sum above \$5,000 was excessive.

The measure of damages in an action against a city for injury to property, alleged to be damaged by an overflow of water caused by a negligently constructed culvert, is the actual damages sustained by the property from the overflow at the time of its occurrence. *Van Pelt v. The City of Davenport*, 42 Id., 308.

A person who could have protected his property from injury by a reasonable expenditure cannot recover from another, by whose negligence he has suffered the injury, more than the amount which would have been expended to secure such protection. *Id.*

If a party know of a defect in a street or sidewalk of a city, or if it is apparent and can be seen by him with the exercise of ordinary care and prudence, and he imprudently and recklessly goes into or upon the same and is injured in consequence of such imprudence, he cannot recover of the city. *Rusch v. The City of Davenport*, 6 Id., 442.

If a person with knowledge of a defect in a street or walk, or if the defect be apparent and can be seen by him and avoided with the exercise of ordinary care, he cannot recover. *Id.*

In an action against a city for damages on account of injuries caused by a defective street, the burden is on the plaintiff to show that the accident happened without the want of any unreasonable care on his part. *Id.* See, also, *Hanton v. City of Keokuk*, 7 Id., 488; *Donaldson v. The M. & M. R. Co.*, 18 Id., 280; *Hoben v. B. & M. R'y Co.*, 20 Id., 562; *Wright v. I. & M. Tel. Co.*, Id., 193; *Whitbeck v. The D. & P. R'y Co.*, 21 Id., 103; *Balcom v. D. & S. C. R'y Co.*, Id., 102; *McAunich v. M. & M. R. Co.*, 20 Id., 338; *Haley v. C. & N. W. R'y Co.*, 21 Id., 15; *Sherman v. West. Stage Co.*, 24 Id., 515; *Spence v. The C. & N. W. R'y Co.*, 25 Id., 139; *Manderschid v. City of Dubuque*, Id., 108; *Greenleaf v. The Ill. C. R'y Co.*, 29 Id., 14; *Baird v. Morford*, Id., 531; *Spencer v. Ill. C. R'y Co.*, Id., 55; *Kesee v. C. & N. W. R'y Co.*, 30 Id., 78; *Dewey v. Same*, 31 Id., 373; *O'Keefe v. C. & P. R'y Co.*, 32 Id., 467; *Stewart v. The B. & M. R'y Co.*, Id., 567; *Dodge v. B. & M. R'y Co.*, 34 Id., 276; *Muldoney v. Ill. Cent. R'y Co.*, 36 Id., 462; *Hamilton v. D. V. R'y Co.*, Id., 31; *Carlin v. C. & P. R'y Co.*, 37 Id., 316; *Willoughby v. C. & N. W. R'y Co.*, Id., 432; *Gribble v. Sioux City*, 33 Id., 390; *Patterson v. The B. & M. R'y Co.*, Id., 279; *Artz v. C. R., L. & P. R'y Co.*, Id., 293; *Nelson v. Same*, Id., 564; *Payne v. Same*, 39 Id., 523; *Muldoney v. The Ill. C. R'y Co.*, Id., 615; *Way v. Same*, 40 Id., 341; *Benton v. Cent. R'y Co.*, 42 Id., 192; *Cramer v. City of Burlington*, Id., 315; *Messenger v. Pate*, Id., 443; *Belair v. C. & N. W. R'y Co.*, 43 Id., 662; *Steele v. Cent. R'y Co.*, Id., 109; *Henderson v. C. & P. R'y Co.*, Id., 620; *Murphy v. Same*, 45 Id., 661; *Starry v. D. & S. W. R'y Co.*, 51 Id., 419.

Conceding that it is the duty of a road supervisor to make slight repairs to a county bridge and its approaches, still the same duty devolves upon the county when the repairs are not made by the supervisor. *Roby v. Appanoose County*, 63 Id., 113. See, also, *Laughlin v. The City of Washington*, Id., 625.

In an action against a city for damages for injuries caused by a defective bridge, evidence respecting the conduct of the city after the accident is not admissible to show that the bridge was a city bridge, for the maintenance of which in good repair the city was liable. *Holmes v. The City of Hamburg*, 47 Id., 348.

A city is required to maintain its bridges only in reasonable and ordinarily good repair. Absolute perfection of condition is not required. *Id.*

Section 527 of the code provides, in substance, that before a street or alley dedicated by the owner to public use in a city shall be deemed public, the city council must accept and confirm such dedication by an ordinance specially passed for that purpose. But where the city council, by resolution, directed its committee on streets and alleys to examine the ground covered by the plat of a proposed addition to the city, and authorized such committee to accept the plat at their discretion, when the proprietor should so change it as to make the streets sixty-six feet wide, but the committee did nothing purporting to be an acceptance of the plat, but simply reported to the council that the ground had been resurveyed, and the streets made sixty-six feet wide, and recommended that the plat be accepted, and the council "adopted" the report, and did nothing more, held that this did not satisfy the demands of the statute, and that the streets as shown by such plat did not become public, and that the city was not liable for injuries occasioned by obstructions in such streets. *Laughlin v. The City of Washington*, 63 Id., 652.

The term "municipal corporations" includes and especially refers to cities, towns, counties, school districts, etc. *Hull et al. v. Marshall County*, 11 Id., 142; *The State, etc., v. Wapello County*, 13 Id., 389; *Iowa Railroad Land Co. v. Carroll County*, 37 Id., 152.

A municipal corporation, having authority to hold and dispose of lands granted to it, possesses the incidental power, the same as individuals, to do, through its proper officers, whatever in their judgment may be necessary to preserve and perfect its interests in and title to the same. *Allen v. Cerro Gordo County*, 34 Id., 54.

It is a well settled principle that a municipal corporation cannot exercise the power or right of taxation unless such power is expressly given to it by the legislature. *Clarke, Dodge & Co. v. The City of Davenport*, 14 Id., 494; *The State v. Smith*, 31 Id., 493.

No property can lawfully be taxed until the legislature authorizes and requires it to be done, and when the act requires it to be done in a particular way, that way alone can be pursued. *The City of Davenport v. The M. & M. R. Co.*, 12 Id., 539.

In an action against a city for damages for injuries caused by a defective bridge, evidence respecting the conduct of the city after the accident is not admissible to show that the bridge was a city bridge, for the maintenance of which in good repair the city was liable. *Holmes v. The City of Hamburg*, 47 Id., 348.

A city is required to maintain its bridges only in reasonably and ordinarily good repair. Absolute perfection of condition is not required. *Id.*

The provisions of section 527, that the county shall construct and maintain all bridges over forty feet in length over streams crossing public highways, does not change section 303 of the code, which requires the board of supervisors to build all bridges which may be needed in their counties. So, in an action against a county for damages occasioned by a defective bridge, the liability of the county does not depend upon the length of the bridge. *Casey v. Tama County*, 57 N. W. R., 138.

SEC. 528. [Wharves: docks: piers: wharfage: dockage: rates fixed: harbor masters: certified copies of survey.]—The city council shall have power to establish and construct and regulate landing places, wharves, docks, piers and basins, and to fix the rates of landing, wharfage and dockage, and to use for the purpose aforesaid any public building or any property belonging to or under the control of the city, and the city council shall have the use and control, for the above purpose, of the shore or bank of any lake or river not the property of individuals, to the extent, and in any manner, that the state can grant such use or control. The city council shall have the power to appoint or to provide that the qualified electors shall elect harbor masters, wharf masters, port wardens, and other officers usual and proper for the regulation and navigation, trade, or commerce of such city, to define their duties and powers, and to fix their fees or compensation. Copies of examination and surveys, and of the proceedings of any port warden in the usual discharge of the duties of such officers, certified under his hand and seal, shall be presumptive evidence of the facts therein duly stated.

The city council have authority to pass an ordinance prohibiting those owning lots abutting on the stream navigated, from using any other place than the wharf, as established by the city authorities, without the permission of the city and payment of the ordinary wharfage fees. *The City of Dubuque v. Stout*, 32 Iowa, 80; s. c., Id., 47.

An ordinance of a city requiring the payment of wharfage fees is not in conflict with the constitution, even though it exact payment from vessels when they are moored at places where no wharves have been provided. *The City of Keokuk et al. v. The N. L. P. Co.*, 45 Id., 196.

A city may prescribe by ordinance the fees which shall be paid for the use of the wharves within its limits, and this power is subject only to the limitation that those fees shall be reasonable. *Id.*

Where a city is authorized by its charter to establish and regulate the use of wharves, fix the rates of wharfage, and regulate the anchorage and mooring of boats and rafts, it possesses, and may by ordinance exercise, the incidental power of prohibiting any and all persons, including those owning lots abutting on the stream navigated, from using any other place than the wharf, as established by the city authorities, without the permission of the city and payment of the ordinary wharfage fees. *The City of Dubuque v. Stout*, 32 Iowa, 80; s. c., Id., 47.

An ordinance of a city requiring the payment of wharfage fees is not in conflict with the constitution, even though it exact payment from vessels when they are moored at places where no wharves have been provided. *The City of Keokuk et al. v. The N. L. P. Co.*, 45 Id., 196.

Wharfage fees thus levied do not constitute a tax but are to be regarded simply as compensation exacted for the use of the wharves. *Id.*

Upon a non-tidal stream any construction of timber or stone upon the bank, of such shape that a vessel may lie alongside of it with its broadside to the shore, constitutes a wharf, and a paved street extending to the water's edge and used by vessels as a place for receiving and discharging freight and passengers may be so designated. *Id.*

In the exercise of their police powers, cities may control the landing of boats, designating the places at which they shall receive and discharge freight and passengers, and collect a reasonable compensation for wharfage. *Id.* *SEEVERS*, Ch. J., dissenting.

A city may prescribe by ordinance the fees which shall be paid for the use of the wharves within its limits, and this power is subject only to the limitation that those fees shall be reasonable. *Id.*

Wharfage fees thus levied do not constitute a tax but are to be regarded simply as compensation exacted for the use of the wharves. *Id.*

SEC. 529. [**License and regulate ferries.**].—The city council of any city shall have the exclusive power to establish and to regulate, and to license ferries from such city, or any landing therein, to the opposite shore, or from one part of said city to another, and in granting such license to impose such reasonable terms and restrictions in relation to the keeping of such ferries, and the time, manner, and rates of the carriage and transportation of persons and property as the city council may prescribe, and the city council shall have power to provide for the revocation of any such license, and for the punishment by proper fines and penalties of the violation of any ordinance prohibiting unlicensed ferries, or regulating those established and licensed.

SEC. 530. [**Removal from office, and vacancies.**] Any member of the city council may be expelled or removed from office by a vote of two-thirds of all the members elected to the city council, but not a second time for the same cause; any officer appointed by the city council may be removed from office by a vote of two-thirds of all the members elected to the city council, and provision may be made by ordinance as to the mode in which charges shall be preferred and a hearing be had; in all cases of vacancy in the city council they shall be filled by special election, and in case any office of an elective officer, except members of the city council, shall become vacant before the regular expiration of the term thereof, the vacancy shall be filled by the city council until a successor is elected and qualified, and such successor shall be elected for the unexpired term at the first annual election that occurs after the vacancy shall have happened.

The right to a public franchise or office cannot be determined in equity upon an original bill for an injunction. *Quo warranto* is the proper remedy. *Cochran v. McCleary*, 22 Iowa, 75.

SEC. 531. (*As repealed and substituted by ch. 120, 18th g. a.*) [The mayor of cities of the second class shall be the **presiding officer** of the city council, and shall constitute a member of such council, and shall have a casting vote when there is a tie in all cases including the election of officers and passage of ordinances, and all other matters provided for in sections 489 and 493 of the code.

Prior to the substitution of this section as the law stood under the revision, chapter 57, the mayor was not a member of the city council, and had no right to preside therein. *Cochran v. McCleary*, 22 Iowa, 75.

(CHAPTER 189, LAWS OF 1880.)

AN Act in relation to the jurisdiction of mayors of cities of the second class and incorporated towns with reference to violations of city ordinances.

SECTION 1. [**Mayor has exclusive jurisdiction under ordinances.**] *Be it enacted by the general assembly of the state of Iowa:* The mayor of cities of the second class or incorporated towns, shall have exclusive jurisdiction of violations of the city ordinances, *provided*, that if he is unable to hold court, or in case of his absence from the city or town, the action may be brought before any justice of the peace having an office in the city or town. All acts and parts of acts inconsistent with this act are hereby repealed.

SEC. 532. (*As amended by ch. 141, 21st g. a.*) [**Election of officers and terms.**]—The qualified electors of each city of the second class shall elect a city treasurer, who shall hold his office for two years, and a city solicitor, who shall hold his office for two years; each of said officers shall have such powers and perform such duties as are prescribed in this chapter, or by any ordinance of the city council not inconsistent therewith. In all such cities the marshal, deputy marshal, and police, shall be elected by the city council, and shall hold their offices during its pleasure.

See note to section 524 as to duties of city solicitor and right to compensation.

SEC. 533. [**Powers and duties of marshal.**].—The marshal of the cities of the second class shall execute and return all writs and processes to him directed

by the mayor, and in criminal cases, or cases in violation of city ordinances, he may serve the same in any part of the county; he shall suppress all riots, disturbances, and breaches of the peace, apprehend all disorderly persons in the city, and shall pursue and arrest any person fleeing from justice in any part of the state; he shall apprehend any person in the act of committing any offense against the laws of the state or ordinances of the city, and forthwith bring such person before the mayor, or other competent authority, for examination and trial; he shall have, in the discharge of his proper duties, like power, be subject to like responsibilities, and shall receive the same fees as sheriffs and constables, in similar cases.

CITIES OF FIRST CLASS.

SEC. 534. [Cities of first class: message of mayor: appointment of police.]—The mayor of the cities of the first class shall, at the first regular meeting of the city council in the month of April of every year, and at such other times as he may deem expedient, report to the city council concerning the municipal affairs of the city, and recommend such measures as to him may seem advisable; he shall appoint one chief of police and as many subordinate officers and watchmen as the city council may deem necessary, who shall hold their appointments during the pleasure of the mayor; he shall have power, in cases of emergency, to appoint as many special watchmen as he may think proper, but such appointments shall be reported to and subject to the action of the city council at its next meeting.

By section 3 of chapter 20, of the laws of 1878, so much of section 534 of the code as was suspended by chapter 33 of the laws of the sixteenth general assembly, was revived, notwithstanding subdivision 1 of section 45 of the code. This section is, therefore, in force as if it had never been repealed.

SEC. 535. [Election of officers and terms.]—The qualified electors shall elect a marshal, a civil engineer, a treasurer, an auditor, a solicitor, police judge and a superintendent of markets, who shall hold their offices for two years, and until their successors are elected and qualified; each of said officers shall have such powers and perform such duties as are prescribed in this chapter, or in any ordinance of the city, not inconsistent herewith.

See chapter 33, laws 16th g. a., *post*.

SEC. 536. [Powers and duties of marshal.]—The city marshal shall execute and return all process to him directed by the mayor or judge of the police court, and shall attend on the sittings of said court; he shall have power to execute any such process, by himself or deputy, in any part of the county; he shall suppress all riots, disturbances, and breaches of the peace, apprehend all persons committing any offense against the laws of this state or the ordinances of the city, and forthwith bring such person before the proper authority for examination or trial; he shall have power to pursue and arrest any person fleeing from justice in any part of the state, and to receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states, and to appoint one or more deputies for whose official acts he shall be responsible; he shall have, in the discharge of his proper duties, like powers, be subject to like responsibilities, and shall receive the same fees as sheriffs and constables in similar cases.

A city marshal, claiming and receiving a salary under a city ordinance providing that such salary shall be full compensation for his services, is estopped to deny the authority of the city to pass such ordinance, and claim fees provided for under section 536 of the code. *Bryan v. City of Des Moines*, 51 Iowa, 590.

A city marshal was held entitled, under this section, to receive only constable's fees in cases where constable's and sheriff's fees differ. *Id.*

While under this section of the code the city marshal is entitled to the same fees as the sheriff and constable in similar cases, yet the county is not liable to him for the payment of such fees,

as it is to the sheriff under section 3790, and to the constable under section 3806. *Christ v. Polk County*, 12 West. Jur., 429.

SEC. 537. (*As amended by ch. 92, 21st g. a.*) [**Appointment of police: powers, duties and jurisdiction thereof.**]-The city council shall, by a general ordinance, direct the number of officers of the police and watchmen to be appointed. They shall also provide, in addition to the regular watch, for the appointment of a reserved watch, to consist of a suitable number of persons in each ward, to be called into duty as the council may prescribe, and by the mayor or officers of police under his direction, in special cases of emergency. The duty of the chief and other officers of the police and of the watchmen shall be under the direction of the mayor and in conformity with the ordinances of the city, to suppress all riots, disturbances and breaches of the peace; to pursue and arrest any person fleeing from justice in any part of the state; to apprehend any and all persons in the act of committing any offense against the laws of the state or the ordinances of the city, and forthwith to bring such person or persons before the police court or other competent authority for examination; and at all times to diligently and faithfully enforce all such laws, ordinances and regulations for the preservation of good order and public welfare as the city council may ordain, and for such purposes they shall have all the power of constables. The mayor, marshal, chief of police, and watchmen of the city may, upon view, arrest any person who may be guilty of a breach of the ordinances of the city, or of any crime against the laws of the state, and may, upon reasonable information, supported by affidavits, procure process for the arrest of any person who may be charged with a breach of any of the ordinances of the city. The city council shall have the power to prescribe by ordinance the width of the tires of all wagons, drays, and other vehicles habitually used in the transportation of persons and articles from one part of the city to another, or in the transportation of coal, wood, stone or lumber into the city; to establish stands for hackney-coaches, cabs, and omnibuses, (drays and express wagons), and enforce the observance and use thereof; and to fix the rates and prices for the transportation of persons and property in such coaches, cabs and omnibuses from one part of the city to another.

(CHAPTER 54, LAWS OF 1876.)

RELATING TO THE CONSTRUCTION OF SEWERS.

An Act to authorize cities organized under special charters to provide for the construction of sewers. [Additional to code, chapter 10, title IV., "Of cities and incorporated towns."]

SECTION 1. [**May construct sewers.**]-*Be it enacted by the general assembly of the state of Iowa:* That all cities in this state organized and existing under special charters, having a population of not less than ten thousand, as shown by the last preceding state census, may provide by ordinance for the construction of sewers, or may divide the city into sewerage districts in such manner as the council may determine, and pay the cost of constructing same out of the general revenue of the city, or assess the cost upon the adjacent property, or may levy a certain sewerage tax within the sewerage district, out of which to pay for the construction of the same, which sewerage tax shall not exceed, in any one year, two mills on the dollar of the assessed value of the property within such district, or may pay a part of the cost of such construction out of the general revenue, a part by the assessment of adjacent property, and a part by levying a tax upon all the property within the sewerage district, or may pay for the same by pursuing any two of the methods herein named.

SEC. 2. [**Must be done under contract.**]—It shall be the duty of such city council to require the work of constructing such sewers to be done under contract therefor, to be entered into with the lowest responsible bidder, and bonds with surety for the faithful performance of such work shall be required to be given by the contractors. *Provided*, that all bids for such work may be rejected by such council, if by them thought to be exorbitant, and new bids ordered.

SEC. 3. **All special tax** levied for the construction of sewers under this act shall be payable by the owners, personally, at the time of such assessment, and shall also be a lien upon the lots and lands so assessed, and shall bear such rate of interest, and the said property assessed may be sold for the payment thereof in the same manner at any regular or adjourned sale, or special sale called therefor, with the same forfeitures, penalties and rights of redemption and certificates, and deeds on such sales shall be made in the same manner and with like effect as in case of sales for the non-payment of the ordinary annual taxes of such cities respectively, as now or hereafter provided by law in respect thereto, or the city council may provide by ordinance for the sale of such assessed property at a special tax sale to be called therefor, after giving notice therefor three consecutive weeks in one of the newspapers published in said city; the last of which publications shall be at least ten days before the day of sale.

SEC. 4. [**Provide mode of making assessments.**]—Such city council may provide by ordinance for the particular mode of making and returning the assessments herein authorized, and payment of such assessments may, if so directed by said council, be enforced by suit in court, in the manner and by the proceedings provided by sections 478, 479, and 481 of the code.

SEC. 5. [**Sec. 465 of code not affected.**]—Nothing in this act contained shall take away, impair, or interfere with the power conferred by section 465 of the code for the construction of sewers, and payment therefor in whole as therein provided.

SEC. 6. [**Cross sewers.**]—The city council shall have power to provide by ordinance terms and conditions on which cross sewers may be attached to or connected with main sewers; and in cases where sewers have been constructed in whole or in part by special assessment, may pay unto the parties who have been so assessed the money, or a part thereof, charged and collected for the privilege of attaching such cross sewers.

(Section 7 repealed by chapter 154, laws of 1884.)

(CHAPTER 162, LAWS OF 1878.)

CONSTRUCTION OF SEWERS IN CITIES OF THE FIRST CLASS.

An Act to authorize cities of the first class to provide for the construction of sewers. (Additional to code, chapter 10, title IV, concerning "cities and incorporated towns.")

SECTION 1. (*As amended by ch. 34, 21st g. a.*) [**Construction of sewers.**]—*Be it enacted by the general assembly of the state of Iowa:* That all cities of the first class in the state may provide by ordinance for the construction of sewers, or may divide the city into sewerage districts in such manner as the council may determine, and pay the cost of constructing same out of the general revenue of the city, or assess the costs upon the adjacent property, or may levy a certain sewerage tax within the sewerage district, out of which to pay for the construction of the same, which sewerage tax shall not exceed in any one year two mills on the dollar of the assessed value of the property within such district, or may pay a part of the costs of such construction out of the general revenue, a part of the assessment of

adjacent property, and a part of levying a tax upon all property within the sewerage district, or may pay for same by pursuing any two of the methods herein named.

SEC. 2. [**Bids for work to be received by city council.**—It shall be the duty of such city council to require the work of constructing such sewers to be done under contract therefor, to be entered into with the lowest responsible bidder, and bonds with security for the faithful performance of such work shall be required to be given by contractors; *provided*, that all bids for such work may be rejected by such council if by them thought to be exorbitant, and new bids ordered.

SEC. 3. **All special tax levied for the construction of sewers** under this act shall be payable by the owners personally at the time of such assessment, and shall also be a lien upon the lots and lands so assessed, and shall bear such rate of interest, and the said property assessed may be sold for the payment thereof, in the same manner at any regular or adjourned sale or special sale called therefor, with the same forfeitures, penalties and right of redemption, and certificates and deeds on such sales shall be made in the same manner and with like effect as in case of sales for non-payment of the ordinary annual taxes of such cities respectively, as now or hereafter provided by law with respect thereto, or the city council may provide by ordinance for the sale of such assessed property at a special tax sale to be called therefor, after giving notice therefor three consecutive weeks in one of the newspapers published in said city, the last of which publications shall be at least ten days before the day of the sale.

SEC. 4. [**Mode of assessment.**—Such city council may provide by ordinance for the particular mode of making and returning the assessments hereinbefore authorized, and payment of such assessments may, if so directed by said council, be enforced by suit in court, in the manner and by the proceedings provided for by sections four hundred and seventy-eight, four hundred and seventy-nine, and four hundred and eighty-one of the code.

SEC. 5. [**Powers conferred in section 465 of code not impaired.**—Nothing in this act contained shall take away, impair, or interfere with the powers conferred by section four hundred and sixty-five of the code, for the construction of sewers, and payment therefor in whole as therein provided.

SEC. 6. [**Cross-sewerage.**—The city council shall have power to provide, by ordinance, terms and conditions on which cross-sewers may be attached to and connected with main sewers; and in cases where sewers have been constructed in whole or in part by special assessment, may pay unto the parties who have been so assessed the money, or a part thereof, charged and collected for the privilege of attaching such cross-sewers.

SEC. 7. *Provided*, that nothing in this chapter shall be held or taken to repeal, impair, or in any manner affect chapter fifty-four, acts of the sixteenth general assembly, or any provision thereof.

(Took effect March 28, 1878, by publication in newspapers)

The first section of this act authorizes cities of the first class to constitute the entire city one sewerage district, or to divide it into several districts, at their discretion, to be exercised to attain an equal distribution of the burdens of taxation among the tax payers in view of the benefits of the improvement to be constructed and the true interests of the city. *Grimmell v. The City of Des Moines*, 57 Iowa, 144, 146.

Where a city council under this chapter passed a general ordinance providing for the construction of sewers, for letting contracts for the work, for the levy of assessments to pay for the same, etc., and that the city council might, by *resolution* order the construction of a sewer upon any street by a majority vote, when such improvement should be asked for in a petition by a majority of the resident property holders, or by a two-thirds vote of the council if there be no such petition, *held* that the passage of such resolution was sufficient to authorize the construction of the sewer directed. *Id.* And that when such resolution did not provide for letting the contract for the work, its passage need not be upon a call of the yeas and nays. *Id.*

Where the sewer is a unit, although constructed on more than one street, a single assessment

therefor is valid. *Id.* And an assessment for a sewer is not rendered invalid because the resolution ordering the same did not direct the manner of payment, this being provided for in the general ordinance. *Id.*

Where the party seeks to defeat an assessment upon his property for the costs of constructing a sewer on the ground that the assessment is unequal and unjust, he must first pay or offer to pay that part of the tax that is justly due. *Id.*

Under a city ordinance, passed in pursuance of this chapter, where the costs of a construction of a sewer was assessed against the owners of abutting lots, it was held that collection of such assessments should be enjoined, because neither said statute nor said ordinance made any provision for notice of the assessment to the owners of the property, and it did not appear that the plaintiff, as one of such owners, either petitioned for the construction of the sewer in question, or otherwise waived his right to notice and a hearing. But it *seems* that it would be sufficient in such case if the ordinance should provide for proper notice, even though the statute did not so provide. *Gatch v. The City of Des Moines*, 63 *Id.*, 718.

(The following two sections were added to the foregoing chapter, by chapter 25 laws of 1884.)

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

(SEC. 10. (*As amended by ch. 7, 22d g. a.*) Whenever any such city exercises the powers granted in section 9 hereof, it may, for the purpose of anticipating the collection of said special taxes, and it may for the purpose of anticipating the collection of any sewerage taxes it has power to levy under section 1 of the act to which this is supplementary, by ordinance cause to be issued its bonds, to be called "sewerage bonds;" said bonds to be issued in four series, each series, in the aggregate respectively, to be for an amount not exceeding the amount of special taxes, as provided in section nine (9) hereof which become delinquent respectively in two, three, four and five years after their levy; and for such further amount as said city may propose to levy and have the power to levy for each of the respective years aforesaid under the provisions of section 1 of the act to which this is amendatory, on the property within the sewerage district in which said sewer or sewers are to be or have been constructed. The first series to be payable in not exceeding two years from the date of their issue; the second series to be payable in not exceeding three years from the date of their issue; the third series to be payable in not exceeding

four years from the date of their issue; the fourth series to be payable in not exceeding five years from the date of their issue; all of said bonds to bear interest not exceeding six per cent per annum, interest payable annually or semi-annually, as said council may provide, with interest coupons attached, to express on their face the name of the street, highway, avenue or alley on which the sewer is located, to defray the cost of which they are issued, and also that the last four installments of the special taxes assessed and levied as aforesaid on property abutting on the particular part of the street, highway, avenue or alley on which said sewer or sewers are located, as also the sewerage tax levied, or to be levied, on the property in the sewerage district to defray the cost of the particular sewer or sewers named as aforesaid in said bonds, shall be and constitute a sinking fund for the payment of said bonds and interest; and to be used and appropriated to no other purpose until the whole of said bonds, with interest, shall have been fully paid and discharged. Said bonds shall not be negotiated or sold for less than their par value, and may be respectively for amounts ranging from one hundred dollars to one thousand dollars, as said council may by ordinance provide. The proceeds arising from said bonds shall be applied exclusively to, and appropriated and used for, no other purpose than the liquidation of the costs of constructing the sewer or sewers upon the particular street, highway, avenue or alley, to defray the cost of which said bonds are issued.

Chapter 162 of the laws of 1878, does not confer upon cities the power to assess a sewer tax upon property owned by the state and used for government purposes. *Polk County Savings Bank v. The State of Iowa et al.*, 69 Id., 24.

(CHAPTER 7, LAWS OF 1888.)

CONSTRUCTION OF SEWERS.

An Act granting additional powers to certain cities of the first class in the construction of sewers and to provide for the payment of costs of the same, and to repeal a part of section 10 of chapter 25 of the acts of the twentieth general assembly.

SECTION 1. [A tax not to exceed five mills may be levied for sewer purposes.]—*Be it enacted by the general assembly of the state of Iowa:* That all cities of the first class that have been organized under the general incorporation laws of the state since the first day of January, 1881, shall have power to levy a tax not exceeding five mills on the dollar of the assessed valuation of all taxable property within such cities for the purpose of creating a fund to pay the cost and expense incurred by such cities for the purpose of constructing sewers at the intersection of streets, highways, avenues, alleys or other places, where the costs and expenses incurred are not assessable against the fronting, abutting, or adjacent property as now provided by law, and to enable such city to make such sewer improvements at intersections as aforesaid, or to include and pay a part of the costs assessable against private property as is provided in section one (1) of chapter 162 acts of the twenty-ninth (twentieth) general assembly.

SEC. 2. [City sewerage bonds may be issued.]—That such cities shall have the power to anticipate said sewer tax and the collection of the same, and to issue city sewerage bonds based on the anticipated levy and collection of said tax, which said bonds when so issued, to run for a period not exceeding twenty years, and to create a sinking fund for the payment of said bonds, with accrued and accruing interest and principal, by the levy of such taxes therefor as now authorized by law, a part of the revenue of which to be appropriated for the payment of said bonds out of said sinking fund, as the city council shall provide by ordinance.

Approved April 13, 1888.

(CHAPTER 44, LAWS OF 1888.)

An Act to provide for the re-assessment and re-levy of special taxes and assessments.

SECTION 1. [**Validates irregular special tax.**]*—Be it enacted by the general assembly of the state of Iowa:* That in cities of the first class and cities organized under special charter, whenever, by reason of an alleged non-conformity to any law or ordinance, or by reason of any omission or irregularity, any special tax or assessment is either invalid or its validity is questioned, the city council may make all necessary orders and ordinances, and may take all necessary steps to correct the same, and to re-assess and re-levy the same, including the ordering of work, with the same force and effect as if made at the time provided by law or ordinance relating thereto; and may re-assess and re-levy the same with the same force and effect as an original levy. Whenever any apportionment or assessment is made and any property is assessed too little or too much, the same may be corrected and re-assessed for such additional error as may be proper, or the assessment may be reduced even to the extent of refunding the tax collected.

SEC. 2. [**Re-assessment of tax: mode of.**]*—Any special tax upon re-assessment or re-levy shall, so far as is practicable, be levied and collected as the same would have been if the first levy had been enforced.*

SEC. 3. [**Construction of law.**]*—Any provision of any law or ordinance specifying a time when, or the order in which, acts shall be done in a proceeding which may result in a special tax, shall be taken to be subject to the qualifications of this act.*

SEC. 4. [**Legalizes ordinances.**]*—Any and every ordinance or part thereof of any such city heretofore passed in substantial conformity with this act, is hereby legalized.*

Approved April 16, 1888.

SEC. 538. [**Infirmary for the poor.**]*—The city council shall have power to establish and maintain an infirmary for the accommodation of the poor of the city, either within or without the limits of the city, and to provide for the distribution of out-door relief to the poor.*

SEC. 539. [**House of refuge and correction: workhouse: who may be confined therein.**]*—The city council shall have power to establish and maintain, either within its limits or within the county in which it is situated, a house of refuge or a house of correction, and a workhouse, or either of them, and place the same under the management and control of such directors, superintendents, and other officers as the council may, by ordinance, provide. All children under the age of sixteen years, who shall be convicted of any offense made punishable by imprisonment under any ordinance of the city, or who shall be liable to be committed to prison under any such ordinance, may be confined in such house of refuge, and may be there kept, or apprenticed out, under such rules as the directors of the house of refuge may prescribe, until they arrive at the age of eighteen years. Any person over the age of sixteen years convicted of the violation of any ordinance, and liable to be punished therefor by imprisonment, may, in lieu thereof, be committed to the house of correction, or to the workhouse, as may be provided by ordinance.*

SEC. 540. [**Directors of: may apprentice inmates.**]*—The board of directors of any house of refuge established by any city, are authorized to appoint a committee of one or more of their own number with power to execute and deliver, on behalf of said board, indentures of apprenticeship for any inmate of said institu-*

tion whom they may deem a proper person for an apprenticeship to a trade or occupation, to such person as said committee or the board may select; and said indentures shall have the like force and effect as other indentures of apprenticeship under the laws of this state, and said indentures shall be filed and kept in said institution by the superintendent thereof, and it shall not be necessary to file the same in any other place or office.

SEC. 541. [**Liable to be re-committed.**]—When any inmate of said institution has been apprenticed and prove untrustworthy and unreformed, he or she shall be re-committed to the said institution to be held in the same manner as before said apprenticeship.

SEC. 542. [**City prison: watch house: police court and clerk.**]—The city council shall have power to erect, establish, and maintain a city prison, which shall be in the keeping of the city marshal under such rules and regulations as the city council shall provide. They shall provide one or more watch or station houses; they shall also provide suitable rooms for holding police court; they shall provide, by ordinance, for the election by the qualified electors of the city, or for the appointment by the police judge, of a clerk of such police court, and for the selection, summoning, and impaneling its juries, and for all such matters touching such court as may tend to its efficiency, and the dispatch of business. No clerk of said court shall be in any way concerned as counsel or agent in the prosecution or defense of any person before such court.

A party arrested and brought to trial in the police court of a city of this state for the violation of a city ordinance is not entitled to a jury trial. Nor can he demand a change of venue to justice of the peace. *Zelle v. McHenry et al.*, 51 Iowa, 572.

Where the police court has jurisdiction of the subject-matter and of the person charged, the proceeding by *habeas corpus* will not lie to correct its errors. *Id.*

SEC. 543. [**Power and jurisdiction of police judge.**]—The police judge shall have, in all criminal cases, the powers and jurisdiction vested in justices of the peace; he shall also have power to take the acknowledgment of deeds and other writings, and shall have jurisdiction of all violations of the ordinances of the city. Every such police court shall be deemed a court of record, shall have a seal, to be provided by the city council, with the name of the state in the center, and the style of the court around the margin.

SEC. 544. [**Fees of police judge.**]—The police judge holding the police court shall be entitled to receive, in all criminal cases prosecuted in behalf of the state, the same fees, to be collected in the same manner, as a justice of the peace in like cases; and in cases prosecuted in behalf of the city, such fees, not exceeding those for services of the like nature in state prosecutions, as the council may, by ordinance, prescribe; and shall also receive such salary or compensation as the city council may, in like manner, prescribe.

Where a city ordinance provided that the police judge should receive in all criminal cases the same fees as a justice of the peace in like cases, and also that he should receive a salary in addition thereto of three hundred dollars per annum, provided that out of it he should pay the salary of the clerk of the court; subsequently he agreed to accept the compensation fixed by the council in payment of his services if the council would provide by ordinance for payment of the clerk, which was done. It was held, 1, that he could not recover of the city his fees in cases where judgment was rendered against the city, decided before the passage of the ordinance; 2, that he could not recover those to which he subsequently became entitled where his petition failed to show the amount of such fees; 3, that the provision of compensation for the clerk constituted a sufficient consideration for the agreement. *Crane v. City of Des Moines*, 47 Iowa, 105. See ch. 56, laws of 1878, *post*.

An ordinance of the city of Des Moines, made in pursuance of chapter 56, laws seventeenth general assembly, providing that the only compensation of the police judge shall be the salary prescribed in such ordinance, takes away the judge's right to the fees provided for in this section. *The City of Des Moines v. Hillis et al.*, 55 Iowa, 643.

SEC. 545. [**The police court shall always** be open for the dispatch of business; and the jurors in said court shall have the qualifications of jurors in the district court.

A person arrested and brought before the police judge, charged with the violation of a city ordinance, is not entitled to a jury trial, nor to a change of venue. *Zelle v. McHenry*, 13 West. Jur., 471.

SEC. 546. [**Appeal.**—An appeal may be taken from the police court in like manner as from a justice of the peace, on the trial whereof the appellate court shall take judicial notice of the ordinances of the city.

SEC. 547. [**Mayor to act as police judge.**—Until a police judge shall be elected and qualified, the mayor of any such city shall have all the powers and jurisdiction of such judge, and shall hold the police court in such manner as required of the police judge, and shall be entitled to demand and receive the same fees and compensation as may be provided for the police judge or police court.

SEC. 548. [**Amending special charters: mode of procedure.**—On the presentation of a petition signed by one-fourth of the electors, as shown by the vote of the next preceding charter election, of any city or town acting under a special charter or act of incorporation, to the governing body thereof, asking that the question of the amendment of such special charter or act of incorporation be submitted to the electors of such city or town, such governing body shall, immediately, propose sections amendatory of said charter or act of incorporation, and submit the same, as requested, at the first ensuing charter election. At least ten days before said election, the mayor of such city or town shall issue his proclamation setting forth the nature and character of such amendment, and shall cause such proclamation to be published in a newspaper published therein; or, if there be none, he shall cause the same to be posted in five public places in such city or town. On the day specified the amendment shall be submitted to the electors thereof for adoption or rejection, and the form of the ballots shall be "for the amendment," or "against the amendment."

This section was held, in *Von Phul v. Hammer*, 29 Iowa, 222, not to be in conflict with section 30 of article 3 of the constitution, prohibiting the legislature from passing local or special laws for the incorporation of towns and cities.

SEC. 549. If a majority of the votes cast is in favor of said amendment, the mayor, or chief officer, shall issue his proclamation accordingly; and the said amendment shall thereafter constitute a part of said charter.

SEC. 550. The legislative body of said city or town may submit any amendment to the vote of the people as aforesaid at any special election; *provided*, one-half the electors as aforesaid petition for that purpose, and the proceedings shall be the same as at the general election.

SEC. 551. [**Prior laws repealed: corporations acting under special charters not affected thereby.**—All acts and parts of acts passed subsequent to the fourth day of July, A. D. 1858, and prior to the taking effect of this code, relating to cities of the first and second class and incorporated towns, or to any or either of said classes of municipal corporations, and applicable, both to such corporations as acting under special charter, and to such as are incorporated under the general act of which this chapter is an amendment, are repealed by the code only so far as they affect the latter, and not as they affect corporations acting under special charters. All rights, powers, privileges, duties, directions and provisions whatever, contained in and enacted by such acts and parts of acts, shall remain in full force and effect so far as municipal corporations acting under special charters are concerned, and the provisions of this chapter shall not apply to any city or town incorporated prior to the eighteenth day of July, A. D. 1858, unless the same be adopted as hereinbefore provided.

This section does not control section 431 of the code, providing that cities may institute proceedings in the circuit court for the annexation of contiguous territory under certain conditions, with respect to its operation upon cities acting under special charters. *City of Burlington v. Leebrick et al.*, 43 Iowa, 252.

(CHAPTER 5, LAWS OF 1874.)

RAILROADS AND WAGON BRIDGES.

An Act to empower cities and towns to make contracts with railroad companies for the use of wagon bridges across rivers.

SECTION 1. (*As amended by ch. 173, 21st g. a.*) [**Cities located on any river shall have power to contract with bridge companies for use of bridge.**]—That all cities situated on any river in the state of Iowa or any river forming the boundary line of the said state, whether organized and existing under special charter or general law, and from which to the opposite shore of any of said rivers a bridge has been or may be constructed by any railroad or other private company, corporation or person, shall have power to contract with the company, co(r)poration or person owning such bridge for the use of the same as a public highway; which use may be jointly with any company, corporation or person having or desiring the right to use the same for the passage of cars propelled by steam or otherwise, or may be for the sole use of such portion of such bridge as may be devoted and adapted to highway travel, and in such contract may have the right to assume the sole or any portion of the liability for damage to persons or property by reason of their being on any portion of said bridge or on any approach to either end thereof caused by the running of cars or locomotives by any corporation, company or person entitled to use the said bridge, whether the damage results from the negligence of the persons engaged in running said cars or locomotives or otherwise, and to indemnify and save harmless the owners of said bridge, and any or all corporations, companies or persons entitled to use the same from all liability or damage so caused to the extent or proportion thereof assumed in the said contract. And the said city may cause to be assessed and levied, each year, upon the taxable property of said city a tax not exceeding ten (10) mills on the dollar, each year, to raise a special fund to carry out the terms of the said contract. And the said city may thereafter, and during the continuance of said contract, manage and control the said bridge so far as necessary to regulate the highway travel thereon, and may regulate the same a free or toll bridge, and prescribe such rates of toll as to it, from time to time, shall seem proper, and make all necessary police regulations for the government of the highway travel on said bridge.

Approved April 13, 1886.

(CHAPTER 57, LAWS OF 1876.)

INDEBTEDNESS OF CITIES AND TOWNS.

An Act to authorize cities and towns to settle and adjust certain indebtedness, and to provide for the payment of the same. (Additional to code, chapter 10, title IV, "Of cities and incorporated towns.")

SECTION 1. [**May settle and adjust indebtedness.**]—*Be it enacted by the general assembly of the state of Iowa:* That cities and towns are hereby authorized, upon such terms as they may deem just and for the best interest, to settle, adjust, renew or extend such indebtedness as may be owing by, or claimed against them, and evidenced by the bonds or other negotiable promissory instruments of such municipal corporation, and to issue new securities for such indebtedness, except as hereinafter mentioned.

SEC. 2. [**May levy special tax to pay interest and principal.**]—Said

several corporations are hereby authorized, whenever any extension or renewal of such indebtedness is made, to provide for the payment of the interest and principal of such extended or renewed indebtedness, by the levy and collection of the necessary taxes at the same time and in the same manner as other taxes; and the levy, collection and payment of such taxes may be enforced by proper legal process, when necessary, in addition to the ordinary means provided by law for the levy and collection of taxes.

SEC. 3. [**Not to apply to current expenses.**—This act is intended to and shall apply only to the settlement, adjustment and extension or renewal of bonds and securities heretofore issued and outstanding at the time of this act, and not including warrants and other evidences of indebtedness issued or incurred for current expenses of such corporations.

SEC. 4. **New bonds or securities** issued by virtue hereof, shall in no case be for a greater sum than the principal and accrued interest unpaid on the bond or security for which such new bond or security may be given.

(Took effect by publication in newspapers March 17, 1876.)

(CHAPTER 141, LAWS OF 1886.)

RELATING TO ELECTIONS OF CITY OFFICERS.

An Act to prescribe the times of the elections of the mayors, treasurers, assessors and solicitors of cities of the second class, amendatory to sections 518, 532 and 390 of the code of 1873.

SECTION 1. [**Certain officers in cities of second class elected biennially.**—*Be it enacted by the general assembly of the state of Iowa:* The mayor, treasurer, assessor and solicitor, shall be elected biennially in cities of the second class, by the qualified electors of the city. They shall be qualified electors and shall reside within the limits of the city, and they shall hold their respective offices for the term for which they have been elected and qualified.

SEC. 2. The **terms of office** for the mayor, treasurer, assessor, and solicitor shall be two years, and the first election under this act shall be held on the first Monday of March, 1887.

Approved April 10, 1886.

(CHAPTER 143, LAWS OF 1876.)

RELATING TO SUPERIOR COURTS IN CITIES.

An Act to provide for establishing superior courts in cities of a certain grade. [Additional to chapter 10, title IV, of the code, "Of cities and incorporated towns."]

SECTION 1. (*As amended by ch. 2, 21st g. a.*) [**What cities may establish.**—*Be it enacted by the general assembly of the state of Iowa:* That any city in this state containing [seven thousand] inhabitants, whether organized under a special charter or the general act for the incorporation of cities and towns, may establish a superior court as hereinafter provided, which, when established, shall take the place of the police court of such city.

SEC. 2. [**The question submitted to vote of electors.**—Upon the petition of one hundred citizens of such city, the mayor, by and with the consent of the common council, may, at least ten days before an annual election for city officers, issue a proclamation submitting to the qualified voters of said city the question of

establishing said court. At the same election and every fourth year thereafter (if the said court is established) there shall be elected a judge of the superior court, the votes for whom shall be upon the same ballot with other city officers. Should [a majority] of all the votes cast at such election be in favor of said court, the same shall thereby be established, and the said judge shall qualify and hold his office for the term of four years, and until his successor is elected and qualified. Immediately after each election of said judge, the mayor of said city shall transmit a certificate of the election of said judge to the governor of the state, who shall thereupon issue to him a commission empowering him to act as judge as herein provided.

SEC. 3. [**Acquirements and bond of judge.**—Said judge shall be a qualified elector of the city, and be possessed of the legal requirements prescribed in section two hundred and eight of the code of Iowa, and shall subscribe in writing the same oath required of the judges of the district court, and file the same with the mayor of the city, and shall give bond to the state of Iowa in the sum of four thousand dollars, for the faithful discharge of his duties, which bond must be filed with, and approved by the mayor; and the effect of such election and qualification shall be to abolish the office of police judge of such city.

SEC. 4. **In case of a vacancy** occurring in the said office of judge, the mayor, by and with the consent of the common council, shall appoint a judge, who shall hold the office until the next annual city election, and until his successor is elected and qualified, who shall be chosen to fill the unexpired term.

SEC. 5. [**Terms of court.**—Said judge shall hold at least one term of court in each month, except in August, commencing on the first Monday in each month, but as a police court it shall always be open for the dispatch of business.

(Section 6 is repealed and substituted by section 1, chapter 40, laws of 1888. See *post*, page —.)

SEC. 7. (*As amended by ch. 40, 22d g. a.*) **Changes of venue** may be had from said court in all civil actions to the [district] court [of the county] and in the same manner, for like causes, and with the same effect, as the venue is changed from the district court, as now or hereafter provided by law. [All criminal actions, including those for the violations of the city ordinances, shall be tried summarily and without a jury, saving to defendant the right of appeal to the district court, which appeal shall be taken in the same time and manner as appeals are taken from justices' courts in criminal actions.]

SEC. 8. [**Powers of judge in vacation.**—The said judges shall have the same power in regard to injunctions, writs, orders and other proceedings, out of court as are now or may be hereafter possessed *for* [by] the judges of the district and circuit courts; and may also administer oaths, take acknowledgments and depositions (except depositions to be used in his own court), and solemnize marriages. But he shall not practice in any of the courts of this state.

SEC. 9. [**Pleadings: mode of trial: rules of practice, etc.**—The superior court shall be a court of record, and all statutes in force respecting venue and commencement of actions, the jurisdiction, process and practice of the circuit and district court, the pleadings and mode of trial of actions at law or in equity, and the enforcement of its judgments by execution or otherwise, and the allowance and taxing of costs, and the making of rules of practice or otherwise, shall be deemed applicable to the superior court, except wherein the same may be inconsistent with the provisions of this act. The records and papers properly filed in a cause in either the district or circuit court are equally evidence in said superior court.

SEC. 10. [**Court seal.**—The said court shall have and use its own seal, having on the face thereof the words "superior court," and the name of the city, county and state.

SEC. 11. [**When a clerk necessary: who shall be.**—As long as the busi-

ness of the court can be done with convenience and dispatch, without a clerk, the judge shall be the clerk of said court. Whenever from the accumulation of causes and other demands upon the court a clerk shall become necessary, the city recorder or clerk shall be the clerk for the superior court; and shall receive such compensation for his services as the city council may from time to time allow; and he shall perform the duties in said court provided by law for the clerk of the circuit court, and shall give bonds as required of the said judge.

SEC. 12. The **city marshal** shall be the executive officer of said court, and his duties and authority in court and in executing process shall correspond with those of the sheriff of the county in the circuit court, and with process from that court, and he shall receive the same fee and compensation as the sheriff for like services. But the process of said court may be also served by the sheriff.

SEC. 13. [**Compensation of judge.**—The judge of said court shall receive in full compensation for his services the sum of two thousand dollars per annum, to be paid to him quarterly; the first two quarters of the municipal year shall be paid from the city treasury, and the last two quarters from the county treasury wherein said city is located. The costs and fees of said court in civil actions shall be the same as in the circuit and district courts, except herein otherwise provided, and the clerk of the superior court shall account for and pay over to the city all fees that may be paid into the said court, and also for all fines for the violation of city ordinances. Of all other fines he shall render the same account as is provided for justices of the peace. In actions for the violations of city ordinances, if unsuccessful, the city shall pay all costs, the same as provided by law for the county in other criminal actions prosecuted in the name and behalf of the state. The fees in criminal actions shall be the same as in justices' courts, and shall be paid and accounted for as hereinbefore stated, and as otherwise provided by law for justices of the peace and their courts.

SEC. 14. (*As amended by sec. 5, ch. 24, 19th g. a.*) [**Jury trial.**—When causes are assigned for trial, any party desiring a jury shall then make his demand therefor, or the same shall be deemed to have been waived. Causes in which a jury has been demanded shall be tried first in their order, and when a disposition shall have been made of such causes the jury shall be discharged from further attendance at that term. No jurymen shall be detained longer than one week, except upon trial commenced within the first week of his attendance.

SEC. 15. [**Selection of jurors.**—In order to provide jurors for said court, the judge, mayor and recorder shall immediately after qualifying, and every three months thereafter, make out a list of twelve names of persons from the body of the county in which the city is situated, qualified to serve as jurors in the district court, which list shall be furnished to the clerk of said superior court, and from this list there shall be drawn by the clerk and marshal nine persons in the same manner as jurors are drawn in the district court, and a precept from the court shall issue accordingly five days before the first day of the next term, as provided by law in like cases in the district court.

SEC. 16. (*As amended by sec. 6, ch. 24, 19th g. a., and ch. 40, 22d g. a.*) (The jury shall consist of **six qualified jurors**, unless, when a jury is demanded as provided in section 3 of this act, the party at that time shall demand a jury of twelve, and in all civil cases the party requesting a jury of twelve shall at the time of making such demand deposit with the clerk the entire additional expense of the additional jurors, which sum shall be fixed by the court and paid to the clerk at the time of making such demand. If the judge shall deem proper, he shall cause a special venire to issue for said extra jurors, or for any number not exceeding twenty-four, or he may order the marshal to complete the same from the bystanders. The pay for all jurors shall be (two) dollars per day and mileage, to be taxed with the costs, which in all civil cases shall be paid by the county in the same manner as in circuit and

district courts. All such deposits of additional expense for jurors shall be paid into the county treasury at the close of each term of such superior court, and the county treasurer shall give duplicate receipts therefor, one receipt to be held by said clerk and the other to be presented by him to the county auditor, who shall charge the treasurer with the amount thereof in the proper account.)

SEC. 17. (*As amended by sec. 7, ch. 24, 19th g. a.*) **All appeals** from judgment or orders of said court, or the judge thereof, in civil actions, shall be taken to the supreme court in the same manner and under the same restriction, within the same time, and with the same effect as appeals are taken from the circuit to the supreme court.

SEC. 18. (*As amended by sec. 8, ch. 24, 19th g. a.*) [**Judgment liens.**]—(Judgments in said court may be made liens upon real estate in the county in which the city is situated, by filing transcripts of the same in the circuit court, as provided in sections 3567 and 3568 of the code, relating to judgments of justices of the peace, and with equal effect, and from the time of such filing it shall be treated in all respects as to its effect and mode of enforcement as a judgment rendered in the circuit court as of that date, and no execution can thereafter be issued from the said superior court on such judgment, and no real property shall be levied on or sold on process issued out of the court created under the provisions of this act; and judgments of said superior court may be made liens upon real estate in other counties in the same manner as judgments in the circuit and district courts.)

SEC. 19. It shall be the duty of the **city attorney or solicitor** to file informations in the superior court for violations of city ordinances, and prosecute the same, and for such services he shall receive such compensation as the city council shall allow.

SEC. 20. (*As amended by sec. 9, ch. 24, 19th g. a.*) The said **judge shall be ex-officio** a magistrate, and in preliminary examinations the proceedings and practice shall be the same as before any magistrate, and all warrants issued in criminal proceedings, under the seal of the court, may be used in any other part of the state, without further attestation, in like manner as if issued by the district court.

This chapter is identical in its nature with chapter 10, title IV of the code, and is not in conflict with the constitution. *Lytle v. May*, 49 Iowa, 224.

(CHAPTER 24, LAWS OF 1882.)

SUPERIOR COURTS IN CITIES.

An Act to amend chapter 143, of the acts of the sixteenth general assembly, entitled "an act to provide for establishing superior courts in cities of a certain grade, relating to cities and incorporated towns."

Be it enacted by the general assembly of the state of Iowa:

(All of the general provisions of this chapter are contained as amendments in the foregoing chapter 143, except section 10, which is as follows):

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

(Approved March 2, 1882.)

(CHAPTER 44, LAWS OF 1886.)

APPOINTMENT OF SHORT-HAND REPORTERS IN SUPERIOR COURTS.

An Act to provide for the appointment of short-hand reporters in the superior courts of the state.

SECTION 1. [**Judges of superior courts may appoint short-hand reporters.**]*—Be it enacted by the general assembly of the state of Iowa:* That the judges of the several superior courts in the state may appoint, whenever in the judgment of either of them it will expedite the public business, a short-hand reporter, who shall be well skilled in the art and competent to discharge the duties required, for the purpose of recording the oral testimony of the witnesses, in all civil cases, upon the request of either party thereto.

SEC. 2. All of the provisions of section 3777 of the code shall apply to the appointment and compensation of such short-hand reporter, and to the testimony so taken so far as the same shall be applicable, except that, the compensation of such short-hand reporter shall not exceed five dollars per day for the time actually employed.

(CHAPTER 22, LAWS OF 1878.)

LEGALIZING SUPERIOR COURTS IN CITIES.

An Act to legalize and establish certain courts organized under chapter one hundred and forty-three, of the laws of the sixteenth general assembly.

WHEREAS, Courts have been organized in this state under the provisions of chapter one hundred and forty-three, of the laws of the sixteenth general assembly:

WHEREAS, Doubts have arisen as to the constitutionality of said courts on account of the provision in said act submitting the same to the people:

SECTION 1. [**Superior courts legalized.**]*—Be it enacted by the general assembly of the state of Iowa:* That all courts heretofore organized in this state under the provisions of said chapter one hundred and forty-three, and approved March 17, 1876, are hereby declared to be legal and valid, and the establishment and organization thereof in pursuance of said act, and all doings, processes, judgments and proceedings in said courts, and the elections and commissions of the judges thereof, are hereby legalized and declared to be lawful and valid to all intents and purposes as fully in all respects as if said act had been fully enacted and declared to be a law, without any submission to a vote of the people as provided in the second section of said act.

(Took effect February 28, 1878, by publication in newspapers).

This chapter could not have the effect to validate the act attempted to be cured if such act was in conflict with the constitution. *Lyle v. May*, 49 Iowa, 224.

(CHAPTER 40, LAWS OF 1888.)

An Act to amend chapter 143 of the acts of the sixteenth general assembly and chapter 24 of the acts of the nineteenth general assembly, relating to superior courts and proceedings therein.

SECTION 1. (*Amendment of ch. 143 of laws of 1876, and ch. 24 of laws of 1882.*) That chapter 143 of the acts of the sixteenth general assembly, and chapter 24 of the acts of the nineteenth general assembly, be and the same are hereby amended as follows, to-wit: That section six (6) of the acts of the sixteenth general assembly be and the same is hereby repealed, and the following is enacted in lieu thereof:

Sec. 6. Said court shall have jurisdiction in all civil matters, concurrent with the district court, as now and as may hereafter be provided by law, except in probate matters and actions for divorce, alimony and separate maintenance. It shall have exclusive original jurisdiction to try and determine all actions, civil and criminal, for the violation of city ordinances, and all jurisdiction conferred on police courts as now or as may hereafter be provided by law; and concurrent jurisdiction with justices of the peace, and writs of error and appeals may be taken from justices' courts in the township in which the court is held, and, by consent of parties, from any other township in the county. For the trial of criminal actions on information and complaint, the court shall be open at such times, under such rules as the court shall prescribe. In actions by attachment, where real property is levied on by writs of attachment, the officer levying the writ shall make entry thereof in the incumbrance book in the office of the clerk of the district court, in like manner and with like effect as of levies made in the district court.

SEC. 2. (*Amends section 7 of ch. 143, 16th g. a.*) That section seven (7) of the acts of the sixteenth general assembly, as amended by section four (4) of the acts of the nineteenth general assembly, be repealed, and the following is enacted in lieu thereof:

Sec. 7. [**Change of venue.**] Changes of venue may be had from said court in all civil actions to the district court of the county, in the same manner, for like causes, and with the same effect as the venue is changed from the district court as now or hereafter may be provided by law. All criminal actions, including those for the violation of the city ordinances, shall be tried summarily and without a jury, saving to the defendant right of appeal to the district court, which appeals shall be taken in the same time and manner as appeals are taken from justices' courts in criminal actions.

SEC. 3. (*Amends section 16, ch. 143, 16th g. a.*) That section 16 of chapter 143 of the acts of the sixteenth general assembly, as amended by section six (6), of chapter twenty-four of the acts of the nineteenth general assembly, be amended by striking out the word "one," in the thirteenth line, and inserting in lieu thereof the word "two."

SEC. 4. [**Terms of court.**]—Said court shall hold at least eight, and not to exceed eleven terms each year, the time thereof being arranged by the judge of the court in such manner as shall least conflict with the terms of the district court of the county where said superior court is held, the terms to be fixed by the general order made of record, at least ten days before the first term of that year, but no term need be held in the month of August.

SEC. 5. [**Challenge to jurors.**]—In all civil cases where the jury shall consist of six jurors, the challenges allowed to either party shall be limited to three each, but where the jury shall consist of twelve jurors the same number of challenges may be allowed to either party as is now or may hereafter be allowed in the district court.

Approved March 23, 1888.

(CHAPTER 6, LAWS OF 1888.)

CONSTRUCTION OF SEWERS.

An Act relating to the construction of sewers in cities having a population of more than thirty thousand according to the census of 1885. Supplementary to chapter 162 of the acts of the seventeenth general assembly, entitled an act to authorize cities of the first class containing, according to any legally authorized census or enumeration, a population of over thirty thousand, to provide for the construction of sewers, additional to code, chapter 10, title IV, concerning cities and towns, and to repeal chapter 166 of the acts of the twenty-first general assembly relating to the construction of sewers.

SECTION 1. [Cities of first class of 30,000 may construct sewers.]—*Be it enacted by the general assembly of the state of Iowa:* That all cities of the first class containing, according to the census of 1885, a population of over thirty thousand authorized by section one of chapter 162 of the acts of the seventeenth general assembly, to provide by ordinance for the construction of sewers, shall have the power and be subject to the conditions and requirements hereinafter provided.

SEC. 2. [Council to pass resolution for sewer.]—Whenever cities subject to the provisions of this act shall deem it necessary to construct any sewer, the council shall declare by resolution the necessity therefor, and shall state the kind, size, location, and designate the terminal points thereof, and notice for twenty days of the passage of such resolution shall be given not less than two weeks nor more than four weeks in some newspaper of general circulation published in such city and by hand bills posted in conspicuous places along the line of the proposed sewer. Said notice shall state the time and place when and where the property owners along the line of said proposed sewer can make objections to the necessity of the construction thereof.

SEC. 3. [Plan filed with board of public works.]—If the council shall thereafter determine to construct such sewer it shall declare the same by resolution stating the kind, size, terminal points thereof and location. The city engineer shall at once file the plans and specifications therefor in the office of the board of public works for public inspection and the proposals for bids and letting the contract shall be in compliance with the provisions of chapter 168, laws of the twenty-first general assembly, and chapter 162, laws of the seventeenth general assembly, and acts amendatory thereto.

SEC. 4. [Board of assessors.]—When the contract is awarded for the construction of said sewer, the board of public works, in connection with the city engineer, shall constitute the board of assessors, and shall at once proceed to make the assessment on the various lots to be charged therewith in proportion, as nearly as may be, to the benefits which in their opinion shall result from such sewer and such lots respectively, and file the same with the city council as soon as practicable after the awarding of the contract, and in estimating the benefits to result from such sewer no account shall be taken of improvements, and each lot shall be considered as wholly unimproved.

SEC. 5. [Notice to be given of adopting assessment.]—Before adopting the assessments so made, the council shall publish notice for two consecutive weeks in some newspaper of general circulation in the corporation, stating the time and place, when and where said assessments will be confirmed by the city council, and if any person object to his assessments he shall file his objections in

writing with the city clerk on or before such date, and when the assessment is confirmed by the council it shall be complete and final.

SEC. 6. [**Assessment made by vote of two-thirds of city council.**]—The concurrence of two-thirds of the members of the city council shall be necessary to confirm the assessment made by the board of assessors.

SEC. 7. [**How an invalid assessment cured.**]—When it shall appear to the council that a special assessment is invalid by reason of informality or irregularity in the proceedings, or when any assessment shall be adjudged to be illegal by a court of competent jurisdiction, the city council may order a re-assessment and the proceedings upon a re-assessment shall be conducted in the same manner as provided in respect to the original assessment.

SEC. 8. [**Limitation of assessment.**]—There shall not be assessed to the lots or land adjacent to the line of any sewer an amount in excess of three dollars per lineal foot, and whenever any assessment shall be made to the limit herein prescribed and the board of assessors and city council shall determine that certain lots or land adjacent to the line of such sewer is not benefited in whole or in part, the council shall order and deliver to the contractor a warrant drawn on the sewer fund for the amount that cannot be assessed on the property not benefited.

SEC. 9. [**Chapter 166, 21st G. A., repealed.**]—Chapter 166, laws of the twenty-first general assembly, the same being entitled “an act supplementary to chapter 162 of the laws of the seventeenth general assembly,” be and the same is hereby repealed.

Approved April 16, 1888.

(CHAPTER 16, LAWS OF 1888.)

GRANTING ADDITIONAL POWERS TO CERTAIN CITIES.

An Act granting additional powers to certain cities of the first class and to cities organized under special charters, and cities of the second class having over 7,000 inhabitants.

SECTION 1. [**Additional power to certain cities.**]—*Be it enacted by the general assembly of the state of Iowa:* That all cities of the first class and cities of the second class having over 7,000 inhabitants, and cities organized under special charters in this state in addition to the powers now granted, shall have the further and additional powers conferred by this act, as follows, to wit: they shall have power to establish, build and regulate market houses, slaughter houses; to license, and regulate bill posters; to repair temporary sidewalks without notice to the property owner and provide by ordinance for the manner of assessing the expense thereof on the property in front of which such repairs are made; to remove snow or ice from the sidewalk without notice to the property owner and provide by ordinance for the manner of assessing the expense thereof on the property in front of which such snow or ice shall be removed; *provided, however,* that the expense thereof shall not exceed one and one-half cent per front foot of any lot; provided that the snow or ice has remained upon the walk for the period of fifteen hours; to repair paving, curbing, sewers and catch-basins; to regulate telegraph, telephone, electric light, district telegraph and other electric wires, and provide the manner in which, and places where the same shall be placed upon, along or under the streets and alleys of such city; to regulate the price of gas, electric light, water rates, and to regulate and fix the charges for water meters, gas meters, electric light meters, or any other device or means necessary for determining the consumption of gas, water or electric light. This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the

above powers are abridged. To fix the charges for making gas, electric light, steam heating, water, telephone and district telegraph connections; to compel street railway companies, whenever any street is ordered paved to pave and maintain in width three and one-half feet each way commencing at the center of the space between the rails, and in case of failure to do so to provide by ordinance for such paving and maintenance, and for the manner of assessing against such companies the cost thereof; to compel railroad companies to erect, construct, maintain and operate, under such regulations as may from time to time be provided by the council, suitable gates upon public streets at railroad crossings; to provide that magazines used for the keeping of gunpowder, inflammable oils and other combustibles, shall not be located or maintained within a certain distance of the corporate limits of such cities; to provide that before any association, company, society, order, exhibition or aggregation of persons shall parade or march upon the streets of such cities, that they shall first obtain from the mayor of such city a permit, when issued to be without charge, and the same shall state the time, manner and conditions of such parade or march; to provide by ordinance that the width of all streets and alleys of all additions to such cities, shall be graded in the same manner, and that they shall conform to the width of the existing streets and alleys of such cities; to expel and remove from office, by a vote of three-fourths of the members of the city council, any elective officer of such city charged with any crime under the statutes of this state, and such removal shall be as provided by section 530 of the code, title 4, chapter 10, for the removal of members of the city council; to make its bonds for all purposes now provided by law or hereafter to be provided by law, payable on or before a date named, or payable at a time certain, as the city council may determine. And such cities shall have full control of the bridge fund levied and paid upon the property within their corporate limits, and shall have the right to use the same for the construction of bridges and culverts and approaches thereto, repairing the same and paying bridge bonds and interest thereon, issued by such city; and it is hereby made the duty of the board of supervisors of the counties within which such cities are located to levy annually upon all of the taxable property within such city such a per centum for that purpose as may be directed by the city council of such cities, not exceeding the limit fixed by law: *provided*, that no contract heretofore made respecting the application of the bridge tax shall be affected hereby.

Approved April 10, 1888.

(CHAPTER 51, LAWS OF 1874.)

RELATING TO THE IMPROVEMENT OF ALLEYS.

An Act to authorize cities and towns to provide for the improvement of alleys.

SECTION 1. [Cities and towns may provide for grading alleys.]—*Be it enacted by the general assembly of the state of Iowa:* That the city council or trustees of any incorporated city or town, organized under special charter or under the provisions of the general incorporation laws of the state, are hereby authorized and empowered to provide *by ordinance* for the improvement of alleys (in said city or town) by grading the same, and for the assessment of the expenses thereof upon the owners of the lots or parcels of land abutting on said alley, pro rata, according to the front feet of said lots or parcels of land; *provided*, that such ordinance shall not be adopted except after the presentation to said council of a written petition for the improvement of such alley, signed by a number of the owners of property so to be assessed therefor equal to a majority of the owners of such property.

SEC. 2. [Work to be let to lowest bidder.]—It shall be the duty of such city council or trustees to require the work of grading such alley to be done under

contract therefor, to be entered into with the lowest responsible bidder; *provided*, that all bids for such work may be rejected by such council or trustees, if by them deemed to be exorbitant, and new bids ordered.

SEC. 3. All assessments for grading alleys under this act shall be a lien upon the lots and lands assessed, and shall bear the same rate of interest; and the said property assessed may be sold for payment thereof in the same manner, at any regular or adjourned sale, with the same forfeiture, penalties and rights of redemption; and certificates and deeds of such sales shall be made in the same manner and with like effect, as in case of sales for non-payment of the annual taxes of such cities or towns respectively, as now or hereafter provided by law in respect thereto.

The italicised portion of section 1 modified by section 12, chapter 116, laws of 1876. See *post*.

SEC. 4. [**Councils may provide mode of assessment.**]—Such city council or trustees may provide by ordinance for the particular mode of making and returning the assessment hereinbefore authorized, and payment of such assessment may, if so directed by said council or trustees, be enforced in the manner and by the proceedings provided for by sections 478, 479 and 481 of the code.

SEC. 5. [**Repealed.**]—That so much of section 465, chapter 10, title IV, as requires the expense of the grading of alleys to be paid out of the general funds of any incorporated city or town, be and the same is hereby repealed.

(Took effect March 29, 1874, by publication in newspapers.)

(CHAPTER 13, LAWS OF 1888.)

An Act to amend section one of chapter 51, acts of the fifteenth general assembly.

SECTION 1. (*Amends section 1, ch 51, laws of 1874.*) *Be it enacted by the general assembly of the state of Iowa:* That so much of section one, chapter 51, acts of the fifteenth general assembly, as requires cities of the first class to provide by ordinance for the improvement of alleys after presentation of petition by owners, of property to be assessed, be and the same is hereby repealed, and such cities of the first class, organized under the general incorporation laws of the state, may provide by ordinance how such improvements shall be made; and thereafter when said cities of the first class may order an alley to be improved, graded or macadamized by resolution, the yeas and nays shall be recorded.

Approved April 3, 1888.

(CHAPTER 56, LAWS OF 1878.)

COMPENSATION OF CERTAIN OFFICERS IN CITIES.

An Act requiring that certain officers in cities may receive a fixed compensation, and that all fees now allowed such officers shall be paid into the treasuries of of such cities.

SECTION 1. [**Officers to receive salary instead of fees.**]—*Be it enacted by the general assembly of the state of Iowa:* That all cities of the first class, organized under the general incorporation law, and all cities organized under special charter, may provide by ordinance that all judges of police courts or other city courts, city marshals, chief of police, police officers and all other officers elected or appointed, shall receive, in lieu of all fees now allowed by law or ordinance, such fixed salary, in monthly or quarterly installments, as may be provided by ordinance, when not provided by law, which salary, when it shall have been fixed, shall not be increased or diminished during their terms of office.

SEC. 2. **No such officer of any city shall receive, for his own use, any**

fees or other compensation for his services of such city, than that which shall be provided as contemplated in section one (1) of this act; but all such fees as are now or may hereafter be allowed by law for such services, shall by such officer, when collected, be paid into the city treasury, at such time and in such manner as may be prescribed by ordinance.

SEC. 3. [**Repealing clause: fees to be paid into treasury.**]*—*All acts and parts of acts in conflict herewith are hereby repealed; *provided*, that the intent of this act is not to abolish any fees now allowed by law, but to require the same to be paid into the city treasury.

(Took effect March 19, 1878, by publication in newspapers).

This chapter, authorizing cities of the first class to provide by ordinance for the payment of salaries to their officers, in lieu of fees theretofore retained by such officers under prior statutes and ordinances, is not invalid as delegating legislative powers to such cities. *The City of Des Moines v. Hillis et al.*, 55 Iowa, 643.

(CHAPTER 107, LAWS OF 1876.)

RELATING TO LEVY OF SPECIAL TAX IN CITIES.

An Act to empower cities to levy a special tax for sewerage purposes. [Additional to code, chapter 10, title 4].

SECTION 1. [**Sewerage fund.**]*—Be it enacted by the general assembly of the state of Iowa:* That any city within this state may levy a tax of not more than two mills on the dollar in addition to the maximum tax now authorized by law for the purpose of commencing a general system of sewerage in such city, and the money so raised shall constitute a sewerage fund, and shall be applied to no other purpose.

SEC. 2. [**May condemn private property.**] *And be it further enacted:* That when, for the purpose of carrying off the water of any stream, which flows within or through the said city, it becomes expedient to cause a principal sewer to pass through private property, the right to condemn such property for this purpose is hereby conferred upon its council. And the powers granted shall be the same in other respects as those enjoyed by railway companies, by and under the provisions of the code. The proceedings to enforce their powers shall also be the same, except that all damages shall be assessed by a board of three commissioners. These shall be appointed by the city council and may be changed at the pleasure thereof. They must be free from all personal interest in subjects brought before them for their adjudication, and they may decide on any question of damages that may arise in respect to any of the property that may be injured by the construction of said sewer.

SEC. 3. [**In relation to construction, by whom.**]*—And be it further enacted:* That instead of constructing such principal sewer itself, the city may authorize its construction by any individual or company, and may agree to pay therefor out of the sewerage fund. And the city council may also make all needful rules and regulations in relation to any of the sewers in their respective cities, and may regulate the manner in which any property holder may connect therewith, and may also prescribe all needful regulations pertaining thereto.

(Took effect March 25, 1876, by publication in newspapers.)

(CHAPTER 151, LAWS OF 1884.)

RELATING TO PARKS.

An Act relating to parks in cities and towns, and to authorize the election of commissioners, and levy of a special tax therefor. (Additional to code, chapter 10, title IV.)

SECTION 1. [Cities acting under special charters, and incorporated towns, may elect three park commissioners.]—*Be it enacted by the general assembly of the state of Iowa:* That cities acting under special charters, and cities and incorporated towns, may provide by ordinance for the election of three park commissioners, and the terms thereof shall be three, four, and five years respectively, and their successors shall be elected for the full term of five years, and such park commissioners shall reside in such city or town.

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

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

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

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

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

SEC. 7. [Cutting, etc., a misdemeanor.]—That it shall be deemed a misdemeanor for any person to cut, break or deface any tree or shrub growing in any such park or parks, or avenues thereto, except by authority of such commissioners

(CHAPTER 33, LAWS OF 1876.)

ELECTION OF CERTAIN OFFICERS IN CITIES OF THE FIRST CLASS.

An Act to provide for the election of certain officers in certain cities of the first class. [Additional to code, chapter 10, title IV: "Of cities and incorporated towns."]

SECTION 1. (*Amended by sec. 1, ch. 20, 17th g. a.*) *Be it enacted by the general assembly of the state of Iowa:* That in all cities of the first class incorporated under the general incorporation laws of this state, whose population according to the census of 1875 was not less than nineteen thousand, the city council at the first regular meeting in April in each and every year thereafter, shall elect [one city marshal, one city solicitor, one city physician, one building commissioner,] one city civil engineer, one superintendent of markets, one street commissioner, and when deemed necessary by the council, one wharfmaster, who shall hold their respective offices for the term of one year and until their successors are elected and qualified; they shall be responsible to the city council for the true and faithful performance of the duties of their respective offices, and shall receive for their services such compensation as the city council shall by ordinance from time to time provide, and for the election of the officers provided for in this section, it shall require an affirmative vote of a majority of all the members elected to the city council.

SEC. 2. (*Amended by sec. 2, ch. 20, 17th g. a.*) [Election of certain other officers.]—The qualified electors of [every such city shall elect] one treasurer, one auditor, and one police judge, who shall hold their respective offices for the term of two years, and until their successors are elected and qualified. Each of said officers shall have such powers and perform such duties as are prescribed by chapter 10, title IV, of the code, and in any ordinance of the city not inconsistent with this code.

[This act not to apply to cities under special charters.]—The officers provided for in this and the preceding section shall each be required to give bond, with two sureties each, in such sum, for the faithful performance of their respective duties, as the city council shall from time to time prescribe by ordinance, and the officers provided for in this act may be removed from their respective offices as provided by section five hundred and thirty (530) of the code; *provided*, that the provisions of this act shall not apply to cities organized under special charters.

(Took effect by publication in newspapers, March 6, 1876.)

(CHAPTER 25, LAWS OF 1878.)

CONFERRING ADDITIONAL POWERS ON CITIES UNDER SPECIAL CHARTERS.

An act to amend the charters of all municipal corporations existing and acting under special charters not now having the powers herein granted, and conferring additional powers upon such cities. [Additional to code, chapter 10, title IV, "Of cities and incorporated towns."]

SECTION 1. [Cities may prohibit dogs from running at large.]—*Be it enacted by the general assembly of the state of Iowa:* That all cities existing and acting under special charters, which do not have the powers herein enumerated, shall have power to regulate, restrain, license, or prevent the running at large of dogs within said cities, and to require dogs to be kept upon the premises of the owners thereof, unless licensed to run upon streets, alleys and other places other

than the premises of the owner, and to provide for the destruction of the same when found in said cities, contrary to and in violation of the provisions of any ordinance or by-laws passed pursuant to the powers herein granted.

Approved February 28, 1878.

(CHAPTER 77, LAWS OF 1880.)

An Act in relation to jury trial in cases for violation of ordinances of cities of second class and incorporated towns.

SECTION 1. [Defendant not entitled to a jury except on appeal.]—*Be it enacted by the general assembly of the state of Iowa:* On an information for a violation of an ordinance of an incorporated town or city of the second class the defendant shall not be entitled to a trial by jury, but shall be tried by the court without a jury except on appeal.

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

(CHAPTER 56, LAWS OF 1880.)

An Act to provide for the extension of the limits of cities of the first and second class.

SECTION 1. [City limits extended in certain cases.]—*Be it enacted by the general assembly of the state of Iowa:* That in addition to the methods now provided by law for extending city limits, whenever the owner or owners of lands adjoining the limits of any city of the first or second class, organized under the general laws of the state of Iowa, shall desire to have their lands brought within the city limits of such city, they may apply to the city council of such city to have the limits of the city extended so as to include such lands, and shall attach to the application a map of such lands, showing their situation, with respect to the existing limits of the city. If the city council shall assent to the extension of the limits of the city, as applied for, a minute thereof shall be indorsed upon the map by the city clerk, and the same shall then be acknowledged by the owner and recorded in the office of the recorder of the proper county, as provided in section 560 of the code. Thereafter the limits of the city shall be extended so as to conform to the line proposed and so assented to by the city council.

(Took effect by publication in newspapers, March 24, 1880.)

(CHAPTER 53, LAWS OF 1880.)

An Act to provide that lands to be laid out into town or city lots shall be free from incumbrance, or that security shall be given against such incumbrance, and that such lots, when thus laid out, shall be accurately described relative to some established corner of the congressional division of which they are part, and repealing chapter 25 of the laws of the fifteenth general assembly, and chapter 63 of the laws of the sixteenth general assembly.

SECTION 1. [Persons laying out towns or city lots, must have treasurer's certificate that they are free from taxes.]—*Be it enacted by the general assembly of the state of Iowa:* That whenever any person or corporation shall lay out any parcel of land into town or city lots in accordance with chapter 12, title IV of the code, such person shall procure from the treasurer of the county in which the land lies, a certified statement that the land thus laid out into lots, streets and alleys is free from taxes, and shall also procure a certified statement

from the recorder of such county that the title in fee to said land is in such proprietor, and that the same is free from every incumbrance; which certified statements shall both be filed with the recorder before the plat of said town or city lots shall be admitted to record or of any validity; *provided, however*, that if the parcel of lands so laid out shall be incumbered with a debt certain in amount, and which will fall due not more than two years after the making of the affidavit hereinafter provided for, and which the creditor will not accept with accrued interest to the day of proffered payment, if it draws interest, or with a rebate of interest at the rate of six per centum per annum if it draws no interest, or if the creditor cannot be found, then such proprietor, and if a corporation, its proper officer or agent, may file with the recorder of such county his affidavit, stating either that such proprietor has offered to pay such creditor the full amount of his debt, with interest or with a rebate of interest, as the case may be, and that such creditor would not accept the same, or that such creditor cannot be found, whereupon such proprietor may execute a bond double the amount of such incumbrance, with three sureties, who shall be freeholders of the county, to be approved by the recorder and clerk of the county, which bond shall run to the county, and shall be for the benefit of the purchasers of any of such town or city lots, and shall be conditioned for the payment of such incumbrance and the cancellation thereof of record as soon as practicable after the same becomes due, and for the holding of all such purchasers and those claiming under them forever harmless from such incumbrance; and when such affidavit and bond shall have been filed with the recorder, together with a certificate of the treasurer that said land is free from taxes, and the certificate of the recorder that the title in fee to said land is in such proprietor, and that the same is free from all incumbrance except that secured by said bond, said plat shall be admitted to record, and be equally valid as if such proprietor had filed with the recorder the certificate of such recorder that said land was free from all incumbrance.

SEC. 2. **All the certificates, affidavits and bonds**, provided for in the preceding section shall be recorded in connection with the plat to which they relate in the office of the recorder before the said plat or the record thereof shall be of any validity.

SEC. 3. **The record and plat of every town or city**, or addition thereto, which may be thus laid out, shall give the bearing and distance from some corner of a lot or block in said town or city or part thereof, to some corner of the congressional division of which said town, city or addition is a part.

SEC. 4. The provisions of this act shall not prevent the annexation of contiguous territory to cities and towns under sections 426, 427, 428 and 429, of chapter 10, title IV, of the code, and chapter 47 of the laws of the sixteenth general assembly, as amended by chapter 169 of the laws of the seventeenth general assembly.

SEC. 5. [**Repeal.**—Chapter 25 of the laws of the fifteenth general assembly, and chapter 63 of the laws of the sixteenth general assembly, are hereby repealed.

Approved March 16, 1880.

(Took effect April 5, 1880, by publication in newspapers.)

(CHAPTER 55, LAWS OF 1880.)

An Act authorizing the construction of sewers for state buildings through streets and alleys of incorporated cities, or cities acting under special charter.

SECTION 1. [**State may construct sewers from state buildings through streets and alleys.**—*Be it enacted by the general assembly of the state of Iowa:* That in any incorporated city, or city acting under special charter, within the limits of which may be situated any state buildings, the trustees or commissioners

having charge of said buildings, or of the construction thereof, shall have authority to construct sewers therefor through or under any of the streets or alleys of said city.

SEC. 2. [**Repealing clause.**—All acts or parts of acts conflicting with this act are hereby repealed.

(Took effect by publication in newspapers, March 20, 1880.)

(CHAPTER 89, LAWS OF 1880.)

An act to authorize cities of the first and second class to acquire and dispose of real property in certain cases.

SECTION 1. [**Cities may purchase real estate on execution sale on behalf of city.**—*Be it enacted by the general assembly of the state of Iowa:* That any city of the first or second class, organized under the general laws of this state, shall have power to acquire real estate, or an interest therein, as a purchaser at an execution sale where such city is the plaintiff in execution, or otherwise interested in the proceeding, and to dispose of the property, or interest therein so acquired, and also to dispose of any real estate or interest therein, including any streets or portion thereof vacated or discontinued, however acquired or held by such city, in such manner and upon such terms as the city council shall deem just and proper.

(Took effect by publication in newspapers, April 3, 1880.)

(CHAPTER 96, LAWS OF 1880.)

An Act to make section 464 of the code of 1873, as amended, applicable to special chartered cities and towns.

SECTION 1. [**Applicable to special chartered cities.**—*Be it enacted by the general assembly of the state of Iowa:* That section 464 of the code of 1873, as amended by chapter six of the public laws of the fifteenth general assembly, shall be applicable to cities and towns organized and acting under special charters, and such cities and towns shall have all the powers conferred by said section on cities and towns incorporated under the general incorporation law.

Approved March 23, 1880.

(CHAPTER 116, LAWS OF 1876.)

RELATING TO CITIES ORGANIZED UNDER SPECIAL CHARTERS.

An Act relating to cities organized and existing under special charters, conferring additional powers, and amending the charters of such cities. [Additional to code, chapter 10, title IV, "Of cities and incorporated towns."

SECTION 1. [**To provide by ordinance when taxes become delinquent.**—*Be it enacted by the general assembly of the state of Iowa:* All cities in this state organized and existing under special charters, may provide by ordinance when taxes, both general and special, shall become delinquent, and the rate of interest which they shall thereafter bear, which rate shall not exceed twenty-five per cent per annum; and for the sale of delinquent special and general taxes, on such terms and at [such] a rebate of the principal or interest, or both, as the city council may determine; and in the notice required by law to be given, it will be sufficient to state the description of the lot or parcel of real estate to be sold for delinquent

taxes of the current year, and also the lot or parcel of real estate on which the delinquent taxes for previous years, without naming such previous years, and the amount of interest and costs, if any, against such lot or parcel of real estate, in which may be included special taxes delinquent, at such rate of interest as the city council may determine, not to exceed the rate allowed by law at the time the taxes were assessed, and the total amount of taxes, interest and cost against such lot or parcel of real estate.

SEC. 2. [Letters and figures may be used.]—In all advertisements for the sale of real property for taxes, and in entries required to be made in any manner connected with the assessment or collection of taxes, letters and figures may be used to denote numbers, fractions of numbers, and amounts, as are commonly used in other business transactions, and no irregularity or informality in the advertisement shall affect the legality of any sale or the title of any property conveyed, if it shall appear that said property was subject to taxation for the year or years for which the same was sold, and that the tax was due and unpaid at the time of sale; and in all cases the advertisement shall be sufficient notice to owners and persons having an interest in or claiming title to any lot or parcel of real estate, of the sale of their property for delinquent taxes, and a failure of the collector to make a personal demand of taxes shall not affect the validity of any sale or the title to property acquired under such sale.

SEC. 3. [Special taxes: interest.]—The city council may provide by ordinance that all special taxes hereafter assessed and levied shall bear the same rate of interest as the annual taxes from and after the same becomes due and delinquent, which rate shall not exceed twenty-five per cent per annum; and all special taxes remaining due and delinquent at the date when the annual taxes become delinquent shall be collected at the time and in the manner the annual delinquent taxes are collected, and the same shall be included with the annual delinquent taxes, if any remain delinquent, and the city council may provide by ordinance that all special taxes or assessments which shall become due and delinquent prior to the delinquency of the annual taxes, shall be collected by a sale of the real estate so taxed or assessed, specially called therefor, and the kind of notice to be given, and may also provide for the collection of such tax by suit, such as is authorized by sections 478 and 479, of chapter 10, title IV, of the code.

SEC. 4. [Receipt by collector.]—The collector shall, in all cases, make out and deliver to the taxpayer a receipt, which receipt shall contain the description and assessed value of each lot or parcel of real estate, and the assessed value of personal property; and in case the property has been sold for taxes and not redeemed, the date of such sale and to whom sold, also the amount of the tax, interest and costs, if any, giving a separate receipt for each year, whereupon he shall make the proper entries of such payments on the books of his office. And the council may provide by ordinance that no person shall be permitted to pay the taxes of any one year until the taxes for the previous years shall be first paid; and provide that the receipt herein contemplated shall be conclusive evidence that all taxes, and the costs of every kind against the property described in such receipt, are paid to the date of such receipt; and provide that for any failure or neglect on the part of the collector, or on the part of any one acting as collector, he and his bondsmen shall be liable to an action on his official bond for the damages sustained by any person or the city through such neglect.

SEC. 5. [Collector to make certificate of purchase.]—The collector of taxes, or person authorized to act as collector shall make, sign and deliver to the purchaser of any real property sold for the payment of any taxes authorized by the provisions of this act, or by any law applicable to cities acting under special charters, a certificate of purchase, which shall have the same force and effect as certificates issued by county treasurers for the sale of delinquent county taxes.

SEC. 6. [**Redemption.**—Real property sold under the provisions of this act, or by virtue of any power heretofore given, may be redeemed at any time—before the redemption is cut off, as hereinafter provided—by payment to the collector, or to the person authorized to act as collector, to be held by him subject to the order of the purchaser on surrender of the certificate, or in case the same is lost or destroyed, on his making affidavit of such fact, and of the further fact that it was not assigned, of the amount for which the same was sold, and twenty per centum of such amount immediately added as a penalty, with ten per cent interest per annum on the whole amount thus made from the day of sale: (*As amended by sec. 1, ch. 174, 17th g. a.*) [and also the amount of all taxes, either annual or special, with interest and costs, paid at any time by the purchaser subsequent to the sale, and a similar penalty of twenty per cent, added as before, on the amount of the payment made at any subsequent time, with ten per cent interest per annum on the whole of such amount or amounts from the day or days of payment: *Provided*, that such penalty for the non-payment of the taxes at any subsequent time or times, shall not attach unless such subsequent tax or taxes shall have remained unpaid for thirty days after they become delinquent.] (*As amended by sec. 2, ch. 174, 17th g. a.*): [These provisions shall not in any manner affect sales for city taxes heretofore made by cities acting under special charters.]

(*As amended by ch. 116, 16th g. a.*) The collector, or person authorized to act as collector shall, upon the application of any party to redeem real property, sold as aforesaid, and being satisfied that such person has a right to redeem the same, and on the payment of the proper amount issue to such party a certificate of redemption, in substance and form as provided by section 891 of chapter 2, title VI, of the code, and shall make the proper entry thereof in the sale book, which redemption shall thereupon be deemed complete without further proceedings. The provisions of sections 892, 893, and 894, of chapter 2, title VI, of the code, shall, so far as the same are applicable, and not herein changed or modified, apply to sales of real estate for delinquent taxes herein contemplated, *provided*, that where the words “treasurer of the county,” or “treasurer,” are used in said sections, the words “collector of the city,” or “collector” or person authorized to act as collector, shall be substituted.

SEC. 7. [**Deed made to holder of certificate of purchase.**—Immediately after the expiration of ninety days from the date of service of the notice, as prescribed by section 894, of chapter 2, title VI, of the code, the collector or person authorized to act as collector then in office, shall make out a deed for each lot or parcel of land remaining unredeemed, and deliver the same to the purchaser, upon the return of the certificate of purchase, any number of parcels of real estate bought by one person may be included in one deed, if required by the purchaser. Deeds executed by the collector or person authorized to act as collector, may be in form substantially as provided by section 896, chapter 2, title VI, of the code, and shall be signed and acknowledged by him in his official capacity, and all deeds and conveyances hereafter made and executed on account of any general or special tax sales, shall have the same force and effect as deeds made by county treasurers for delinquent county taxes, and the purchaser, as well as the owner of any real property sold on account of such general or special delinquent tax, shall be entitled to all the rights and remedies which are granted and prescribed by sections 897, 898, 899, 900, 901, 902, 903, 904 and 905, of chapter 2, title VI, of the code; *provided*, that wherever the words “county” or “county treasurer” are used, the word “city” or “city collector,” or person authorized to act as collector, shall be substituted.

SEC. 8. When the **grade of any street or alley** shall have been established, and any person shall have built or made improvements on such street or alley according to the established grade thereof, and such city shall alter said established

grade in such a manner as to injure or diminish the value of said property, said city shall pay to the owner or owners of said property so injured the amount of such damage or injury.

SEC. 9. [**Damages assessed by commissioners.**—Said damage or injury shall be assessed by three commissioners, who shall be disinterested freeholders, to be appointed by the city council. They shall, before entering upon their duty, be sworn to execute the same according to the best of their ability. Before entering upon their duty the city shall cause notice to be given, which notice shall be signed by the commissioners and published for three weeks in one or more newspapers printed in such city, of the time and place of their meeting for the purpose of viewing the premises and making their assessments. They shall view the premises, and, in their discretion, receive any legal evidence, and may adjourn from day to day; either one of whom shall have the power, in the presence of the others, to administer an oath or oaths to any witness or witnesses to be examined before them.

SEC. 10. When the **appraisement** shall be completed the commissioners shall sign and return the same to the city council within thirty days of their appointment. The city council shall have power, in their discretion, to confirm or annul the appraisement, and if annulled all proceedings shall be void, but if confirmed an order for the confirmation shall be entered. Any person interested may appeal from the order of confirmation to the circuit or district court of the county in which such city is situated, by notice in writing to the mayor, at any time before the expiration of twenty days after entering the order of confirmation. Upon the trial of the appeal all questions involved in the proceedings, including the amount of damages, shall be open to investigation. The cost of any proceedings incurred prior to the order of such city council confirming or annulling the appraisement, shall in all cases be paid by such city.

SEC. 11. [**City council may remove commissioners.**—The city council shall have power to remove commissioners, and from time to time appoint others in the place of such as may be removed, refuse, neglect, or be unable from any cause, to serve.

SEC. 12. (*As amended by sec. 1, ch. 51, 15th g. a.*) [**Council may improve alley without petition.**—That so much of section 1, chapter 51, acts of the fifteenth general assembly, as requires cities to provide by ordinance for the improvement of alleys after presentation of petition by owners of property to be assessed, be, and the same is, hereby, repealed, and such cities organized under special charters may provide by ordinance how such improvement shall be made, and thereafter may order any alley to be improved, graded or macadamized, by resolution passed by the affirmative vote of two-thirds of such council, and on voting on such resolution the yeas and nays shall be recorded.

SEC. 13. [**Property condemned.**—All property taken and condemned by virtue *or* [of] any power heretofore conferred or herein granted may be so taken and condemned and such power may be exercised and pursued without resorting to proceedings in court in the first instance to enforce the same, anything in any law to the contrary notwithstanding.

SEC. 14. [**Council may regulate sales.**—The city council of any such city may regulate and license sales by transient merchants, bankrupt and dollar stores, and the like; *provided*, that the exercise of such power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors, or other persons required by law to sell real or personal property.

SEC. 15. [**Annual tax of not to exceed three per cent.**—The city council of all cities acting under special charters, with a population of not more than fifteen thousand inhabitants, as shown by the last state census, shall have power

to levy an annual tax of not to exceed three per cent of the assessed value of all taxable property within its limits, for the purpose of defraying the annual current expenses of the city, carrying on its municipal affairs and paying its bonded indebtedness: *provided*, that no other or greater assessment shall be made in any one year than the amount herein authorized, anything in any law to the contrary notwithstanding. While all other cities acting under special charters may levy the taxes now authorized by law, and, when such city constitutes a road district, may levy a road tax in addition to the road tax now allowed by law of two mills on the dollar of the assessed valuation, which road tax shall in no case exceed five mills: *provided*, however, the city council may provide by ordinance that all property lying within the corporate limits of any city acting under a special charter, and which is not now subject to tax for city purposes, by reason of the said property being used for agricultural, horticultural or gardening purposes, shall be subject to a road tax not exceeding the sum of forty cents for each one hundred dollars of the valuation thereof, for the purpose of keeping in repair the roads, streets and bridges lying within that part of any such city where the property is not subject to taxation for city purposes.

SEC. 16. [**When taxes collected by marshal.**]—When, by the provisions of special charters, taxes or revenue of any kind are required to be collected by the marshal or any other designated officer, the city council of any such city shall have the power to provide by ordinance for the collection of such taxes or revenue, and the discharge of all other duties relating thereto by any other officer or person.

SEC. 17. [**Numbering of houses.**]—Cities acting under special charters shall have power to provide by ordinance for the numbering of houses by the owners or lessees thereof.

SEC. 18. [**When flow of water is obstructed by filling.**]—All such cities shall have the power to require the owner or lessee of any lot or tract of ground extending into, across, or bordering on any hollow or ravine which constitutes a drain for surface water, or a water course of any kind, who shall by grading or filling such lot or tract of ground obstruct the flow of water through such water course, to construct through such lot or land such a drain or passage-way for water as the council may designate, and to enforce the same by proper penalties, or the city may construct such drains at the expense of the owners, and assess the costs thereof on the lots or tracts of ground.

SEC. 19. [**Poll tax.**]—All such cities shall have power to enforce the payment of poll tax in such manner as it may determine, by suit, penalties or otherwise, as may be provided by ordinance.

SEC. 20. [**Police powers, etc.**]—In regard to the police powers, sanitary regulations, and regulations for the prevention and spread of fires, and of contagious diseases, the enumerated powers shall not be construed as a limitation of the general powers.

SEC. 21. **No general law** as to powers of cities organized under the general incorporation act, shall in any manner be construed to affect the charter or laws of cities organized under special charters, and while they continue to act under such charters, unless the same shall have special reference to such cities.

Under this section it has been held that section 390 of the code, as amended by chapter 6, of the laws of 1876, providing for the election of city assessors, does not apply to cities organized and acting under special charters. *The State v. Finger*, 46 Iowa, 25.

A city acting under special charter may lawfully vote a tax in aid of a railroad, without conflict with the foregoing chapter. *Bartemeyer v. Kohlf's*, 71 Id., 582.

SEC. 22. [**Repeal.**]—That section 7, chapter 238, acts of the sixth general assembly of the state of Iowa, approved January 27, A. D. 1857, be and the same is hereby repealed.

(Took effect March 30, 1876, by publication in newspapers.)

(CHAPTER 24, LAWS OF 1880.)

An Act relating to cities organized and existing under special charters, conferring additional powers, and amending the charters of such cities, in certain respects.

SECTION 1. [**May appoint or elect marshal or abolish office.**]*—Be it enacted by the general assembly of the state of Iowa:* That all cities in this state organized and existing under special charters, shall have power to provide by ordinance for the appointment of a city marshal by the council of such city, or for the election of such officer by the electors thereof, or may dispense with such officer and confer the duties pertaining thereto upon any other officer or person.

(Took effect by publication in newspapers, March 11, 1880.)

(CHAPTER 80, LAWS OF 1880.)

An Act to empower certain special chartered cities to use for school purposes, public grounds unused for the purpose for which such grounds were originally dedicated or set apart.

SECTION 1. [**Cities under special charters may use public grounds for school purposes, when.**]*—Be it enacted by the general assembly of the state of Iowa:* That all special chartered cities or towns having a population not exceeding five thousand inhabitants, situated on the Mississippi or Missouri rivers, having within their limits public grounds heretofore set apart or dedicated for levee or warehouse purposes, and in which the use of such grounds for such purposes has ceased or been abandoned, may use such grounds for school purposes, and the city council, or other governing body of such city or town, may authorize the use of such grounds by any school district on such terms and conditions as said council or governing body may determine.

(Took effect by publication in newspapers, March, 1880.)

(CHAPTER 117, LAWS OF 1878.)

RELATING TO CITIES ACTING UNDER SPECIAL CHARTERS.

An Act to reduce the limit of certain cities incorporated under special charters. Additional to code, title IV, chapter 10: "Of cities and incorporated towns."

SECTION 1. [**Manner of severing territory.**]*—Be it enacted by the general assembly of the state of Iowa:* That when any city, incorporated under a special charter, and having, according to the returns of the census taken under and by authority of the state of Iowa in the year 1875, a population of not less than ten thousand nor more than twelve thousand inhabitants, shall desire to have any portion of the territory embraced within its limits severed from or stricken out of the limits of such city, the city council of said city may, upon a vote of two-thirds of the whole number of members of such council, present to the circuit court of the county in which such city is situated a petition setting forth the facts and describing the territory that it is desired to have severed, with the names of each overseer of of any portion of such territory, so far as shown by the assessment list of such city, which petition shall have attached thereto a map or plat of such territory. A notice of the filing of such petition shall be served by publication in one of the daily newspapers published in such city for the period of four weeks prior to the meeting of the circuit court in which said petition is filed. And the city shall be

plaintiff and said overseers defendants, and issues joined, and the cause tried in the same manner as other causes so far as applicable, except that no judgments for costs shall be rendered against defendants. If the court finds the allegations of the petition to be true and that justice and equity require that said territory, or any part thereof, should be severed from such city, a decree shall be entered accordingly, and from the time of entering such decree the territory herein described shall be severed from and no longer be a part of such city.

Approved March 25, 1878.

(CHAPTER 19, LAWS OF 1888.)

An Act to authorize cities organized under special charters to refund their outstanding bonded debt, and to provide for the payment of the same.

SECTION 1. [**How they may refund.**]*—Be it enacted by the general assembly of the state of Iowa:* That all cities in the state having a population of more than 2,000, organized and existing under special charters, are hereby authorized and empowered if, by a vote of two-thirds of the city council, it be deemed for the public interest, to refund the indebtedness of any such city, evidenced by the bonds thereof, heretofore issued and outstanding at the time of the passage of this act, and to issue the coupon bonds of such city in denominations of not less than one hundred dollars and not more than one thousand dollars, and having not more than twenty years to run, redeemable in the lawful money of the United States at maturity and bearing interest payable semi-annually at a rate not exceeding six per cent per annum. The principal of such bonds shall be made payable at the office of the treasurer of the city, but the interest upon such bonds may be made payable either in the city of New York, state of New York, or the city of Boston, state of Massachusetts, or the city of Chicago, state of Illinois, or at the office of the treasurer of the city. Such bonds, as well as the coupons, shall be cancelled when paid and destroyed in the presence of the city council, which shall cause to be kept a register of all such bonds issued, and also of all bonds or coupons which are cancelled or destroyed. Such bonds shall be signed by the mayor of the city and attested by its clerk, with the seal of the city attached, and shall be so signed and attested in open session of the city council, and a register shall be then made and kept thereof, and such bonds so executed shall be at once delivered to the city treasurer of the city, who shall be liable on his official bond for the safe keeping thereof and the proceeds thereof until he parts therewith under the direction of the city council.

SEC. 2. [**Form of bond.**]*—The bonds issued under this act shall be substantially in the following form:*

No..

The city of . . . , in the state of Iowa, for value received, promises to pay . . . or . . . order, at the office of the treasurer of . . . in . . . on the first day of . . . , the sum of . . . dollars, with interest thereon from date until paid at the rate of . . . per cent per annum, payable semi-annually, at the . . . , in the city of . . . , state of . . . , on the first day of . . . in each year, on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the city council of said city, under and in accordance with the provisions of chapter . . . of the session laws of the twenty-second general assembly of the state of Iowa, and in conformity with a resolution of said city council, dated . . . day of . . . , 18..

In testimony whereof, the said city council of the city of . . . has caused this bond to be signed by the mayor of said city and attested by its city clerk, with the seal of said city attached thereto, this . . . day of . . . , 18..

And the interest coupons on each bond shall be in substantially the following form:

"The city of . . . , in the state of Iowa, will pay to the holder hereof, on the . . . day of . . . , 18. . . , at the . . . , in the city of . . . , in the state of . . . , . . . dollars for interest on bond No. . . . , issued under the provisions of chapter . . . of the session laws of the twenty-second general assembly of the state of Iowa," and such coupons shall be signed by the city clerk or recorder.

SEC. 3. [**How bonds sold.**]-The city council of any such city is hereby authorized to sell and dispose of the bonds issued under this act at not less than their par value, and to apply the proceeds thereof to the redemption of the outstanding bonded debt, or may exchange such bonds for outstanding bonds par for par, but the bonds hereby authorized shall be issued for no other purpose whatever; *provided, however*, that the city council of such city may, if deemed advisable, appropriate not to exceed two per centum on the bonds herein authorized to pay the expenses of preparing, issuing, advertising and disposing of the same, and may employ a financial agent therefor.

SEC. 4. [**Tax for interest.**]-The city council of any such city shall cause to be assessed and levied each year upon the taxable property of such city, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on all outstanding bonds issued in conformity with this act accruing before the next annual levy, and also such proportion of the principal as shall fall due before such next annual levy, and such city council may, at its option, in addition to the levy hereinbefore authorized, levy an amount not exceeding two mills on the dollar of the assessed valuation of such city in any one year for the purpose of purchasing and cancelling any of its bonds issued under this act before the maturity of the same. And the money arising from such levies shall be known as the bond fund, and shall be used for the payment of the bonds and interest coupons, and for the purchase and canceling of the bonds, and for no other purpose whatever. And the treasurer of such city shall open and keep in his book a separate and special account thereof, which shall at all times show the actual condition of such bond fund.

SEC. 5. [**Bonds purchased.**]-The city council of any such city shall have power to purchase any of the bonds issued under this act before the maturity of the same, and to this purpose may at its option appropriate any moneys in the bond fund not required to pay bonds or interest coupons maturing before the next annual levy; *provided*, that in the purchase of such bonds there shall be paid in no case a premium to exceed five per centum of the face value of the bond above the amount actually due thereon.

SEC. 6. [**Unpaid bonds filed with auditor.**]-If the city council of any such city which has issued bonds under the provisions of this act shall fail to make the levy necessary to pay such bonds or interest coupons at maturity, and the same shall have been presented to the treasurer of any such city and payment thereof refused, the owner may file the bond, together with the unpaid coupons, with the auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office, and the executive council shall at their next session as a board of equalization, and at each annual equalization thereafter, add to the state tax to be levied in such city a sufficient rate to realize the amount of principal or interest past due and to become due prior to the next levy, and the same shall be levied and collected as a part of the state tax and paid into the state treasury and passed to the credit of such city as bond tax, and shall be paid by warrant as the payments mature to the holder of such obligation as shown by the register in the office of the state auditor until the same shall be fully satisfied and discharged; *provided*, that nothing herein shall be construed to limit or postpone the right of the holder of any such bonds to resort to any other remedy which such holder might otherwise have.

SEC. 7. [**Statute not repealed.**—Nothing in this act shall take away, impair, or interfere with the powers conferred by chapter 58 of the session laws of the seventeenth general assembly of the state of Iowa, entitled "An act to authorize counties, cities and towns to refund outstanding bonded debt at a lower rate of interest and to provide for the payment of the same," as amended by chapter 140 of the session laws of the eighteenth general assembly of the state of Iowa, making the same applicable to cities organized under special charters.

Approved March 10, 1888.

(CHAPTER 2, LAWS OF 1888.)

An act extending to cities organized under special charters, the provisions of chapter 192, of the acts of the twentieth general assembly.

SECTION 1. [**Applied to Special Charters.**—*Be it enacted by the general assembly of the state of Iowa:* That the provisions of chapter one hundred and ninety-two (192) of the acts of the twentieth general assembly, relating to the powers and duties of mayors of cities of the first and second class, shall be and are hereby made applicable to cities organized under special charters.

Approved March 12, 1888.

(CHAPTER 8, LAWS OF 1888.)

CONSTRUCTION OF SEWERS.

An act to authorize cities organized under special charters to provide for the construction of sewers.

SECTION 1. [**Cities under special charter.**—*Be it enacted by the general assembly of the state of Iowa:* That all cities in this state organized and existing under special charters, having a population of not less than ten thousand, nor more than fifteen thousand as shown by the last preceding state census, shall have power to construct, reconstruct and repair sewers or to authorize the construction, re-construction and repair of the same.

SEC. 2. [**Cities divided into districts.**—That all cities in this state organized and existing under special charters having a population of not less than ten thousand nor more than fifteen thousand, as shown by the last preceding state census, may provide by ordinance for the construction, reconstruction and repair of sewers, or may divide the city into sewerage districts in such manner as the council may determine, and pay the cost of the construction, reconstruction and repairing the same out of the general revenue of the city or assess the cost upon the adjacent property, or may levy a certain sewerage tax within the sewerage district, out of which to pay for the construction, reconstruction and repair of the same, or may pay a part of the cost of such construction, reconstruction and repair out of the general revenue, a part by the assessment of adjacent property, and a part by levying a tax upon all the property within the sewerage district, or may pay for the same by pursuing any two of the methods herein named.

SEC. 3. [**Tax may be levied.**—That the whole of the sewerage tax to pay for the cost of constructing, reconstructing and repairing sewers in any of the methods provided in the last section may be levied on the property at one time, and the city council of any such city may provide by ordinance that such tax shall become payable and delinquent, part in the year in which the same shall be levied and other parts in subsequent years, appropriating the same into as many parts, and payable in as many years as the city council may by ordinance determine.

SEC. 4. [**In making contracts** with contractors for the construction, reconstruction or repair of sewers, the contracts promising to pay the contractors may

be made in negotiable form, and the city may therein agree to levy and order the collection of such tax therefor at such time or times as may have been provided by ordinance, and to pay for such construction, reconstruction or repair from the proceeds of such tax when collected.

Approved March 24, 1888.

(CHAPTER 14, LAWS OF 1888.)

An Act granting additional powers to cities organized under special charters with reference to the improvements of streets, highways, avenues or alleys, and to provide a system for payment therefor.

SECTION 1. [**Cities under special charters vested, etc.**].—*Be it enacted by the general assembly of the state of Iowa:* That all cities in this state organized and existing under special charters, are hereby vested with all the power and authority conferred by chapter 20 of the acts of the twentieth general assembly of the state of Iowa upon cities of the first class therein named.

SEC. 2. [**Laws not repealed.**].—That nothing in section one of this act shall be construed or considered as repealing any law now in existence granting authority to any cities incorporated under special charter, but whatever authority upon any of the subjects in the foregoing law is now in existence shall be deemed cumulative to the provisions of said section one hereof.

Approved April 10, 1888.

(CHAPTER 119, LAWS OF 1878.)

PROHIBITING THE SALE OF MALT OR VINOUS LIQUORS WITHIN TWO MILES OF CORPORATION AND OF PLACE OF ELECTION.

An Act to prohibit, regulate, and punish the sale of malt and vinous liquors within two miles of the corporate limits of any municipality, and within two miles of where an election is held, and to extend the powers and jurisdiction of said municipality and its officers. Additional to code, title IV, chapter 10, "Of cities and incorporated towns."

SECTION 1. [**The sale of ale, wine and beer prohibited.**].—*Be it enacted by the general assembly of the state of Iowa:* It is hereby made unlawful for any person, by himself, his agent or employe, directly or indirectly to sell to any person, ale, wine or beer, or other malt or vinous liquor within two miles of the corporate limits of any municipal corporation, except at wholesale for the purpose of shipment to places outside of such corporation and such two mile limits, except as hereinafter provided; and, excepting further, that when said two miles embrace any part of another municipal corporation, that parts so embraced within said corporation shall not be held to be affected by this act, but shall remain as heretofore, exclusively under the control of the corporation within which it is situated.

SEC. 2. [**Sale within two miles of polls prohibited.**].—It is hereby made unlawful for any person, by himself, his agent or employe, directly or indirectly to sell to any person, and upon any pretext whatever, ale, wine, beer or other malt or vinous liquors upon the day on which any election is held under the laws of this state, within two miles of the place where said election is held.

SEC. 3. [**May be sold on prescription of physician.**].—The foregoing sections shall not be held to include the sale, by any person holding a permit therefor under the laws of this state, of said malt or vinous liquors, when said sale is

made upon the prescription therefor of a practicing physician. The provisions of this section shall be a matter of defense in any prosecution under this act.

SEC. 4. [**Giving punished.**]—The giving to any person of ale, wine or beer, or other malt or vinous liquor, in consideration of the purchase of any other property, shall be construed and held to be a sale thereof within the meaning of this act, and courts and jurors shall construe this act so as to prevent evasion.

SEC. 5. [**Penalty for violating this act.**]—Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and shall pay, on his first conviction for said offense, a fine of twenty dollars and costs of prosecution, and shall stand committed five days, unless the same be sooner paid; on the second conviction for said offense, he shall pay a fine of fifty dollars and the costs of prosecution, and shall stand committed fifteen days unless the same be sooner paid; and *on the third and every subsequent conviction for said offense*, he shall be punished by a fine of one hundred dollars, and shall pay the costs of prosecution, and shall stand committed for thirty days if the same be not sooner paid, or by imprisonment in the county jail for thirty days.

SEC. 6. [**Liability of agent.**]—Any employe or agent, of whatsoever kind, engaged or employed in selling, in violation of this act, shall be charged and convicted in the same manner as a principal may be, and shall be subject to the penalties and punishment in this act provided for such principal.

SEC. 7. [**Information may charge several violations in separate counts.**]—Informations for violations under this act may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate informations; but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and third convictions mentioned in this act shall be construed to mean convictions on separate informations. If the information does not otherwise indicate, it shall be held to be for a first offense.

SEC. 8. [**Conviction may be held a forfeiture of lease.**]—A conviction for a violation of the provisions of this act, shall, at the option of the landlord or his agent, be held to be a forfeiture of any lease of the real estate in or upon which such sale in violation thereof is made, and such landlord or his agent shall have the right at any time, within thirty days from such conviction, to institute a suit of forcible entry and detainer for the possession of said real estate, and shall recover possession of such leased premises upon proof of the conviction of the tenant, his agent, servant, clerk, or any one claiming under him, of a violation of the provisions of this act, committed in or upon said leased premises.

SEC. 9. [**Jurisdiction extended two miles.**]—The power and jurisdiction of every municipal corporation, whether acting under general or special charter, to regulate, prohibit or license the sale of ale, wine and beer, and of the courts and officers thereof to enforce said regulations, is hereby extended two miles beyond the corporate limits of said corporation. *Provided*, that this section shall not be held to authorize said corporation to license any malt or vinous liquors, other than those malt or vinous liquors which said corporation, at this date, is authorized to license.

Approved March 25, 1878.

This chapter is not obnoxious to the provisions of the constitution requiring all laws to be uniform in their operation. Nor is it in violation of the constitutional requirement that every act shall embrace but one subject, and matters properly connected therewith. *The State v. Shroeder*, 51 Iowa, 197; *The Town of Centerville v. Miller*, Id., 712.

The fact that the title of an act contains matter not of the subject of the act does not render it invalid. *Id.*

In a prosecution for the sale of intoxicating liquors within two miles of the limits of a city, under an ordinance passed in pursuance of this chapter, it is sufficient to show that the sale was made within two miles of the *de facto* limits; that is, the limits of the territory over which the city

exercises actual jurisdiction, for city purposes, with a claim of right; and such limits may be shown by parol testimony. Whether the proceedings establishing such limits were legal or not cannot be inquired into in such prosecution. *The City of Albia v. O'Harra*, 64 Id., 297.

Prior to the taking effect of this act the town of Toledo passed an ordinance providing "that no person shall sell within the limits of said town, or of any territory over which the town may have jurisdiction for that purpose, any beer, wine or any malt or vinous liquors * * * without first procuring from the mayor a license, etc.," and the defendant in September, 1878, sold beer outside, but within one mile of, the corporate limits of the town; held that the ordinance applied to the two mile limit over which the town subsequently obtained jurisdiction by the statute, and that the defendant was properly found guilty thereunder. *Town of Toledo v. Edens*, 59 Id., 352.

(CHAPTER 16, LAWS OF 1882.)

RELATIVE TO CHANGE OF NAME OF CITIES AND TOWNS.

An Act to authorize cities of the first and second class[es] and incorporated towns to change their corporate names; and to prescribe the manner in which such change may be made. (Additional to code, chapter 10, title IV, relating to cities and towns.)

SECTION 1. [Change of name.]—*Be it enacted by the general assembly of the state of Iowa:* That the corporate name of any city of the first and second class, or incorporated towns in this state, may be changed in the manner prescribed by this act.

SEC. 2. [Council to propose change by resolution.]—The council of any city of the first or second class or any incorporated town may, by resolution, propose a change of the corporate name of such city or incorporated town setting forth therein the proposed new name, which shall not be the same as that of any city of either the first or second class or incorporated town or post-office existing in this state at the time of the passage of such resolution.

SEC. 3. [Question submitted, when.]—The question of making such change shall then be submitted to a vote of the qualified electors of such city or incorporated town at the next following annual election; or at a special election, as the council may provide. Notice that a change of name is to be voted on at any election shall be published in a newspaper published in said city or incorporated town at least ten (10) days before the election.

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

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

SEC. 6. [Contracts not invalidated.]—Nothing herein contained shall in any manner affect the rights or liabilities of such city or incorporated town; nor invalidate any contract to which the said city or incorporated town may be a party before such change.

(Took effect by publication in newspapers February 24, 1882.)

(CHAPTER 38, LAWS OF 1882.)

PAVING INTERSECTIONS OF STREETS.

An Act requiring the cost of paving street and alley intersections in certain cities to be paid out of a general paving fund, and authorizing the levy of a special tax therefor.

SECTION 1. [**Intersections to be paved by city.**]*—Be it enacted by the general assembly of the state of Iowa:* That the cost of paving the intersections of streets and alleys in all cities organized under the general incorporation laws of this state, including cities acting under special charters therein, and which have not commenced to pave the same at the expense of the property fronting on the street or streets paved, shall be paid for out of a general paving fund to be raised or created as hereinafter provided: *Provided*, nothing herein contained shall prevent councils of said cities from requiring railroads and street railways to pave any portion of said intersections.

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

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

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

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

Approved, March 8, 1882.

(CHAPTER 63, LAWS OF 1882.)

CONSTRUCTION OF COUNTY BRIDGES.

An Act to enable townships, incorporated towns, and cities, including cities acting under special charters, to aid in the construction of county bridges in certain cases. (Additional to code, chapter 10, title IV, relating to cities and towns.)

SECTION 1. [**Township, town, or city may aid in construction of bridges costing \$10,000.**]*—Be it enacted by the general assembly of the state of Iowa.* That it shall be lawful for any township, incorporated town, or city, including cities acting under special charter(s), to aid in the construction of county bridges when the estimated cost of the same is not less than \$10,000, as fixed by the board of supervisors, as hereinafter provided.

SEC. 2. **Whenever a petition shall be presented** to the council or trustees of any incorporated town or city, or trustees of any township, signed by a

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

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

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

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

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

Approved March 13, 1882.

(CHAPTER 89, LAWS OF 1882.)

ENLARGING THE POWERS OF CITIES.

An Act granting additional powers to cities organized under the general incorporation laws of the state. (Additional to code, chapter 10, title IV, relating to cities and towns.)

SECTION 1. [Powers enlarged: itinerants: junk dealers: receiving goods from minors.]—*Be it enacted by the general assembly of the state of Iowa:* That cities organized under the general incorporation laws of the state, in addition to the powers now granted them, shall have power: To regulate, license, and tax itinerant doctors, physicians and surgeons, junk dealers, and to prohibit pawn-brokers, or second hand dealers, purchasing or receiving from minors without the written consent of their parents or guardians.

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

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

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

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

SEC. 6. [Lights: bonfires: fire-works.]—To regulate the use of lights in stables, shops, and other places, and the building of bonfires; and to regulate or prohibit the use of fire-works, fire-crackers, torpedoes, Roman candles, sky-rockets, and other pyrotechnic displays.

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

SEC. 8. (As amended by chap. 116, 21st g. a.) [Cities have power to require all water, gas, etc., connections to be made prior to street improvements.]—(City councils of all cities organized under the general incorporation laws or special charters of the state of Iowa shall have power to require the connections from gas pipes, water pipes, steam heating pipes and sewer to the curb line of adjacent property to be made before the permanent improvement of the street whereon they are located; and to regulate the making of such connections on streets already improved, and in case the owners of property on such streets shall fail to make such connections within the time fixed by such council, they may cause such connections to be made, and to assess against the property in front of which such connections are made, the cost and expense thereof.)

SEC. 9. (As amended by ch. 9, 22d g. a.) [Sewer connections.]—(That they shall also have power to compel all property owners on streets along which sewers

shall have been constructed to make proper connections therewith and to use the same for proper purposes, and in case the owners of property on such street shall fail to make such connections within the time fixed by such council, they may cause such connections to be made and to assess against the property in front of which such connections are made the cost and expenses thereof.)

Approved April 9, 1886.

(This chapter is made applicable to cities acting under special charters by chapter 93, laws of 1886. See page —.)

(CHAPTER 90, LAWS OF 1882.)

ENLARGING POWERS OF CITIES UNDER SPECIAL CHARTERS.

An Act authorizing cities acting under special charters to cause land on which there is stagnant water to be filled up or drained, and providing for the collection of such expense.

SECTION 1. [**Cities under special charters may fill lots, when.**]*—Be it enacted by the general assembly of the state of Iowa:* That all cities acting under special charters shall have power to cause any lot or piece of land within their limits, on which water at any time becomes stagnant, to be filled up or drained in such manner as may be directed by a resolution of the city council, and the owner or his agent, of such lot or piece of land shall, after service of a copy of such resolution, or after publication of the same in some newspaper of general circulation in such city for two consecutive weeks, comply with the directions of such resolution within the time therein specified, and in case of a failure or refusal so to do it may be done at the expense of such city, and the amount of money so expended shall be a debt due from the owner of said lot or piece of land to said city, and shall also be a lien on said lot or piece of land from the time of the adoption of said resolution.

SEC. 2. [**May cause expense to be levied as special tax.**]*—Any such city may, in addition to the means provided by section 1, of this act, if by ordinance it so elects, cause the expense of such filling to be levied as a special tax on such lot or piece of land, and may collect the same by tax-sale in such manner as may be provided by such ordinance.*

(Took effect March 15, 1882.)

(CHAPTER 124, LAWS OF 1882.)

VACANCIES IN TOWN OFFICES.

An Act to provide for filling vacancies in offices of incorporated towns. [Additional to code, chapter 10, title IV, relating to cities and towns.]

SECTION 1. [**Vacancy to be filled by council.**]*—Be it enacted by the general assembly of the state of Iowa:* That, whenever, from death or other cause, a vacancy in the office of mayor, recorder, councilman, trustee or other office[r], in any incorporated town, shall occur, such vacancy shall be filled by the council of such incorporated town at the first regular meeting of such council after such vacancy shall occur, or as soon thereafter as may be.

SEC. 2. [**Manner of filling vacancy.**]*—The manner of filling such vacancy shall be by ballot, and the person receiving a majority of the votes of the whole number of the members elected to the council shall be declared duly elected to fill*

such vacancy, and, on duly qualifying, shall hold such office until the next annual election, and until his successor is elected and qualified.

SEC. 3. [**Repeal.**—All acts or parts of acts inconsistent herewith are hereby repealed.

Approved March 28, 1882.

(CHAPTER 7, LAWS OF 1884.)

APPOINTMENT OF MARSHALS IN CITIES.

An Act to provide for the appointment of marshals in cities of the first class. [Additional to code, chapter IV, title 10.]

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

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

(CHAPTER 93, LAWS OF 1886.)

GRANTING POWERS TO CITIES UNDER SPECIAL CHARTER.

An Act to grant additional authority to cities organized under special charters and to make certain provisions of law applicable thereto.

SECTION 1. [**Application.**] *Be it enacted by the general assembly of the state of Iowa:* That sections 454 to 463 inclusive, and section 3720 of the code of Iowa, 1873, and all the provisions of chapter 89 of the nineteenth general assembly, are hereby made applicable to the cities acting under special charters, the same as if such cities were therein specially enumerated.

SEC. 2. [**Sec. one does not repeal any existing law.**] That nothing in section one of this act shall be construed or considered as repealing any law now in existence granting authority to any cities incorporated under special charters, but wherever authority on any of the subjects mentioned in foregoing laws is now in existence, the provisions of said section shall be deemed merely cumulative thereto.

SEC. 3. (*As amended by ch. 27, 22d g. a.*) [**Election of mayor and city marshal authorized.**] All cities organized under special charters are hereby authorized to provide by ordinance for the election of mayor and city marshal [recorder, assessor, treasurer, collector, auditor and city attorney] for such terms as the city council may deem expedient. *Provided,* that no such term of office shall exceed two years.

SEC. 4. [**May regulate certain acts for public good.**] That cities organized under special charters are hereby authorized to prohibit, or regulate the piling or depositing of any kind of wood, lumber or timber upon any lot or property

within the city limits within a distance of one hundred yards of any dwelling house.

SEC. 5. [**May provide by ordinance for the public safety.**]— Cities organized under special charter are hereby authorized to provide by ordinance for the repairs of any building which is dangerous, or which may be liable to fall, and to levy and collect a special tax against the property and owner thereof for the expense thereof as other special taxes are levied and collected.

Approved April 8, 1886.

(CHAPTER 63, LAWS OF 1886.)

FISH DAMS ACROSS OUTLETS OF MEANDERED LAKES.

An Act to authorize cities and incorporated towns to erect and maintain fish dams across the outlets of meandered lakes, and to provide punishment for the injury or destruction of the same.

SECTION 1. (*As amended by ch. 108, 22d g. a.*) [**Cities and towns may maintain fish dams.**] *Be it enacted by the general assembly of the state of Iowa:* That any city or incorporated town which is bounded in whole or in part by any meandered lake [or chain of lakes] of this state is hereby authorized and empowered to construct and maintain across any outlet of such lake a dam to obstruct the passage of fish. Such dam may be constructed of earth, masonry or other substance to the *height* [height] of the natural and ordinary level of the lake, but above such level and across the entire width of the natural outlet it shall be an open net-work of bars, rods or wire, including, however, the necessary and proper framework and supports therefor. Said net-work may be constructed to prevent, so far as possible, the escape of fish from the lake. But nothing herein contained shall be construed to authorize the raising of the ordinary and natural level of the lake, or the interfering with any water power, dwelling-house, out-building, orchard or grove.

SEC. 2. [**May condemn property.**] Such city or town is authorized to purchase or to condemn in the manner provided by law for condemning private property for streets and other municipal purposes, so much land situate within or without the corporate limits of said city or town, as the council shall deem necessary for the construction and maintenance of such dam, and to pay for the same out of the general fund; *provided*, however, that before any city or incorporated town shall be authorized to acquire property or construct or maintain a dam by virtue of the provisions of this act, a majority of the resident tax-payers of such city or town shall petition the council therefor.

SEC. 3. [**Penalty for injuring fish dam.**] If any person shall willfully injure or destroy, or be a party to the injury or destruction of any dam constructed or maintained by virtue of the provisions of this act, he shall be punished by a fine not exceeding five hundred dollars, and by imprisonment in the county jail not exceeding one year.

(Approved April 1, 1886.)

(CHAPTER 128, LAWS OF 1882.)

An Act to provide for the publication of city and town ordinances in book or pamphlet form and for the taking effect thereof. (Additional to code, title IV, chapter 10, relating to cities and towns.)

SECTION 1. [Ordinances to be published in book or pamphlet form.] *Be it enacted by the general assembly of the state of Iowa:* That when any city or town organized under the general incorporation laws of the state shall cause or have [has] heretofore caused its ordinances to be published in book or pamphlet form, such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, as of the dates mentioned or provided for therein in all courts and places without further proof.

(Took effect March 24, 1882.)

(CHAPTER 133, LAWS OF 1882.)

An Act to authorize incorporated towns and cities to procure and donate to railway companies sites for depots, machine shops, and other buildings. (Additional to code, title IV, chapter 10, relating to cities and towns.)

SECTION 1. [Cities and towns may donate depot grounds, etc.] *Be it enacted by the general assembly of the state of Iowa:* That it shall be lawful for any incorporated town or city to procure for the purpose of donating, and to donate, to any railway company owning a line of railroad in operation or in process of construction, in such incorporated town or city, sufficient land for depot grounds, engine-houses, and machine-shops for the construction and repair of engines, cars, and other machinery necessary to the convenient use and operation of said railroad.

SEC. 2. [Donation can only be made on petition of resident free-holders, taxpayers and two-thirds vote at a special election.] Before such donation shall be made or appropriation of funds to procure land for such purpose, a petition shall be presented to the trustees or council of such incorporated town or city, signed by a majority of the resident free-hold tax-payers of such incorporated town or city, asking that such donation be made and limiting the sum to be appropriated for that purpose. Upon the presentation of such petition, a special election of such city or town shall be called. On the ballots used at such election shall be printed the words, "for the donation," and "against the donation," and if a two-thirds majority of the qualified electors, voting at such election shall vote for the donation, said trustees or council shall determine the site to be donated, designating the boundaries thereof, and the amount to be appropriated in procuring said site, not exceeding the amount named in said petition, and may, in the name of such incorporated town or city, procure said land by purchase or by payment of the estimated damages in case said land or any part thereof shall be taken in the name of such railway company by process of condemnation for railroad purposes, and may also vacate any streets and alleys within the boundaries of said site, and may prescribe the terms, conditions and limitations upon which said grant shall be made, which shall be binding upon the railway company accepting such donation. *Provided,* that land set aside as a park, public square, or levee shall not be appropriated or donated under the provisions of this act, and no land occupied with buildings used for business purposes or as private residences shall be appropriated or donated under the provisions of this act, unless the consent of the owners thereof shall be first obtained.

(CHAPTER 154, LAWS OF 1882.)

An Act authorizing cities of the second class to erect and maintain city jails. [Additional to code, title IV, chapter 10, relating to cities and towns.]

SECTION 1. [Cities of second class to have city jails.]—*Be it enacted by the general assembly of the state of Iowa:* That any city of the second class shall have the power to erect and maintain a city jail, and to purchase the necessary grounds therefor, and to appropriate out of its general fund the amounts necessary for said purposes.

Took effect March 23, 1882.

(CHAPTER 20, LAWS OF 1884.)

IMPROVEMENT OF STREETS IN CERTAIN CITIES.

An Act granting additional powers to certain cities of the first class, with reference to the improvements of streets, highways, avenues or alleys, and to provide a system for payment therefor.

SECTION 1. [Grading, paving, etc.]—*Be it enacted by the general assembly of the state of Iowa:* That cities of the first class that have been or may be so organized since January first, 1881, shall have power to open, widen, extend, grade, construct permanent sidewalks, curb, pave, gravel, macadamize and gutter, or cause the same to be done in any manner they may by ordinance deem proper, any street, highway, avenue, or alley within the limits of such city, and may open, extend, widen, grade, park, pave, or otherwise as aforesaid improve part of any such street, highway, avenue, or alley, and levy a special tax as hereinafter provided, on the lots and lands fronting and abutting on such street, highway, avenue or alley, and where said improvements are proposed to be made, to pay the expenses of the same. But unless the owners resident in such city of a majority of the front feet owned by them, of the property subject to assessment as hereinafter provided, for such improvements, shall petition the council of such city to make the same; such improvements shall not be made until three-fourths of all the members of such council shall, by vote, assent to the making of the same; *provided*, that the construction of permanent sidewalks, curbing, paving, graveling, or macadamizing of any such street, highway, avenue, or alley shall not be done until after the bed of the same shall have been brought so near to the grade as established by the ordinances of such city, as that said sidewalks, curbs, paving or other improvements as aforesaid, when fully completed, will bring said streets, highways, avenues or alleys fully up to said established grade.

SEC. 2. [Work on contract.]—It shall be the duty of the council of said city to require all of the work necessary to the making of any improvements authorized by section one hereof, to be done under contract thereof, to be entered into with the lowest responsible bidder, and bonds with good and sufficient surety for the faithful performance of such work shall be required to be given by the contractors; *provided*, that all bids for such work, or any part thereof, may be rejected by such council, and new bids ordered.

SEC. 3. [Improvement districts.]—Any such city shall, for the purpose of effectuating the objects enumerated in section one hereof, have power, by ordinance, to create improvement districts, which shall be consecutively numbered. The cost of opening, extending, widening, grading, constructing permanent sidewalks—curbing, paving, graveling, macadamizing, and guttering any street, highway, ave,

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

SEC. 4. [Tax bonds.]—For the purpose of paying the costs of the improvements mentioned and specified in section three hereof, and which costs are to be

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

SEC. 5. [City bonds, account exempt property, etc.]—Whenever the council of any such city shall deem it expedient they shall have power, for the purpose of paying the costs of opening, extending, widening, grading, paving, curbing, guttering, graveling, or macadamizing spaces in front of city property and of other property exempt from special taxation, the intersections of any streets, highways, avenues, or alleys and the space opposite alleys, to issue bonds of the city to run for not exceeding twenty years and to bear interest payable semi-annually at a rate not exceeding six per cent per annum with coupons attached, to be called "city improvement bonds," and which shall not be sold for less than par, and the proceeds of which shall be used for no other purpose than paying for the cost of the improvements aforesaid, and upon the particular streets, highways, avenues, or alleys, the intersections of which, and spaces opposite are improved as aforesaid: *provided*, that no bonds can be issued to pay for any such improvements as aforesaid, except when the same become a part of and are necessary to fully complete the improvement; as aforesaid of any street, highway, avenue, or alley, undertaken to be made or made under section three hereof.

SEC. 6. [Railways to pave between rails.]—All railway companies and street railway companies in cities of the first class, as provided in section one of this act, shall be required to pave or repave between rails and one foot outside of their rails, at their own expense and cost. Whenever any street, highway, avenue, or alley shall be ordered paved or repaved by the council of any such city, such paving or repaving between and outside the rails shall be done at the same time and shall be of the same material and character as the paving or repaving of the street, highway, avenue, or alley upon which said railway track is located, or of such other material as said council may order, and when said paving or repaving is done said companies shall lay, in the most approved manner, the strap or flat

rail; such railway companies shall keep that portion of the streets, highways, avenues, or alleys between and one foot outside of their rails, up to grade and in good repair, using for such purpose the same material with which the street, highway, avenue, or alley is paved upon which the track is laid, or such other material as said council may order. In the event of the neglect or refusal of such railway companies to pave or repave or repair as aforesaid, when so ordered and directed as aforesaid by the council of such city, such city shall have power to pave, repave, or repair between and outside of said rails as herein required of such railway companies, and the cost and expenses of the same to assess and levy as a special tax upon any of the real estate or personal property of such railway company, within the corporate limits of said city, which tax shall be a lien upon said property, shall become delinquent in sixty days after it is levied, shall draw interest at the rate of seven per cent per annum, and said city shall have power to enforce the payment of the same in the same manner and by the same means and with and under the same penalties as is provided herein with reference to special taxes upon the abutting property on the streets, highways, avenues, or alleys, ordered to be improved as aforesaid, as hereinbefore provided.

Approved March 15, 1884.

(CHAPTER 158, LAWS OF 1882.)

TAXATION FOR ROAD PURPOSES IN MUNICIPALITIES.

An Act providing for the taxation of certain property for road purposes.

SECTION 1. (*As amended by ch. 85, 22d g. a.*) [**Taxable property not subject to municipal taxation to be liable for road taxes.**—*Be it enacted by the general assembly of the state of Iowa:* That all property now subject to taxation in any city or town which by law is not subject to taxation for general municipal purposes shall nevertheless be liable to taxation for road purposes as may be provided by the council of such city or town, but not exceeding the rate of five mills upon the dollar of the assessed valuation thereof. (And all personal property necessary for the uses and cultivation of agricultural or horticultural lands shall be liable for such road taxes, but shall not be liable for any other city tax.)

Approved March 20, 1882.

(CHAPTER 20, LAWS OF 1888.)

An Act to authorize incorporated towns to refund outstanding bonded debt.

SECTION 1. [**Vote tax.**—*Be it enacted by the general assembly of the state of Iowa:* That incorporated towns having outstanding bonded indebtedness of not less than one thousand dollars, and past due at the time of the passage of this act, are hereby authorized, by a vote of two-thirds of the town council, to refund such indebtedness as evidenced by the bonds thereof, and to issue the coupon bonds of such corporation in sums not less than one hundred dollars nor more than one thousand dollars, having not more than twenty years to run, redeemable in lawful money of the United States at the pleasure of such corporation, after five years from the date of their issue, and bearing interest payable semi-annually at a rate not exceeding seven per centum per annum.

(CHAPTER 168, LAWS OF 1882.)

BOARDS OF HEALTH IN CITIES UNDER SPECIAL CHARTERS.

An Act empowering cities under special charters to establish boards of health.

SECTION 1. [May appoint a board of health.]—*Be it enacted by the general assembly of the state of Iowa:* The mayor and alderma[e]n of each city in this state acting under a special charter shall have full power and authority to appoint a local board of health, consisting of three or five members, a majority of whom shall be members of the city council. The mayor of the city shall be *ex officio* one of said members of the board of health, and the chairman thereof. The manner of the appointment and duration of office of said board shall be determined by the ordinances of said city.

SEC. 2. [Board may appoint physician: clerk of board.]—The board of health may appoint a physician to the board, who shall hold office during the pleasure of the board. The city clerk shall be clerk of said board, unless some other clerk may be provided by the ordinances of said city. The said board of health may regulate all fees and charges of the physician and clerk and all persons employed by them in the execution of the health laws, and the rules, regulations, and orders of said board. A majority of the members of said board shall constitute a quorum for the transaction of the powers conferred upon said board.

SEC. 3. [Report of clerk and physician annually.]—It shall be the duty of such clerk and physician to report at least once a year to the state board of health the proceedings of such board, and such other facts as may be required, on blanks, in accordance with instructions received from the state board. They shall also make special reports whenever required so to do by the state board.

SEC. 4. Rules and orders by board respecting nuisances, etc.]—Said local board of health may make such regulations, rules and orders respecting nuisances, sources of filth, and cases of sickness within their jurisdiction, and on any boats in their ports and harbors, and for the prevention of nuisances and the preservation of public health, as said board may judge necessary for the public health and safety.

SEC. 5. [Fines and punishments for violation of rules, etc.]—Said cities shall have the power and may provide by ordinance for the punishment by fine and imprisonment of any person who shall knowingly violate or fail to comply with any rule, regulation or order of such local board of health, but the fine shall not exceed one hundred dollars (\$100) or the imprisonment thirty days. The prosecutions for the violation of any rule, regulation or order of such board of health shall be in the name of the city appointing such board of health; and shall be conducted in the same manner and before the same tribunals as other prosecutions for the violation of other ordinances of such city.

SEC. 6. [May order removal of nuisances, etc.]—Any such board of health may order the owner or occupant of any property, place, or building, at his own expense, to remove or abate any nuisance, source of filth, or cause of sickness found on such property, within twenty-four hours, or such time as is deemed reasonable, after personal notice shall have been served upon such owner or occupant; and said board of health may, in its discretion, specify in its notice the manner of such removal or abatement of said nuisance, cause of sickness or source of filth, and if such owner or occupant neglects to comply with such order he may be punished in accordance with the provisions of section 5 hereof.

SEC. 7. [When board may remove nuisances.]—Whenever the owner or occupant fails to comply with such order, said board may cause the nuisance, source

of filth, or cause of sickness to be removed, and all expenses incurred thereby shall be paid by the owner, occupant, or other person who caused or permitted the same to be, and the same shall be a lien upon the said property whereon said nuisance, source of filth, or cause of sickness existed. And the said expenses may be recovered and the lien enforced by a civil action in the name of said city in any court of competent jurisdiction.

SEC. 8. [When owner or occupant of building not found.]—Whenever the owner or occupant of such property, place or building shall not be found in said city, or whenever the said board of health may deem immediate action necessary, the said board may, without notice to such owner or occupant, immediately proceed to remove said nuisance, source of filth or cause of sickness, and the expense thereof shall be a lien upon such property, place or building, and the same may be enforced in any court having jurisdiction by an action in the name of the city.

SEC. 9. [When board of health may order suspension of works.]—Whenever any person or persons are engaged in a work, or doing things, or threatening to do things which, in the opinion of the board of health, will result in a nuisance, or in danger to the public health, the said board of health may order said work or the doing of such things to be discontinued, or not to be done, and in case any such person or persons shall fail to comply with any such order after personal service of a notice thereof, such person or persons may be proceeded against and punished under the provisions of section 5 hereof.

SEC. 10. [General regulations to be published.]—Whenever any such board of health shall establish any general regulations for the public health, under section 4 hereof, the same shall be published daily for two consecutive weeks in some newspaper of general circulation in such city, and upon the completion thereof the same (shall) be and remain binding and obligatory during the term of office of said board, unless sooner revoked or changed by said board. And no notice of such general regulations shall be necessary other than said before-mentioned publication.

SEC. 11. [By whom notices served.]—Whenever it is necessary, under this act, that any notice be served, the same may be served by any city officer, or by any other person whom the board of health may appoint or designate.

SEC. 12. [Board may require tenements or buildings to be freed from filth and nuisance.]—The board when satisfied upon due examination that any cellar, room, tenement or building in said city, occupied as a dwelling house, has become, by reason of the number of inhabitants, or want of cleanliness, or other cause, unfit for such habitation and the cause of nuisance or sickness to the occupants thereof or the public, may issue a notice to the occupants or any of them, requiring the premises to be put into a proper condition as to cleanliness or health, or, if such board see fit, requiring the occupants to quit or remove from the premises within such time as said board deems reasonable. If the persons so notified neglect or refuse to comply with the terms of the notice, the board may cause the premises to be properly cleaned at the expense of the owners, and such expense shall be a lien on said property, and may be enforced in any court having jurisdiction; or said board may remove the occupants forcibly and close up the premises, and the same shall not again be occupied as a dwelling house without permission of the board. And the persons notified and failing to comply with the order of the board may be punished in accordance with the provisions of section 5 hereof.

SEC. 13. [Board may prohibit the congregation of people in churches, schools, etc., when danger of disease spreading.]—Whenever by reason of the prevalence of small-pox or other contagious or infectious disease in any such city, or the vicinity thereof, the board of health may deem it dangerous to permit the congregation together of large crowds of people, the said board of health

may, with the consent of the city council, by public proclamation published once in some newspaper of general circulation in said city, prohibit the congregation of people in schools, churches, theaters and *in* all other buildings in said city, and it shall thereupon become the duty of the principals, teachers or other persons in charge of said schools, and of the persons in charge of such churches, theaters or other buildings specified in said publication, to keep the same closed, and to prevent the congregation of people therein; and when small-pox is prevalent in said city or its vicinity, the said board of health may, with the consent of the city council, by notice served upon the teachers or persons in charge of any of the public or private schools, prevent the admission therein of any pupils, until such pupils shall have proved to the satisfaction of the board of health, or the persons by it selected for that purpose, that such pupils have been vaccinated within the past five years or such time as the board may designate. And said board may in like manner prevent the admission of persons not furnishing satisfactory proof of vaccination, into churches, theaters or other buildings, by notifying the persons in charge thereof not to admit such persons.

SEC. 14. [When board may enter houses, etc., to remove nuisances.]—Whenever the board of health shall think it necessary for the preservation of the lives or the health of the inhabitants to enter a place, building, or vessel, within its jurisdiction, for the purpose of examining into and destroying, removing, or preventing any nuisance, source of filth, or cause of sickness, and shall be refused such entry, any member of the board may make complaint under oath, before any justice of the peace, or any tribunal having jurisdiction, to enforce the ordinance of such city, whether such judicial officer be a member of said board or not, stating the facts of the case so far as he has knowledge thereof. Such tribunal shall thereupon issue a warrant directed to the sheriff or any constable of the county, or the city marshal, commanding him to take sufficient aid, and, being accompanied by two or more members of said board of health, between the hours of sunrise and sunset, repair to the place where such nuisance, source of filth, or cause of sickness may be, and the same destroy, remove, or prevent under the direction of such members of the board of health.

SEC. 15. [Board may provide for safety of public from infectious diseases by removing infected persons.]—When any person coming from abroad or residing within such city shall be infected, or lately shall have been infected, with small-pox or other sickness dangerous to the public health, the board of health shall make provision in the manner by them deemed best for the safety of the inhabitants, by removing such sick or infected person to a separate house, if it can be done without damage to his health, and by providing nurses and other assistance and supplies, which shall be charged to the person himself, his parents, or other person liable for his support, if able; otherwise at the expense of the county to which he belongs.

SEC. 16. [Infected persons provided for without removal.]—If any afflicted person cannot be removed without danger to his health, the board of health shall make provision for him, as directed in the preceding section, in the house in which he may be, and in such case they may cause the persons in the neighborhood to be removed, and take such other means as may be deemed necessary for the safety of the inhabitants.

SEC. 17. [Justice of the peace has jurisdiction to enforce ordinances of city.]—Any justice of the peace, or tribunal having jurisdiction to enforce the ordinance of such city, on application under oath, showing cause therefor, by any member of the board of health, shall issue his warrant, directed to the the sheriff or constable of the county, or city marshal, commanding him under the direction of the board of health to remove any person infected with contagious disease, or to

take possession of the condemned houses and lodgings, and to provide nurses and attendants and other necessities for the care, safety, and relief of the sick.

SEC. 18. [**Meetings of board of health.**]—Every such board of health shall meet for the transaction of business on the first Monday of May and the first Monday of October in each year, and at such other times as occasion may require, and the clerk of said board shall transmit his annual report to the secretary of the (state) board within two weeks after the October meeting. Said report shall embrace a history of any epidemic disease which may have prevailed within his district. The failure of the clerk to prepare or have prepared, and forward, such report shall be considered a misdemeanor, for which he shall be subject to a fine of not more than (\$25) twenty-five dollars.

SEC. 19. [**Powers of cities in relation to public health not impaired.**]—This act shall not in any way limit the powers of cities embraced therein, in relation to matters affecting the public health; and the city councils of said cities may by ordinance provide for the manner of the exercise of the powers herein conferred by said boards of health to report to them their doings, and may supervise, modify or rescind their actions, orders, rules or regulations.

(Took effect March 29, 1882.)

(CHAPTER 13, LAWS OF 1886.)

TO ENABLE CITIES TO AID IN CONSTRUCTION OF HIGHWAY BRIDGES OVER NAVIGABLE BOUNDARY RIVERS OF IOWA.

An Act to enable cities to aid in the construction of highway bridges over navigable boundary rivers of the state of Iowa.

SECTION 1. [**Five per cent tax may be voted in cities of over 5,000 inhabitants to build bridges.**]—*Be it enacted by the general assembly of (the) state of Iowa:* That taxes not to exceed five per centum on the assessed value of any incorporated city having over five thousand inhabitants, may be voted to construct, or to aid any company which is or may be incorporated under the laws of the state of Iowa, in the construction of a highway bridge, commencing or terminating in such city, across any navigable boundary river of the state of Iowa.

SEC. 2. [**Petition.**]—Whenever a petition shall be presented to the council of any incorporated city, containing the population herein provided, signed by a majority of the resident freehold tax-payers of said city, asking that the question of construction or aiding any company incorporated under the laws of the state of Iowa, in the construction of a highway bridge over such a river, be submitted to the voters thereof, it shall be the duty of the council of such incorporated city to immediately give notice of a special election, by publication in some newspaper published in such city; and also by posting copies of such notice in five public places in such incorporated city at least ten days before such election, which notice shall specify the time and place of holding such election, and in case of a petition to vote aid to such incorporated company, the name of the company proposed to be aided, minimum rate per centum of the tax to be levied, the amount which the board of supervisors are instructed and authorized to cause to be collected each year, and in case of proposed aid to such company said notice to also state the amount of work required to be done on such bridge, and any other condition which shall be performed before said tax or any part thereof shall become due, collectible or payable, until the conditions are complied with by such company, such notice may also contain terms and conditions to be performed by such company receiving such aid, after the completion of such bridge, which terms and conditions shall become obligatory and binding upon such company and its successors and assigns.

At such election the question of taxation shall be submitted to the electors of such incorporated city, and the form of ballots shall be: "For taxation" and "Against taxation," and if a majority of the votes polled be "For taxation" then the clerk of such city shall forthwith certify to the county auditor of the county in which such city is situated, the result of said election, the maximum rate per centum of tax thus voted, the years during which the same is to be collected, the amount to be collected each year, and, provided aid is voted to such incorporated company, the name or designation of such company, and the terms and conditions upon which the same when collected is to be paid to such company, together with an exact copy of the notice under which said election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds of the county. When such certificate shall have been recorded, the board of supervisors of the county shall at the time of the levying the ordinary taxes, levy each year on the taxable property of such incorporated city such taxes as are voted under the provisions of this act, as shown by said certificate, and cause the same to be placed on the tax lists of said incorporated city. Said taxes shall be collected in the same manner, and subject to the same laws after they are collected or collectible as other taxes; in conformity with the terms and conditions of the notice submitting the question of taxation to said electors.

SEC. 3. [**How paid out.**—The *monies* [moneys] collected under the provisions of this act shall be paid out by the county treasurer to the treasurer of such company to whom such aid is voted for the purpose of such highway bridge, or the treasurer of such incorporated city, upon the order of the president or a majority of the directors of such company or the order of the council of such incorporated city, at any time after such council, or a majority of its members, shall have certified to the county treasurer that the conditions required as set forth in the notice for the special election at which the tax was voted, have been complied with; and said council or a majority of its members shall make such certificate whenever such conditions shall have been so performed.

SEC. 4. [**Tax forfeited in one year.**] Should taxes levied under the provisions of this act remain in the county treasury more than one year after the same shall have been collected, the right to them shall be considered forfeited, and the same shall be refunded to the taxpayers, and the board of supervisors shall cause the same to be cancelled, and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy of said taxes.

Approved February 25, 1886.

(CHAPTER 98, LAWS OF 1886.)

AMENDS CHAPTER 13, ACTS 21ST GENERAL ASSEMBLY.

An Act to amend an act passed at the present session of the general assembly entitled, "An Act to enable cities to aid in the construction of highway bridges over navigable boundary rivers of the state of Iowa."

SECTION 1. [**Chap. 13, acts 21st g. a., amended.**—*Be it enacted by the general assembly of the state of Iowa:* That the provisions of an act passed at the present session of this general assembly, entitled "An Act to enable cities to aid in the construction of highway bridges over navigable boundary rivers of the state of Iowa" shall apply to cities incorporated and acting under special charters as well as to cities incorporated under the general incorporation law, and wherever the words city clerk are used in said act they shall be construed and understood to mean city recorder in any case where a city has not a city clerk, but has a city recorder.

(CHAPTER 160, LAWS OF 1886.)

RELATING TO IMPROVEMENTS IN CITIES.

An Act granting powers to cities of the first class organized as such since January 1, 1886, in relation to sewers and the improvement of streets and alleys and providing for payment therefor, by issuing bonds and the levy of a tax, in addition to, and amendment of chapter 162, laws of the seventeenth general assembly of Iowa, and chapter 20, laws of the twentieth general assembly of Iowa.

SECTION 1. [Provisions of chapter 162, acts of 17th G. A. and amendments thereto shall apply to cities of first class, organized as such since Jan. 1, 1886.]—*Be it enacted by the general assembly of the state of Iowa:* That all the provisions of chapter 162 of the laws of the seventeenth general assembly of the state of Iowa, and amendments and acts supplementary thereto, shall be applicable to and hereby conferred upon cities of the first class, organized as such since January 1, A. D. 1886, notwithstanding the fact that any such city may have, prior to the time of becoming such city of the first class, commenced a general system of sewerage by the levy and expenditure of any tax therefor, under the provision of chapter 107 of the acts of the sixteenth general assembly of Iowa.

SEC. 2. [May provide by ordinance that any part of special assessment for certain improvements may be paid by city.]—That any city of the first class organized as such since January 1, A. D. 1886, in addition to the requirements of chapter 20 of the laws of the twentieth general assembly of Iowa, may provide by ordinance that any part of the expense of opening, widening, extending and grading only of any street, highway, avenue or alley in front of or alongside of abutting property that is, under said act, subject to special assessment therefor, shall be paid by the city instead of assessing the whole cost to such abutting property as therein required, and in such case the same may be paid for in the same manner as street intersections and spaces in front of city property under section 5 of said chapter 20, and this section shall be deemed a part of said chapter 20.

SEC. 3. [Required to levy special tax to meet bonds for city improvements herein provided for.]—That such cities of the first class organized as such since January 1, 1886, for the purpose of paying the city improvement bonds, authorized under section 5 of said chapter 20 of the laws of the twentieth general assembly, or of paying for such improvements themselves and those authorized by section 2 hereof, are hereby authorized and required to levy annually until the same is paid for, a special city improvement tax upon all the property within the city not exceeding three mills on the dollar, to be collected the same as other taxes, and the money so arising therefrom shall constitute a special fund for the payment of said bonds and interest and improvements, to be used and appropriated to no other purpose. In issuing such city improvement bonds in such city under said section 5 and section 2 hereof, such city may make any of the same become due at periods as soon as such levy will provide sufficient funds for the payment of the same, and such bonds shall be deemed issued in anticipation of the revenue herein provided for their payment.

SEC. 4. That any officer of such city or member of the city council who shall participate in any division of said taxes or the moneys collected thereunder, to any other purpose than those provided in this act, shall be guilty of the crime of embezzlement and be punished accordingly.

Approved April 12, 1886.

(CHAPTER 192, LAWS OF 1884.)

POWERS AND DUTIES OF MAYORS.

An Act in relation to powers and duties of mayors of cities of first and second class. [Additional to code, chapter 10, title IV.]

SECTION 1. [**In cities of 8,000 inhabitants mayor to sign ordinances, etc.**—*Be it enacted by the general assembly of the state of Iowa:* That the mayor of every city of the first and second class except of less than eight thousand inhabitants by the last census report in this state, shall sign every ordinance or resolution passed by any city of the first or second class before such ordinance or resolution shall take effect or be in force.

SEC. 2. [**In case of refusal to sign, shall call meeting within fourteen days.**]—If the mayor of any city of the first and second class only as above excepted shall refuse to sign any ordinance or resolution after it has been passed by the council of such city he shall call a meeting of such city council within fourteen (14) days after the passage of such ordinance or resolution, and shall return the ordinance or resolution to them with his reasons for refusing to sign the same.

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

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

Approved April 14, 1884.

(CHAPTER 171, LAWS OF 1886.)

PAID FIRE DEPARTMENTS IN CITIES UNDER SPECIAL CHARTERS.

An Act authorizing cities under special charter to levy a special tax for the maintenance of a paid fire department.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* All cities acting under special charter are hereby authorized in addition to the taxes now authorized by law, to levy and cause to be collected a special tax on the taxable property of such cities, sufficient to pay the expense of organizing, keeping and maintaining a paid fire department, including the expenses of constructing, purchasing, leasing and maintaining the proper and necessary buildings, grounds and apparatus therefor, *provided*, however, that said tax shall not exceed the sum of two (2) mills on the dollar in any one year.

Approved April 13, 1886.

(CHAPTER 23, LAWS OF 1888.)

An Act to provide for the appointment and removal of policemen in cities organized under special charters.

SEC. 1. [**Policemen removed.**]*—Be it enacted by the general assembly of the state of Iowa:* That in all cities in this state organized under special charters all policemen shall be appointed and may be removed by the mayor of such city.
Approved March 3, 1888.

(CHAPTER 168, LAWS OF 1886.)

RELATING TO IMPROVEMENTS IN CERTAIN CITIES AND PROVISION FOR PAYMENT THEREOF.

An Act making further provision with respect to contracts by cities of the first class containing a population of over thirty thousand, for paving and curbing streets, and construction of sewers, and the making and collection of assessments and issuance of bonds or certificates to pay the same.

SECTION 1. [**Certain cities of over 30,000 population subject to provisions of this act.**]*—Be it enacted by the general assembly of the state of Iowa:* That all cities of the first class in this state, containing according to any legally authorized census or enumeration a population of over thirty thousand, shall have the powers and be subject to all the provisions of this act.

SEC. 2. [**Board of public works to make contracts for materials.**]*—*When the council of any city shall direct the paving, curbing or sewerage of any street or streets, the board of public works of such city shall make and enter into contracts for furnishing materials and for curbing and paving or sewerage, as the case may be, of any such street or streets either for the entire work in one contract or parts thereof in separate and specified sections as to them may seem best; *provided,* that no work shall be done under any such contract until a certified copy shall have been filed in the office of the city clerk.

SEC. 3. (*As amended by ch. 5, 22d g. a.*) [**Contract to be made in name of city.**]*—*All such contracts shall be made by the board of public works in the name of the city upon such terms of payment as shall be fixed by the council, and shall be made with the lowest bidder or bidders upon sealed proposals after public notice for not less than three weeks in at least two newspapers of said city, which notice shall state the kind and amount of work to be done and specify the different kinds of material for which bids shall be received.

SEC. 4. [**Contractor shall give bond.**]*—*Each contractor shall be required to give a bond to the city with sureties to be approved by the council for the faithful performance of the contract, and the council shall have power to institute suit in the name of the city to enforce all such contracts.

SEC. 5. (*As amended by ch. 5, 22d g. a.*) [**Duty of city engineer to furnish grades and lines.**]*—*It shall be the duty of the city engineer to furnish the [board of public works] with proper grades and lines, and see that the work is done in accordance with the ordinances and regulations of the city with respect to said grades and lines.

SEC. 6. (*As amended by ch. 5, 22d g. a.*) [**Provisions for payment.**]*—*For the purpose of providing for the payment of the cost and expense of any such improvement or improvements, the council shall be authorized from time to time, as the work progresses [upon estimates to be furnished by the board of public works] to

make requisitions upon the mayor of the city for the issue of bonds of the city in such sums as shall be deemed best, and it shall be the duty of the mayor to make and execute bonds accordingly in the name of the city, to an amount not exceeding the amount of the contract price of any such improvement, and the incidentals attending the same. Said bonds to bear the name of the street or streets improved, to be signed by the mayor, and countersigned by the city clerk, and sealed with the corporate seal of the city, and shall all bear the same date, and be payable seven years after date, and redeemable at any time at the option of the city, and shall bear interest at the rate of not exceeding six per cent per annum, payable semi-annually.

SEC. 7. [**Bonds delivered to clerk.**]—When said bonds shall have been issued by the mayor, and sealed with the corporate seal of the city, they shall be delivered to the clerk, who shall register them in a book to be kept for that purpose, and countersigned, and deliver them to the committee or person authorized to negotiate the same, taking receipts therefor.

SEC. 8. [**How negotiated.**]—Said committee or person authorized to negotiate said bonds shall negotiate the same in such manner as they may think best, and for such prices as may be obtainable for the same, not less than par, and shall pay all moneys received therefrom to the treasurer of the city, and report to the city clerk the number of bonds sold, and the amount received therefor, and before delivering the same to the purchaser they shall be countersigned by the said committee or other person so authorized to negotiate the same.

SEC. 9. [**Proceeds of bonds kept in separate fund.**]—All *monies* [moneys] received by the city treasurer from the sale of said bonds shall be kept by him in a separate fund and paid out on requisition of the council, accompanied by affidavit of the city engineer that work has been done or material furnished to the amount of said requisition, and that it is required for payment of the same, and all *monies* [moneys] received by said treasurer shall be kept in the same manner, and subject to all the regulations regarding other money of the city, except that he shall keep a separate account of the same, and all interest received upon the same shall be credited to such fund.

[SEC. 10. (*As substituted by ch. 5, 22d g. a.*) When any such improvement shall have been completed it shall be the duty of the council to ascertain the entire amount of the bonds sold and the interest thereon to the date of completion, which shall be taken to be the costs of such improvement, and the entire amount of such costs, including the intersection of streets and alleys, shall then be assessed by the board of public works and city engineer, constituting the board of assessors, upon the property fronting or abutting upon said improvement; *provided*, that nothing in this act shall be construed as authorizing the council to assess a greater amount than three dollars per lineal foot on account of the construction of sewers, and *provided further*, that the cost of any such improvement shall not be assessed on property belonging to the state.]

[SEC. 11. (*Same amendment.*) **The board of public works** shall cause a plat of the street or streets on which any improvement shall be made showing the separate lots of ground and the name of all such owners and the amount assessed against each lot or piece of ground, and shall give two weeks' notice in two newspapers of the city and by handbills posted in conspicuous places on the line of such street or streets of the time and place, where for the period of twenty days thereafter the same may be seen for the correction of errors, and after having corrected such errors as may be made known to them, said board shall file the same in the office of the city clerk, and shall deliver a copy of said plat and schedule to the auditor of the county in which said city is situated.]

[SEC. 12. (*Same amendment.*) **Said assessment** may be placed on the tax duplicate or list of the county, and shall be payable at the office of the county treasurer

in seven equal installments, with interest at six per centum from the date of the assessment upon the unpaid portion thereof, the first of which, with interest on the whole amount at six per cent, shall be payable at the first semi-annual payment of taxes next succeeding the time said assessment is placed on said duplicate, and the others annually thereafter, and said assessment shall be collected in the same manner and bear the same penalties when delinquent as now provided by law for the collection of other taxes.]

SEC. 13. [**Assessments a lien upon property.**]—Said assessments with interest accruing thereon shall be a lien upon the property abutting upon the street or streets on which any such improvement is made from the commencement of the work, and shall remain a lien until fully paid, and shall have precedence over all other liens excepting ordinary taxes, and shall not be divested by any judicial sale; provided, that such lien shall be limited to the lots bounding or abutting on such street or streets, and not exceeding in depth therefrom one hundred and fifty feet.

SEC. 14. [**Assessments may be paid in full any time after made, with interest.**]—The owner of any property against which an assessment shall have been made for the cost of any such improvement, shall have the right to pay the same in full with interest thereon at six per cent from the time said assessment was made, or after having paid one or more of said seven installments and interest, he may at any time pay in full the balance of his assessments remaining unpaid, with interest thereon at six per cent from the time when the preceding payment became due, and such payment in full shall satisfy and discharge the lien upon said property, and any owner of such property who shall divide the same so that the feet front on any such improvement are divided into separate lots or parcels, may discharge the lien in like manner upon any one or more of such lots or parcels, by payment of the amount unpaid thereon calculated by the ratio of feet front of such lot or lots or parcel or parcels to the feet front of the whole lot.

SEC. 15. [**Receipts from assessments shall be applied on bonds or certificates for said improvements.**]—All *moneys* [moneys] received from assessments shall be appropriated to the payment of the interest and redemption or payment of the bonds, or of the certificates hereinafter provided for, as the case may be, that shall be issued for said improvements, and if any interest shall become due on any of said bonds, when there is no fund with which to pay the same, the council shall be authorized to make a temporary loan for the payment thereof.

SEC. 16. [**When council is prohibited by constitution from issuing bonds, they may issue certificates to contractors for work done.**]—If, by reason of the prohibition contained in section 3, article 11 of the constitution of this state, it shall at any time be unlawful for any such city to issue bonds as by this act provided, it shall be lawful for such city to provide by ordinance for the issuance of certificates to contractors, who under contract with the city shall have constructed any such improvement, in payment therefor, each of which certificates shall state the amount or amounts of one or more of the assessments made against any owner or owners and lot or lots on account and for payment of the cost of any such improvement, and shall transfer to the contractor, and his assigns, all of the right and interest of such city to, in and with respect to every such assessment, and shall authorize such contractor and his assigns to receive, sue for and collect, or have collected every such assessment embraced in any such certificate, by or through any of the methods provided by law for the collection of assessment for local improvements, including the provisions of this act.

SEC. 17. [**Lot owners may avail themselves of the privilege of payment of certificates in installments, by promise in writing, etc.**]—Whenever the owner or owners of any lot or lots, the assessment or assessments against which is or are embraced in any such certificate, shall severally promise and agree in writing endorsed on such certificate that, in consideration of having the right

to pay his or their assessment or respective assessments in installments, they will not make any objection of illegality or irregularity as to their respective assessments, and will pay the same with interest thereon at such rate, not exceeding six per cent, as shall by ordinance or resolution of the city council of such city be prescribed and required, he or they shall have the benefit and be subject to all of the provisions of this act authorizing the payment of assessments in annual installments relating to the lien and collection and payment of assessments so far as applicable.

SEC. 18. [**Owners not complying with preceding section shall pay assessment in full.**—Any owner of any lot or lots assessed for payment of the cost of any such improvement who will not promise and agree in writing as provided by section seventeen hereof, shall be required to pay his assessment in full, when made, and the same shall be collectible by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act.

SEC. 19. [**Mistake does not vitiate lien.**—Any mistake in the description of the property or in the name of the owner shall not vitiate the lien.

SEC. 20. [**Vote of council.**—The council of any such city shall not have the right to authorize any improvement under this act unless the owners of two-thirds of the feet front of the property abutting upon the street or streets to be improved shall petition therefor, or unless the same shall be voted for by three-fourths of the members of the council.

SEC. 21. Any part or section of any street may be improved under this act as well as an entire street.

SEC. 22. All acts and parts of acts in conflict with this act are hereby repealed.
Approved April 13, 1886.

(CHAPTER 78, LAWS OF 1886.)

PROVIDING FOR FUNDING CERTAIN OUTSTANDING INDEBTEDNESS OF CERTAIN CITIES.

An Act authorizing certain cities to fund certain outstanding indebtedness, and to provide for the levy of taxes for the payment thereof, and providing a penalty for the diversion of such tax.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* That all cities organized under the general incorporation laws of the state, and having a population of not less than seven thousand according to the census of 1885, and whose outstanding indebtedness, evidenced by the warrants of said cities exceeds the sum of ten thousand dollars, are hereby authorized and empowered to fund the same and issue bonds of said cities therefor, in sums of not less than one hundred and not more than one thousand dollars each, having not more than twenty years to run, and bearing a rate of interest not exceeding six per cent per annum, payable semi-annually.

SEC. 2. [**Form of bond.**—Said bond shall be substantially in the following form:

No.. The city of... in the state of Iowa, for value received promises to pay ... or order at...., on the ... day of ... 18..., or at any time before that date, at the pleasure of said city, the sum of dollars, with interest at the rate of .. per cent per annum, payable semi-annually at, on the days of.... and in each year, upon presentation and surrender of the interest coupons hereto attached. This bond is issued by the city council of said city, under the provisions of chapter of the acts of the twenty-first general assembly of the state

of Iowa, and in conformity with a resolution of said city council, dated . . . day of . . . 18..

IN TESTIMONY WHEREOF, The said city council of the city of . . . have caused [SEAL.] this bond to be signed by its mayor and attested by its auditor (or clerk,) with the seal of said city affixed, this . . . day of . . . 18..

Attest:

..... Auditor or Clerk,
..... Mayor of the city of.....

And the interest coupons attached to said bonds shall be substantially in the following form:

[Form of coupon.]-No.. The treasurer of the city of . . . in the state of Iowa, will pay the holder hereof on the . . . day of . . . 18.. at . . . the sum of dollars, for interest on city bond No.. series of . . . issued under the provisions of chapter . . . of the acts of the twenty-first general assembly of the state of Iowa.

.....
City Auditor or Clerk.

SEC. 3. [Bonds when executed delivered to treasurer.] Whenever any bonds issued under the provisions of this chapter shall be duly executed, numbered consecutively and sealed, they shall be delivered to the treasurer of said city issuing the same, and his receipt taken therefor, and he shall stand charged on his official bond with all bonds so delivered to him and the proceeds thereof, and he shall sell them on the best available terms or exchange them for any legal indebtedness of said city, evidenced by the outstanding warrants of said city outstanding at the date of the final passage of this act, but in no case shall said bonds be so sold or exchanged for a less sum than their face value, and all interest accrued at the date of said sale or exchange; and if any of such bonds shall be sold for money, the proceeds thereof shall be applied exclusively to the payment of such indebtedness outstanding at the date of the final passage of this act. When they are exchanged for warrants of said city said treasurer shall at once cancel said warrants as by the ordinances of said city provided. He shall keep a record of all bonds sold or exchanged by him by number, date of sale, amount, date of maturity, the name and address of the purchaser, and if exchanged, what evidences of debt were received therefor, which record shall at all times be open to the inspection of the citizens of said city; said treasurer shall also report under oath to the city council of said city at each first regular session thereof in each month, a statement of all such bonds so sold or exchanged by him since his last report, and the date of such sale or exchange, and when exchanged, a description of the city indebtedness exchanged therefor.

SEC. 4. [Shall not exceed constitutional limit.]-No bonds shall be issued under this act in excess of the constitutional limit, nor for any other purpose than to fund the outstanding indebtedness of said cities evidenced by the warrants of said cities outstanding at the date of the final passage of this act.

SEC. 5. [City council shall levy tax to meet interest on bonds.]-The city council of all cities issuing bonds under and by virtue of this chapter shall cause to be assessed and levied each year upon all the taxable property of said city, in addition to the levy for other purposes, a sum sufficient to pay the interest on bonds outstanding issued in conformity with and by virtue of the provisions of this act, accruing before the next annual levy, and such proportion of the principal, that at the end of five years the sum raised shall equal at least twenty per cent of the amount of bonds issued: at the end of ten years at least forty per cent of said amount; at the end of fifteen years at least sixty-five per cent of said amount, and at or before the date of the maturity of said bonds a sum equal to the whole amount of the principal and interest, and the money arising from such levies shall

be known as the bond fund, and shall be used for the payment of the bonds issued under and by virtue of the provisions of this act, and the interest thereon, and for no other purpose.

SEC. 6. [**Shall pay off bonds as fast as possible.**]—Whenever the amount in the hands of the treasurer belonging to the bond fund, after deducting the amount required to pay the interest on said bonds maturing before the next levy, shall be sufficient to redeem one or more bonds, he shall notify the owner of such bond, or bonds, that he is prepared to pay the same with all interest accrued thereon, and if not presented for payment, or redemption, within thirty days after the date of such notice, the interest on such bond shall cease and the amount due thereon shall be set aside for the payment thereof whenever presented. All redemptions shall be made in exact order of their issuance, and the notice herein required shall be directed to the address of the owner of said bonds as shown by the record thereof kept in the treasurer's office.

SEC. 7. If the city council of any city which has issued bonds under the provisions of this act shall fail to make the levy necessary to pay such bonds and coupons at maturity, and the same shall have been presented to the treasurer of such city, and payment refused, the owner may file the bond together with all the unpaid coupons, with the auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office, and the executive council, at their next session as a board of equalization, and at each annual equalization thereafter, shall add to the state tax to be levied in said city a sufficient rate to realize the amount of principal and interest past due and to become due prior to the next levy, and the same shall be collected as a part of the state tax and paid into the state treasury and passed to the credit of such city as bond tax, and shall be paid by warrants as the payments mature to the holder of such bond, as shown by the register of the state auditor, until the same shall be fully satisfied and discharged, *provided*, that nothing herein contained shall be construed to limit or postpone the right of any holder of any such bonds to resort to any other remedy which such holder might otherwise have.

SEC. 8. [**Diversion of funds.**]—Any member of the council, or any officer of any city levying and collecting taxes under the provisions of this act, who shall in any manner participate in, or advise the diversion of said tax to any other purpose than that provided for in this act, shall be deemed guilty of the crime of embezzlement, and shall be punished accordingly.

Approved April 6, 1888.

(CHAPTER 25, LAWS OF 1888.)

SUITS AND CLAIMS AGAINST MUNICIPAL CORPORATIONS.

An Act limiting the time of making claims and bringing suit against municipal corporations, including cities organized under special charters.

SECTION 1. [**Limitation of actions.**]—*Be it enacted by the general assembly of the state of Iowa:* That in all cases of personal injury resulting from defective streets or sidewalks, or from any cause originating in the neglect or failure of any municipal corporation, or its officers to perform their duties in constructing or maintaining streets or sidewalks, no suit shall be brought against the corporation after six months from the time of the injury unless written notice specifying the place and circumstances of the injury shall have been served upon such municipal corporation within ninety days after the injury.

SEC. 2. [**Applicable to cities under special charters.**]—All the provisions of this act shall be applicable to all cities in this state now organized under special charters.

Approved February 17, 1888.

(CHAPTER 10, LAWS OF 1888.)

An Act providing for the issue of water works bonds by cities of the second class.

SECTION 1. [**May issue bonds.**] *Be it enacted by the general assembly of the state of Iowa:* In all cases where a city of the second class has determined or hereafter may determine to erect water works to be owned and operated by the city as provided in section number 471 of the code, it shall be lawful for such city to issue its bonds to procure the money for such purpose to an amount not exceeding five per cent upon the taxable property of such city; but in no case shall the aggregate indebtedness of the city by the issue of such bonds be increased beyond the limit of indebtedness fixed by the constitution of the state, and no money procured upon the issue of such bonds shall be used for any other purpose than the erection of such water works.

Approved February 22, 1888.

(Took effect by publication in newspapers February 23, 1888.)

(CHAPTER 21, LAWS OF 1888.)

FIRE LIMITS IN CITIES.

An Act to authorize cities of the first class to make regulations against danger or accident by fire, to establish fire limits and to prohibit the erection of certain buildings within such limits, and to provide for the removal of buildings erected contrary to such regulations.

SECTION 1. [**Regulate against fire.**]*—Be it enacted by the general assembly of the state of Iowa:* Cities of the first class have power to make regulations against danger or accidents by fire, to establish fire limits and to prohibit the erection thereon of any building or addition to any building unless the outer walls and roof thereof be made of brick and mortar or of iron and stone and mortar, or of other non-combustible material, and to provide for the removal of any building or addition erected contrary to such prohibitions.

SEC. 2. The provisions of section 457 of the code of 1873 shall not apply to cities of the first class.

Approved April 3, 1888.

(CHAPTER 17, LAWS OF 1888.)

FUNDING BONDS.

An Act providing for funding certain bonds and outstanding indebtedness of certain cities and authorizing certain cities to fund certain outstanding indebtedness, and to provide for the levy of taxes for the payment thereof, and providing a penalty for the diversion of such tax.

SECTION 1. [**May fund.**]*—Be it enacted by the general assembly of the state of Iowa:* That all cities organized under the general incorporation laws of the state and having a population of five thousand or more, according to the census of 1885, and whose outstanding indebtedness, evidenced by the warrants of said cities, exceeds the sum of ten thousand dollars, are hereby authorized and empowered to fund the same and issue bonds of said cities thereof, in sums of not less than one hundred and not more than one thousand dollars each, having not more than twenty

years to run, and bearing a rate of interest not exceeding six per cent per annum, payable semi-annually. And such cities may also in the same manner refund the indebtedness of said corporations evidenced by bonds thereof heretofore issued and outstanding at the time of the passage of this act.

SEC. 2. [Form of bond.]—Said bonds shall be substantially in the following form:

No.... The city of, in the state of Iowa, for value received, promises to pay 18., or at any time before that date, at the pleasure of said city, the sum of dollars, with interest at the rate of per cent per annum, payable semi-annually at on the days of and in each year, upon presentation and surrender of the interest coupons hereto attached. This bond is issued by the city council of said city under the provisions of chapter of the acts of the twenty-second general assembly of the state of Iowa, and in conformity with a resolution of said city council, dated day of 18..

In testimony whereof, the said city council of the city of, have caused this bond to be signed by its mayor and attested by its auditor or clerk with the seal of said city affixed, this day of, 18..

.....,
Auditor or clerk.

.....,
Mayor of the city of

And the interest coupons attached to said bonds shall be substantially in the following form:

No.... The treasurer of the city of, in the state of Iowa, will pay the holder thereof on the day of, 18., at, the sum of..... dollars, for interest on city bond No, series of, issued under the provisions of chapter of the acts of the twenty-second general assembly of the state of Iowa.

.....,
City auditor or clerk.

SEC. 3. [Treasurer to sell lands.]—Whenever any bonds issued under the provisions of this chapter shall be duly executed, numbered consecutively and sealed, they shall be delivered to the treasurer of said city issuing the same, and his receipt taken therefor, and he shall stand charged on his official bond with all bonds so delivered to him and the proceeds thereof, and he shall sell them on the best available terms or exchange them for any legal indebtedness of said city, evidenced by the outstanding warrants or bonds of said city outstanding at the date of the final passage of this act, but in no case shall said bonds be sold or exchanged for a less sum than their face value and all interest accrued at the date of said sale or exchange; and if any such bonds shall be sold for money, the proceeds thereof shall be applied exclusively to the payment of such bonded indebtedness outstanding at the date of the final passage of this act. When they are exchanged for warrants of said city, said treasurer shall at once cancel said warrants as by the ordinance of said city provided. He shall keep a record of all bonds sold or exchanged by him, by number, date of sale, amount, date of maturity, the name and address of the purchaser, and if exchanged, what evidences of debt were received therefor, which record shall at all times be open to the inspection of the citizens of said city; said treasurer shall also report under oath to the city council of said city, at each first regular session thereof in each month, a statement of all such bonds so sold or exchanged by him since his last report and the date of such sale or exchange, and when exchanged, a description of the city indebtedness exchanged therefor.

SEC. 4. No bonds shall be issued under this act in excess of the constitutional limit nor for any other purposes than to fund the outstanding indebtedness of said cities evidenced by the warrants of said cities outstanding at the date of the

final passage of this act, or to refund outstanding bonds, at such time or by contracts existing at such date and to be performed within the year 1888.

SEC. 5. [**Assessments to pay interest.**]-The city council of all cities issuing bonds under and by virtue of this chapter shall cause to be assessed and levied each year upon all taxable property of said city, in addition to the levy for other purposes, a sum sufficient to pay the interest on bonds outstanding issued in conformity with and by virtue of the provisions of this act, accruing before the next annual levy, and such proportion of the principal that at the end of five years the sum raised shall equal at least twenty per cent of the amount of bonds issued; at the end of ten years at least forty per cent of said amount; at the end of fifteen years at least sixty-five per cent of said amount, and at or before the date of the maturity of said bonds a sum equal to the whole amount of the principal and interest; and the money arising from such levies shall be known as the bond fund, and shall be used for the payment of the bonds issued under and by virtue of the provisions of this act, and the interest thereon, and for no other purpose.

SEC. 6. [**Redemption of bonds.**]-Whenever the amount in the hands of the treasurer belonging to the bond fund, after deducting the amount required to pay the interest on said bonds maturing before the next levy, shall be sufficient to redeem one or more bonds, he shall notify the owner of such bond or bonds that he is prepared to pay the same with all interest accrued thereon, and if not presented for payment or redemption within thirty days after the date of such notice the interest on such bonds shall cease, and the amount due thereon shall be set aside for the payment thereof whenever presented. All redemptions shall be made in the exact order of their issuance, and the notice herein required shall be directed to the address of the owner of said bonds as shown by the record thereof kept in the treasurer's office.

SEC. 7. [**Unpaid bonds to be filed with state auditor.**]-If the city council of any city which has issued bonds under the provisions of this act shall fail to make the levy necessary to pay such bonds and interest coupons at maturity and the same shall have been presented to the treasurer of such city, and payment thereof refused, the owner may file the bond, together with all unpaid coupons, with the auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office, and the executive council, at their next session as a board of equalization, and at each annual equalization thereafter, shall add to the state tax to be levied in said city a sufficient rate to realize the amount of principal and interest past due and to become due prior to the next levy, and the same shall be collected as a part of the state tax and paid into the state treasury and passed to the credit of such city, as bond tax, and shall be paid by warrants as the payments mature to the holder of such bond as shown by the register of the state auditor, until the same shall be fully satisfied and discharged; *provided*, that nothing herein contained shall be construed to limit or postpone the right of any holder of any such bonds to resort to any other remedy which such holder might otherwise have.

SEC. 8. [**Embezzlement punished.**]-Any member of the council or any officer of any city levying and collecting taxes under the provisions of this act who shall in any manner participate in or advise the diversion of said tax to any other purpose than that provided for in this act shall be deemed guilty of the crime of embezzlement, and shall be punished accordingly.

SEC. 9. This act being deemed by the general assembly of immediate importance, shall take effect and be in force from and after its publication in *The Iowa State Register* and *The Des Moines Leader*, newspapers published in the city of Des Moines.

(Approved April 3, 1888.)

(CHAPTER 12, LAWS OF 1888.)

An Act granting additional authority to certain cities of the first class relating to the improvement of public places, street, highway, avenue and alley intersections, and to provide a system of payment therefor.

SECTION 1. [**Power to levy five mill tax for paving.**]*—Be it enacted by the general assembly of the state of Iowa:* That all cities of the first class that have been, or may be organized under the general incorporation laws of cities in this state since January 1, 1881, shall have power to levy not exceeding five mills on the dollar on the assessed valuation of all taxable property in such cities for the purpose of creating a fund to pay the costs and expenses incurred by such cities in the building of pavement or other city street improvements now authorized by law to be made by cities at the intersections of streets, highways, avenues, alleys or other places when the costs and expenses of such street improvements are not assessable against the fronting or abutting property, and that such cities may anticipate the collection of said tax and issue city improvement bonds to run for a period not exceeding twenty years, and may create a sinking fund to pay the accrued and accruing interest and principal of said bonds at their maturity, as the council shall provide by ordinance.

Approved April 3, 1888.

(CHAPTER 24, LAWS OF 1888.)

An Act to fix the compensation to be paid to members of the city council in cities of the first class.

SECTION 1. [**Compensation \$250 per annum.**]*—Be it enacted by the general assembly of the state of Iowa:* That there shall be paid to members of the city council of cities of the first class an amount prescribed by ordinance not in excess of two hundred and fifty dollars (\$250) per annum, and this amount shall be in full compensation of all services of such councilmen of every kind and character whatsoever, connected with their official duties.

SEC. 2. [**Repeal.**]*—All acts and parts of acts in conflict herewith are hereby repealed.*

Approved April 5, 1888.

(CHAPTER 1, LAWS OF 1888.)

BOARD OF PUBLIC WORKS.

An Act creating in all cities of the first class having a population, according to any legally authorized census, of more than thirty thousand inhabitants, a board of public works, and defining the powers and duties of its members.

SECTION 1. [**Creates board of public works in cities of first class.**]*—Be it enacted by the general assembly of the state of Iowa:* There shall be established and created in every city of the first class having a population, according to any legally authorized census, of more than thirty thousand inhabitants, a board of public works, which shall consist of two members, residents of such city, to be appointed by the mayor, by and with the approval of the city council, on or before the first Monday of April, 1889. One member shall be appointed for the term of two years and the other for the term of three years, and they shall hold their office

until their successors are duly appointed and qualified, and their successors shall be appointed in the manner hereinbefore provided for the term of three years. The mayor shall fill all vacancies occurring in said board, by and with the approval of the city council, but no member of the city council or city officer shall be appointed a member of said board.

SEC. 2. [Salary of members of board.]—The salary of each member of such board of public works shall not be less than fifteen hundred dollars (\$1,500) and not more than twenty-five hundred dollars (\$2,500) per year, as may be fixed by the city council, but the salary shall not be reduced during the term of office of any member. Each member of said board before entering upon the discharge of his duties, shall take an oath to faithfully discharge the duties of his office, and enter into a bond with the city, with two or more good and sufficient sureties, to be approved by the city council, in a sum of not less than twenty thousand dollars (\$20,000). The conditions of said bond shall be for the faithful performance of the duties of such members; and no member of said board shall ever be directly or indirectly interested in any contract entered into by them on behalf of such city, nor shall they be interested either directly or indirectly in the purchase or sale of any material to be used or applied in or about the uses and purposes contemplated by this act.

SEC. 3. [Board must consult with city engineer.]—Said board shall consult the city engineer of such cities in regard to the plans, specifications and advisability of making any improvements, or doing any work contemplated by the provisions of this act, and the city engineer shall furnish said board, from time to time, estimates of the cost of material for any improvement to be ordered or advertised for by said board, together with the plans and specifications therefor.

SEC. 4. [Contracts to be drawn by city solicitor.]—Contracts for all public improvements made by said board of public works shall be drawn by the city solicitor of such cities, and he shall charge not less than three or more than ten dollars for each contract, and said money shall be collected by him from the contractors, and pay the same monthly to the city treasurer for the use of such cities, and said charge shall include a copy of said contract and specifications to be furnished to such contractors.

SEC. 5. [Board must advertise for bids and make contracts.]—Said board of public works shall advertise for bids and make all contracts on behalf of the city for all material and work for public improvements in excess of two hundred dollars (\$200), whenever the same shall be ordered by the city council, or voted for at some general or special election by the voters of such city, and proposals for bids shall be published at least two weeks in two of the daily newspapers of such city, and said publication shall be completed at least two weeks before the making and entering into any contract by said board. The proposals for bids shall state the amount and different kinds of material to be furnished and kind of improvement, and the time and conditions upon which bids shall be received. The board shall have power to reject any or all bids. All such contracts shall be made with the lowest bidder, but it shall not be necessary before proposals are published or bids received to determine specifically the kind of material to be used. All contracts made and entered into by said board shall be subject to the approval of the city council.

SEC. 6. Said board shall advertise for bids and make contracts for the lighting of streets, alleys, and public places of such cities, and for the removal of all garbage.

SEC. 7. [Superintendence of work.]—Said board shall superintend the performance of all public work, and the erection or construction of all improvements contemplated by this act. It shall approve the estimates of the city engineer which may be made from time to time of the cost of work as the same progresses,

to accept any work done or improvement made when the same shall be fully completed according to contract, subject to the approval of the city engineer, and they shall perform such other duties as may be devolved upon them by ordinance or resolution of such city.

SEC. 8. [**Report disapproval of plans, etc., to engineer.**—Whenever said board shall disapprove of the plans, specifications or estimates furnished by the city engineer, they shall report said fact at once in writing to the city council, and state their reasons for such disapproval.

SEC. 9. [**To superintend all work of streets, etc.**—Said board shall take special charge of the construction, repairing and superintendence of all streets, alleys, highways, sidewalks, public grounds, cleaning streets and alleys, lamps and light for lighting the streets, alleys, highways, parks, public places and public buildings of such cities.

SEC. 10. It shall take special charge of the construction, repairing and superintendence of all paving, sewers, bridges, viaducts, public buildings and grading of streets and alleys, subject to the approval of the city engineer.

SEC. 11. [**Control and direct expenses of department, etc.**—Said board of public works shall control and direct all expenditures to be made by its department, and sign and draw orders for the same, and all orders given and bills and accounts created by said board of public works shall first be endorsed by each of the members thereof, and approved by the city council, or they shall state their reasons in writing why they have not endorsed the same, before the same shall be ordered paid.

SEC. 12. [**Not to order extra work not provided for in contract.**] Said board shall not order any extra work in excess of that contained in any contract, or pay out any money for any extras whatsoever, without submitting and recommending the same to the city council and receiving its authority therefor.

SEC. 13. [**Board may appoint agents.**—It shall have power to appoint agents and employes, subject to the approval of the city council, absolutely necessary for the doing of the work of said board, but such agents or employes shall be actually engaged in the construction or improvements of the public works of such city, and shall not include any assistants, superintendents, book-keepers or secretaries, but said last named offices shall be filled and duties connected therewith performed by said board of public works, without extra compensation.

SEC. 14. [**Estimates to be approved by board and engineer.**]—It shall require all plans and specifications for all buildings costing over five thousand dollars (\$5,000), according to the estimate of the contractor or builder, to be submitted to them for the joint approval of said board and the city engineer, and no such building shall be erected until the above requirements have been complied with. It shall require any person before erecting any building or improvement within said city to first obtain a permit from said board of public works, and said board shall charge not more than one mill on the dollar of the cost of the construction of any such building or improvement, to be based on the architect's or builder's estimate, and the money derived and collected by said board for such purpose shall be by them monthly paid to the city treasurer for the benefit of the city.

SEC. 15. [**Fire proof roofs may be required.**—Said board shall have the power to require the fire proof roofs to be used on all buildings erected in the squares or blocks of such cities, when the outer walls thereof are constructed of non-combustible materials, and to require non-combustible material to be used in the outer walls of all buildings built or erected in such squares or blocks within the fire limits of such cities.

SEC. 16. [**Laying of water, gas and steam mains.**—It shall have power and be required, by and with the advice of the city engineer, to superintend the laying of all water, gas and steam heating mains and all connections therefor, and

laying of telephone, telegraph, district telegraph and electric wires in the manner provided by the ordinances of such city.

SEC. 17. [**Fire escapes: construction of.**—It shall be the duty of such board to regulate the size, number and manner of construction of fire escapes, doors and stairways of theaters, tenement houses, audience rooms and all public buildings, whether now built or hereafter to be built, used for the gathering of a large number of people, so that there may be convenient, safe and speedy exit in case of fire.

SEC. 18. [**Make full reports.**—Said board shall, on the first day of April and the first day of December in each year, and at the expiration of the term of office of any member of said board, submit a full, complete and detailed statement to the city council of all work done by it, giving the amount of the expenditures and the names of the persons who have received any pay on account of such public work, and the amount of such pay, and for what the same was paid, and the number of permits issued, and the amounts received therefor. Such report shall further state [that] since the last report no member of said board has been directly or indirectly interested in any contract let by said board, or work ordered or superintended by them; that they have not been interested in the sale or purchase of any material used in the construction of said work or improvements, and that they have not received, or expect to receive, any presents or compensation from any contractor or other person interested in said work or improvements, and said report shall be duly sworn to by each member of said board.

SEC. 19. [**Board to keep record.**—Said board shall keep a full and complete record and copies of all contracts, plans, maps, specifications, plats and record of every kind whatsoever, growing out of any work or improvement made or superintended by said board, and the number of all building permits issued, and the location and cost of such buildings and improvements, and shall keep a full account of all expenditures made by it since its last report. No member of said board shall purchase any material of any kind whatsoever, without giving a written order therefor signed by at least one member of the board.

SEC. 20. [**Removal of member of board.**—Any member of such board may at any time be removed from office by a vote of two-thirds of the city council for sufficient cause, and the proceedings in that behalf shall be entered in the records of the council: *provided*, that the council shall previously cause a copy of the charges against such member or members sought to be removed to be served upon him or them, together with a notice of the time and place of hearing the same at least ten days previous to the time assigned, and opportunity to be given him or them to make his or their defense.

SEC. 21. [**Office of board.**—Said board shall be provided with a suitable office with fuel, lights, stationery, apparatus, utensils, etc., at the expense of the city.

SEC. 22. [**City council may confer further powers on board.**—Said board shall have such further powers and perform such duties as the city council may lawfully from time to time prescribe by ordinance, not inconsistent with the provisions of this act.

(Approved April 9, 1888.)

(CHAPTER 32, LAWS OF 1888.)

CONSTRUCTION OF VIADUCTS.

An act to authorize certain cities to require the erection and construction of viaducts over or under railroads on public streets, and to provide compensation to owners of property abutting on such streets.

SECTION 4. [**What cities authorized.**].—*Be it enacted by the general assembly of the state of Iowa:* The council of any city of the first class and cities organized under special charter, or cities of the second class having a population of (7,000) seven thousand or over, shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of such city, to erect, construct, reconstruct, complete and keep in repair to the extent hereinafter provided, any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches thereto, as may be deemed and declared by ordinances of such city necessary for the safety and protection of the public; *provided*, that the approaches to any such viaduct which any railroad company or companies may be required to construct, or reconstruct and keep in repair, shall not exceed for each viaduct a total distance of eight hundred feet, and, *provided further*, that no such viaduct shall be required on more than every fourth street running in the same direction, and that no railroad company shall be required to build or contribute to the building of more than one such viaduct with its approaches in any one year. Nor shall any viaduct be required until the board of railroad commissioners shall, after due examination, deem said viaduct to be necessary in order to promote the public safety and convenience, and the plans of said viaduct prepared as provided in section 3 hereof, shall have been approved by said board.

SEC. 2. [**Assessment of damages.**].—Whenever any such viaduct shall be deemed and declared by ordinances necessary for the safety and protection of the public, the council shall provide for appraising, assessing and determining the damages, if any, which may be caused to any property, by reason of the construction of such viaduct and its approaches. The proceedings for such purpose shall be the same as provided for by law for taking possession of streets by railroad companies, except that the damages assessed shall be paid by the city.

SEC. 3. [**Specifications.**].—The width, height and strength of any such viaduct, and the approaches thereto, the material therefor, and the manner of construction thereof shall be such as may be required by the board of public works and approved by the mayor and council, but if there be no board of public works, then they shall be such as may be required by the council.

SEC. 4. [**When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or of the cost to be borne by each, shall be determined by the council.**]. After the completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines, or otherwise, shall constitute a special fund, and shall be applied in making repairs to such viaduct. One-half of all ordinary repairs to such viaduct, or to the approaches thereto, shall be paid out of such fund, or shall be borne by the city, and the remaining half shall be borne by the railroad company or companies and if the track of more than one company is so crossed the said one-half of said repairs shall be borne by such companies in the same proportion as the original construction of such viaduct.

SEC. 5. [**Indemnity bond.**].—Every city to which this act applies is authorized and empowered to receive a bond of indemnity from persons interested in the con-

struction of any such viaduct conditioned for the payment of all the damages which may be assessed in favor of abutting property owners, together with costs.

SEC. 6. [**Remedy for refusal to comply.**]-If any railroad company neglects or refuses for more than thirty days after such notice as may be prescribed by ordinance, to comply with the requirements of any ordinance passed under the provisions hereof, the city may construct or repair the viaduct, or approach, or portion of viaduct or approach, which such ordinance may require such railroad company to construct or maintain, and recover the cost of such construction or maintenance from such railroad company in any court of competent jurisdiction.

Approved April 7, 1888.

(CHAPTER 4, LAWS OF 1888.)

An Act to regulate the appropriation of money in certain cities of the first class.

SECTION 1. [**Appropriations must be made for all expenditures of city for each fiscal year.**]-*Be it enacted by the general assembly of the state of Iowa:* All cities of the first class shall make their appropriation for all the different expenditures of the city government for each fiscal year at or before the beginning thereof, and it shall be unlawful for the city council or any officer, agent or employe of the city, to issue any warrant, enter into any contract or appropriate any money in excess of the amount thus appropriated, for the different expenses of the city, during the year for which said appropriation shall be made, and any such city shall not appropriate in the aggregate, an amount in excess of its annual legally authorized revenue; but nothing herein shall prevent such cities from anticipating their revenues for the year for which such appropriation was made, or from bonding or refunding their outstanding indebtedness; *provided*, that this section shall not apply to cities of the first class organized since 1881.

SEC. 2. [**Advertisements for bids for supplies.**]-Such cities shall advertise in at least two newspapers published in said cities for three weeks, two insertions each week, for bids for furnishing all supplies of every kind, for the several departments of the city, not required to be advertised for by the board of public works; said advertisements to be published two weeks before the beginning of each fiscal year. Each officer or board in charge of any department in said cities, shall furnish and file in the city clerk's office, thirty days before the beginning of each fiscal year, a sworn detailed statement of the supplies necessary for his or their department during the next fiscal year.

(CHAPTER 3, LAWS OF 1888.)

An Act to regulate the manner of issuing or paying city warrants in cities of the first and second class and cities organized under special charters.

SECTION 1. [**Warrants drawn on vote of council.**]-*Be it enacted by the general assembly of the state of Iowa:* The city auditor or city clerk or any other officer of such cities whose duty it is to draw warrants of any city of the first or second class or any city organized under special charter, shall not draw any warrants, except upon the vote of the city council, and he shall, on the first Monday of each month, furnish the council a sworn and complete list of all warrants, and the amount thereof drawn by him during the preceding month, and such list shall state on whose account and the object and purpose for which the same are drawn, and the auditor or other proper officer of such city shall publish such report monthly in the official newspapers of such city.

SEC. 2. [**List of warrants.**]-The city treasurer of such cities shall keep a list

of all warrants presented for payment, and the date of presentation, and of the particular fund upon which they are drawn. Warrants so presented where there are no moneys in the funds on which they are drawn to pay the same, shall be endorsed as follows: "Presented and not paid for want of funds," and thereafter such warrants shall bear interest at the rate of six per cent (6%) per annum, except warrants issued by a resolution of the city council, or contract with the city in which it is provided that they shall not bear interest. Warrants shall be paid in the order of their presentation from the particular fund upon which they are drawn, and whenever there is an accumulation in the city treasury of any city of the first class or city organized under a special charter the sum of two thousand five hundred dollars (\$2,500), or in the city treasury of any city of the second class the sum of five hundred dollars (\$500), in any fund or sufficient to pay all warrants drawn on that fund, he shall call in warrants to the amount of such fund for payment in the order of their presentation, or the city council may at any time direct a call. The notice of such call shall be published in two of the daily newspapers of the cities of the first class or cities organized under special charters for one week, and in one daily or weekly newspaper in cities of the second class or cities organized under special charters, and shall state that after a certain date, no interest will be paid on warrants therein described. He shall set out in such notice the several numbers of warrants to be paid. Warrants issued by any such cities shall not be tendered or received by the county treasurer in payment of city taxes.

SEC. 3. [**Limit of sum of warrant.**]—The city auditor or other proper officer shall draw no single warrant for an amount in excess of five hundred (\$500) dollars.

Approved April 12, 1888.

(CHAPTER 18, LAWS OF 1888.)

An Act to empower cities of the first class organized as such since January 1, 1885, to levy taxes additional to section 461, code.

SECTION 1. [**Tax to pay library debts.**—*Be it enacted by the general assembly of the state of Iowa:* That all cities of the first class organized as such since January 1, 1885, that have accepted the benefits of the provisions of section 461 of the code of Iowa, shall, in addition to the powers conferred by said section, have power to levy and collect a tax not to exceed three mills on the dollar of the assessed valuation of such city or town to pay the interest on any indebtedness heretofore contracted, or that may hereafter be contracted or incurred for the purchase of land and the erection of buildings for a public library, or the hiring of rooms or buildings for such purposes, or for the compensation of the necessary employes as provided in section 461 of the code, and to create a sinking fund for the extinguishment of such indebtedness.

Approved April 11, 1888.

CHAPTER 11.

OF GENERAL REGULATIONS AFFECTING COUNTIES, TOWNS AND CITIES.

SECTION 552. **Public money shall not be appropriated,** given, or loaned by corporate authorities, supervisors or trustees of any county, township, city, or town, or municipal organization of this state, to or in favor of, any institution, school, association, or object, which is under ecclesiastical or sectarian management or control.

SEC. 553. [**Cannot take stock in banks or railways.**]-No county, city, or incorporated town in this state shall, in their corporate capacity, or by their officers, directly or indirectly, subscribe for stock, or become interested as a partner, shareholder, or otherwise, in any banking institution, whether the same be a bank of issue, deposit, or exchange, nor in any plank road, turnpike, or railway, or in any other work of internal improvement; nor shall they be allowed to issue any bonds, bills of credit, scrip, or other evidences of indebtedness for any such purposes—all such evidences of indebtedness for said purposes being hereby declared absolutely void: *provided, nevertheless,* that this section shall not be so construed as to prevent, or in any wise to embarrass, the counties, cities, or towns, or any of them, in the erection of their necessary public buildings, bridges, laying off highways, streets, alleys and public grounds, or other local works, in which said counties, cities, or towns may respectively be interested.

SEC. 554. [**Bonds void.**]-All bonds, or other evidences of debt, hereafter issued by any corporation to any railway company as capital stock, shall be null and void, and no assignment of the same shall give them any validity.

SEC. 555. [**Recovery on coupons no bar to another action.**]-In all actions now pending or hereafter brought in any court in this state, on any bond or coupon issued, or purporting to be issued, by any county, city, or incorporated town for railway purposes, a former recovery against such corporation on any one or more, or any part of such bonds or coupons, shall not bar or estop any defense such corporation has made, or can make, to such bonds or coupons in the action in which such former recovery was had; but the corporation sought to be charged in any such action now pending or hereafter brought, may allege and prove any matter of defense in such action to the same extent, and with the same effect, as though no former action had been brought or former recovery had.

SEC. 556. [**Officers cannot purchase warrants at discount.**]-No officer of any county or other municipal corporation, or any deputy or employe of such officer, shall, either directly or indirectly, be permitted to take, purchase, or receive in payment, exchange, or in any way whatever, any warrant, scrip, or other evidence of the indebtedness of such corporation, or any demand against the same, for a less amount than that expressed on the face of the warrant, scrip, or other evidence of indebtedness or demand.

SEC. 557. [**Duty of treasurer.**] -The treasurer of every county, or other municipal corporation, when he shall receive any warrant, scrip, or other evidence of indebtedness of such corporation, shall endorse thereon the date of its receipt, from whom received, and what amount.

SEC. 558. [**Penalty.**]-Any officer of any county or other municipal corporation, or any deputy or employe of such officer, who violates any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars, and not more than five hundred dollars for each offense.

(CHAPTER 75, LAWS OF 1886.)

PROVIDING FOR USE OF PUBLIC SQUARES FOR SCHOOL PURPOSES.

An Act to authorize the people of an incorporated town, located wholly within an independent school district, in which town is situated a public square or plat of ground, dedicated or deeded to the use of the public, to transfer or dedicate such public square, or plat of ground, to the purpose of a public school house lot.

SECTION 1. [**Public squares may be used for school purposes.**]*—Be it enacted by the general assembly of the state of Iowa:* That it shall be lawful for the people of any incorporated town, located wholly within an independent school district in which is situated a public square or plat of ground, deeded or dedicated to the said town or the public, by the proprietor of the town, or of any addition thereof, to transfer or re-dedicate such plat or square to the purpose of a public school house lot, to be used either for the erection thereon of a public school-house, or as school grounds, in connection with such school house.

SEC. 2. [**Manner of transfer.**]*—*The manner of procedure to effect the change or transfer of the purpose for which such lot or square shall be used, as is authorized in section 1 of this act, shall be as follows: When a plat or lot of the character described in section 1 of this act is located in such incorporated town, and one-half of the resident voters of such town, according to the last census thereof, national or state, shall petition the mayor and town council of such town, asking said city authorities to submit to the voters of the town at a general or special election the question whether or not such public square, lot or plat shall be transferred, dedicated and used for the purposes of a public school-house lot, for the use of the independent district in which the same is situated, said mayor and town council shall submit the question to the voters of the town, in accordance with the prayer of said petitioners, after giving ten days notice thereof, by written or printed notices, in which the proposition submitted shall be clearly set forth, and signed by said mayor, three of which notices shall be posted in public and conspicuous places in the town, and one shall be published in the last two issues, preceding such election, in a weekly newspaper published in the town, or if there be no such newspaper published in the town, then in the weekly newspaper published elsewhere in the county, having the largest circulation in said town; such notice shall state the manner of voting, which shall be by ballot, and substantially as follows: The ballot shall contain in print, ink or pencil, the words, "For transferring lot or block or square (as the case may be, describing it) to the purposes of a public school-house lot.....or....." "Against transferring lot or block or square (as the case may be, describing it) to the purposes of a school-house lot." And such election shall be held as per notice given, and be conducted as ordinary town elections are, under the supervision of the town authorities, who shall canvass the vote as by law provided in other cases. If it shall appear that two-thirds or more of all the legal votes cast at such election, for and against the proposition submitted, have been cast in favor of the transfer of such lot or block or square, to the purposes of a public school house lot, then such transfer shall be held to have been completed, and the lot or block or square may be appropriated and used for the purposes so indicated by said vote, and shall be no longer held for any other purpose. If less than two-thirds of the votes cast at such election are found to be in favor of the transfer then it shall be held that the proposition failed, and no transfer shall be effected.

Approved April 5, 1886.

(CHAPTER 185, LAWS OF 1884.)

TO REGULATE SALE OF COAL OIL.

An Act to provide for the inspection and to regulate the sale of petroleum and its products, and to repeal chapter 172 of the acts of the seventeenth general assembly and section 3901 of the code.

SECTION 1. [Governor, with consent of senate, to appoint state inspector of oils.]—*Be it enacted by the general assembly of the state of Iowa:* That the governor, by and with the advice and consent of the senate, shall appoint a suitable person, resident of the state, who is not interested in manufacturing, dealing in, or vending any illuminating oils manufactured from petroleum, as state inspector of oils, whose term of office shall commence on the first day of April of each even numbered year, and continue for two years and until his successor is appointed and qualified. It shall be the duty of such state inspector, by himself or his deputies hereinafter provided for, to examine and test the quality of all such oils offered for sale by any manufacturer, vender, or dealer; and if upon such testing or examination the oils shall meet the requirements hereinafter specified, he shall fix his brand or device: "*Approved, flash test, — degrees*" (inserting the number of degrees), with the date, over his official signature, upon the package, barrel or cask containing the same. And it shall be lawful for the state inspector, or his deputies, to enter into or upon the premises of any manufacturer, vender or dealer of said oils, and if they shall find or discover any kerosene oil, or any other product of petroleum kept for illuminating purposes, that has not been inspected and branded according to the provisions of this act, they shall proceed to inspect and brand the same. It shall be lawful for any manufacturer, vender or dealer to sell the oil so tested and approved as an illuminator; but if the oil or other product of petroleum so tested shall not meet said requirements, he shall mark in plain letters on said package, barrel or cask, over his official signature, the words, "*Rejected for illuminating purposes; flash test, — degrees*" (inserting the number of degrees). And it shall be unlawful for the owner thereof to sell such oil or other product of petroleum for illuminating purposes. And if any person shall sell or offer for sale any of such rejected oil or other product of petroleum for such purpose, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a penalty not exceeding three hundred dollars.

SEC. 2. (As amended by ch. 149, 21st g. a.) [May appoint deputies.] The state inspector provided for in this act is authorized to appoint a suitable number of deputies, which deputies are empowered to perform the duties of inspection, and shall be liable to the same penalties as the state inspector; *provided*, that the state inspector may remove any of said deputies for reasonable cause. It shall be the duty of the inspector and his deputies to provide themselves, at their own expense, with the necessary instruments and apparatus for testing the quality of said illuminating oils, and when called upon for that purpose to promptly inspect all oils hereinbefore mentioned, and to reject, for illuminating purposes, all oils which will emit a combustible vapor at a temperature of one hundred [and five] degrees, standard Fahrenheit thermometer, closed test; *provided*, the quantity of oil used in the flash test shall not be less than one-half pint. The oil tester adopted and recommended by the Iowa state board of health shall be used by the inspector and his deputies in all tests made by them. And said board shall prepare rules and regulations as to the manner of inspection in the use of the oil tester adopted, which rules and regulations shall be in effect and binding upon the inspector and his deputies appointed under this act.

SEC. 3. [**Oath of inspector.**] The state inspector, before he enters upon the discharge of the duties of his office shall take the oath or affirmation provided by law, and file the same in the office of the secretary of state, and execute a bond to the state of Iowa in a penal sum of not less than twenty thousand dollars, with sureties thereto, to be approved by the secretary of state, who shall justify as provided by law, and in addition thereto shall state under oath that they are not interested, directly or indirectly, in manufacturing, dealing in or vending any illuminating oils manufactured from petroleum; such bond to be conditioned for the faithful performance of the duties imposed upon him by this act, and which shall be for the use of all persons aggrieved by the acts of said inspector, or his deputies. Every deputy inspector, before entering on the discharge of his duties, shall take a like oath or affirmation prescribed herein for the state inspector, and execute to the state a bond in the penal sum of five thousand dollars, with like conditions and for like purposes, and with sureties who shall justify and have like qualifications as herein provided for the sureties for the state inspector, and such sureties shall be approved by the clerk of the district court of the county in which such deputy inspector resides, and said bond and oath shall be filed in the office of such clerk, and such deputy inspector shall, before entering upon the discharge of his duties, forward said clerk's certificate of such filing to the state inspector and to the secretary of state to be placed on file.

SEC. 4. (*Substituted by ch. 149, 21st g. a.*) **All inspections herein provided for** shall be made within the state of Iowa, and the inspector and the deputy inspectors shall be entitled to demand and receive from the owner or party calling on him or for whom he shall perform the inspection the sum of ten cents per barrel, and for the purposes of this act a barrel shall be deemed to be fifty-five gallons. All fees accruing for inspection shall be a lien upon the oil so inspected.

SEC. 5. (*As amended by ch. 82, 22d g. a.*) [**Duty of state inspector.**]*—*It shall be the duty of the state inspector, and every deputy inspector, to keep a true and accurate record of all oils so inspected and branded by him, which record shall state the date of inspection, the number of gallons rejected, the number of gallons approved, the number of gallons inspected, the number and kinds of barrels, cask, or packages, the name of the person for whom inspected, and the amount of money received for such inspection, and such record shall be open to the inspection of all persons interested, and every deputy inspector shall return a true copy of such record at the beginning of each month to the state inspector. It shall be the duty of the state inspector to make and deliver to the [governor] for the fiscal period ending the 30th day of June 1885, and every two years thereafter, a report made by himself and deputies for such period containing the information and items required in this act to be made on record, and the same shall be laid before the general assembly.

SEC. 6. [**Punishment for violation of act.**]*—*If any person or persons, whether manufacturer, vendor or dealer, shall sell or attempt to sell to any person in this state, any illuminating oil, the product of petroleum, whether manufactured in this state or not, which has not been inspected as provided in this act, he shall be deemed guilty of a misdemeanor, and subject to a penalty in any sum not exceeding three hundred dollars, and if any manufacturer, vendor or dealer in either or any of said illuminating oils shall falsely brand the package, cask or barrel containing the same as provided for by this act, or shall re-fill packages, casks or barrels, having the inspector's brand thereon, without erasing such brand, having the oil inspected and such packages, casks or barrels re-branded, he shall be guilty of a misdemeanor, and shall be subject to a penalty not exceeding three hundred dollars, or be imprisoned in the county jail not exceeding six months, or both, in the discretion of the court.

SEC. 7. (*As amended by ch. 149, 21st g. a.*) [**Empty barrels.**]*—*Any person

selling or dealing in illuminating oils produced from petroleum who shall [purchase,] sell or dispose of any empty kerosene barrel, cask or package before thoroughly cancelling, removing or effacing the inspection brand on the same, shall be guilty of a misdemeanor, and on conviction thereof, shall pay a fine of one dollar for each barrel, cask or package thus sold or disposed of; and any person who shall knowingly use any illuminating oil, the product of petroleum, for illuminating purposes before the same has been approved by the state inspector of oils, or his deputy, shall be guilty of a misdemeanor, and on conviction thereof shall pay a fine in any sum not exceeding ten dollars, for each offense.

SEC. 8. [**Adulteration prohibited.**].—No person shall adulterate with paraffine or other substance for the purpose of sale or for use, any coal or kerosene oils, to be used for lights, in such a manner as to render them dangerous to use; nor shall any person knowingly sell, or offer for sale, or knowingly use any coal or kerosene oil, or any products of petroleum for illuminating purposes which by reason of being adulterated, or for any other reason, will emit a combustible vapor at a temperature less than one hundred degrees standard Fahrenheit's thermometer, tested as provided in this act; *provided*, that the gas or vapor from said oils may be used for illuminating purposes when the oils from which said gas or vapor is generated are contained in closed reservoirs outside the building illuminated or lighted by said gas. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment in the discretion of the court; *provided, further*, that nothing in this act shall be so construed as to prevent the sale for and use in street lamps of lighter products of petroleum, such as gasoline, benzine, benzole, naphtha, or to prevent the use of machines or generators constructed on the principle of the "Davy safety lamp."

SEC. 9. [**Persons offending to be prosecuted.**].—It shall be the duty of the state inspector, or the deputy inspector, who shall know of the violation of any of the provisions of this act, to prosecute before a court of competent jurisdiction any person so offending. And in case the state inspector, or any deputy inspector, having knowledge of the violation of any of the provisions of this act, shall neglect to prosecute as required herein, he shall be deemed guilty of a misdemeanor and punished accordingly, and upon conviction, shall be removed from office.

SEC. 10. [**Oils prohibited.**].—No oil, nor fluid, whether composed wholly or in part of petroleum or its products, or of other substances or material, which will ignite and burn at a temperature of three hundred degrees of the standard Fahrenheit thermometer, open test, shall be carried as freight, nor shall the same be burned in any lamp, or vessel, or stationary fixture of any kind, in any passenger, baggage, mail or express car on any railroad, nor on any passenger boat moved by steam power, nor in any street railway car, stage coach, omnibus or other public conveyance in which passengers are carried, within this state. A violation of any of the provisions of this section shall be deemed a misdemeanor, and the offender shall, on conviction thereof, be fined not less than one hundred dollars, nor more than one thousand dollars, and shall be liable for all damages resulting therefrom.

SEC. 11. [**Penalty for false branding.**].—If any inspector or deputy shall falsely brand or mark any barrel, cask or package, or be guilty of any fraud, deceit, misconduct or culpable negligence in the discharge of his official duties, or shall deal in, or have any pecuniary interest, directly or indirectly, in any oil or fluids used or sold for illuminating purposes, while holding such office, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not exceeding one hundred dollars, or imprisoned not exceeding thirty days, and be liable to the party injured for all damages resulting therefrom.

SEC. 12. [**Removal from office.**].—It shall be the duty of the governor to

remove from office and to appoint a competent person in the place of any inspector who is unfaithful in the duties of his office.

SEC. 13. [**Penalty for selling oil below test.**—Any person who shall knowingly or negligently sell, or cause to be sold, any of the oils mentioned in this act, for illuminating purposes, except for the purposes herein authorized, which are below the standard and test required in this act, shall be liable to any one purchasing said oil, or to any person injured thereby, for all damages resulting from any explosion of said oil.

SEC. 14. (*As substituted by ch. 149, 21st g. a.*) [**Board of health shall make rules for inspection.**—(Within sixty days after the passage of this act, the state board of health shall make and provide the necessary rules and regulations for the inspection of illuminating oil and for the government of the inspector and deputy inspectors provided for in this act, and as contemplated by the provisions of this act, which shall be approved by the governor of the state, and when so approved shall be furnished by said board to the inspector and his deputies. When written complaint shall be presented to the governor charging the inspector or any deputy with a failure or refusal to comply with or carry out said rules and regulations, or any provisions of this act, he shall investigate such charge, and if well founded and sustained, the person against whom said charges were made shall be removed from office by the governor without delay. Said rules and regulations may be changed or modified by said board subject to the approval of the governor not oftener than once a year.)

SEC. 15. [**Repeal.**—Chapter 172 of the acts of the seventeenth general assembly and section 3901 of the code are hereby repealed.

Approved April 14, 1884.

(CHAPTER 58, LAWS OF 1878.)

REFUNDING OUTSTANDING BONDED INDEBTEDNESS.

An Act to authorize counties, cities, and towns, to refund outstanding bonded debt at a lower rate of interest, and to provide for the payment of the same.

SECTION 1. (*As amended by ch. 175, 20th g. a., and by ch. 14, 21st g. a.*) [**May refund corporate debts.**—*Be it enacted by the general assembly of the state of Iowa:* That counties, cities, and towns are hereby authorized and empowered, if by a vote of two-thirds of the board of supervisors or city or town council, as the case may be, it be deemed for the public interest to refund the indebtedness of such corporation, evidenced by the bonds thereof [now outstanding], and to issue the coupon bonds of such corporation in sums not less than one hundred dollars nor more than one thousand dollars, having not more than twenty years to run, redeemable in lawful money of the United States of America, at the pleasure of such corporation, after five years from the date of their issue, and bearing interest payable semi-annually at a rate not exceeding [six] per centum per annum, which bonds shall be substantially in the following form:

[**Form of bond.**—No.....

The..... of, in the state of Iowa, for value received, promises to pay or order, at the office of the treasurer of said in, on the first day of, or at time before that date after the expiration of five years at the pleasure of said, the sum of dollars, with interest at the rate of per cent per annum, payable semi-annually, on the first days of and in each year on presentation and surrender of the interest coupons hereto attached. This bond is issued by the of said under the provisions of chapter of the session laws of the seventeenth gen-

eral assembly of Iowa, and in conformity with a resolution of said, dated day of, 18. In testimony whereof, the said has caused this bond to be signed by the [L. S.] and attested by the seal attached this day of, 18.

And the interest coupons shall be in the following form:

\$. . . The treasurer of, Iowa, will pay to the holder hereof on the day of, 18., at in, dollars for interest on bond No., issued under provisions of chapter of the session laws of the seventeenth general assembly.

SEC. 2. [**Treasurer to sell bonds at not less than par.**].—The treasurer of any such corporation is hereby authorized to sell and dispose of the bonds issued under this act at not less than their par value, and to apply the proceeds thereof to the redemption of the outstanding bonded debt, or he may exchange such bonds for outstanding bonds par for par; but the bonds hereby authorized shall be issued for no other purpose whatever; *provided, however*, such corporation may appropriate not to exceed two per centum of the bonds herein authorized, to pay the expenses of preparing, issuing, advertising, and disposing of the same, and may employ a financial agent therefor.

SEC. 3. [**Levy of tax to pay interest.**].—The board of supervisors or common council of any city or town, as the case may be, shall cause to be assessed and levied each year upon the taxable property of the county, city or town, as the case may be, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds issued in conformity with the provisions of this act, accruing before the next annual levy, and such proportion of the principal that at the end of eight years the sum raised from such levies shall at least equal fifteen per cent of the amount of bonds issued; at the end of ten years, at least thirty per cent of the amount, and at and before the date of maturity of the bonds, shall be equal to the whole amount of the principal and interest; and the money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer of such county, city or town shall open and keep in his book a separate and special account thereof, which shall, at all times, show the exact condition of said bond fund.

SEC. 4. [**Upon notice to bondholder, interest to cease.**].—*Whatever* [whensoever] the amount in the hands of the treasurer of any such county, city, or town belonging to the bond fund, after setting aside the sum required to pay the interest coupons maturing before the next levy is sufficient to redeem one or more bonds, he may notify the owner of such bond or bonds that he is prepared to pay the same, with all interest accrued thereon, and if said bond or bonds are not presented for payment or redemption within thirty days after the date of such notice, the interest on such bond shall cease, and the amount due thereon shall be set aside for its payment whenever presented; *provided, however*, that nothing herein shall be construed to mean that any such bond or bonds issued in accordance with this act shall be due or payable before the expiration of five years after its date of issue.

[**Bonds paid in order of issue.**].—All redemptions shall be made in the exact order of their issuance, beginning with the lowest or first number, and the notice herein required shall be directed to the postoffice address of the owner, as shown by the record kept in the treasurer's office.

SEC. 5. [**When board or council neglect to make levy.**].—If the board of supervisors of any county or the common council of any city or town which has issued bonds under the provisions of this act shall fail to make the levy necessary to pay such bonds or interest coupons at maturity, and the same shall have been presented to the treasurer of any such county, city or town, and payment thereof refused, the owner may file the bond, together with all unpaid coupons, with the

auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office, and the executive council shall, at their next session as a board of equalization, and at each annual equalization thereafter, add to the state tax to be levied in said county, city or town, a sufficient rate to realize the amount of principal or interest past due and to become due prior to the next levy, and the same shall be levied and collected as a part of the state tax and paid into the state treasury, and passed to the credit of such county, city or town as bond tax, and shall be paid by warrants as the payments mature to the holder of such obligation, as shown by the register in the office of the state auditor, until the same shall be fully satisfied and discharged; *provided*, that nothing in this act shall be construed to limit or postpone the right of any holder of any such bonds to resort to any other remedy which such holder might otherwise have.

(Took effect March 22, 1878, by publication in newspapers.)

(CHAPTER 140, LAWS OF 1880.)

An Act to authorize cities and towns organized under special charters to refund outstanding bonded debts at a lower rate of interest, and to provide for the payment of the same.

SECTION 1. [**Powers of special chartered cities.**] *Be it enacted by the general assembly of the state of Iowa:* That all cities and towns organized under special charters are hereby vested with all the power and authority under such restrictions and provisions as are "cities and towns" by and under the provisions of chapter 58 of the laws of the seventeenth general assembly, and for such purpose the words "cities and towns," wherever used in such chapter 58, shall be construed as including "cities" and "towns" when organized under special charters.

(Took effect by publication in newspapers, March 30, 1880.)

(CHAPTER 21, LAWS OF 1886.)

TO VALIDATE COUNTY BONDS OUTSTANDING APRIL 11, 1884.

An Act to validate county bonds outstanding April 11, 1884.

WHEREAS, The twentieth general assembly of the state of Iowa passed an act amending chapter 58 of the acts of the seventeenth general assembly of the state of Iowa, which amendment took effect April 11, 1884, and is published as chapter 175 of the laws of the twentieth general assembly, and entitled "An act to amend chapter 58, acts of the seventeenth general assembly;" and,

WHEREAS, Doubts have arisen as to the effect of said amendment; now, therefore,

SECTION 1. [**Validated, etc.**]*—Be it enacted by the general assembly of the state of Iowa:* That all issues of bonds made by any county or counties in the state of Iowa, which are in all other respects legal and valid, and which are affected by the doubts as to the construction of said amendment, are hereby legalized and fully validated as if the said amendment had in terms extended the provisions of said chapter 58 of the laws of the seventeenth general assembly, to apply to bonds outstanding April 11, 1884.

(CHAPTER 146, LAWS OF 1876.)

IN RELATION TO CHANGING NAMES OF UNINCORPORATED TOWNS AND VILLAGES.

An Act to provide for the changing of the names of unincorporated towns and villages.

SECTION 1. [Board of supervisors may change name.]—*Be it enacted by the general assembly of the state of Iowa:* That the board of supervisors may change the name of unincorporated towns or villages within their respective counties in the manner herein prescribed.

SEC. 2. [Petition for change.]—When any number of the inhabitants of such town or village shall desire to change the name thereof, there shall be filed in the office of the county auditor of the proper county, at least ten days before the regular meeting of the board of supervisors, a petition for that purpose, which must be signed by at least two-thirds of the qualified electors of said town or village, setting forth the name by which said town or village is known, its location as near as practicable, and giving the name which they desire the town shall thereafter be known by.

SEC. 3. [Notice of petition.]—Notice of the filing of said petition and the time and place when the same shall be heard, and the objects and purposes thereof shall be given at least four weeks before the regular meeting of the board of supervisors, in like manner as the publication of original notices in civil actions where the defendant cannot be personally served within the state, or by posting up a notice of said petition in three public places in the town or village, the name of which is sought to be changed, at least four weeks before the meeting of said board, and also one copy of said notice for the same length of time on the front door of the court house of the county wherein the last term of the district court was held.

SEC. 4. [Hearing on petition.]—At the first regular meeting of said board after publication of notice is completed, the board of supervisors shall proceed to hear and determine said petition, unless said hearing is for good cause continued until the next meeting; and said board on the hearing of said petition, shall hear any remonstrances against the proposed change, and in all proceedings in relation to the hearing of said petition and remonstrances to the same, the said board shall be governed by the law regulating the hearing of petitions for the establishment of highways, so far as they are applicable and not inconsistent with this act.

SEC. 5. [When board shall order change.]—If, on hearing, it shall appear to the said board that two-thirds of the qualified electors of said town or village in good faith signed said petition for change of name, and desired the same, then the said board shall order said name to be changed as prayed for.

SEC. 6. [What order shall contain.]—Said order of the board shall thereupon be entered of record, giving the name of said town or village, as set forth in said petition, the new name given, the time when the change shall take effect, which shall not be less than thirty days thereafter, and directing that notice of said change be published in at least one newspaper published in said county, if any, and if there is no newspaper published in said county, then said notice shall be published by posting the same for four weeks on the front door of the court house where the last term of the district court of said county was held.

SEC. 7. [Proof of publication of notice.]—The ordinary proof of such publication shall be filed in the office of the county auditor, shall be by him filed for preservation, and on the day fixed by the board as aforesaid the change shall be complete.

SEC. 8. [**Costs, how taxed.**—In all cases arising under the provisions of this act where there is no remonstrance or opposition to said petition, the petitioners shall pay all costs, but in other cases, costs shall abide the result of the proceeding, and be taxed to either party, in the discretion of the board, or divided equitably between the parties.

Approved March 17, 1876.

(CHAPTER 45, LAWS OF 1880.)

An Act requiring boards of supervisors in certain cases to pay to cities of the first class a portion of the county bridge fund.

SECTION 1. [**Bridge tax collected in city to be expended on bridges therein.**—*Be it enacted by the general assembly of the state of Iowa:* That in each county in this state containing a city of the first class within the corporate limits of which there are any bridge or bridges exceeding three hundred feet in length, constructed by such city, and for the cost of constructing which such city shall be indebted in a sum of not less than one hundred thousand dollars, the board of supervisors be and hereby is required to annually set apart and pay to such city out of the bridge fund of such county, the whole amount of bridge tax collected on the taxable property within the limits of such city for that year, until such indebtedness be fully paid. That thereupon such bridge or bridges shall be and become free, and that such city be and hereby is required to apply the money so set apart and paid to it, and the tolls meanwhile collected on such bridge or bridges, after first paying the necessary expense of maintaining the same, on such indebtedness, and it shall be unlawful to use or apply the same or any part thereof for or to any other purpose, except that so much thereof as may be necessary for that purpose may be used to repair any bridge or bridges in such city, the repair of which is required for public safety.

(Took effect by publication in newspapers March 20, 1880.)

CHAPTER 12.

OF PLATS.

SECTION 559. [**Subdivision of lands.**—Every original owner or proprietor of any tract or parcel of land who has heretofore subdivided, or shall hereafter subdivide the same into three or more parts for the purpose of laying out any town or city, or any addition thereto or any part thereof, or suburban lots, shall cause a plat of such subdivision, with references to known or permanent monuments, to be made, which shall accurately describe all the subdivisions of such tract or parcel of land, numbering the same by progressive numbers, and giving the dimensions and length and breadth thereof, and the breadth and courses of all the streets and alleys established therein. Descriptions of lots or parcels of land in such subdivisions, according to the number and designation thereof on said plat contained, in conveyances or for the purposes of taxation, shall be deemed good and valid for all intents and purposes. The duty to file for record a plat as provided herein, shall attach as a covenant of warranty in all conveyances of any part or parcel of such subdivision by the original owner or proprietors against any and all assessments, costs and damages paid, lost or incurred by any grantee, or person claiming under him, in consequence of the omission on the part of said owner or proprietors to file such plat.

When a town is properly platted, certified, acknowledged and recorded, such acts amount to a conveyance of the streets, alleys, public squares, commons, etc., to, and vest the title in, the corporation or public, for the uses specified and intended, and the corporation or public is capable of taking and holding the title for such uses and trusts. *The City of Pella v. Scholte*, 21 Iowa, 463. See also *Fisher v. Beard*, 40 Id., 625. See also *Dubuque v. Benson*, 23 Id., 248.

In *The City of Des Moines v. Hall*, 24 Iowa, 234, it was held that where the proprietor caused land adjoining a city to be platted into blocks and lots with streets and alleys, as an addition to the city in conformity with chapter 41 of the code of 1851, that an entry upon the plat that the streets and alleys marked thereon were conveyed to the county within which the city was situated was ineffectual to deprive the latter, or to confer upon the former any rights in or control over such streets and alleys. The city had the sole right of control over the same.

The laying off and recording a town plat or addition thereto under that section of the code of 1851 had the effect to vest in the corporation the fee simple title to and exclusive dominion over the streets and alleys dedicated to public use. *Id.*

SEC. 560. [Plat to contain statement that it is made with the free consent of owners.]—Every such plat shall contain a statement to the effect that the above or foregoing subdivision of (here insert a correct description of the land or parcel subdivided), as appears on this plat, is with the free consent and in accordance with the desire of the undersigned owners and proprietors, which shall be signed by the owners and proprietors, and shall be duly acknowledged before some officer authorized to take the acknowledgment of deeds; and when thus executed and acknowledged, said plat shall be filed for record and recorded in the office of the recorder of the proper county.

SEC. 561. [Acknowledgment and recording equivalent to deed.]—The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use; or as is thereon dedicated to charitable, religious or educational purposes.

A public square of a city is held by the corporation in trust for the public, and cannot be sold on execution against the city for its general indebtedness. *Ransom v. Boal*, 29 Iowa, 68.

The fee in the streets of towns and cities laid out under the law of January 25, 1839, and the code of 1851, which was the same as this section, vests in the corporation in trust for the public, and not in the owners of lots fronting thereon. *Milburn et al. v. The City of Cedar Rapids et al.*, 12 Id., 246; *Ransom v. Boal*, 29 Id., 68; *The City of Clinton v. The C. R. & M. R. R. Co.*, 24 Id., 45; *The City of Des Moines v. Hall*, Id., 234; *The City of Pella v. Scholte*, Id., 283; *Pettingill v. Devin*, 35 Id., 344; *Davis v. The City of Clinton*, 50 Id., 585.

A city has the right to impose conditions upon which an adjacent property owner may be permitted to excavate an area under the sidewalk, and, until the conditions it has imposed are complied with, it is authorized to forbid such excavation to be made. *Davis v. The City of Clinton*, 50 Id., 585.

When a town is laid out with a street running parallel with a navigable river, and a narrow strip of land between the street and river is not embraced in the plat of the town, it will not be presumed that it was dedicated to public use as a front or water street for the town. *Coules v. Gray*, 14 Id., 1. See *Yost v. Leonard*, 34 Id., 1, as to intersection of streets.

The acknowledgment and recording of a city or town plat is equivalent to a deed in fee simple of such portions of the platted premises as are set apart for streets; and by a reservation, in such act, of the right to construct and use a mill-race across one of the streets included in the plat, the owners of the land platted simply retain an easement on such street; and when the race is constructed, they are bound to build and keep in repair a bridge across the same where it cuts the street, and if they neglect to do so, and the city repairs the bridge at its own expense, it may recover the cost of the same of the owners of the race. *City of Waterloo v. Union Mill Co.*, 59 Id., 437.

The acknowledgment and recording of a town plat, or of an addition thereto, operate to vest in the public the right to use the ground designated for highway purposes. *Lathrop v. The Central Iowa R'y Co.*, 69 Id., 105; *McDunn v. The City of Des Moines*, 39 Id., 286.

SEC. 562. [Streets may be altered after the manner for highways.]—Streets and alleys so platted and laid out, or which have been platted or laid out under any prior law of this state regulating private plats, may be altered or vacated in the manner provided by law for the alteration or discontinuance of highways.

Upon the vacation of a street, or any part thereof, the title to the land embraced in the street does not revert to the original owner, and his grantee cannot evict the owner of the adjacent prop-

erty who has taken possession of the land formerly constituting the street. *Day et al. v. Shroeder & Lindblom*, 46 Iowa, 546; *Pettingill et al. v. Devin et al.*, 35 Id., 344.

This section relates only to the manner of vacating streets and alleys in unincorporated towns and villages. *Dempsey v. City of Burlington*, 66 Id., 687.

SEC. 563. [Plat may be vacated.]—Any such plat may be vacated by the proprietors thereof, at any time before the sale of any lots therein, by a written instrument declaring the same to be vacated, duly executed, acknowledged, or proved and recorded in the same office with the plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys, commons, and public grounds laid out or described in such plat. And in cases where any lots have been sold the plat may be vacated, as herein provided, by all the owners of lots in such plat joining in the execution of the writing aforesaid.

What effect such vacation will have on private rights, see *Deeds v. Sanborn*, 26 Iowa, 419.

Under the provisions of sections 563 and 564 of the code, not only the original proprietors of a town plat may vacate the same, or a portion thereof, but persons who have acquired title from such original proprietors may exercise the power conferred by the statute. *McGrew v. The Town of Lettsville et al.*, 71 Id., 150.

The vacation of a portion of a town plat does not have the effect to take such portion out of the corporation. *Id.*

SEC. 564. [Not vacated when it affects the rights of others.]—Any part of a plat may be vacated under the provisions and subject to the conditions of this chapter, *provided* such vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat; and, *provided further*, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law.

SEC. 565. [Streets enclosed.]—When any part of a plat shall be vacated as aforesaid, the proprietors of the lots so vacated may enclose the streets, alleys and public grounds adjoining said lots in equal proportions.

SEC. 566. [Recorder's duty when vacated.]—The county recorder, in whose office the plats aforesaid are recorded, shall write in plain, legible letters across that part of said plat so vacated, the word "vacated," and also make a reference on the same to the volume and page in which the instrument of vacation is recorded.

SEC. 567. [Plats vacated may be re-platted and conveyed accordingly.]—The owner of any lots in a plat so vacated may cause the same and a proportionate part of adjacent streets and public grounds to be platted and numbered by the county surveyor; and when such plat is acknowledged by such owner, and is recorded in the record office of the county, such lots may be conveyed and assessed by the numbers given them on such plat.

SEC. 568. [Plat to be made and recorded: by whom.]—Whenever the original owner or proprietor of any sub-division of land, as contemplated in section five hundred and fifty-nine of this chapter, have sold or conveyed any part thereof, or invested the public with any rights therein, and have failed and neglected to execute and file for record a plat as provided in section five hundred and fifty-nine of this chapter, the county auditor shall notify some, or all, of such owners and proprietors by mail or otherwise, and demand the execution of said plat as provided; and if such owners or proprietors, whether so notified or not, fail and neglect to execute and file for record said plat for thirty days after the issuance of such notice, the auditor shall cause to be made the plat of such sub-division and any surveying necessary therefor. Said plat shall be signed and acknowledged by the auditor, who shall certify that he executed by reason of the failure of the owners or proprietors named to do so, and filed for record; and, when so filed for record, shall have the same effect for all purposes as if executed, acknowledged and recorded by the owners or proprietors themselves. A correct

statement of the costs and expenses of such plat, surveying and recording, verified by oath, shall be by the auditor laid before the first session of the board of supervisors, who shall allow the same, and order the same to be paid out of the county treasury, and who shall, at the same time, assess the said amount, *pro rata*, upon all the several subdivisions of said tract, lot or parcel so subdivided; and said assessment shall be collected with and in like manner as the general taxes, and shall go to the general county fund; or said board may direct suit to be brought in the name of the county before any court having jurisdiction, to recover of the said original owners or proprietors, or either of them, the said cost and expense of procuring and recording said plat.

SEC. 569. [When subdivisions of land are not described by metes and bounds.]—Whenever any congressional subdivision of land of forty acres or less, or any lot or subdivision is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof can not, in the judgment of the county auditor, be made sufficiently certain and accurate, for the purposes of assessment and taxation, without noting the metes and bounds of the same, the auditor shall require and cause to be made and recorded, a plat of such tract or lot of land with its several subdivisions in accordance with the provisions of this chapter; and he shall proceed in such cases according to the provisions of section five hundred and sixty-eight, and all the provisions of said section in relation to plats of towns, cities, and so forth, shall govern as to the tracts and parcels of land in this section referred to.

SEC. 570. [Conveyance deemed warranty.]—Every conveyance of land in this state shall be deemed to be a warranty that the description therein contained is sufficiently definite and accurate to enable the auditor to enter the same on the plat book required by law to be kept; and when there is presented to be entered on the transfer book, any conveyance in which the description is not, in the opinion of the auditor, sufficiently definite and accurate, he shall note said fact on said deed, with that of the entry for transfer, and shall notify the person presenting the same that the land therein not sufficiently described must be platted within thirty days thereafter. Any person aggrieved by the opinion of the auditor may, within said thirty days, appeal therefrom to the board of supervisors, by claiming said appeal in writing, and thereupon no further proceedings shall be taken by the auditor, and at their next session the board of supervisors shall determine said question and direct whether or not said plat shall be executed and filed and within what time; and if the grantor in such conveyance shall neglect for thirty days thereafter to file for record a plat of said land and of the appropriate congressional subdivision in which the same is found, duly executed and acknowledged as required by the auditor, or in case of appeal as directed by the board of supervisors, then the auditor shall proceed as is provided in section five hundred and sixty-eight of this chapter, and cause such plat to be made and recorded, and thereupon the same proceedings shall be had and rights shall accrue, and remedies had, as are in said section provided. Such plat shall describe said tract of land and any other subdivisions of the smallest congressional subdivision of which the same is part, numbering them by progressive numbers, setting forth the courses and distances, and number of acres, and such other memoranda as are usual and proper; and descriptions of such lots or subdivisions according to the number and designation thereof on said plat shall be deemed good and sufficient for all purposes of conveyancing and taxation.

SEC. 571. [Plats heretofore made legalized.]—None of the provisions of this chapter shall be construed to require replatting in any case where plats have been made and recorded in pursuance of any law heretofore in force; and all plats heretofore filed for record, and not subsequently vacated, are hereby declared valid, notwithstanding irregularities and omissions in the manner or form of acknowl-

edgment or judge's certificate; but the provisions of this section shall not affect any action or proceeding now pending.

SEC. 572. [**Penalty where plats have not been made.**—Any person who shall dispose of or offer for sale, or lease any lots in any town, or addition to any town or city, until the plat thereof has been duly acknowledged and recorded as provided in this chapter, shall forfeit and pay fifty dollars for each lot and part of lot sold or disposed of, leased, or offered for sale.

This section does not operate as a prohibition upon the sale itself, but only imposes a penalty upon the seller, and hence the purchase of a lot, the plat of which is not recorded, is not rendered invalid by this section. *Watrous & Snouffer v. Blair et al.*, 32 Iowa, 58.

See also *Pangburn v. Westlake et al.*, 38 Id., 546.

(CHAPTER 61, LAWS OF 1874.)

VACATION OF TOWN-PLATS.

An Act in relation to vacation of town-plats. [Additional to code, title IV, chapter, 12: "Of plats."]

[**When plats may be vacated.**—*Be it enacted by the general assembly of the state of Iowa:* That whenever the owners of any piece of land, not less than forty acres in amount, which has been platted into town lots, and the plat of which has been recorded, shall desire to vacate said plat or part of plat, it may be done in the manner following: A petition, signed by all the owners of the town or part of the town to be vacated, shall be filed in the clerk's office of the district court of the district in which the land so platted lies, and notice of such petition shall be given, at least four weeks before the meeting of the court, by posting notices in three conspicuous places in the town where the vacation is prayed for, and one upon the court-house door of the county. At the term of court next following the filing of petition and notice, the court shall fix the time for hearing the petition, and notice of the day so fixed shall be given by the clerk of the court in some newspaper published in the county at least one week before the day appointed for the hearing. At the hearing of the petition, if it shall appear that all the owners of lots in the town or part of the town to be vacated desire the vacation, and there is no valid objection thereto, a decree shall be entered vacating such portion of the town, and the streets, alleys, and avenues therein, and for all purposes of assessments, such portion of the town shall be as *it* (if) it had never been platted into lots; *Provided, however,* that if any street as laid out on the plat shall be needed for the public use, it shall be excepted from the order of vacation, and shall remain a public highway: *And further provided,* that this act shall not affect cities of the first and second class.

Approved March 21, 1874.

(CHAPTER 53, LAWS OF 1880.)

RELATIVE TO TOWN OR CITY LOTS.

An Act to provide that lands to be laid out into town or city lots shall be free from incumbrance, or that security shall be given against such incumbrance, and that such lots when thus laid out shall be accurately described relative to some established corner of the congressional division of which they are part, and repealing chapter 25 of the laws of the fifteenth general assembly, and chapter 63 of the laws of the sixteenth general assembly.

SECTION 1. [**Certificate of no incumbrance.**—*Be it enacted by the general assembly of the state of Iowa:* That whenever any person or corporation shall lay

out any parcel of land into town or city lots in accordance with chapter 12, title IV, of the code, such person shall procure from the treasurer of the county in which the land lies a certified statement that the land thus laid out into lots, streets and alleys, is free from taxes, and shall also procure a certified statement from the recorder of such county, that the title in fee to said land is in such proprietor, and that the same is free from every incumbrance; which certified statements shall both be filed with the recorder before the plat of said town or city lots shall be admitted to record or be of any validity: *Provided, however,* that if the parcel of land so laid out shall be incumbered with a debt certain in amount, and which will fall due not more than two years after the making of the affidavit hereinafter provided for, and which the creditor will not accept with accrued interest to the day of proffered payment, if it draws interest, or with a rebate of interest at the rate of six per centum per annum if it draws no interest, or if the creditor cannot be found, then such proprietor, and if a corporation, its proper officer or agent, may file with the recorder of such county his affidavit, stating either that such proprietor has offered to pay such creditor the full amount of his debt, with interest or with a rebate of interest, as the case may be, and that such creditor would not accept the same, or that such creditor cannot be found, whereupon such proprietor may execute a bond double the amount of such incumbrance with three sureties, who shall be freeholders of the county, to be approved by the recorder and clerk of the county, which bond shall run to the county, and shall be for the benefit of the purchasers of any such town or city lots, and shall be conditioned for the payment of such incumbrance and the cancellation thereof of record as soon as practicable after the same becomes due, and for the holding of all such purchasers and those claiming under them forever harmless from such incumbrance; and when such affidavit and bond shall have been filed with the recorder, together with a certificate of the treasurer that said land is free from taxes, and the certificate of the recorder that the title in fee to said land is in such proprietor, and that the same is free from all incumbrance, except that secured by said bond, said plat shall be admitted to record, and be equally valid as if such proprietor had filed with the recorder the certificate of such recorder that said land was free from all incumbrance.

SEC. 2. **All the certificates, affidavits and bonds** provided for in the preceding section shall be recorded in connection with the plat to which they relate, in the office of the recorder before the said plat or the record thereof shall be of any validity.

SEC. 3. **The record and plat of every town, or city,** or addition thereto, which may be thus laid out, shall give the bearing and distance from some corner of a lot or block in said town, or city, or part thereof, to some corner of the congressional division of which said town, city, or addition is a part.

SEC. 4. The provisions of this act shall not prevent the annexation of contiguous territory to cities and towns under sections 426, 427, 428 and 429 of chapter 10, title IV, of the code, and chapter 47 of the sixteenth general assembly, as amended by chapter 169 of the laws of the seventeenth general assembly.

SEC. 5. **[Repeal.]** Chapter 25 of the laws of the fifteenth general assembly, and chapter 63 of the laws of the sixteenth general assembly are hereby repealed.

Approved March 16, 1880.

(CHAPTER 162, LAWS OF 1884.)

MONUMENTS TO DECEASED SOLDIERS.

An Act to provide for the erection of monuments to deceased soldiers of the late war.

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

Approved April 5, 1884.

TITLE V.

OF ELECTIONS AND OFFICES.

CHAPTER 1.

OF THE ELECTION OF OFFICERS, AND THEIR TERMS.

SEC. 573. (*Constitutional amendment 1, of 1884.*) The general election for state, district, county, and township officers shall be held on the Tuesday next after the first Monday in November.

SEC. 574. **Special elections** authorized by any law, or held to supply vacancies in any office to be filled by the vote of the qualified voters of the entire state, or of any district, county, or township, may be held at the time designated by such law, or by the officer authorized to order such election.

SEC. 575. **All vacancies in office** created by the expiration of a full term shall be supplied at the general election next preceding the time of expiration.

SEC. 576. (*As substituted by ch. 72, 16th g. a.*) [The term of office of all officers, except highway supervisors, chosen at a general election for a full term, shall commence on the first Monday in January next thereafter, except when otherwise provided by the constitution. The term of office of highway supervisor shall commence fifteen days after the date of the general election. The term of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor.]

SEC. 577. [**Proclamation by governor.**]—At least thirty days before any general election, the governor shall issue his proclamation designating all the offices to be filled by the vote of all the electors of the state, or by those of any congressional, legislative, or judicial district, and transmit a copy thereof to the sheriff of each county.

SEC. 578. **The sheriff shall give at least ten days' notice thereof**, by causing a copy of such proclamation to be published in some newspaper printed in the county; or, if there be no such paper, by posting such a copy in at least five of the most public places in the county.

SEC. 579. A similar proclamation shall be issued before any special election ordered by the governor, designating the time at which such special election shall be held, and the sheriff of each county in which such election is to be held shall give notice thereof as above provided.

SEC. 580. [**Election of governor.**]—The governor, lieutenant-governor, and superintendent of public instruction shall be chosen at the general election in each odd numbered year.

SEC. 581. [**Other state officers.**]—The secretary of state, auditor of state, treasurer of state, register of state land office, and attorney-general, shall be chosen at the general election in each even numbered year, and their term of office shall be two years.

SEC. 582. [**Judges supreme court.**]—One judge of the supreme court shall be chosen at the general election in each odd-numbered year, and a judge of said court shall also be chosen at the general election in the year 1876, and each sixth year thereafter.

(CHAPTER 7, LAWS OF 1876.)

TO INCREASE THE NUMBER OF THE SUPREME COURT.

An Act to increase the number of judges of the supreme court.

SECTION 1. [Court to consist of five judges.]—*Be it enacted by the general assembly of the state of Iowa:* That hereafter the supreme court shall consist of five judges, three of whom shall constitute a quorum to hold court.

SEC. 2. The regular term of the **additional judge** of the supreme court, provided for by this act, shall commence on the first Monday of January, 1879, and he shall be chosen at the general election in the year 1878, and every six years thereafter.

SEC. 3. **The vacancy in the office of judge** of the supreme court created by this act, shall be filled by appointment by the governor; the person so appointed shall hold his office until the general election in the year 1876, and until his successor is elected and qualified, and at said general election there shall be chosen a judge of said court to fill the unexpired portion of the vacancy hereby created.

(Took effect by publication in newspapers, February 12, 1876.)

SEC. 583. **The clerk and reporter** of the supreme court shall be chosen at the general election in the year 1874, and each fourth year thereafter, and their terms of office shall be four years.

SEC. 584. **A district judge and district attorney** shall be chosen in each judicial district except the twelfth and thirteenth, at the general election in the year 1874, and each fourth year thereafter.

SEC. 585. (Repealed by chapter 134, laws of 1886.)

SEC. 586. [Circuit judges.]—A circuit judge shall be chosen in each judicial district at the general election in the year 1876, and every fourth year thereafter, and his term of office shall be four years, and shall commence on the first day of January next after his election.

SEC. 587. [Representatives.]—Members of the house of representatives shall be chosen by the qualified voters of the respective representative districts in each odd-numbered year.

SEC. 588. [Senators.]—Senators in the the general assembly, to succeed those whose term of office is about to expire, shall be chosen by the qualified voters of the respective senatorial districts in each odd-numbered year, for the term of four years.

SEC. 589. [County officers.]—Each county shall elect at the general election in each even-numbered year, a clerk of the district and circuit courts, and a recorder of deeds; and in each odd-numbered year, an auditor, a treasurer, a sheriff, a coroner, a county superintendent, and a surveyor; and each of said officers shall hold his office for the term of two years.

SEC. 590. [Justices and constables.]—Two justices of the peace and two constables shall be chosen by the qualified voters of each township at the general election of each even-numbered year, and shall hold their offices for the term of two years.

A constable who has been re-elected and continues to act as before, but fails to file a new bond or take a new oath, is an officer *de facto*, and, in the absence of proof that an order has been made by the proper officer requiring him to qualify within a time fixed, it is equally a crime to assist a prisoner to escape from his custody as though he was an officer *de jure*. *The State v. Bates*, 23 Iowa, 96.

SEC. 591. (*Amended by ch. 161, 18th g. a.*) [Election of clerk, assessor and highway supervisors for two years.]—(That at the general election in the year 1880, and biennially thereafter, there shall be elected in each civil township

of the state by the qualified electors thereof, in the manner prescribed by law, one township clerk, one assessor, and one highway supervisor for each highway district, who shall hold their offices for the term of two years and until their successors are elected and qualified.)

(CHAPTER 12, LAWS OF 1878.)

TOWNSHIP TRUSTEES.

An Act to amend section 591, title V, chapter 1 of the code, relating to terms of office of township trustees.

SECTION 1. [**Election of trustees.**]*—Be it enacted by the general assembly of the state of Iowa:* That there shall be three trustees elected in each township, who shall hold their office for the term of three years, except as hereinafter provided.

SEC. 2. [**Manner of electing.**]*—At the general election in 1878 there shall be elected in each township of the state, three trustees, one of whom shall hold his office for one year, one for two years, and one for three years, their respective terms to be determined by lot by the board of canvassers of said township; and annually thereafter there shall be one trustee elected, who shall continue in office for three years, and until his successor is elected and qualified.*

SEC. 3. [**Repealed.**]*—All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.*

(Approved February 20, 1878.)

SEC. 592. [**Additional justices and constables.**]*—One or two additional justices of the peace, and one or two additional constables may be elected in each township, if the trustees so direct, by posting up notices of the same in three of the most public places in the township, at least ten days before election.*

SEC. 593. [**Justices and constables county officers.**]*—Justices of the peace and constables shall be considered as county officers under the provisions of this title, but they shall be voted for by the voters of their respective townships.*

Justices of the peace are county officers, under this section, and the board of supervisors, and not the township trustees, is charged by statute with the duties of canvassing the return of the election of a justice of the peace. *Lynch v. Vermazen*, 61 Iowa, 76.

Whether a justice of the peace, although deemed to be a county officer for some purposes, can hold a court in another township than the one for which he was elected, *query*. *Ely v. Dillon*, 21 Id., 47.

And where a case was heard and decided by a justice of another township it was *held* no ground for dismissing the action, the action having been commenced before a justice having jurisdiction. *Id.*

CHAPTER 2.

(This chapter of the code was repealed, and the following chapter enacted in lieu thereof:

(CHAPTER 161, LAWS OF 1886.)

REGISTRATION OF VOTERS IN CITIES.

An Act to provide for ascertaining the citizens who shall be entitled to vote in all incorporated cities, to repeal section 618 of the code and to repeal chapter two (2), title five (5) of the code.

SECTION 1. [**Repeal.**]*—Be it enacted by the general assembly of the state of Iowa:* Chapter 2, title 5 of the code is hereby repealed and the following sections of this act enacted in lieu thereof.

SEC. 2. [**Cities shall have exclusive jurisdiction.**]*—For all purposes of election known to the laws of the state of Iowa after July 4, 1886, no city of the state shall have attached to its jurisdiction for the purpose of voting at such elections any part of a township or territory outside of the corporate boundaries of such city, and the voting precincts in such city for all elections now provided by law, whether township, city, county, state, national or special elections, shall be the wards of such city, or if a ward or wards are divided into voting precincts in any city, then for such city or cities such divisions shall be the voting precincts, and all territory of a township or townships in which such city may be situated and outside of the corporate limits of such city, shall be divided into one or more voting precincts for all election purposes, as may be determined by the board of supervisors as now provided by law. All acts or parts of acts that might seem to be in conflict with this section of this act are hereby changed to the extent of being made to conform herewith.*

SEC. 3. (*As amended by ch. 48, 22d g. a.*) [**Council shall appoint two registers: how selected.**]*—In all incorporated cities of this state, (having a population of twenty-five hundred (2,500) or more, as determined by the last preceding state or national census), the city council shall, on or before the sixth Monday next preceding the general election in November of each year, appoint one suitable person from each of the two opposing political parties which cast the greatest number of votes at the then next general preceding election, from three names handed in by the chairman of the city central political committee of each of such parties, to be registers for such election precinct, in such cities, for the registration of votes therein; said registers shall be electors of the election precincts in which they shall act; shall be temperate, of good habits, and of good reputation and character, and of generally recognized clerical ability, and able to speak the English language understandingly; shall hold their offices for one year, and shall take an oath or affirmation to discharge their duties according to law. If for any cause, such registers, or any of them, shall not be appointed at or before the time above mentioned, or, if appointed, shall be unable for any cause to discharge the duties of such office, the mayor of such city shall forthwith, on similar recommendation as above provided, make such appointments, and shall also fill all vacancies, and persons so appointed by the mayor shall have the same qualifications, shall hold their offices for the same time, and shall be subject to the same duties as if appointed by the city council, except that all appointments, in cases of vacancies, shall be for the unexpired terms of office.*

[Failure of mayor to appoint.]—Should the mayor, upon the request of five freehold electors, fail for a period of three days to perform the duties aforesaid, he shall forfeit and pay, at the suit of any such electors, to be prosecuted in any court of competent jurisdiction, the sum of one hundred dollars per day, for the equal benefit of the city and suitor.

SEC. 4. (Repealed by chapter 48, twenty-second general assembly.)

SEC. 5. **[Requisites of electors.]**—Any person to be entitled to vote, at any of the elections mentioned in the preceding sections, shall appear before the registers of the election precinct where he is entitled to vote, at the time and place designated for the registration of voters, and make and subscribe a statement under oath, in a suitable registration book to be provided for the purpose by the city clerk and furnished to the registers at the equal expense of the city and county, and by them kept open for public inspection and examination during the time fixed for the registration, which statement shall contain the following in the following form:

Register of Voters.....Precinct..... ..Ward.

No.	Residence.	Name.	Nativity.	Color.	TERM OF RESIDENCE.			Naturalized.	Date of papers.	Court.	By act of congress.	Qualified voter.	Date of application.	Last preceding place of resid c.	Signature.
					Precinct, street, number.	County.	State.								
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The signature of the applicant shall be made at the right hand end of the line under the column "signature," one of the registers having first administered to him this form of oath: "You do solemnly swear (or affirm) that you will fully and truly answer all such questions as shall be put to you touching your place of residence, name, place of birth, your qualifications as an elector, and your right, as such, to register and vote under the laws of this state." After which the registers or either of them shall propound questions to the applicant for registration in relation to his name, his then place of residence, street and number; how long he has resided in the precinct where the vote is offered, what was the last place of his residence before he came into that precinct and also as to his citizenship, and whether a native or naturalized citizen, and, if the latter, when, where, and in what court, or before what officer he was naturalized, or whether by act of congress; whether he came into the precinct for the purpose of voting at that election; how long he contemplates residing in the precinct; and all such other questions as may

tend to test his qualifications as a resident of the precinct, citizenship and right to vote at the polls; then, if the applicant appears to have the right to be registered, the registers shall fill out the above prescribed form of statement, whereupon the applicant shall sign as aforesaid and thus his statement for registration shall be complete under oath.

SEC. 6. Such statement shall be dated and numbered consecutively, beginning with number one each time for registration aforesaid. No person shall register at any other place than as above designated, or at any other time, except as hereinafter provided. At the close of each day's registration, the registry shall be ruled off to prevent fraudulent entries, and after the completion of the final registration and the certified copy provided for in section 8 hereof, the registers shall forthwith return the registration to the city clerk, who shall keep the same at all times open to public inspection.

SEC. 7. (As amended by ch. 48, 22d g. a.) [Registers shall prepare alphabetical list.]—The registers shall, within three days after the registration [for each general annual election] has been made, prepare an alphabetical list for their respective voting precincts of the names of all persons so registered, their residences, their last preceding places of residence, and the dates of removal when removals occur within one year; their nativity; their color; their term of residence in precinct, county and state; whether naturalized, date of papers, the naturalizing court, or place of naturalization if court is not known; whether naturalized by act of congress, and date of application for registration; which list they shall forthwith post or cause to be posted up conspicuously at the usual place of holding elections at such precinct, for inspection of the public.

SEC. 8. The registers shall be in attendance again at their respective places for the registration of voters on the Wednesday of the week preceding the day of each election in the state, provided by law for township, city, county, state, national or special elections, for the purpose of revising or correcting the lists aforesaid, and for this purpose they shall meet at 9 o'clock A. M. and remain in session until 8 o'clock P. M. of that day; and they shall there revise, correct, add to, and strike from, and complete the said lists, and shall on that day receive and add to the said lists the names of any persons who would on said election days be entitled, under the provisions of the constitution and laws of this state, to exercise the right of suffrage in their election precincts. Upon the revision and completion of each of said lists, the registers shall make a copy thereof, which, duly certified by the registers, with the proper number and date of registry in each case added, the registers shall deliver or cause to be delivered to the judges of election of the proper precinct on every such election day, before the opening of the polls. The judges of election shall carefully preserve the said lists for their use on election day; no vote shall be received at any election aforesaid unless the name of the person offering the vote be on such registry made and completed as before provided, preceding the election; a person whose name is on the registry may be challenged, and the same oath shall be put, and the same proceedings had as are prescribed by law for all such cases. This section shall be taken and held by every judicial and other tribunal as mandatory and not directory. The judges of election shall designate one of their number, or one of the clerks, at the opening of the polls, to check the name of every voter voting in such precinct whose name is on the registry. Any vote which shall be received by the judges of election in contravention of any provisions of this act shall be void, and shall be rejected from the count in any legislative or judicial proceeding wherein any result of the election is involved. The judges of election shall deliver the lists aforesaid to the official as by law provided to whom they shall deliver the returns of the elections. The registers under their duties aforesaid shall register every male applicant who would be twenty-one years of age on the day of the next election, if otherwise qualified, and every applicant

who has commenced to reside in such precinct, at least the legal time before such election, now required by law, down to the date of the election, in order to be a legal voter in such precinct, according to the character of the election about to take place, shall be entered in such registry, but unless, on the day of election, he shall have resided for the legal time in such election precinct, he cannot vote therein, although otherwise qualified.

SEC. 9. [The proceedings of said registers shall be open, and all persons entitled to vote in said precinct shall have the right to be heard by said registers in reference to corrections or additions to said lists. No name shall be placed upon any such lists of the name of persons, nor shall any name be added thereto, except of one who shall have appeared in person before said registers; and shall furnish, upon demand, and to the satisfaction of the registers, the same proofs of his right to register as may by law be required by judges of election of any person desiring to vote. *Provided:* that if an elector is, on account of sickness, which confines him to his residence in his precinct, unable to go to the registers on any day they may be in session, it shall be the duty of the registers, on the affidavit made before them, of a registered elector to visit such sick elector at his place of residence in the precinct and place the name of such sick person on the registration list if he be found entitled to be registered; such visits by the registers for the registration of such invalids shall be at no time during any registration day except between the hours of 7 A. M. and 8 A. M. or between 9 P. M. and 10 P. M. Any one of the registers, on the points hereinbefore provided, may at any time administer an oath or affirmation to any applicant, that he shall true answers make to all questions put to him touching his qualifications as an elector.

SEC. 10. That if any register shall fail to perform any duty in any of the preceding sections of this act prescribed, he shall be liable to a penalty of one hundred dollars, to be recovered on the complaint of any person, before any court of competent jurisdiction; and if any register or judge of election shall willfully neglect or disregard any duty imposed in any of said sections, or make or permit to be made any registration, statement or list, except at the time and place and in the manner in said sections prescribed, or shall knowingly make or permit to be made any false statement, as aforesaid, or if any person shall willfully make or authorize to be made any statement in said section required, false in any particular, or shall violate any provisions thereof, every such register or judge of election, and every such person or persons, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than fifty dollars, or be imprisoned in the county jail not less than twenty days nor more than six months, or both, at the discretion of the court.

(Section 11 repealed by chapter 48, twenty-second general assembly.)

SEC. 12. The times and places of making registrations of voters shall be published by the mayor in the two leading political party daily newspapers published in every such city for a period of three days prior to the opening of the registry, or if there are no daily papers of the two leading political parties published in such city, then the notice shall be published one week before the date of the registry book, in the weekly paper of each of such political parties, inviting the voters to present themselves for registration at their respective precincts within the proper time, under the risk of being debarred the privilege of voting at such election.

SEC. 13. (As amended by ch. 48, 22d g. a.) That during the receiving and counting of the ballots in any voting precincts of such cities [and in any voting precinct made up of the townships outside of the city limits, whose polling place is within the corporate limits of said city, as hereinafter provided], it shall be unlawful for persons to congregate or loiter within one hundred feet of the voting place, or to hinder or delay in any manner any elector in reaching or leaving the place fixed for casting his ballot. It shall be unlawful for any person within said

distance of one hundred feet to give or offer to give any ticket or ballot to any one not a judge of election, or to fold or unfold, or display any ballot which he intends to cast so as to reveal its contents, or to solicit the vote of any elector, or attempt in any way to influence him in the matter of casting his vote. The judges of election shall, so far as practicable, prevent any violation of this section, by having printed copies of this section conspicuously posted within one hundred feet of the voting place and in other ways, and they and each of them shall order the arrest of any person guilty of violating any of its provisions, or guilty of any breach of the peace, or disorderly conduct, and all special policemen and all other persons are authorized and required to obey the lawful orders and commands of said judges of elections, given to prevent violations of this section. But orders for the arrest of such persons shall not prevent them from properly casting their votes. The city council is authorized and required to detail and employ on the nomination of the principal political committee of each political party recognized as the two leading parties from citizens or the police force of the city, from two to four special policemen for each precinct, and duly empower them for the special occasion of each election, who shall be men of good moral character and reputation, in equal numbers from each of the leading political parties, to prevent the violation of any of the terms, provisions, or requirements of this section, or of any order or command made in pursuance with the provisions hereof, and any person violating or attempting to violate any of such terms, provisions, requirements, orders or commands shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished as provided in the last penal clause of section 10 of this act, and no other peace officer for preserving order shall exercise his authority at or near such voting places than those above named unless called in by an unexpected, dire emergency. *Provided*, that nothing in this section shall be construed to prohibit the presence at the polls of any persons who are authorized by law to perform, or charged likewise, with the performance of official duties at the election, or of any persons not exceeding three from each political party having candidates to be voted for, at such elections, to act as challenging committees who are duly appointed and accredited by the principal committee of such political parties, or organizations, respectively, or of persons not exceeding three from each such political parties, appointed and accredited in the same manner, as before prescribed, for challenging committees to witness the counting of ballots.

SEC. 14. **Voting precincts made up of the townships** outside of the city limits of the city which is situated in such township or townships may, if preferred for the convenience of the voters therein, have their polling places for all election purposes, at some room or rooms in the court house, or other buildings within the corporate limits of such city, as the board of supervisors may provide. Section 618, chapter 3, title V of the code is hereby repealed.

Approved, April 12, 1886.

(CHAPTER 48, LAWS OF 1888.)

REGISTRY LAW AMENDED.

An Act to amend chapter 161 of the acts of the twenty-first general assembly, relating to elections held within cities and to registration of voters therein.

SECTION 1. [**Place of registration.**]*—Be it enacted by the general assembly of the state of Iowa:* That sections 4 and 11 of chapters 161, of the acts of the twenty-first general assembly be and the same are hereby repealed, and the following is enacted in lieu thereof: The place for the registration of voters in and for every

election precinct in the cities mentioned in section three of the act of which this is amendatory, shall be the usual places of holding elections therein. The registers shall be in attendance at their respective places for registration on the second Thursday next preceding every general annual election, for the purpose of registering voters, copying registry lists and correcting the same, and performing such other duties as are required of them in order to properly prepare the necessary lists for the ensuing election. They shall be in attendance from 8 o'clock A. M. till 9 o'clock P. M.; shall personally supervise all registration and shall be in constant attendance during the hours designated for the discharge of their duties. For the general annual election in 1888, and that of every fourth year thereafter, they shall remain in attendance three days, and for every other general annual election they shall remain in attendance two days.

SEC. 2. [New lists every fourth year.]—The registers shall make a complete new registry of voters for the general annual election of 1888, and for that of every fourth year thereafter. For all other general state elections they shall prepare a new registry list, based on that of the last preceding general annual election, and every person whose name appears upon such registry list of the last preceding general annual election shall be entered upon the new registry list, as also the facts showing his qualification as a legal voter as they appear upon such last preceding registry list.

SEC. 3. [Other general and special elections.]—For all other general or special elections, whether state, county, city or township, the registry list for the last preceding general annual election shall be used, and every person registered thereon shall be considered as registered to vote at such election, except as such list may be corrected and changed by the registers, as by law provided; said registers shall meet upon the Saturday preceding every election, whether general or special, township, city, state or national, instead of upon Wednesday, as provided in section 8, of said chapter 161; and except as to said change of meeting from Wednesday to Saturday preceding said election, all of the provisions of said section eight shall remain unimpaired and in full force.

SEC. 4. [Registry list certified.]—Upon the revision and completion of said registry lists they shall be duly certified by the registers, who, after making the same corrections upon and additions to the alphabetical lists, shall deliver the registry and alphabetical lists to the judges of election for the proper precinct, on every such election day, before the hour for the opening of the polls.

SEC. 5. [Alphabetical lists.]—During the days when the registers are in session, they shall, when not actually engaged in registering voters, prepare the alphabetical lists and complete their labors with all reasonable dispatch. They shall receive as compensation \$2.50 per day, for each calendar day upon which they shall be employed, for all services required of them under the provisions of this act. They shall be paid their compensation by the county, except that in case of city elections they shall be paid by the city.

SEC. 6. [Lists to be preserved.]—The city clerk shall carefully preserve all registry and alphabetical lists and poll books and other papers pertaining to the last preceding election for eighteen months after the election at which they were first issued, and may then destroy them unless a contest be then pending over the election of a person voted for at such election, in which case he shall preserve those so bearing upon such contest until after the same has been finally disposed of. He shall, on the application of the registers, deliver to them, prior to their first meeting for each election, the registry and alphabetical lists and poll books which they require in order to properly prepare the necessary lists for the next ensuing election, all of which shall be returned to him by them when they have completed their work for such election, except such as they are required to deliver to the judges of election.

SEC. 7. [Session on day of election.]—The registers shall also be in session on the day for the holding of each and every election, at some place convenient to, but not within one hundred feet of the voting place, and during all the hours in which, by law, the polls are required to be kept open, for the purpose only of granting certificates for registration to persons who, being electors, are not registered; but no such certificate shall be granted except to a person who was absent from the city during all the days fixed for the registration of voters for that election, or to a person, who, being a foreigner, has received his final papers since the last preceding day for the registration of voters for that election, or to a person whose name was, on the preceding Saturday, and in the absence of such person, stricken from the registry list, and who, on said day of election, shall prove to the satisfaction of said registers that he is a lawfully qualified elector of said voting precinct. These certificates shall contain all the data showing the qualification of the voter, as is required for a regular registration, and in addition, the special matter showing the voter's right to a certificate under this section. The proper statement shall be signed and sworn to by the voter before one of the registers, and it shall be supported by the affidavit of a freeholder who is a registered voter in that precinct, who shall make oath to the qualification of the applicant as a voter in that precinct; and if the applicant be one whose name was stricken from the registry list, said affidavit of such freeholder shall contain the fact showing the right of said applicant to vote in that precinct. The certificate shall be handed in to the judges of election with the voter's ballot. The data therefrom, showing the voter's name and his qualification as a voter, shall be entered on the registry lists by the judges and clerks of the election, under the appropriate headings, and the original certificate shall be returned to the city clerk, who shall carefully preserve it in the same manner, and for the same time as the registry lists and poll books. The certificate, before delivery to the applicant, shall be certified by the registers to the effect that the person therein named is a qualified voter in that precinct; and that he is entitled to be registered as such, under this section.

SEC. 8. [What list used.]—For every election to which the registry law is applicable, and which may be held prior to the general annual election in 1888, and registry lists for the general annual election in 1887 shall be used, in the same manner as is provided in section 3 hereof.

SEC. 9. [Amends ch. 161, 21st g. a.]—Section 13 of said chapter 161 is hereby amended by inserting in the second line thereof, after the word "cities," the following: "And in any voting precinct made up of the townships outside of the city limits, whose polling place is within the corporate limits of said city, as hereinafter provided."

SEC. 10. [Inapplicable to school electors.]—This act, and the act to which it is amendatory, are hereby declared inapplicable to elections held under and in accordance with the school laws of the state.

SEC. 11. So much, and so much only, of chapter 161, acts of the twenty-first general assembly of the state of Iowa, as is in conflict herewith, is hereby repealed.

SEC. 12. [Amendment.]—That section 7 of chapter 161, acts of the twenty-first general assembly, be amended by striking out the word "aforesaid" in the second line thereof, and inserting in lieu thereof the words "for each general annual election." And that section 3 of said act be amended by inserting after the word "state" in the first line thereof the following words: "having a population of twenty-five hundred (2,500) or more, as determined by the last preceding state or national census."

SEC. 13. This act being deemed of immediate importance shall take effect and be in force from and after its publication in *The Iowa State Register* and *The Des Moines Leader*, newspapers published in Des Moines, Iowa.

Approved February 8, 1888.

CHAPTER 3.

OF THE GENERAL ELECTION.

SECTION 603. [**Election precincts.**].—At the general elections each township shall be an election precinct, and a poll shall be opened at the place of election therein. But the board of supervisors may, in their judgment, divide any township in their county into two or more precincts.

SEC. 604. [**Numbered and recorded.**].—In that case they shall number or name the several precincts and cause the boundaries of each to be recorded in their minute-book, and notice thereof to be published in some newspaper of general circulation in the county for three consecutive weeks at least once a week, the last publication to be made at least thirty days before the next election.

SEC. 605. [**Place of voting.**].—No person shall vote in any other precinct than that in which he resides at the time.

Voting in a precinct in which the voter is not a resident is an indictable offense. *The State v. Minnick*, 15 Iowa, 123, Code § 3997. No person is entitled to vote at any other precinct than that in which he resides at the time he offers his vote. *Id.*

SEC. 606. [**Judges and clerk.**].—There shall be three judges of election in each precinct, who shall be appointed by the board of supervisors at their meeting in September; and there shall be two clerks of the election, one of whom shall be the township clerk, and the other some elector named by him, and if the township clerk does not attend, then the two clerks shall be chosen judges of election; *provided*, that the township trustees and township clerks shall be judges and clerks of election in those precincts where they respectively reside.

SEC. 607. [**Failure of judges to attend.**].—If any judge does not attend in time, or refuses to be sworn, his place shall be filled by an elector appointed by those who do attend; and if no judge is present at the time for opening the polls, the electors present shall choose three qualified persons to act as judges of election.

SEC. 608. [**Of clerks.**].—If the clerks, or either of them, are not present at the opening of the polls, or, being present, refuse to be sworn, the judges of election shall fill their places from the electors present.

SEC. 609. [**Oath.**].—Before opening the polls, each of the judges and clerks shall take the following oath: I, A. B., do solemnly swear that I will impartially, and to the best of my knowledge and ability, perform the duties of judge (or clerk) of this election, and will studiously endeavor to prevent fraud, deceit and abuse in conducting the same.

Neither an election nor the particular returns will be invalidated by the failure of the judges of the election to be sworn. *Dishon v. Smith*, 10 Iowa, 212, and cases cited on page 220.

SEC. 610. [**Who may administer.**].—Any one of the judges or clerks present may administer the oath to the others, and it shall be entered in the poll-books, subscribed by the person taking it, and certified by the officer administering it.

SEC. 611. [**The polls shall be open at nine o'clock in the forenoon.**].—unless vacancies have to be filed as above, in which case they are to be opened as soon thereafter as may be, and they shall be kept open until six o'clock in the afternoon; and if the judges deem it necessary for receiving the ballots of all the electors, they may keep them open until nine o'clock in the evening. Proclamation thereof shall be made at or before the opening of the polls, and half an hour before closing them.

SEC. 612. [**Order: preservation of.**].—Any constable of the township who may be designated by the judges of election is directed to attend at the place of election, and he is authorized and required to preserve order and peace at and about the same; and if no constable be in attendance, the judges of the election may

appoint one or more specially, by writing, who shall have all the power of a regular constable.

SEC. 613. [**Same.**—If any person conducts in a noisy, riotous, or tumultuous manner at or about the polls so as to disturb the election, or insults or abuses the judges or clerks of election, the constable may forthwith arrest him and bring him before the judges, and they, by a warrant under their hands, may commit him to the jail of the county for a term not exceeding twenty-four hours; but they shall permit him to vote.

SEC. 614. [**Boxes.**—The board of supervisors shall provide for each precinct in the county, for the purpose of elections, one box with lock and key.

SEC. 615. [**Poll-books.**—The county auditor shall prepare and furnish to each precinct two poll-books, having each of them a sufficient column for the names of the voters, a column for the number, and sufficient blank leaves to contain the entries of the oaths, certificates and returns; and also all books, blanks and materials necessary to carry out the provisions of the chapter on registration of voters.

SEC. 616. [**Ballots.**—The ballots shall designate the office for which the persons therein named are voted for.

SEC. 617. [**Voting.**—In voting, the electors shall deliver their ballots to one of the judges, and he shall deposit them in the ballot-box.

SEC. 618. (Repealed by chapter 161, laws of 1886)

SEC. 619. [**Challenge.**—Any person offering to vote, whether his name be on the register or not, may be challenged as unqualified by any judge or elector; and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified.

SEC. 620. [**Oath.**—When any person is so challenged, the judges shall explain to him the qualification of an elector, and may examine him as to his qualifications, and if the person insists that he is qualified, and the challenge is not withdrawn, one of the judges shall tender to him the following oath: "You do solemnly swear that you are a citizen of the United States, that you are a resident of this precinct, that you are twenty-one years of age as you verily believe, that you have been a resident of this county sixty days, and of this state six months next preceding this election, and that you have not voted at this election." And if he takes such oath his vote shall be received.

The oath to be administered to an elector when challenged, requires that he should swear to the precinct of his residence. *The State v. Minnick*, 15 Iowa, 123, 124.

The provisions of the registry law held to be mandatory and imperative and an election held without a register of votes under chapter 171, laws of 1868 was void. *Nefzger v. The D. & St. P. R'y Co.*, 36 Id., 642.

SEC. 621. [**Name entered on poll-book.**—The name of each person, when his ballot is received, shall be entered by each of the clerks in the poll-book kept by him, so that there may be a double list of voters.

(CHAPTER 71, LAWS OF 1878.)

ELECTION OF ROAD SUPERVISORS AND TOWNSHIP ASSESSOR.

An Act to amend chapter 3, title V, of the code, regulating the election of supervisors of highways, and of township assessors in certain cases.

SECTION 1. [**Who may vote.**—*Be it enacted by the general assembly of the state of Iowa:* That no person shall vote for supervisor of highways of any highway district other than that in which he resides at the time of election, nor shall any person living in a city or incorporated town, which constitutes a part of the township, and which has a corporate assessor, vote for a township assessor.

SEC. 2. [**Manner of electing.**—The township trustees of each township or

election precinct shall cause to be prepared a separate ballot-box to receive the votes for supervisors of highways, with as many different compartments as there are highway districts in the township, or election precincts, and numbered accordingly, and each person voting shall, at the time he gives in his vote for supervisor of highways, which shall be on a separate ballot, state to the judges of election the number of the highway district in which he resides, and his vote shall be placed in the corresponding compartment of the ballot-box.

SEC. 2. [**Election of township assessor.**]—Where any township or election precinct embraces the whole or any part of any city or incorporated town having a corporate assessor, a separate ballot-box for township assessor shall be prepared by the township trustees, and the vote for township assessor shall be in such township on a separate ballot, and every person voting for such officer shall, at the time, if required, prove to the judges of election that he resides outside of the limits of such city or incorporated town, and his vote for such officer shall be placed in the ballot-box made for that purpose.

Approved March 1, 1878.

CANVASS BY JUDGES OF ELECTION.

SEC. 622. [**Canvass.**]—When the poll is closed, the judges shall proceed to canvass and ascertain the result of the election.

SEC. 623. [**Same.**]—The canvass shall be public, and shall commence by a comparison of the poll-lists from the beginning, and a correction of any errors which may be found therein until they agree. If two or more ballots are found so folded together as to convince the judges that they were cast as one, they shall not be counted, but they shall have the words "rejected as double" written upon them, be folded together again, and kept as herein directed.

SEC. 624. [**Ballot rejected.**]—If, at any stage of the canvass, a ballot, not stating for what office the person therein named is voted for, is found in the box when officers of different kinds are to be elected, it is to be rejected.

SEC. 625. [**Same.**]—If a ballot be found containing the names of more persons for an office than can be elected to that office, and such ballot form an excess above the number voting, it shall be rejected as to that office, the cause of rejection being indorsed thereon, and disposed of as hereafter directed; and if it does not form such excess, so many of the names first in order as are required shall be counted.

SEC. 626. [**Tally list.**]—As a check in counting, each clerk shall keep a tally list.

SEC. 627. [**Effect of excess of ballots.**]—If the ballots for any officer are found to exceed the number of the voters in the poll-lists, that fact shall be certified with the number of the excess in the return, and if it be found that the vote of the precinct where the error occurred would change the result in relation to a county officer, if the person elected were deprived of so many votes, then the election shall be set aside as to him in the precinct where such excess occurs and a new election ordered therein, providing that no person or persons residing in another precinct at the time of the general election shall be allowed to vote at such special election; but if the error occurs in relation to a township officer, the trustees may order a new election or not, in their discretion. If the error be in relation to a district or state officer, the error and the number of the excess are to be certified to the state canvassers, and if it be found that the error would affect the result as above, a new vote shall be ordered in the precinct where the error happened, and the canvass be suspended until such new vote is taken and returned. Where there is a tie vote and such an excess, there shall be a new election as above directed.

The word "error" as employed in section 627 of the code, is used in the sense of excess. *Rankin v. Pitkin et al.*, 50 Iowa, 313.

SEC. 628. **A return in writing** shall be made in each poll-book, setting forth, in words written at length, the whole number of ballots cast for each officer, except those rejected, the name of each person voted for, and the number of votes given to each person for each different office, which return shall be certified as correct, signed by the judges, and attested by the clerks. Such return shall be substantially as follows:

At an election held at the house of....., in.....township, or inprecinct of.....township, in.....county, state of Iowa, on the.....day of....., A. D....., there were.....ballots cast for the office of (governor) of which

A.....B.....had.....votes.
C.....D.....had.....votes.

(and in the same manner for any other officer.)

A TRUE RETURN:

L.....M....., }
N.....O....., } Judges of the election.
P.....Q....., }

ATTEST:

R.....S....., }
T.....U....., } Clerks of election.

SEC. 629. [**Disposition of poll-books.**]-One of the poll-books containing such return, with the register of election attached thereto, in cases where such register is required by law, shall be delivered to the township clerk, and be by him filed in his office. The other poll-book, with its return, shall be enclosed, sealed, superscribed, and delivered by one of the judges of election within two days, to the county auditor, who shall file the same in his office.

SEC. 630. [**Disposition of ballots and tally lists.**]-When the result of the election is ascertained, the judges shall cause all the ballots, including those rejected, with the tally list, to be placed in some convenient condition for preservation and deposited with the township clerk, who is to keep them until the time is passed which is allowed for contesting the election of any officer voted for.

SEC. 631. [**Result of canvass to be certified.**]-In townships constituting a single precinct, the judges of the election shall certify the result as to township officers immediately after the canvass above directed; but where there are two or more precincts in a township, the trustees and clerk thereof shall meet on the day after the election, and canvass the votes given for township officers as shown by the returns from the precincts.

SEC. 632. [**Tie vote for office.**]-When there is a tie between two persons for a township office, the clerk shall notify them to appear at his office at a given time to determine the same by lot before one of the trustees and the clerk, and the certificate of election is to be given accordingly. If either party fail to appear or to take part in the lot, the clerk shall draw for him.

SEC. 633. [**Clerk to notify officers elect.**]-The ballots for township officers having been canvassed, the clerk shall, within five days thereafter, post up in three public places in the township written notices containing the names of the persons elected to township offices at such election, and require each of them to appear before the proper officer and qualify according to law.

SEC. 634. [**Returns not made.**]-If the returns from all the precincts are not made to the county auditor by the third day after the election, on the fourth day he shall send messengers to obtain them from those precincts whose returns are wanting, the expense of which shall be paid out of the county treasury.

SEC. 635. [**Supervisors to canvass, etc.**]-At their meeting on the Monday after the general election, at twelve o'clock noon, the board of supervisors shall open and canvass the returns and make abstracts, stating in words written at

length the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office.

A board of canvassers of an election possesses no power or authority to judge of the validity of the returns, or of votes. *The State, ex rel. Rice, v. The County Judge of Marshall County*, 7 Iowa, 186.

The canvassers are only to receive the returns, and count them, leaving all questions as to their validity or sufficiency to another competent tribunal. *Id.*

Where a board of canvassers have rejected returns which they should have counted, no legal canvass has been made. *Id.*

Where the returns of an election fail to show that the election officers were sworn, the canvassers could not, for this reason, reject the returns.

The board of canvassers have no discretion to receive or reject returns. If they may be known as returns, it is their duty to receive them and count the votes. The power to decide what votes or returns shall be rejected and not counted belongs solely to the tribunal which is empowered to determine ultimately upon a contested election. *Id.*

The board of county canvassers cannot reject an election return of a township because of extrinsic evidence connected with its execution, and thereby declare a result which will defeat the manifest intent of the people. *State v. Cavers*, 22 *Id.*, 343.

A board of canvassers cannot adjudicate upon the sufficiency of election returns, but a court of justice may go behind the returns, and determine the regularity of the election and of the manner in which it was conducted. *Id.*

SEC. 636. [Form of abstracts.]—The abstract of the votes for each of the following classes shall be made on a different sheet:

1. Governor and lieutenant-governor;
2. All state officers not otherwise provided for;
3. Representatives in congress;
4. Senators and representatives in the general assembly from the county alone;
5. Senators and representatives in the general assembly by districts comprising more than one county;
6. Judges of the district court, district attorneys, and judges of the circuit court;
7. County officers.

SEC. 637. [Two abstracts made.]—Two abstracts of all the votes cast for any state or judicial district officer shall be made, and one forwarded to the secretary of state, and the other filed by the county auditor.

SEC. 638. [Who elected.]—The person having the greatest number of votes for any office is to be declared elected.

SEC. 639. [Declare who elected.]—Each abstract of the vote for such officers as the county alone elects, shall contain a declaration of whom the canvassers determine to be elected, except when two or more persons receive an equal and the greatest number of votes.

SEC. 640. [Returns filed: abstracts recorded.]—When the canvass is concluded, the board shall deliver the original returns to the auditor to be filed in his office, and shall cause each of the abstracts mentioned in the preceding section to be recorded in a book to be kept for recording the result of county elections, and to be called the "election book."

SEC. 641. [Certificate.]—When any person thus elected has appeared and given bond, and taken the oath of office as directed in this title, there shall be delivered him a certificate of election, under the official seal of the county, in substance as follows:

STATE OF IOWA, }
 COUNTY. }

At an election holden in said county on day of, A. D., A. B. was elected to the office of of said county, for the term of two years from the first Monday of January, A. D. (or if he was elected to fill a vacancy, say for the residue of the term ending on the day of,

A. D.) and until his successor is elected and qualified by giving bond and taking the oath of office as required by law.

[L. S.]

A. B.,

President of the board of canvassers.

WITNESS: E. F., county auditor.

Which certificate shall be presumptive evidence of his election and qualification.

SEC. 642. [**Of senators and representatives.**]—The certificates of senators and representatives in the general assembly may vary from the foregoing according to the nature of the case, and the requirements of law, and shall be made out in duplicate, one copy to be forwarded to the secretary of state, and the other to be delivered to the member on request.

SEC. 643. [**Tie vote.**]—When two or more persons receive an equal and the highest number of votes for an office to be filled by the county alone, the auditor shall issue a notice to such persons of such tie vote and require them to appear at his office on a day named in the notice, within twenty days from the election day, and determine by lot which of them is to be declared elected.

SEC. 644. [**Lot.**]—The county auditor shall notify the board of canvassers, or, in case of their absence or inability, the recorder and sheriff, of such lot, and on the day fixed the parties interested, or such of them as may appear, shall determine, by a lot fairly arranged by the three officers, which of them is to be declared elected; and the three officers shall certify such lot and its result under their official names and the seal of the county, to be affixed by the county auditor, and the certificate shall be recorded in the election book, and the auditor shall deliver to the person elected his certificate of election on the terms prescribed in this chapter.

SEC. 645. [**Abstracts for governor and state officers.**]—Within ten days after the election day the county auditor shall envelope and seal up by itself, one of the abstracts of votes for governor and lieutenant-governor; and indorse upon it in substance, “abstract of votes for governor and lieutenant-governor, from county,” and address it to the speaker of the house of representatives. The abstract of votes for other state officers, and for such district officers as are to be returned to the secretary’s office, are to be enveloped, sealed, and indorsed in like manner, and directed to the secretary of state. The several packages shall then be placed in one envelope and transmitted to the secretary by mail.

SEC. 646. [**For senator or representative elected by more than one county.**]—When a senator or representative in the general assembly is elected by a district composed of more than one county, the board of county canvassers shall, at the time of canvassing the vote of the county, make and certify an abstract of the votes cast in their county for such office, similar to the abstract required by section six hundred and thirty-six of this chapter, and the auditor shall seal up, direct, and transmit such abstract to the secretary of state as provided in section six hundred and forty-five of this chapter. He shall also transmit a similar abstract to the county auditor of each other county in the district, who shall file the same in his office.

SEC. 647. [**Duty of canvassers.**]—The board of state canvassers shall open the abstracts transmitted to the secretary of state, as provided by the last section, and canvass the votes therein returned at the time of canvassing the state vote, or at such other time as they may fix, and in all cases at least twenty days prior to the time fixed by law for the meeting of the next general assembly, and in case of a special election, within five days after the receipt of such abstracts, and shall immediately make out, certify, and transmit by mail to the county auditor of each county in such district, to be by him filed in his office, an abstract of such canvass similar to the abstract required by section six hundred and forty-five of this chapter.

SEC. 648. [**Make certificate.**]-They shall, also, make and sign a certificate showing who is elected to the office of senator or representative in such district, designating it by its number and similar to the certificate required by section six hundred and fifty-five of this chapter, and the secretary of state shall deliver it to the person appearing by it to be elected to such office on his demanding it.

STATE CANVASS.

SEC. 649. [**Returns: messenger sent.**]-If the abstracts from any county are not received at the office of the secretary of state by the fourth Monday after the day of election, the secretary is authorized to send a messenger to the auditor of such county, who shall furnish such messenger with the abstracts, or, if they have been sent, with a copy of them, and he shall return them to the secretary without delay.

SEC. 650. [**Abstracts opened.**]-The abstracts, when received by the secretary, shall be kept in his office unopened until the day appointed for opening them, and shall be opened only in the presence of the board of canvassers.

SEC. 651. [**Who constitutes.**]-The executive council constitute a board of canvassers for the state, but no member shall take part in canvassing the votes for any office for which he himself is a candidate.

SEC. 652. [**Time of.**]-On the Thursday following the fourth Monday after the day of election, the board of state canvassers shall open and examine the returns, if they are received from all the counties, and if not all received, they may adjourn, not exceeding twenty days, for the purpose of obtaining the returns from all the counties, and when these are received, shall proceed with the canvass.

SEC. 653. [**Make abstracts.**]-They shall make an abstract stating the number of ballots cast for each office, the names of all the persons voted for, for what office they respectively received the votes, and the number of votes each received, in words at length, and stating whom they declare to be elected to each office; which abstract shall be signed by the canvassers, in their official capacity, and as state canvassers, and have the seal of the state affixed.

SEC. 654. [**Record of canvass.**]-The secretary shall record the abstract in a book to be kept by him for recording the result of state elections, and to be called the election book, and also file the abstract.

SEC. 655. [**Certificate.**]-A certificate shall be prepared for each person elected, in substance as follows:

STATE OF IOWA:

At an election holden on the . . . day of . . . , A. B. was elected to the office of . . . of said state, for the term of . . . years from the first Monday (or day, as the case may be), of January, A. D. . . . , (or, if to fill a vacancy, say, for the residue of the term ending on the . . . day of . . . , A. D. . . .).

Given at Des Moines, this . . . day of . . . , A. D. . . .

Which certificate shall be signed by the governor, if present, if not, by the secretary, with the seal of the state affixed in either case, and be attested by the other canvassers, but in the absence of the governor the secretary's certificate shall be signed by the auditor.

SEC. 656. [**Delivery.**]-Such certificate shall be delivered to the person elected when he has qualified as provided in chapter five of this title.

SEC. 657. [**Notice.**]-The governor shall cause the persons elected to be notified thereof immediately, either by mail or by a sheriff or constable, who shall return his doings to the secretary's office.

SEC. 658. [**Representative in congress.**]-The certificate of the election of are presentative in congress shall be signed by the governor, with the seal of state affixed, and be countersigned by the secretary of state, and the governor shall cause it to be delivered to the person elected.

CHAPTER 4.

OF ELECTORS OF PRESIDENT AND VICE-PRESIDENT.

SECTION 659. [**Election of.**]-On the Tuesday next after the first Monday in November in the year eighteen hundred and seventy-six, and every four years thereafter, or on such days as the congress of the United States may direct, a poll shall be opened in each precinct for the election of electors of president and vice-president of the United States.

SEC. 660. (*As amended by ch. 23, 16th g. a.*) [**Ballots.**]-The names of all the electors to be chosen shall be written [or printed] on each ballot, and each ballot shall contain the name of at least one inhabitant of each congressional district into which the state may be divided, and against the name of each person shall be designated the number of the congressional district to which he belongs.

SEC. 661. [**Conducted.**]-This election shall be conducted, and the returns made, as directed in relation to the election of state officers and representatives in congress, except as herein otherwise expressed.

SEC. 662 [**Duty of county canvassers and auditor.**]-The board of county canvassers shall examine the returns, make, sign, envelope, and seal up the abstracts, and endorse and direct them as provided in other cases, and the county auditor shall transmit them to the secretary of state by mail. In case of his failure so to do, or if they are not received by the secretary of state within fifteen days after the election, he may send a special messenger for them as in other cases.

SEC. 663. [**Time of state canvass.**]-On the twentieth day after the day of election, or before that time, if the returns are received from all the counties, the board of state canvassers shall open and examine the returns and make an abstract as directed in regard to the general elections, which shall be recorded by the secretary in the election book.

SEC. 664. The canvass shall be public, and in canvassing the returns the persons having the greatest number of votes are to be declared elected; and if more than the requisite number of persons are found to have the greatest and an equal number of votes, the election of one of them shall be determined by lot, to be drawn by the governor in the presence of the other canvassers.

SEC. 665. (*As amended by ch. 50, 22d g. a.*) [**Certificate.**]-After the expiration of ten days from the day the canvass is completed the governor shall issue a certificate of election under his hand and the seal of the state, and cause it to be served on each person elected, notifying him to attend at the seat of government at noon on the second Monday in January next following their appointment, and report himself to the governor as in attendance; but in case of a contest of election of an elector the governor shall withhold the certificate until the contest is determined.

SEC. 666. [**Time of meeting.**]-The electors so attending shall meet at noon of said Monday, and the governor shall provide them a list of all the electors, and in case of the absence of any elector, or if the proper number of electors shall, for any cause, be deficient, those present shall forthwith elect, from the citizens of the state, so many persons as will supply the deficiency.

SEC. 667. [**Notice.**]-Such choice being certified to the governor, he shall cause the person chosen to be notified immediately.

SEC. 668. (*As amended by ch. 50, 22d g. a.*) [**Election.**]-The college of electors, being full, shall meet at the capitol at noon of the said second Monday in January, or as soon thereafter on that day as practicable, and proceed to the election in conformity with the constitution of the United States and the laws of congress enacted by authority thereof. And it shall be the duty of the governor,

as soon as practicable, to communicate under the seal of the state to the secretary of state of the United States, a certificate, or certificates, complying with the requirements of section 3 of the act of congress entitled an act to fix the day for the meeting of the electors of president and vice-president and other purposes, approved February 3, 1887.

SEC. 669. [**Compensation.**]-The electors shall receive a compensation of five dollars for every day's attendance, and the same mileage as members of the general assembly.

CHAPTER 5.

OF QUALIFICATION FOR OFFICE.

SECTION 670. [**Must qualify.**]-No civil officer shall enter on the duties of his office until he has qualified himself as required in this chapter.

SEC. 671. [**Governor and lieutenant-governor.**]-The governor and lieutenant-governor, by taking an oath in the presence of the general assembly in convention assembled, administered by a judge of the supreme court, to the effect that he will support the constitution of the United States and the constitution of the state of Iowa, and will faithfully, impartially, and to the best of his knowledge and ability, discharge the duties incumbent upon him as governor, or lieutenant-governor, of this state.

SEC. 672. [**Members of general assembly.**]-Members of the general assembly, by taking the oath prescribed for them in the third article of the constitution.

SEC. 673. [**Judges.**]-The judges of the supreme, district and circuit courts, by taking and subscribing an oath in writing to the effect that they will support the constitution of the United States and that of the state of Iowa, and that, without fear, favor, affection, or hope of reward, they will, to the best of their knowledge and ability, administer justice according to the law, equally to the rich and the poor; and, unless elected by the people, shall be commissioned by the governor.

SEC. 674. [**Who to give bond: form of.**]-County supervisors and township trustees, with the officers already named in this chapter, are not required to give bond. All other civil officers elected by the people, with those specified hereafter in this chapter, are required to give bond with a condition in substance as follows:

That as..... (naming the office) in..... township, county (or state of Iowa,) he will render a true account of his office and of his doings therein to the proper authority when required thereby or by law; that he will promptly pay over to the person or officer entitled thereto all money which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands at the termination of his office; that he will exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, securities or other property pertaining to his said office, and deliver them to his successor, or to any other person authorized to receive the same; and that he will faithfully and impartially, without fear, favor, fraud or oppression, discharge all duties now or hereafter required of his office by law.

Where sureties sign the official bond of their principal, leaving certain blanks as to amount, date, etc., which they expect him to properly fill, and he does fill accordingly, they are estopped from claiming that their liability is affected thereby. *Wright & Co. v. Harris et al.*, 31 Iowa, 272.

Where a constable acting in his official capacity levies upon and sells property which is exempt from execution, he and his sureties are liable on his official bond for damages. *Strunk v. Ochel-tree*, 11 Id., 158.

County treasurers are required to exercise only reasonable diligence and care in the preservation and disposal of the public money. *Ross v. Heath*, 5 Id., 149.

The duties and responsibilities of a county treasurer are fixed by his official bond, and from it the measure of liability incurred by him in the preservation and disposal of the moneys received by him as treasurer, is to be ascertained and determined. *Id.*

In bonds given to secure the public, courts will disregard objections purely technical, and will hold such undertakings invalid only upon the most cogent and satisfactory grounds. *State v. Fredericks*, 8 Id., 553.

Sureties on official bonds are not liable for prior delinquencies of the principal. *Mahaska County v. Ingalls*, 16 Id., 81; *Warren County v. Ward*, 21 Id., 84.

A justice of the peace and his sureties upon his official bond are liable for notes left with him for collection. *Latham v. Brown*, 16 Id., 118; *Bessenger v. Dickerson*, 20 Id., 260; *Thompson v. Dickerson*, 22 Id., 360; *Mahaska County v. Ingalls*, 16 Id., 81.

A county treasurer is not liable for the acts or defalcations of a book-keeper or assistant in his office employed by, and acting under the direction of the board of supervisors. *Scott County v. Fluke*, 34 Id., 317.

The county treasurer is justified when he levies upon property for the non-payment of special taxes, to the same extent as he would be for general taxes. *Games v. Robb*, 8 Id., 193.

A county treasurer and his sureties are liable on his official bond for moneys received by him in partial payment of taxes. *Warren County v. Ward et al.*, 21 Id., 84.

That the taxes collected by a county treasurer were illegally assessed cannot be set up as a defense in an action on his bond. *Mahaska County v. Ingalls*, 14 Id., 170.

Money paid to the clerk of the district and circuit court upon a judgment recorded in his office is received by him in virtue of his office; and upon his failure to pay over the money to the party entitled thereto an action on his bond will lie. *Morgan v. Long*, 29 Id., 434.

An action on the bond of a constable will lie for an "arrest without warrant or probable cause, beating, etc., by the constable," under cover and by virtue of his office. *Clancy v. Kenworthy et al.*, 35 N. W. R., 427.

SEC. 675. [Oath.]—Every civil officer who is required to give bond, shall take and subscribe on the back of his bond, or on a paper attached thereto, to be certified by the officer administering it, an oath that he will support the constitution of the United States and that of the state of Iowa, and that to the best of his knowledge and ability he will perform all the duties of the office of (naming it) as provided by the condition of his bond within written.

SEC. 676. [Same.]—The oath of office provided by article eleven of the constitution for all civil officers not otherwise expressly provided for, may be substantially in the following form: I,, do solemnly swear that I will support the constitution of the United States and the constitution of the state of Iowa, and that I will faithfully and impartially, to the best of my ability, discharge all the duties of the office of, (naming it) in, (naming the township, county, district, or state, as the case may be,) as now or hereafter required by law.

SEC. 677. [Bonds.]—The bonds of the state and district officers shall be given to the state, those of county and township officers to the county.

The bond of a county treasurer purporting to be executed unto the county of Warren and state of Iowa, is a bond given for the security of the county and not of the state. *The State v. Henderson*, 40 Iowa, 242.

The commencement of an action upon a county treasurer's bond in the name of the state, for a defalcation in the state revenue, will not avoid the operation of the statute of limitation, which has already barred an action by the county. *Id.*

SEC. 678. [Same.]—The bond of the secretary of state shall be in the penal sum of not less than five thousand dollars.

Of the auditor of state, in the sum of not less than ten thousand dollars.

Of the treasurer of state, in the sum of not less than three hundred thousand dollars.

Of the state printer, in the sum of not less than five thousand dollars.

Of the state binder, in the sum of not less than two thousand dollars.

Of the attorney-general, in the sum of not less than ten thousand dollars.

Of the register of the state land office, in the sum of not less than five thousand dollars.

Of the reporter of the supreme court, in the sum of not less than ten thousand dollars.

Of the clerk of the supreme court, in the sum of not less than ten thousand dollars.

Of each district attorney, in the sum of not less than ten thousand dollars.

Of the superintendent of public instruction, in the sum of not less than two thousand dollars.

The bonds of county treasurers, clerks of the district and circuit courts, county recorders, coroners, county surveyors, township assessors, auditors, county superintendents, sheriffs, and of justices of the peace and constables, shall each be in a penal sum to be fixed by the board of supervisors; but those of the treasurer, clerks of the district and circuit courts, auditors, and sheriffs, shall not be in a less sum than five thousand dollars each, and those of justices and constables, not less than five hundred dollars each.

SEC. 679. [Number of sureties.]—Every official bond shall be given with at least two sureties; all sureties shall be freeholders within the state; the bonds of the state printer and state binder shall be given with at least three sureties, and those of the treasurer of state and each county treasurer with at least four sureties.

The board of supervisors may be made liable for omission or neglect of duty in respect to the approval of official bonds of certain officers, but they are not liable for honest mistakes or errors in judgment, whether of law or fact, in the approval of such bonds. *Wasson v. Mitchell*, 18 Iowa, 153.

SEC. 680. [Approval of bonds.]—The bonds of state officers must be approved by the governor before being filed; those of district attorneys, by the district judges of their respective districts; those of county officers and township clerk, by the board of supervisors, and of township officers, by the township clerk. The approval shall in all cases be indorsed upon the bond and signed by the officer approving, or the president of the board. But in case the board of supervisors should decide that a bond which is to be approved by them is insufficient, or such bond is not approved the first day of the session, then a reasonable time, not to exceed five days, is to be allowed the officer elect to supply a sufficient bond, or to approve the same.

SEC. 681. [Same.]—If the board of supervisors refuse or neglect to approve the bond of any county officer elect, he may present the same for approval to the judge of the circuit court, who shall fix a day for the hearing. Notice of such hearing shall be served upon the board of supervisors as provided by law for the service of original notice; and due proof of such service being made to the judge at the time fixed, he shall, unless good cause for postponement be shown, proceed to hear and determine the sufficiency of the bond, and, if satisfied that the same is sufficient, he shall approve the same, and such approval shall have the same force and effect as an approval by the board of supervisors at the time the same was presented to them for approval, would have had.

SEC. 682. [State officers filed and recorded.]—The bonds and oaths of state officers shall be filed in the office of secretary of state, except those of the secretary, which shall be filed and recorded in the office of the auditor; those of county and township officers in the county auditor's office, except those of the county auditor, which shall be kept in the county treasurer's office, and those of justices of the peace, which shall be filed by the auditor in the office of the clerk of the district court, after the same have been approved and recorded.

SEC. 683. [Same: of county officers.]—The auditor of each county shall keep in his office a book to be known as the record book of officers' bonds, and shall record in said book the official bonds of all county officers, including justices of the peace and constables, filed in his county; and shall also keep an index to said book, in which, under the title of each office, shall be entered the names of each principal and his sureties, and the date of the filing of the bond.

SEC. 684. [Penalty.]—Any county officer who shall enter upon the discharge of the duties of his office, without first having caused his official bond to be

recorded, shall forfeit to the county of which he is an officer, the sum of five dollars for each official act by him performed prior to the recording said bond, and the chairman of the board of supervisors of each county is hereby required to bring suit for, or collect such penalty in the name of his county; and it shall be considered a misdemeanor for any officer who is required to give bond to act in such official capacity without giving such bond as is provided by law, and he shall be liable to a fine for an amount not exceeding the amount of the bond required of him.

SEC. 685. [When governor and lieutenant-governor shall qualify.]—The governor and lieutenant-governor shall qualify within ten days after the result of the election shall be declared by the general assembly; judges of the supreme, district, and circuit courts by the first day of January following their election; and all other officers by the first Monday of January following their election.

SEC. 686. [Refusal to serve.]—A failure to qualify within the time prescribed shall be deemed a refusal to serve.

SEC. 687. [Election contested.]—When an election is contested, the person elected shall have twenty days in which to qualify after the day of the decision.

SEC. 688. [Effect of bonds.]—The bonds of officers shall be construed to cover duties required by law subsequent to giving them.

Where the covenant in the bond of the county treasurer bound him, as required by the form in section 674, *ante*, to "discharge all duties now or hereafter required of his office by law," the sureties on the bond are liable for his default in the management of the school fund under a law enacted after the execution of the bond. *The county of Mahaska v. Ingalls et al.*, 14 Iowa, 170.

SEC. 689. No official bond shall be void for want of compliance with the statute, but it shall be void in law for the matter contained therein.

SEC. 690. [Bond not approved until all public property has been accounted for.]—When the incumbent of an office is re-elected, he shall qualify as above directed; but when the re-elected officer has had public funds or property in his control, under color of his office, his bond shall not be approved until he has produced and fully accounted for such funds and property to the proper person to whom he should account therefor; and the officer or board approving the bond shall indorse upon the bond before its approval the fact that the said officer has fully accounted for and produced all funds and property before that time under his control as such officer; and when it is ascertained that the incumbent holds over another term by reason of the non-election of a successor, or for the neglect or refusal of the successor to qualify he shall qualify anew within the time to be fixed by the officer who approves of the bonds of such officers.

By the failure to elect a new member of the board of supervisors prior to the expiration of a member's term, a vacancy occurs, which, under the statute, is to be filled by the qualifying anew of the member whose term expires; such member, however, is only entitled to hold the office until it can be legally filled by election, which may be at the next succeeding general election. *Dyer v. Bagwell*, 54 Iowa, 487.

A constable who has been re-elected and continues to act as before, but fails to file a new bond and take the oath of office anew, is an officer *de facto*, and in the absence of any proof that an order has been made by the proper officer to qualify by the time fixed, it is equally a crime to assist a prisoner to escape from his custody as if he had been qualified anew. *The State v. Bates*, 23 Iowa, 96.

This section of the code, directing the board of supervisors, before approving the bond of a re-elected county treasurer, to indorse on the bond the fact that the officer has fully accounted for and produced all funds and property before that time under his control as such officer, is directory merely, and a failure so to do does not invalidate the bond against the sureties therein. *Carroll Co. v. Ruggles et al.*, 69 *Id.*, 269.

SEC. 691. [Temporary officer.]—Any person appointed to fill an office during the incapacity or suspension of the regular incumbent, shall qualify in the manner required by this chapter for the office so to be filled.

(CHAPTER 54, LAWS OF 1886.)

QUALIFICATIONS OF COUNTY AND TOWNSHIP OFFICERS.

An Act relating to the qualifications of county and township officers.

SECTION 1. [**May qualify in ten days.**]*—Be it enacted by the general assembly of the state of Iowa:* All county and township officers who have been or may be prevented by sickness, the inclement state of the weather or other unavoidable casualty, from qualifying for their respective offices by the first Monday of January following their election, shall be held to have legally qualified, if they do so qualify within ten days thereafter.

Approved March 30, 1886.

CHAPTER 6.

OF CONTESTING ELECTIONS.

SECTION 692. [**By whom, and for what causes.**]*—The election of any person to a county office may be contested by any elector of the county:*

1. When mal-conduct, fraud or corruption on the part of the judges of election in any precinct, or of any board of canvassers, or any member of either board, sufficient to change the result;

2. When the incumbent was not eligible to the office at the time of the election;

3. When the incumbent has been duly convicted of an infamous crime before the election, and the judgment has not been reversed, annulled, or set aside, nor the incumbent pardoned at the time of the election;

4. When the incumbent has given or offered to any elector, or any judge, clerk or canvasser of the election, any bribe or reward in money, property or thing of value for the purpose of procuring his election;

5. When illegal votes have been received or legal votes rejected at the polls sufficient to change the result;

6. For any error in any board of canvassers in counting the votes, or in declaring the result of the election if the error would affect the result;

7. For any other cause which shows that another was the person legally elected.

SEC. 693. [**Incumbent.**]*—The term "incumbent" in this chapter, means the person whom the canvassers declare elected.*

SEC. 694. [**Same.**]*—When the misconduct complained of is on the part of the judges of election in a precinct, it shall not be held sufficient to set aside the election, unless the rejection of the vote of that precinct would change the result as to that office.*

SEC. 695. [**Court: how constituted.**]*—The court for the trial of contested county elections shall be thus constituted: The chairman of the board of supervisors shall be the presiding officer, and the contestant and incumbent may each name a person who shall be associated with him.*

SEC. 696. [**Clerk.**]*—The county auditor shall be clerk of this court, and keep all papers and record the proceedings in the election book, in manner similar to the record of the proceedings of the district court. But when the county auditor is a party, the court shall appoint a suitable person as clerk, whose appointment shall be recorded.*

SEC. 697. [**Contestant to file statement.**—The contestant shall file in the office of the county auditor, within twenty days after the day when the votes were canvassed, a written statement of his intention to contest the election, setting forth the name of the contestant, and that he is an elector of the county, the name of the incumbent, the office contested, the time of the election, and the particular causes of contest, which statement shall be verified by the affidavit of the contestant, or some other elector of the county, that the causes set forth are true as he verily believes. The contestant must also file with the county auditor a bond, with security to be approved by said auditor, conditioned to pay all costs in case the election be confirmed, or the statement be dismissed or the prosecution fail. When the auditor is a party, the clerk of the district court shall receive such statement and approve such bond.

A court of equity has power to restrain the collection of taxes levied upon property exempt from taxation. *Smith & Frank v Osborn et al.*, 53 Iowa, 474.

The exemption provided by this section extends only to the taxation provided in title 6 of the code, and does not exempt school district property situated in an incorporated city or town from a sidewalk tax imposed by said city or town. *The City of Sioux City v. The Independent School District, etc.*, 55 Id., 150.

SEC. 698. [**Illegal votes.**—When the reception of illegal, or the rejection of legal votes is alleged as a cause of contest, the names of the persons who so voted, or whose votes were rejected, with the precinct where they voted or offered to vote, shall be set forth in the statement.

SEC. 699. [**Day of trial: notice.**—The chairman of the board of supervisors shall thereupon fix a day for the trial, not more than thirty, nor less than twenty days thereafter; and shall cause a notice of such trial to be served on the incumbent, with a copy of the contestant's statement, at least ten days before the day set for trial.

SEC. 700. [**Selection of judges.**—The contestant and incumbent shall each file in the auditor's office, on or before the day of trial, a written nomination of one associate judge of the contested election, who shall be sworn in manner and form as trial jurors are in trials of civil action. If either the contestant or the incumbent fail to nominate, the presiding judge shall appoint for him. When either of the nominated judges fails to appear on the day of trial, his place may be filled by another appointment under the same rule.

SEC. 701. [**Trial postponed.**—The trial shall proceed at the time appointed, unless postponed for good cause shown by affidavit, the terms of which postponement are in the discretion of the court.

SEC. 702. [**Manner of: powers of court.**—The proceedings shall be assimilated to those in an action, so far as practicable, but shall be under the control and direction of the court, which shall have all the powers of the district court necessary to the right hearing and determination of the matter, to compel the attendance of witnesses, swear them, and direct their examination; to punish for contempt in its presence or by disobedience to its lawful mandate, to adjourn from day to day, to make any order concerning intermediate costs, and to enforce its orders by attachment. It shall be governed by the rules of law and evidence applicable to the case.

SEC. 703. [**Testimony.**—The testimony may be oral or by depositions, taken as in action at law in the district court.

SEC. 704. [**Subpoenas for witnesses** may be issued at any time after the notice of trial is served, either by the clerk of the district court or by the county auditor. The command to a witness may be to appear at . . . , on . . . , to testify in relation to a contested election, wherein A. B. is contestant and C. D. is incumbent.

SEC. 705. [**Statement not dismissed for want of form: amendment.**—The statement shall not be dismissed for want of form, if the particular causes of contest are alleged with such certainty as will sufficiently advise the incumbent of

the real grounds of contest. If any part of the causes are held insufficient, they may be amended, but the incumbent will be entitled to an adjournment if he state on oath that he has matter of answer to the amended causes for the preparation of which he needs further time. Such adjournment shall be upon such terms as the court deem reasonable; but if all the causes are held insufficient, and an amendment is asked, the adjournment shall be at the cost of contestant. If no amendment is asked for or made, or in case of entire failure to prosecute, the proceedings may be dismissed.

SEC. 706. [**Process: fees.**]-The style, form and manner of service of process and papers, and the fees of officers and witnesses, shall be the same as in the district court, so far as the nature of the case admits.

SEC. 707. [**Trial: where to take place.**]-The trial of contested county elections shall take place at the county seat, unless some other place within the county is substituted by the consent of the court and parties.

SEC. 708. [**Sheriff to attend.**]-The court, or the presiding judge, may direct the attendance of the sheriff or a constable when deemed necessary.

SEC. 709. [**Witness compelled to answer.**]-The court may require any person called as a witness who voted at such election, to answer touching his qualifications as a voter; and if he was not a qualified voter in the county where he voted, then to answer for whom he voted; and if the witness answer such questions, no part of his testimony on that trial shall be used against him in any criminal action.

SEC. 710. [**Compensation.**]-The judges shall be entitled to receive four dollars a day for the time occupied by the trial.

SEC. 711. [**Who liable for costs.**]-The contestant and the incumbent are liable to the officers and witnesses for the costs made by them respectively. But if the election be confirmed, or the statement be dismissed, or the prosecution fail, judgment shall be rendered against the contestant for costs; and if the judgment be against the incumbent, or the election be set aside, it shall be against him for costs.

SEC. 712. [**How collected.**]-A transcript of the judgment, filed and recorded in the office of the clerk of the circuit court as provided in relation to transcripts from justices' courts, shall have the same effect as there provided, and execution may issue thereon.

SEC. 713. [**Certificate of election withheld.**]-If notice of contesting the election of an officer is filed before the certificate of election is delivered to him, it shall be withheld until the determination of the contest.

SEC. 714. [**Judgment.**]-The court shall pronounce judgment whether the incumbent or any other person was duly elected, and the person so declared elected will be entitled to his certificate on qualification. If the judgment be against the incumbent, and he has already received the certificate, the judgment annuls it. If the court find that no person was duly elected, the judgment shall be that the election be set aside.

SEC. 715. [**Judgment enforced.**]-When either the contestant or incumbent shall be in possession of the office, by holding over or otherwise, the presiding judge shall, if the judgment be against the party so in possession of the office and in favor of his antagonist, issue an order to carry into effect the judgment of the court, which order shall be under the seal of the county, and shall command the sheriff of the county to put the successful party into possession of the office without delay, and to deliver to him all books and papers belonging to the same, and the sheriff shall execute such order as other writs.

SEC. 716. [**Appeal.**]-The party against whom judgment is rendered may appeal within twenty days to the circuit court but if he be in possession of the office, such appeal shall not supersede the execution of the judgment of the court

as provided in the preceding section, unless he give a bond with security, to be approved by the circuit judge, in a sum to be fixed by the judge, and which shall be at least double the probable compensation of such officer for six months, which bond shall be conditioned that he will prosecute his appeal without delay, and that if the judgment appealed from be affirmed, he will pay over to the successful party all compensation received by him while in possession of said office after the judgment appealed from was rendered.

Where a verbal notice of appeal from the judgment of a court of contest, in a contested election case, was given at the time the judgment was rendered, and thereupon the parties made an agreement respecting the custody of the ballot-box, it was *held*, that the appeal should not be dismissed for insufficiency of notice. Whether or not a written notice might be necessary, if the notice of appeal were unaccompanied by any other action, *quære*. *McIntosh v. Livingston*, 41 Iowa, 219.

SEC. 717. [**Judgment on appeal.**]-If, upon appeal, the judgment be affirmed, the circuit court may render judgment upon the bond for the amount of damages against the appellant and his sureties on the bond.

OF CERTAIN STATE OFFICERS.

SEC. 718. [**By whom.**]-The election of any person to any state office, except that of governor or lieutenant-governor, or to the office of district judge, circuit judge, or district attorney, may be contested by an eligible person who received votes for the same office, for any of the causes before mentioned.

SEC. 719. [**Court: how constituted.**]-The court for the trial of contested state elections shall consist of three judges, not interested, of the supreme, district or circuit court, or any of them, as may be convenient.

SEC. 720. [**Clerk.**]-The secretary of state shall be the clerk of this court. But if the person holding that office is a party to the contest, the clerk of the supreme court, or in case of his absence or inability, the auditor of state, shall be clerk.

SEC. 721. [**Statement filed.**]-The statement must be filed with such clerk within thirty days from the day when the votes are canvassed.

SEC. 722. [**Time of trial: notice.**]-The clerk shall, as soon as practicable, ascertain which three of the judges residing nearest the seat of government can attend the trial, fix a time therefor, and notify the judges, and cause a copy of the statement and a notice of the time fixed for trial to be served upon the incumbent, and a notice of the time to be served upon the contestant at least twenty days before the day of trial, and returns thereof to be made to him. When convenient, the service of the above papers may be made by the clerk of this court. The time for the trial shall not be set beyond the last Monday of January following the election.

SEC. 723. [**Subpœnas: depositions.**]-The secretary of state, the several clerks of the supreme and district courts, under their respective seals of office, and either of the judges of the supreme, district or circuit courts, under their hands, may issue subpœnas for witnesses to attend this court; and disobedience to such process may be treated as a contempt. Depositions may also be taken as in the case of contested county elections.

SEC. 724. [**Process.**]-Process and papers may be issued to and served by the sheriff of any county.

SEC. 725. [**Place of trial.**]-The trial shall take place at the seat of government, unless some other place be substituted by consent of the court and both parties.

SEC. 726. [**Compensation.**]-The judges shall be entitled to receive, for their travel and attendance, the sum of six dollars each per day, with such mileage as is allowed to members of the general assembly, to be paid from the state treasury.

SEC. 727. [**Judgment filed: execution.**]-A transcript of the judgment rendered by such court, filed in the office of the clerk of the supreme court, shall have the

force and effect of a judgment of the supreme court, and execution may issue therefrom in the first instance, and against the party's property generally.

SEC. 728. [**Power of presiding judge.**]—The presiding judge of this court shall have authority to carry into effect any order of the court after the adjournment thereof, by attachment or otherwise.

SEC. 729. [**Provisions applicable.**]—The provisions of this chapter, in relation to contested county elections, are applied to contested state elections when applicable, except as herein otherwise directed.

OF MEMBERS OF THE GENERAL ASSEMBLY.

SEC. 730. [**By whom.**]—The election of any person to a seat in either branch of the general assembly may be contested by any qualified voter of the district to be represented.

SEC. 731. [**Statement served.**]—The contestant shall, within thirty days after the canvass, serve on the incumbent a statement as required in relation to county officers, except the list of illegal votes, which shall be served with the notice of taking depositions relative to them, and if no such deposition is taken, then twenty days before the first day of the next session.

SEC. 732. [**Subpœnas.**]—Any judge or clerk of a court of record may issue subpœnas in the above cases as in those before provided, and compel the attendance of witnesses thereunder.

SEC. 733. [**Depositions.**]—Depositions may be taken in such cases in the same manner and under the same rules as in an action at law in the district court; but no cause for taking the same need be shown.

SEC. 734. [**Same.**]—A copy of the statement, and of the notice for taking depositions with the service indorsed, and verified by affidavit if not served by an officer, shall be returned to the officer taking the depositions, and then with the depositions shall be sealed up and transmitted to the secretary of state with an indorsement thereon showing the nature of the papers, the names of the contesting parties, and the branch of the general assembly before which the contest is to be tried.

SEC. 735. [**Statement and deposition given presiding officer.**]—The secretary shall deliver the same unopened to the presiding officer of the house in which the contest is to be tried, on or before the second day of the session, regular or special, of the general assembly next after taking the depositions, and the presiding officer shall immediately give notice to his house that such papers are in his possession.

SEC. 736. [**Power of general assembly.**]—Nothing herein contained shall be construed to abridge the right of either branch of the general assembly to grant commissions to take depositions, or to send for and examine any witness it may desire to hear on such trial.

OF GOVERNOR.

SEC. 737. [**By whom.**]—The election of any person declared duly elected to the office of governor or lieutenant-governor, may be contested by an eligible person who received votes for the office contested.

SEC. 738. [**Notice of contest.**]—The contestant shall, within thirty days after the proclamation of the election, deliver to the presiding officer of each house of the general assembly a notice of his intent to contest, and a specification of the grounds of such contest as before directed.

SEC. 739. [**Notice to incumbent.**]—As soon as the presiding officers have received the notice of specifications, they shall make out a notice directed to the

incumbent, including a copy of the specifications, which shall be served by the sergeant-at-arms.

SEC. 740. [**To each house.**].—The presiding officers shall also immediately make known to their respective houses that such notice and specifications have been received.

SEC. 741. [**Court, how chosen.**].—Each house shall forthwith proceed, separately, to choose seven members of its own body in the following manner:

1. The names of members of each house, except the presiding officer, written on similar paper tickets, shall be placed in a box, the names of the senators in their presence by their secretary, the names of the representatives in their presence by their clerk;

2. The secretary of the senate in the presence of the senate, and the clerk of the house of representatives in the presence of the house, shall draw from their respective boxes the names of seven members each;

3. As soon as the names are thus drawn, the names of the members drawn by each house shall be communicated to the other, and entered on the journal of each house.

SEC. 742. [**Authority of committee.**].—The members thus drawn shall constitute a committee to try and determine the contested election, and for that purpose shall hold their meetings publicly at the place where the general assembly is sitting at such times as they may designate; and may adjourn from day to day, or to a day certain, not more than four days distant, until such trial is determined; shall have power to send for persons and papers, and to take all necessary means to procure testimony, extending like privileges to contestant and the incumbent, and shall report their judgment to both branches of the general assembly, which report shall be entered on the journals of both houses.

SEC. 743. [**Testimony.**].—The testimony shall be confined to the matters contained in the specifications.

SEC. 744. [**Judgment.**].—The judgment of the committee pronounced in the final decision on the election shall be conclusive.

SEC. 745. [**Other provisions.**].—The provisions of this chapter in relation to other contested elections are applied to a contested election for governor, when applicable, except as herein otherwise directed.

(CHAPTER 49, LAWS OF 1888.)

CONTESTS OF PRESIDENTIAL ELECTORS.

An Act providing for contesting the election of presidential electors, additional to chapter 6, title V, of the code of 1873.

SECTION 1. [**Election of electors may be contested.**].—*Be it enacted by the general assembly of the state of Iowa:* The election of any presidential elector may be contested by any eligible person who received votes for the same office, for any of the causes enumerated in chapter 6, title 5 of the code of 1873.

SEC. 2. [**Court of contest: how constituted.**].—The court for the trial of contested elections for presidential electors shall consist of the chief justice of the supreme court, who shall be the presiding judge of the court, and the four judges of the district court, not interested, being nearest the capital of the state, two of whom with the chief justice shall constitute a quorum for the transaction of the business of the court. If the chief justice should, for any cause, be unable to attend the trial, the next senior judge, or the one longest on the supreme court bench, if of equal rank, shall preside in place of the chief justice, and any question arising as to the membership of the court shall be determined by the members of the

court not interested in the question. The secretary of the state shall be the clerk of the court, or in his absence or inability to act, the clerk of the supreme court shall be the clerk. Each member of the court, before entering upon the discharge of his duties, shall take an oath before the secretary of state or some officer qualified to administer oaths, that he will support the constitution of the United States and that of the state of Iowa, and that, without fear, favor, affection or hope of reward, he will, to the best of his knowledge and ability, administer justice according to law and the facts in the case.

SEC. 3. [Contestant must file his statement.]—The contestant shall file the statement provided for in this chapter in the office of the secretary of state within ten days from the day on which the returns are canvassed by the state board of canvassers, and within the same time serve a copy of the same, with a notice of the contest, on the incumbent.

SEC. 4. [Clerk to notify the judges when statement is filed.]—The clerk of the court shall, immediately after the filing of the statement, notify the judges specified in section two of this act and fix a day for the organization of the court within three days thereafter, and also notify the parties of the contest. The judges shall meet on the day fixed and organize the court and make and announce such rules for the trial of the case as they shall deem necessary for the protection of the rights of each party and a just and speedy trial of the case, and commence the trial of the case as early as practicable thereafter, and so arrange for and conduct the trial that a final determination of the same and judgment shall be rendered at least six days before the second Monday in January then next following.

SEC. 5. [Judgment.]—The judgment of the court shall determine which of the parties to the action is entitled to hold the office of presidential elector, and shall be authenticated by the presiding judge and clerk of the court and filed with the secretary of state, and the judgment so rendered shall constitute a final determination of the title to the office, and a certificate of appointment shall be issued to the successful party as an elector.

SEC. 6. Sections 723, 724 and 725 of the code shall apply to this act.

Approved April 13, 1888.

CHAPTER 7.

OF REMOVAL AND SUSPENSION FROM OFFICE.

SECTION 746. [Causes of removal.]—All county and township officers may be charged, tried, and removed from office for the causes following:

1. For habitual or willful neglect of duty;
2. For gross partiality;
3. For oppression;
4. For extortion;
5. For corruption;
6. For willful maladministration in office;
7. Upon conviction of a felony;
8. For a failure to produce and fully account for all public funds and property in his hands at any inspection or settlement.

If a county treasurer should refuse to make a settlement, or it should appear by an examination of his books and the counting of his cash that he is a defaulter, he is liable to be removed from his office. *Boone County v. Jones*, 54 Iowa, 699.

SEC. 747. [By whom made.]—Any person may make such a charge, and the district court shall have exclusive original jurisdiction thereof by the service of original notice.

SEC. 748. [**Proceedings.**]—The proceedings shall be as nearly like those in other actions at law as the nature of the case admits, excepting where otherwise provided in this chapter.

The proceedings to disbar an attorney for illegal conduct as such is analogous to the proceeding provided for in sections 746, 747 and 749. *The State v. Clarke*, 46 Iowa, 155.

SEC. 749. [**Petition.**]—The petition shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them and be verified by any elector.

SEC. 750. [**Notice.**]—It will be sufficient that the notice require the accused to appear and answer the petition of A. B. (naming accuser), for “official misdemeanors”; but a copy of the petition must be served with the notice.

SEC. 751. [**When clerk is the accused.**]—If the person who holds the office of clerk of the district and circuit courts is the accused in either of those capacities, his removal or suspension shall operate in both courts and the petition may be filed with the county auditor, and both he and the clerk may issue subpoenas for witnesses, and the county auditor shall deliver the papers to the judge of the district court, on its sitting.

SEC. 752. [**Suspension.**]—If a continuance of the action take place beyond the return term, the court may suspend the accused from the functions of his office until the determination of the matter, if sufficient cause appear from testimony, or affidavits then presented; and if such suspension take place, the board of supervisors shall temporarily fill the office by appointment.

SEC. 753. [**Appointments.**]—When the accused is an officer of the court and is suspended, the court may supply his place by appointment for the term.

SEC. 754. [**Trial: judgment.**]—The question of fact shall be tried as in other actions, and if the accused is found guilty, judgment shall be entered removing the officer from his office, and declaring the latter vacant; and a copy thereof shall be certified to the county auditor, who shall cause it to be entered in the election book.

SEC. 755. [**Costs.**]—The accuser and the accused are liable to costs as in other actions.

SEC. 756. [**Judges may suspend clerk or sheriff.**]—The judges of the district and circuit courts in their respective districts shall have authority, on their own motion, to suspend from office any clerk of those courts, or sheriff of a county, for any of the causes mentioned in this chapter coming to their own knowledge, or manifestly appearing from the papers or testimony in any proceeding in court.

When the district or circuit judge becomes satisfied that the public interest requires the suspension of the sheriff or clerk from office, he is authorized to suspend him, notwithstanding a petition cannot be filed and notice served before the close of the term. *McCue v. The Circuit Court of Wapello County*, 51 Iowa, 60.

Upon the suspension of the sheriff the person whom the board of supervisors may appoint is authorized to discharge the duties of the office, and not the deputy of the suspended officer. *Id.*

Where upon the suspension of the sheriff his deputy was temporarily appointed to discharge the duties of the office, and the board of supervisors afterward selected another person to temporarily fill the office, it was held, that it was competent for the court to decide, without an action of *quo warranto*, that the latter was entitled to the possession of the office. *Id.*

SEC. 757. [**Direct petition to be filed.**]—Upon suspension the court may direct the district attorney to file a petition in the name of the county; but it need not be verified.

SEC. 758. [**Suspension verified.**]—Such order of suspension shall be certified to the county auditor and be by him entered in the election book.

SUSPENSION OF STATE OFFICERS.

SEC. 759. [**Accounts examined.**]—Whenever, in the judgment of the governor, the public service requires it, he shall appoint a commission of three competent accountants who shall examine the books, papers, vouchers, moneys,

securities and other documents in the possession or under the control of any state officer, shall make out a full, complete and specific statement of the transactions of said officer, with, for, or on behalf of the state, showing the true balances in each case, and report the same to the governor with such suggestions as they may deem proper.

SEC. 760. [Defalcation: suspension.]—Whenever any commission appointed as aforesaid, or under the provisions of section one hundred and thirty-two, of chapter nine, of title II of this code, shall report that any officer has been guilty of any defalcation or misappropriation of the public money, or that his accounts, papers and books are improperly or unsafely kept, and that the state is liable to suffer loss thereby, the governor shall forthwith suspend such officer from the exercise of his office, and require him to deliver all the money, books, papers and other property of the state to the governor to be disposed of as hereinafter provided.

Where a deputy sheriff collects money on execution and neglects or refuses to pay it over, the remedy of the party entitled to the money is by an action against the sheriff on his official bond, and not against the deputy and his sureties. The bond of the deputy is given to the sheriff and is for his protection. *Brayton v. Town*, 12 Iowa, 346.

If this section provided for the absolute removal by the governor of an elective state officer before the expiration of the term for which he was elected under the constitution, it might reasonably be contended that the statute was unconstitutional; but since it only provides for a *suspension* of the officer, for the reasons therein stated, from the performance of official duties, and not necessarily from the emoluments of the office, *held* that it is not repugnant to the constitution in the point above raised, nor as an attempt to clothe the governor with judicial power. *Brown v. Duffus*, 65 Id., 193.

SEC. 761. [Consequences.]—After such suspension, it shall be unlawful for such officer to exercise, or attempt to exercise, any of the functions of his office until such suspension shall be revoked, and any attempt to exercise said office after such suspension, shall be deemed a misdemeanor, and shall subject the offender for each offense to the penalty of not more than one year's imprisonment in the county jail, and not more than one thousand dollars fine, to be recovered and enforced as provided by law.

SEC. 762. [Temporary appointment.]—In every such case of suspension, the governor shall appoint some suitable person to fill, temporarily, the office, and such person having qualified as required by law, shall perform all the duties and enjoy all the rights to the said office belonging, until the removal of the suspension of his predecessor or the election of a successor.

SEC. 763. [Duty of governor.]—Whenever the governor shall suspend any such public officer, he shall direct the proper legal steps to be taken to indemnify the state from loss.

SEC. 764. [Compensation.]—The commissioners provided for in this chapter shall each receive the sum of three dollars per day, for the time actually employed in the performance of their duties.

SEC. 765. (As amended by ch. 20, 16th g. a.) [Power of commissioners.]—Said commissioners shall have power, when in session (to administer oaths), to issue subpoenas, to call any person before them to testify in reference to any fact connected with their investigation; also to require such person to produce any papers or books which the district court might require to be produced.

CHAPTER 8.

OF DEPUTIES.

SECTION 766. (*As amended by ch. 117, 19th g. a., and ch. 36, 22d g. a.*) [**Who appoint.**]—The secretary, auditor, and treasurer of state, the superintendent of public instruction, the register of the state land office, (clerk of the supreme court), county auditor, treasurer, sheriff, surveyor, and recorder may appoint a deputy, (and each clerk of the district court may appoint one deputy, or in counties having a population of 30,000 inhabitants, more than one, if so ordered by the court), for whose acts he shall be responsible, and from whom he shall require bonds; which appointment must be in writing and be approved by the officer who has the approval of the principal's bond, and shall be revocable by writing under the principal's hand; and both the appointment and the revocation shall be filed and kept in the office of the secretary of state and county auditor respectively.

Where, upon the suspension of the sheriff, his deputy was temporarily appointed to discharge the duties of the office, and the board of supervisors afterwards selected another person to temporarily fill the office, *held* that it was competent for the court to decide without an action of *quo warranto* that the latter was entitled to the possession of the office. *McCue v. The Circuit Court of Wapello County*, 51 Id., 60.

SEC. 767. (*As amended by ch. 4, 16th g. a.*) [**Powers of deputy.**]—In the absence or disability of the principal, the deputy shall perform the duties of his principal pertaining to his own office; but when any officer is required to act in conjunction with or in the place of another officer, his deputy cannot supply his place: (*Provided*, that in the counties having two county seats the deputy may hereafter perform all acts of the principal.)

Prior to the amendment of this section it has been held that the deputy sheriff cannot supply the place of the sheriff, who is required to act with the clerk or his deputy in comparing the ballots with the list of jurors, and correcting the same if necessary. *The State v. Brandt*, 41 Iowa, 593. Following *Dutel v. The State*, 3 G. Greene, 125.

The deputy clerk has the same power to administer oaths as his principal. *Wood v. Baily*, 12 Id., 46.

The acceptance of service, by the deputy sheriff, of notice of the ownership of property levied upon by the sheriff personally, is not binding upon the latter as notice to him. *Chapin v. Pinkerton*, 58 Id., 236.

When the duties of a public officer are of a ministerial character, they may be discharged by deputy; but not so when the duties are judicial. *Abrams v. Ervin*, 9 Iowa, 87.

The clerk of the district court is a ministerial officer and his deputy may do any act which the principal may do. He may take the acknowledgment of a deed, but he must do so in the name of his principal. *Id.*

A deputy treasurer has *prima facie* authority to sign the name of principal to certificates of redemption from tax sales and such certificates are admissible in evidence upon showing that the person signing the same was deputy, without further showing his authority to sign the same. *Byington v. Allen*, 11 Id., 3.

Where upon the suspension of the sheriff, his deputy was temporarily appointed to discharge the duties of the office, and the board of supervisors afterward selected another person to temporarily fill the office, *held* that it was competent for the court to decide without the action of *quo warranto*, that the latter was entitled to the possession of the office. *McCue v. The Circuit Court of Wapello County*, 51 Id., 60.

SEC. 768. [**Who may be appointed.**]—The secretary, treasurer and auditor of state can neither of them appoint either of the others his deputy; nor can either the clerk of the district court, auditor, recorder, treasurer or sheriff of a county, appoint either of the others.

SEC. 769. [**Sheriff.**]—The sheriff may appoint such number of deputies as he sees fit.

SEC. 770. [**Oath.**]—Each deputy shall take the same oath as his principal, which shall be indorsed upon and filed with the certificate of his appointment.

SEC. 771. [**Compensation.**]—When a county officer receiving a salary is compelled by the pressure of the business of his office to employ a deputy, the board of supervisors may make a reasonable allowance to such deputy.

A county officer cannot recover against the county for money paid as compensation to a deputy. The county is liable directly to the deputy, and not to the principal. *Mahaska County v. Ingalls*, 14 Iowa, 170.

But see *Washington County v. Jones*, 45 Iowa, 260, where it is held that the clerk is entitled to such additional allowance over his salary for the hire of a deputy as may be reasonable in view of the amount of labor demanded by the duties of his office.

See also *Harvey v. Tama County*, 46 Id., 522, in which it was held, that where the board of supervisors appointed a deputy treasurer, in pursuance of a written agreement with the treasurer that the services of such deputy should be paid for by him, and the services were rendered notwithstanding no allowance had been made by the board for their payment, the county was not liable therefor. This decision is based upon the provisions of section 771, rather than upon the agreement.

CHAPTER 9.

OF ADDITIONAL SECURITY AND THE DISCHARGE OF SURETIES.

SEC. 772. [**Bonds of state officers increased.**]—Whenever the governor shall deem it advisable that the bonds of any state officer should be increased and the security enlarged, or a new bond given, he shall notify said officer of the fact, the amount of new or additional security to be given, and the time when the same shall be executed, which said new security shall be approved and filed as provided by law.

SEC. 773. [**Additional security required.**]—Any officer or board who has the approval of another officer's bond, when of opinion that the public security requires it, upon giving ten days' notice to show cause to the contrary, may require him to give such additional security by a new bond, as may be deemed requisite, within a reasonable time to be prescribed.

SEC. 774. [**Security in force.**]—If a requisition made under either of the foregoing sections be complied with, both the old and the new security shall be in force; and if not complied with, the office shall become and be declared vacant, and the proceeding be certified to the proper officer to be recorded in the election book or township record.

The sureties in a new or substituted official bond, are not liable for moneys which came into the hands of their principal before its execution, and during the existence of a prior bond in place of which the new bond was given. *Thompson v. Dickerson*, 22 Iowa, 360.

SEC. 775. [**Sureties relieved.**]—When any surety on the bond of a civil officer conceives himself in danger by remaining surety, and desires to be relieved of his obligation, he may petition the approving officer or board above referred to for relief, stating the ground of his apprehension.

SEC. 776. [**Notice of petition.**]—The surety shall give the principal at least twenty-four hours notice of the presenting and filing of the petition, with a copy thereof. At the expiration of this notice, the approving officer may hear the matter or may postpone the hearing as the case permits or requires.

SEC. 777. [**Hearing: order: effect.**]—If, upon the hearing, there appears substantial ground for apprehension, the approving officer or board may order the principal to give a new bond and to supply the place of the petitioning surety within a reasonable time to be prescribed; and upon such new bond being given, the petitioning surety upon the former bond shall be declared discharged from liability on the same for future acts; which order of discharge shall be entered in the proper election book, but the bond will continue binding upon those who do not petition for relief.

SEC. 778. [**Failure to comply.**]—If the new bond is not given as required, the office shall be declared vacant, and the order to that effect entered in the proper election book.

SEC. 779. [**Justice of the peace.**]—If the proceedings relate to a justice of

the peace and he is removed from office, the county auditor shall notify the proper township trustees, or clerk, of the removal.

SEC. 780. [**Subpœnas.**]—The approving officer may issue subpœnas in his official name for witnesses, compel their attendance, and swear them.

CHAPTER 10.

OF VACANCIES AND SPECIAL ELECTIONS.

SECTION 781. [**Civil office: when vacant.**]—Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows:

1. The resignation of the incumbent;
2. His death;
3. His removal from office;
4. The decision of a competent tribunal declaring his office vacant;
5. His ceasing to be a resident of the state, district, county, or township in which the duties of his office are to be exercised, or for which he may have been elected;
6. A failure to elect at the proper election, there being no incumbent to continue in office until his successor is elected and qualified, nor other provision relating thereto;
7. A forfeiture of office as provided by any law of the state;
8. Conviction of an infamous crime, or of any public offense involving the violation of his oath of office;
9. The acceptance of a commission to any military office, either in the militia of this state or in the service of the United States, which requires the incumbent in the civil office to exercise his military duties out of the state for a period not less than sixty days.

SEC. 782. [**Resignations: how made.**]—Resignations of civil officers may be made as follows:

1. By the governor to the general assembly, if in session, if not, to the secretary of state;
2. By senators and representatives in congress, and by all officers elected by the qualified voters of the state [or chosen by the general assembly], and by judges of courts of record, and district attorneys, to the governor;
3. (*As amended by ch. 107, 17th g. a.*)—By senators and representatives in the general assembly, to the presiding officer of their respective bodies, if in session, who shall immediately transmit information of the same to the governor; if such bodies are not in session, to the governor;
4. By all county officers to the board of supervisors, and by members of the board of supervisors to the county auditor;
5. By all township officers to the township clerk; and by the township clerk to the township trustees, or any one of them;
6. By all officers holding by appointment to the officer or body by whom they were appointed.

(SEC. 2. [**Vacancies in boards of state institutions, as amended by ch. 107, 17th g. a.**]—In case of a vacancy from any cause, other than resignation or expiration of term, occurring in any of the boards of trustees or directors of state institutions, it shall be the duty of the secretary of the board wherein the vacancies shall happen, to notify the governor thereof immediately. *Provided*, That this section shall not apply to vacancies in the board of regents of the state university.)

(SEC. 3. [Governor to notify general assembly.]—Upon receiving notice of vacancies which are required to be filed by the general assembly, the governor shall at once notify that body thereof, if it be in session, and immediately upon its next convening if it be not. He shall also notify the board of regents of all vacancies occurring therein by resignation.)

(Approved March 25, 1878. Took effect April 2, 1878, by publication in newspapers.)

The tendering of a resignation of a public office, in writing, to the officer authorized by law to receive it, and the filing of the same without objection by such officer, operates to vacate the office resigned according to the tenor of such resignation. *Gates v. Delaware County*, 12 Iowa, 405.

SEC. 783. **Vacancies shall be filled as follows:**

In the offices of clerk and reporter of the supreme court, by the supreme court;

In all other state offices, and in the membership of any board or commission created by the state, where no other method is specially provided, by the governor;

In county offices by the board of supervisors; and in the membership of such board by the county clerk, auditor, and recorder;

In township offices by the trustees, but where the offices of the three trustees are all vacant the clerk shall appoint, and if there be no clerk, the county auditor shall appoint.

SEC. 784. [Continuance of term.]—Every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless the statute under which he is elected or appointed expressly declares the contrary; *provided*, that this section shall not be construed in any way to prevent the removal or suspension of such officer during or after his term, in cases provided by law.

In *The County of Wapello v. Bingham*, 10 Iowa, 39, it was held that where a county treasurer was re-elected he should have qualified anew, and having continued in office the second term without qualifying anew he did not legally hold over, but remained treasurer *de facto* only, and that the sureties on the bond executed for his first term, were not liable for his delinquencies in office after the expiration of that term.

SEC. 785. [Appointments.]—Appointments under the provisions of this chapter shall be in writing, and continue until the next election at which the vacancy can be filled until a successor is elected and qualified, and be filed with the secretary or proper township clerk, or in the proper county office, respectively.

The term of office of a justice of the peace appointed to fill a vacancy continues only until the next election, when the vacancy can be filled, and until a successor is elected and qualified. *Desmond v. McCarthy*, 17 Iowa, 525.

SEC. 786. [Qualification.]—Persons appointed to office as herein provided shall qualify in the same manner as those elected, within a time to be prescribed in their appointment, and the provisions of the chapter relating to qualification for office are extended to them.

SEC. 787. [Removed.]—A person appointed as herein contemplated may be removed by the officer appointing, and no person can be appointed who has been removed from office within one year.

SEC. 788. [Who may take possession of office.]—When a vacancy occurs in a public office, possession shall be taken of the office room, and of the books, papers, and all things pertaining to the office, to be held until the election or appointment and qualification of a successor, as follows:

Of the office of the county auditor, by the clerk of the district court;

Of that of the clerk or treasurer, by the county auditor;

Of any of the state officers, by the governor; or in his absence or inability at the time of the occurrence, as follows:

Of the secretary, by the treasurer;

Of the auditor, register of the land office, or superintendent of public instruction, by the secretary;

Of the treasurer, by the secretary and auditor, who shall make an inventory of the money and warrants therein, sign the same, and transmit it to the governor if he be in the state; and the secretary shall take the keys of the safes and desks after depositing the books, papers, money, and warrants therein, and the auditor shall take the key of the office room.

SEC. 789. [**Election to fill vacancies.**].—Vacancies occurring in the township offices, ten days; in county offices, fifteen days; and in all other public elective offices, thirty days prior to a general election, shall be filled thereat. When a vacancy occurs in the office of representative in congress, or senator or representative in the general assembly, and the body in which such vacancy exists will convene prior to such election, the governor shall order a special election to fill such vacancy at the earliest practicable time, and ten days notice of such election shall be given.

SEC. 790. [**Members of general assembly.**].—Whenever a vacancy shall occur in the office of a senator or representative in the general assembly, the auditor of the county in which such vacancy occurs shall notify the governor of such fact and the cause of the vacancy; and if more than one county is represented in the district in which such vacancy may occur, then such notice shall be given by the auditor of the county in which the late member resided.

SPECIAL ELECTIONS.

SEC. 791. [**Provisions for.**].—The provisions relating to general elections shall govern special elections except where otherwise provided by law.

SEC. 792. [**Canvass, when and by whom made.**].—In all cases where special elections are held to fill vacancies in the offices of senator or representative in the general assembly, or representative in congress, the board of county canvassers shall meet at twelve o'clock, m., on the second day after said election, to canvass the votes cast at such election, and the auditor, within four days after such election, shall transmit to the secretary of state an abstract of the votes cast at said election, if there be more than one county in the district.

SEC. 793. [**State canvass.**].—Within fifteen days after said election, in the case last mentioned, the board of state canvassers shall meet and canvass the votes cast to fill such vacancy, and if the returns have not been received from all the counties composing said district, they may adjourn to such day as they deem necessary, not exceeding ten, for the purpose of receiving said returns.

SEC. 794. [**In office of justice.**].—Whenever a vacancy occurs in the office of a justice of the peace or constable more than thirty days prior to any general election, the county auditor shall immediately notify the clerk of the township in which the vacancy exists, and the township clerk, within five days after receiving such notice, shall notify each of the trustees of his township in writing, fixing the time and place that they shall meet for the purpose of filling such vacancy by appointment. Such notice may be served by any constable of the township, and shall be served at least five days prior to such meeting.

SEC. 795. [**Trustees to appoint; qualification.**].—The trustees shall meet in accordance with such notice and fill such vacancy, and in five days after such appointment has been made, the township clerk shall record it in the township record book, and shall cause a notice to be served upon the person so appointed, informing him of his appointment, by any constable in the township in the manner prescribed by law for the service of notices, and any person so appointed and notified, shall qualify within ten days after such notice has been served upon him. The auditor may approve of the bond of a justice of the peace and constable so appointed, by the recommendation of the sufficiency of the sureties upon such bond, signed by any member of the board of supervisors.

TITLE VI.

OF REVENUE.

CHAPTER 1.

OF THE ASSESSMENT OF TAXES.

SECTION 796. [**Levy: amount of.**]—The board of supervisors for each county shall, annually, at their September session, levy the following taxes upon the assessed value of the taxable property in the county:

1. For state revenue, one and a half mills on a dollar, or such rate as may be directed by the executive council, not exceeding two mills on a dollar;

2. (*As substituted by ch. 43, 22d g. a.*) For ordinary county revenue, including the support of the poor, not more than four mills on a dollar, and a poll-tax of fifty cents; [*provided, however, that in counties having a population of twenty thousand and less, excepting counties having an area exceeding nine hundred square miles, such levy may be six mills or less; provided, however, that in any county in which the levy is herein limited to four mills, the board of supervisors may submit the question of increasing the same to six mills or less to a vote of the electors at any general election, and if at such election a majority of the electors declare in favor of such increase, the board of supervisors may levy the same for the year following such election at the next meeting at which the general levy is made;*]

3. For the support of schools, not less than one nor more than three mills on a dollar;

4. For making and repairing bridges not more than three mills on a dollar.

The power to levy the requisite taxes is given to the board of supervisors. *Hill v. Wolfe*, 28 Iowa, 577, 579.

The second subdivision of this section was intended to invest the board of supervisors with all the authority necessary to raise the county revenue, including whatever may be necessary for the payment of debts. The limitations in this subdivision have the same controlling operation which those in a city charter have upon the power of municipal taxation. And one who becomes a creditor of a county is presumed to do so in view of the existing law, and cannot complain if his debt exceed its power of immediate payment. *The Iowa R. Land Co. v. Sac County*, 39 Id., 124.

Section 3940 of the code confers no independent power of taxation, and does not require a county or other municipal corporation to levy a tax in excess of the *maximum rate* of taxation allowed by the statute. *Id.*

It is not within the power of the board of supervisors to bind the county by the offer of a reward for the arrest of persons charged with the commission of a crime, but they may offer a reward for the recovery of money which has been stolen from the county. *Hawk v. Marion County*, 48 Id., 472.

EXEMPTIONS.

SEC. 797. [**Property exempt.**]—The following classes of property are not to be taxed, and they may be omitted from the assessments herein required:

1. The property of the United States and of this state, including university, agricultural college and school lands, and all property, leased to the state; the property of a county, township, city, incorporated town, or school district, when devoted entirely to the public use and not held for pecuniary profit; public grounds, includ-

ing all places for the burial of the dead; fire engines, and all implements for extinguishing fires, with the grounds used exclusively for their buildings and for the meetings of the fire companies; all public libraries, grounds, and buildings of literary, scientific, benevolent, agricultural, and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding six hundred and forty acres in extent, and not leased or otherwise used with a view to pecuniary profit; and all property leased to agricultural, charitable institutions, and benevolent societies, and so devoted during the term of such lease; *provided*, that all deeds by which such property is held shall be duly filed for record before the property therein described shall be omitted from the assessment;

2. [**Books, papers, and apparatus.**—The books, papers, and apparatus belonging to the above institutions, used solely for the purposes above contemplated, and the like property of students in any such institution used for their education;

3. [**Money, credits.**—Money and credits belonging exclusively to such institutions, and devoted solely to sustaining them, but not exceeding in amount or income the sum prescribed by their charter;

4. [**Enumeration of articles.**—Animals not hereafter specified, the wool shorn from sheep belonging to the person giving the list, his farm produce harvested within one year previous to the listing, private libraries not exceeding three hundred dollars in value, family pictures, kitchen furniture, beds and bedding requisite for each family, all wearing apparel in actual use, and all food provided for the family; but no person from whom a compensation for board or lodging is received or expected, is to be considered a member of a family within the intent of this clause;

5. [**Polls or estates of infirm persons.**—The polls or estates, or both, of persons who by reason of age or infirmity may, in the opinion of the assessor, be unable to contribute to the public revenue; such opinion, and the fact on which it is based, being in all cases reported to the board of equalization by the assessor or any other person, and subject to reversal by them;

6. [**Farming utensils.**—The farming utensils of any person who makes his livelihood by farming, and the tools of any mechanic, not in either case to exceed three hundred dollars in value;

7. [**Land entered during the year.**—Government lands entered or located, or lands purchased from this state, shall not be taxed for the year in which the entry, location, or purchase is made.

[8. (*As amended by ch. 97, 21st g. a.*) The homestead, not to exceed \$500 in value, of the widow of any federal soldier or sailor who died during the late war while in service or who has since died of wounds received or disease contracted while in such service. *Provided*, that the provisions of this act shall only apply to persons who do not own other real estate than such homestead.]

Lands granted by the United States to the state, and by the state to the counties as indemnity for swamp lands granted to the state under the acts of congress relating thereto, were not taxable prior to the act of 1870, chapter 187, though lying in a county different from that owning the lands in question. *The County of Guthrie v. The County of Carroll*, 34 Iowa, 108.

A water company which supplies a city with water, at rates regulated by the city council, and which, by the provisions of the ordinance conferring its powers may be purchased by the city at a fixed price; is, nevertheless, a *private* corporation, and its property is subject to taxation. *In the matter of the appeal of the Des Moines Water Co.*, 48 Id., 324.

Since the primary and exclusive use of the real and personal property of such corporation is not for the extinction of fires, both are subject to taxation. *Id.*

Under this section, all property, including the residence of professors upon the grounds of literary institutions and the dwellings of clergymen owned by religious societies, and used exclusively for such dwellings without income to the owners, which is proper and appropriate to effectuate the objects of the institutions or societies, is exempt from taxation. *The Trustees of Griswold College v. The State of Iowa*, 46 Id., 275.

This provision of the statute is not in conflict with section 3 of article 1 of the state constitution. *Id.*

An entry of land, under the homestead act of congress, does not divest the United States of the title until five years from the date of filing the declaratory statement, and prior to that time the land is not subject to taxation. *Moriarty v. Boone County*, 39 Id., 634.

Land granted to railroads under the various acts of congress and of the general assembly are not taxable until the year after they are patented. *The McGregor & M. R. Co. v. Brown*, Id., 655.

Parol evidence is admissible to show that a railroad company has fraudulently prevented the issuance to it of patents to lands, for the purpose of avoiding taxation thereon. *The M. & M. R. Co. v. Brown*, 39 Id., 655.

If property which the legislature has declared to be liable to taxation is to be exempted from bearing its due proportion of the public burdens, the exemption must rest upon some clear and just ground; and courts are not justified in indulging in nice distinctions to defeat the legislative will. *Morseman v. Younkin et al.*, 27 Id., 350.

Lands purchased by a county for its own protection upon a judgment in its favor, are not held for "pecuniary profit," but for public use, and are not taxable. *Gibson v. Howe*, 37 Id., 168.

Lands granted by the state are not taxable so long as it holds the title thereto. *Goodrich v. Beaman*, 37 Id., 563.

Where a county bound by contract to convey its swamp lands to a railroad company refuses to do so, it will be thereby estopped from afterward claiming that during such time the title was in the company and subject to taxation. *The Iowa L. Co. v. Story Co.*, 36 Id., 48.

Nor would such lands in any case be taxable before their conveyance by the county, if it were not then known what particular lands the company would be entitled to. There must have been a definite designation of the lands. *Id.* Following *C. R. & M. R. Ry Co. v. Woodbury Co.*, 29 Id., 247.

Nor would such lands, while held as property of the county, be taxable under section 711 of the revision (section 797 of code), which exempts from taxation property of the state or county, when not held for pecuniary profit. *Id.*

In order to exempt real estate from taxation under this section, use and ownership, either legal or equitable, must combine in the same person. Where the legal title is in a private individual, though the property is used for a church and school, it is not exempt from taxation. *Laurent v. City of Muscatine*, 59 Id., 404.

The real and personal property of such corporation may be assessed to the company, and must be so assessed when the shares of stock have not been otherwise assessed. *Id.*

The land, buildings, machinery and water-mains are all real property, and the mains are subject to assessment in the township where the machinery which propels the water through them is situated. *Id.*

A building owned by a benevolent society and leased by it for pecuniary profit is subject to taxation, although built with a fund which was exempt, and into which the rents are paid. Under the statute it is immaterial to what the income from leased property is devoted. When the property is leased for business purposes it is taxable. *Fort Des Moines Lodge v. County of Polk*, 56 Id., 34.

Where forty acres of land were held by a church as a burying ground, but only one acre was actually used for burying purposes and the remainder as farm land, it was held that the thirty-nine acres so used were subject to taxation. *Mambroy v. Churchman*, 52 Id., 233.

The property of an incorporated town, where devoted entirely to the public use, and not held for any pecuniary profit, is exempt from taxation under this section, but where property is devised to trustees in trust for the town, with a proviso that the rents and profits shall be applied to a public purpose, it is held for pecuniary profit, in contemplation of the statute, and is subject to taxation. *The Town of Mitchellville v. The Board of Supervisors et al.*, 64 Iowa, 554.

The plaintiff, a religious corporation, in August, 1880, purchased a city lot for the purpose of erecting thereon a house of worship, and it was used for no other purpose after its purchase, but in January of the same year it was assessed to the plaintiff's grantor. Held that it was not exempt, in the hands of the plaintiff, from taxation for the year 1880, under this section of the code. *The First Congregational Church v. Linn County*, 70 Id., 396. See also *Kirk v. St. Thomas Church*, Id., 287.

SEC. 798. (As amended by ch. 50, 17th g. a., and ch. 190, 18th g. a.) [Forest trees].—For every acre of forest trees planted and cultivated for timber within the state, the trees thereon not being more than twelve feet apart and kept in a healthy condition, the sum of one hundred dollars shall be exempted from taxation upon the owner's assessment, for ten years after each acre is so planted. (Provided, that such exemption be applied only to the realty owned by the party claiming the exemption, not to exceed one hundred and sixty acres of land, upon which the trees are grown, and in growing condition.) For every acre of fruit trees

planted and suitably cultivated within the state, the trees thereon not being more than thirty-three feet apart and kept in a healthy condition, the sum of fifty dollars shall be exempted from taxation upon the owner's assessment, for five years after each acre is planted. Such exemption shall be made by the assessor at the time of the annual assessment, upon satisfactory proof that the party claiming the same has complied with this section; and the assessor shall return to the board of equalization the name of each person claiming exemption, the quantity of lands planted to timber or fruit trees, and the amount deducted from the valuation of his property; (*Provided*, that the amount so deducted shall not exceed one-half of the valuation of the realty on which such exemption is claimed.)

(Section 799 was repealed and a substitute enacted in lieu thereof by chapter 45, laws of 1874; and by chapter 50 of the laws of 1878, the substituted section is repealed.)

SEC. 800. (*As amended by ch. 66, 15th g. a.*) [**When property destroyed by fire, tornado, etc.**].—(The board of supervisors shall have power to rebate in whole or in part the taxes of any person whose buildings, crops, stock or other property has been destroyed by fire, tornado or other unavoidable casualty) if said property shall not have been sold for taxes, or if said taxes have not been in default for thirty days at the time of destruction. But the loss for which such rebate is allowed, shall be such only as is not covered by insurance.

Where the board of supervisors rebates a tax for any of the reasons named in this section, and the tax has been paid when such rebate is made, the county treasurer has no authority to refund such tax without an order to that effect from the board of supervisors; whether a warrant from the auditor would not also be necessary, *quære. Crosby v. Floete, Treas., etc.*, 65 Iowa, 370.

TAXABLE PROPERTY, AND LISTING THEREOF.

SEC. 801. (*As amended by ch. 163, 16th g. a.*) [**Enumerated.**].—All other property, real or personal, is subject to taxation in the manner directed. Ferry franchises and toll bridges, for the purposes of this title, are considered as real property. Horses, cattle, mules, asses, sheep, swine, and money, whether in possession or on deposit, and including bank bills, money, property, or labor due from solvent debtors on contract or on judgment, mortgages and other like securities, and accounts bearing interest, property situated in this state belonging to any bank, or company, incorporated or otherwise, whether incorporated by this or any other state, public stocks or loans, household furniture, including gold and silver plate, musical instruments, watches and jewelry, private libraries, for their value exceeding three hundred dollars, carriages, threshing machines, and every description of vehicle, farming utensils, machines and machinery, mechanics' tools, and professional libraries, for their aggregate value over three hundred dollars, boats and vessels of every description, wherever registered or licensed, and whether navigating the waters of this state or not, if owned either wholly or in part by inhabitants of this state, to the amount owned in this state; any and all lands in this state which are owned or held by any other county or counties claiming title under locations with swamp land indemnity scrip, or otherwise, shall be taxed the same as other real estate within the limits of the county. [The shares of stock of mutual loan and building associations shall be assessed at their cash value, but that only the unredeemed shares of such stock shall be taxed, and such unredeemed shares shall be listed to the individual owners thereof.]

The property of railroads is subject to taxation, and a municipal corporation, authorized by its charter to levy and collect taxes upon "all taxable property within its limits," may levy and collect a tax upon property belonging to railroads the same as other property, and this notwithstanding the provisions of chapter 196, acts of the twelfth general assembly. COLE, J., dissenting. *The Duntleith & Dubuque Bridge Co. v. The City of Dubuque*, 32 Iowa, 427.

The property of railroad companies is required by section 2, article 8, of the state constitution, to be taxed the same as that of individuals—that is, the legislature is required to impose the bur-

den of taxation upon the property of corporations for pecuniary profit the same as or equally with that of individuals. The property of this class of corporations shall bear the same burdens of taxation as are imposed upon that of individuals; each shall be taxed for the same objects, and in the same degree, so that individuals shall not be required to pay any taxes on *their property* which are not also assessed and laid upon the *property of corporations* of the class named, nor in any greater proportion. When the legislature provides for taxing the property of individuals, this clause of the constitution requires it to tax the property of corporations for pecuniary profit, to the same extent and for the same purposes. *The City of Davenport v. The Chicago, R. I. & P. R'y Co.*, 38 Id., 633; see, also, *The City of Dubuque v. The Illinois Central R'y Co.*, 39 Id., 56.

Taxable property in lands includes every species of title, inchoate or complete; it embraces rights which lie in contract, executory as well as executed. *Stockdale v. Treasurer of Webster Co.*, 12 Id., 536.

Lands included in the grant for the construction of railroads in this state, made by act of congress of May 15, 1856, are subject to taxation by the state after the railroad companies to which they were granted have acquired the title in fee, and before they had been alienated by the companies. *The B. & M. R. R'y Co. v. Hayne*, 19 Id., 137; *Stockdale v. Treas. of Webster Co.*, 12 Id., 536; *Iowa Homestead Company v. Webster Co.*, 21 Id., 221.

Lands held by the United States in trust for certain grantees, are subject to taxation as the property of such grantees. *Stockdale v. Webster Co.*, 12 Id., 536.

Lands entered with military land warrants by the warrantee or his heirs, are exempt from taxation under the fifth subdivision of section six of the acts of congress admitting the state of Iowa into the union. *Sands v. The County of Adams*, 11 Id., 577.

But lands entered with military land warrants by the assignees of the warrantees are not exempt from taxation under said act of congress. *Id.*

Land acquired from the government of the United States after the time fixed by the law for the completion of the assessment for the current year, is exempt from taxation until the following assessment. *Des Moines Navigation & R'y Co. v. Polk County*, 10 Id., 1; *Tallman v. The Treasurer of Butler County*, 12 Id., 531.

A mortgage made by a railroad company upon its depot grounds, road and rolling stock situated in this state, is not subject to taxation upon the failure of the mortgagee to list, when the holder or owner of the mortgage is a non-resident of the state. *The City of Davenport v. The M. & M. R. Co.*, 12 Id., 439.

Agricultural college lands leased by the trustees of the college under chapter 117, laws of 1864, providing that the lessee shall pay six per cent per annum upon the appraised value of the land, with the privilege of purchasing the same at the expiration of the lease at the appraised value at the date thereof, are not taxable. *Trustees of Agricultural College v. Webster County*, 34 Id., 141.

Lands granted to the state by congress, and by the state to a county as indemnity for swamp lands granted to the state under the various acts of congress relating thereto, were not taxable prior to the act of 1870, chapter 187, though lying in a county different from that owning the land in question, and to which the grant was made. *The County of Guthrie v. The County of Carroll*, Id., 108. But said lands were liable for taxation for 1870, under said chapter 187. *Id.*

Mortgages before foreclosure are choses in action, and as such attach to the person of the holder, and are taxable at the place of his domicile. They are not taxable in this state when the owner resides out of the state. *City of Davenport v. The M. & M. R'y Co.*, 12 Id., 539.

The annual premiums of an insurance company received by an agent thereof residing in a city, are not subject to taxation as personal property, under the general power conferred upon a city by its charter to provide for the taxation and assessment of all taxable property within the city. *The City of Dubuque v. The N. W. Life Insurance Co.*, 29 Id., 9.

Such premiums are in the nature of gross incomes and do not constitute property in its proper sense. *Id.*

A mortgage for the purchase money of land is not exempt from taxation. *McGregor's Executors v. Vampel*, 24 Id., 436.

Where a resident of this state had deposited for safe keeping in a bank in Illinois, certain promissory notes belonging to him, but which had never been brought by him into this state, it was held that they were subject to taxation here. *Hunter v. The Board of Supervisors et al.*, 33 Id., 376.

The notes in such cases are merely the evidence of the debts or rights represented, and these follow the person of the owner. *Id.*

Lands granted by the United States to the counties as swamp lands are not subject to taxation so long as they are held and owned by the counties. Nor are they taxable for any year in which they may be conveyed by a county if the assessment for that year be completed before the conveyance is made. *Sully v. Poorbaugh*, 45 Id., 453.

When lands are acquired from the government after the close of the assessment for the current year, they are not subject to assessment for taxation until the following year. *Tallman v. Treasurer of Butler County*, 12 Id., 531; *Des Moines Nav. & R. Co. v. Polk County*, 19 Id., 1.

SEC. 802. [Definition of term "credit."]—The term "credit" as used in this title, includes every claim and demand for money, labor, or other valuable thing, and every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, mortgage, or otherwise; but pensions of the United States, or any of them, any salaries or payments expected for services to be rendered, are not included in the above.

When in the month of December, 1882, the plaintiff by parol sold a farm to another for \$6,000, one hundred of which was paid down, and the remainder was to be paid on the first of March following, when possession was to be given and a warranty deed delivered; *Held*, that the debt thus created from the purchaser to the plaintiff was an assessable credit on the first day of January, 1883, as defined in this section. *Perrin v. Jacobs et al.*, 64 Iowa, 79.

SEC. 803. [How listed.]—Every inhabitant of this state, of full age and sound mind, shall assist the assessor in listing all property subject to taxation in this state of which he is the owner, or has the control or management, in the manner hereinafter directed; the property of a ward is to be listed by his guardian; of a minor, by his father if living, if not, by his mother if living, and if not, by the persons having the property in charge; of a married woman, by herself or husband; of a beneficiary for whom property is held in trust, by the trustee, and the personal property of a decedent, by the executor; of a body corporate, company, society, or partnership, by its principal accounting officer, agent, or partner. Property under mortgage or lease is so listed by and taxed to the mortgagor or lessor, unless it be listed by the mortgagee or lessee.

Mortgages before foreclosure are choses in action, and as such attach to the person of the holder and are taxable at the place of the domicile. They are not taxable in this state when the owners are non-residents. *The City of Davenport v. The M. & M. R. Co.*, 12 Iowa, 539.

Where a vendee, under a bond "for a good and sufficient deed clear of all incumbrances," upon payment of the purchase-money, enters into the possession of the premises sold, in pursuance of the contract, he is liable for the taxes assessed upon the property after his taking possession thereof; and he cannot enforce the execution of a deed by the grantor with a covenant against the lien for taxes which have thus accrued. *Miller v. Cory*, 15 Id., 166.

A mortgagor, where the mortgage contains covenants of warranty, is bound to defend the title against all claims arising out of delinquent taxes existing on the land at the time of the execution of the mortgage. *Porter v. Lafferty et al.*, 33 Id., 254.

He cannot defeat the title of the mortgagee or of a third party who purchases the premises under the foreclosure of the mortgage, by buying in the property at tax sale for such delinquent taxes. In such case the tax title would inure to the mortgagee or the person purchasing at the foreclosure sale. *Id.*

The same rule would apply to one who purchased the mortgage premises from the mortgagor, and under the agreement to discharge it, he would be regarded as a privy in estate with the mortgagor. *Id.*

It is the duty of a mortgagor to pay the taxes, and he cannot set up a title having its origin in a failure to perform this duty, as against the mortgagee. *Dayton v. Rice et al.*, 47 Id., 429.

Where land was sold at sheriff's sale and before the time for redemption had expired, a tax deed was executed to the same land, the purchase by the judgment debtor, before the expiration of the right of redemption, of the outstanding tax title, will be regarded in equity merely as the discharge of his duty to redeem the land from tax sale. *Id.*

SEC. 804. [Who deemed owners.]—Commission merchants and all persons trading and dealing on commission, and assignees authorized to sell, when the owner of the goods does not reside in the county, are, for the purpose of taxation, to be deemed the owners of the property in their possession.

SEC. 805. [When listed: in whose name.]—Any person required to list property belonging to another shall list it in the same county in which he would be required to if it were his own, except as herein or otherwise directed, but he shall list it separately from his own, giving the assessor the name of the person or estate to whom it belongs; but the undivided property of a person deceased, belonging to his heirs, may be listed as belonging to his heirs without enumerating them.

SEC. 806. [Where taxed: partnership property.]—When a person is doing business in more than one county, the property and credits existing in any one of the counties shall be listed and taxed in that county, and the credits not exist-

ing or pertaining especially to the business in any county, shall be listed and taxed in that where the principal place of business may be. Any individual of a partnership is liable for the taxes due from the firm.

The personal property left by a decedent is, as a general rule, to be assessed in the county of which he died a resident, and in which administration is granted, rather than in the county where his executor resides. If different from that sections 714 and 716 of the revision (§§ 803 and 805 of the code of 1873) do not charge this rule. *McGregor's Exrs. v. Vanpel*, 24 Iowa, 436.

SEC. 807. [**Insurance companies: how taxed.**].—Every insurance company doing business in this state, except joint stock and mutual companies organized under the laws of this state, shall at the time of making the annual statements as required by law, pay into the state treasury as taxes, two and one-half per cent of gross amount of premiums received in this state during the preceding year, taking duplicate receipts therefor, one of which shall be filed with the auditor; and upon the filing of said receipts, and not till then, the said auditor shall issue the annual certificate as provided by law; and the said sum of two and one-half per cent shall be in full for all taxes, state and local.

SEC. 808. [**Real property of railways.**].—Lands, lots, and other real estate belonging to any railway company, not exclusively used in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers shall be subject to assessment and taxation on the same basis as the property of individuals in the several counties where situated.

SEC. 809. [**Road-beds and highways.**].—No real estate used by railway corporations for road-beds, shall be included in the assessment to individuals of the adjacent property, but all such real estate shall be deemed to be the property of such companies for the purpose of taxation; nor shall real estate, occupied for and used as a public highway, be assessed and taxed as part of adjacent lands whence the same was taken for such public purpose.

SEC. 810. [**Railway property: how assessed and taxed.**].—All railway property not specified in section eight hundred and eight of this chapter, shall be taxed upon the assessment made by the executive council as provided in chapter five of title ten, at the same rates, by the same officers, and for the same purposes as individual property under the provisions of this chapter; and all provisions of this title relating to the levy and collection of taxes shall apply to the taxes so levied upon railway property.

SEC. 811. [**Telegraph and express companies.**].—All property real or personal, including their franchises, owned by telegraph and express companies, shall be listed and assessed for taxation and shall be subject to the same levies as the property of individuals.

SEC. 812. (*As amended by ch. 63, laws 15th g. a.*) [**When, and in whose name assessed.**].—All taxable property shall be taxed each year, and personal property shall be listed and assessed each year, in the name of the owner thereof on the first day of January; (except moneys and credits of associations organized under the general incorporation laws of this state, for the purpose of transacting a banking business, and moneys and credits of private bankers and others who have loaned money, bought notes, mortgages, or other securities within the year previous to the time of assessing; in every such instance the average value of the moneys and credits which have been in the possession or under the control of the person making the list during the year previous to the time of making such assessment, shall be listed for taxation); real property shall be listed and valued in the year eighteen hundred and seventy-three, and each second year thereafter, and shall be assessed at its true cash value, having regard to its quality, location, and natural advantages, the general improvement of the vicinity, and all other elements of its value; and in each year in which real estate is not regularly assessed, the assessor shall list and value any real property not included in the previous assessment.

A banker is liable to taxation only for such moneys and credits as are in his possession as owner, and not for those which he may hold as the custodian of others. Bank deposits are taxable to the depositors and not to the bank. *Branch v. The Town of Marengo*, 43 Iowa, 600.

Where the assessor employed another to make the valuations of property, which were afterwards submitted him for correction and approval, the assessment thus made was held not invalid. *Snell v. City of Fort Dodge*, 45 Id., 564.

Under our law all property is assessed at the value and to the owner thereof on the first day of January of the current year. *Parsons v. Childs*, 36 Id., 110.

Improvements upon real property, though made at the expense of the personal estate of the owner, and diminishing the amount of personalty subject to taxation, are not to be regarded as taxable property until the real estate is again assessed in the manner provided by law. *Richards v. Wapello County*, 48 Id., 507.

The plaintiff, who resided in South township, Madison county, had certain cattle fed during the winter months in Scott township; he listed them for taxation in the township where he resided, and they were also assessed in Scott township, where they happened to be on the first of January; held, that they were subject to taxation only in the township where the owner resided. *Ryno v. Madison County*, 43 Id., 632.

Where a city charter refers to the general law of the state for the subjects of taxation, any change in the general law in respect thereto works a corresponding change as regards the subjects of taxation by the city for municipal purposes. *Tackaberry v. The City of Keokuk*, 32 Id., 155.

Under this section, as it stood in the revision, personal property was not subject to taxation for municipal purposes unless owned by the person to whom it was assessed, on the first day of January of the then current year. *Id.*

Where the administrator of an estate, having personal property thereof in his possession, resides in the same county in which his decedent died, but in a different township, such property is taxable in the township of his residence. *Cameron v. City of Burlington*, 56 Id., 320.

Under the statute, personal property is taxable to the person owning it on the first day of January, and its assessment to one who acquires the ownership between that time and the date when the assessment is made is illegal. *Wangler Bros. v. Black Hawk County*, 56 Id., 384.

Improvements placed on real estate after assessment, escape taxation until the lands are again assessed, two years later. *The Central Iowa R'y Co. v. The Board of Supervisors et al.*, 67 Id., 199.

In view of the principle, on the one hand, that there can be no taxation of property unless the statute so provides, and the well established doctrine, on the other hand, that taxation is the rule and exemption the exception, sections 801, 812, 813 and 821 of the code, and chapter 15 of laws of 1884, being considered and held to authorize and require shares of bank stock to be assessed to their owners. *Henkle v. The Town of Keota, and three other causes*, 63 Id., 334.

SEC. 813. Depreciated bank notes, and the stock of corporations and companies, shall be assessed at their cash value; credits shall be listed at such sum as the person listing them believes will be received or can be collected thereon, and annuities, at the value which the person listing believes them to be worth in money.

See *United States Express Company v. Ellison*, 28 Iowa, 370, 376, as to how depreciated bank notes and corporation stocks are to be assessed.

A water company which supplies a city with water, whose rates are regulated by the council, and which, by the terms of the ordinance conferring its powers, may be purchased at a fixed price by the city, is nevertheless a private corporation and its property is subject to taxation. *Appeal of Des Moines Water Co.*, 48 Id., 324.

The real and personal property of such a corporation may be assessed to it, and must be so assessed when the shares or stock of the company have not been otherwise assessed. *Id.* See notes to section 797, *ante*, page 192.

Under this section the shares of stock in a toll-bridge owned by a corporation are taxable in the hands of the stockholders, although the bridge property has been taxed to the corporation and such tax has been paid. The legislature has the power under the constitution to impose a tax on the property of the corporation, and also to impose a tax on the shares of stock as the property of the respective stockholders. *Cook v. The City of Burlington*, 59 Id., 251.

SEC. 814. [Debts owing to be deducted from credits.]—In making up the amount of money or credits which any person is required to list, or have listed and assessed, he will be entitled to deduct from the gross amount all debts in good faith owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of this section, and so much only of any liability of such person as security for another shall be deducted, as

the person making the list believes he will be compelled to pay on account of the inability of the principal debtor, and if there are other sureties able to contribute, then so much only as he in whose name the list is made will be bound to contribute; but no person will be entitled to any deduction on account of any obligations of any kind given to any insurance company for the premiums of insurance, nor on account of any unpaid subscription to any institution, society, corporation or company; and no person shall be entitled to any deduction on account of any indebtedness contracted for the purchase of United States bonds, or other non-taxable property.

While this section and a similar enactment in the state of Ohio are almost identical, section 30 of article 3, of the constitution of Iowa, and section 2 of article 12 of the constitution of Ohio, are so essentially different that a determination of the constitutionality of one statute is not an authority for the construction of the other. *Macklot v. City of Davenport*, 17 Iowa, 379.

Whether the tax-payer is entitled to have an acknowledgment of indebtedness deducted from the amount of moneys and credits which he is required to list for assessment, depends on whether it is founded in actual consideration. *Hutchinson v. The Board of Equalization of Oskaloosa*, 67 Id., 182.

The amount which the stockholders of an insurance company would be entitled to receive upon present distribution of the moneys and credits of the corporation is a debt due from the company to them, within the meaning of section 814 of the Code, which allows a tax-payer a deduction of his indebtedness from his taxable property, and should be deducted from its moneys and credits in listing them for taxation. *Equitable Life Ins. Co. v. Board of Equalization*, 37 N. W. R., 141.

The fund reserved by a life insurance company to pay or reinsure its policy holders is a debt due from the company to them, within the statute, section 814 of the code, and may be deducted from its moneys and credits in listing them for taxation; such indebtedness not being taxable moneys. *Id.*

Corporation stocks are not "credits" of the owner within the meaning of section 814 of the code, which provides that for the purposes of taxation the tax-payer may deduct from his moneys and credits the debts which he in good faith owes at the time. *Bridgman v. The City of Keokuk et al.*, 72 Iowa, 42.

SEC. 815. [Who held to be a merchant.]—Any person owning, or having in his possession, or under his control, within this state, with authority to sell the same, any personal property purchased with a view of its being sold at a profit, or which has been consigned to him from any place out of this state to be sold within the same, shall be held to be a merchant for the purposes of this title; such property shall be listed for taxation, and in estimating the value thereof, the merchant shall take the average value of such property in his possession or under his control during the next year previous to the time of assessing, and if he has not been engaged in the business so long, then he shall take the average during such time as he shall have been so engaged, and if he be commencing, he shall take the value of the property at the time of assessment.

A person engaged in buying and packing pork is deemed to be a "merchant" for the purposes of taxation, and, in listing his merchandise for taxation, is entitled to estimate the average value thereof during the year next before the time of assessment. *McConn v. Roberts, Treasurer*, 25 Iowa, 152.

SEC. 816. [Who a manufacturer.]—Any person who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, packing of meats, refining, purifying or by the combination of different materials, with a view of making gain or profit by so doing, and by selling the same, shall be held to be a manufacturer for the purposes of this title, and he shall list for taxation the average value of such property in his hands, estimated as directed in the preceding section; but the value shall be estimated upon those materials only which enter into the combination of manufacture.

The fact that property was purchased and held with a view to selling it out of the state, and that it was so sold; or the fact that the property was purchased on credit or with borrowed capital, will not relieve the owner of taxation thereon. The debts owing by him may be deducted from his "moneys and credits," but not from his general property. *McConn v. Roberts, Treasurer*, 25 Iowa, 152.

SEC. 817. [**Agent personally liable.**—Any person acting as the agent of another, and having in his possession, or under his control or management, any money, notes, and credits, or personal property belonging to such other person, with a view to investing or loaning, or in any other manner using the same for pecuniary profit, shall be required to list the same at the real value, and such agent shall be personally liable for the tax on the same; and if he refuse to render the list, or to swear to the same, the amount of such money, property, notes, or credits, may be listed and valued according to the best knowledge and judgment of the assessor, subject to the provisions of section eight hundred and twenty-four of this chapter.

This section of the code providing for the taxation of moneys, credits, etc., held by anyone as agent in this state for pecuniary profit, is not repugnant to Sec. 13, Art. 1 of the constitution, which provides that private property shall not be taken for public use without just compensation. *Hutchinson v. The Board of Equalization of Oskaloosa*, 66 Iowa, 35.

Where plaintiff, a resident of this state, had under his exclusive control and management, for investment in the form of loans, money belonging to English capitalists, some of which was invested in this state and some in Kansas, but the securities were made to him and held by him in his own name, in this state, he could not defeat the provisions of this section by the legal fiction which obtains for some purposes of the law, that the *situs* of such property is where the owner resides. Such property is in this state taxable here. *Id.* But see *Davenport v. The M. & M. Ry Co.*, 12 *Id.*, 539; *Hunter v. Board of Supervisors*.

If an acknowledged indebtedness be founded upon actual consideration the taxpayer is entitled to have the same deducted from his taxable moneys and credits, regardless of the motive which may have induced him to incur the obligation. So, where the plaintiff, as an agent of some English capitalists, had invested certain moneys of theirs and controlled the securities, but to avoid paying taxes thereon under this section of the code, he caused the securities to be assigned to himself and executed his own obligations to the capitalists for the amount thereof, *held*, that he was entitled to have the obligations thus incurred deducted from the amount of his moneys and credits, including the securities thus taken to himself, and that he was no longer liable to be taxed on such securities as agent. *Hutchinson v. Board of Equalization, etc.*, 67 Iowa, 182.

BANKING ASSOCIATIONS.

SEC. 818. [**How assessed and taxed.**—All shares of the banking associations organized within this state, pursuant to the provisions of the acts of congress to procure a national currency secured by a pledge of the United States stocks, and to provide for the circulation and redemption thereof, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate in the assessment of taxes in the township, incorporated town or city where such banking association is located and not elsewhere, whether the holder thereof resides there or not, but not at a greater rate than is assessed on other moneyed capital in the hands of individuals.

While the *capital* of national banks cannot be taxed by state authority, the *shares* of stockholders therein may be, in a rate not exceeding that imposed upon the shares of banks organized in and by the authority of the state. *Hubbard et al v. The Board of Supervisors of Johnson County*, and other cases, 23 Iowa, 130.

In the case of assessment of a tax wholly unauthorized, it is not necessary, before filing a petition to enjoin its collection, for the aggrieved party to make application for relief to the board of supervisors. *Id.*

In a proceeding to restrain the collection of such unauthorized tax, the county treasurer is a proper party. *Id.*

Some slight latitude is allowed the legislature in modes of assessment, demanded by what are deemed controlling considerations, even though they should not result in absolute equality of taxation; and with this principle in mind this section of the code, providing for the taxation of national bank shares, and section 28 of chapter 60, laws of the fifteenth general assembly, providing for the taxation of the capital of savings banks compared and examined, and *held* not to discriminate against national banks in violation of section 5219 of the revised statutes of the United States. *Davenport National Bank v. Board of Equalization*, 64 Iowa, 140.

SEC. 819. [**List: by whom made.**—The principal accounting officer of each of said associations, between the first and fifteenth days of January of each year,

shall list the shares of the association, giving the assessor the name of each person owning shares, and the amount owned by each; and for the purpose of securing the collection of taxes assessed upon said shares, each banking association shall be liable to pay the same as the agent of each of its shareholders, under the provisions of section eight hundred and seventeen; and the association shall retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied upon his shares.

SEC. 820. [Acts of congress amended.]—If, at any time, congress shall amend the acts aforesaid, then each assessor shall assess the shares in any such national bank in such manner as to conform to such amended act of congress: *provided*, that such shares shall not be assessed at a greater rate than is imposed by law on other moneyed capital in the hands of individuals in this state.

Chapter 153 of the laws of 1863, being the same substantially as sections 818, 819 and 820 of the code, providing for the taxation of shares in national banks, were *held* authorized and valid under the 41st section of the act of congress of June 3, 1864, and that of February 10, 1868. *Morseman v. Younkin, Treasurer, et al.*, 27 Iowa, 350.

An assessment against a stockholder in a bank organized under the national banking law, does not authorize the seizure of the property of the bank to satisfy the tax. *First National Bank of Iowa City v. Hershire*, 31 Id., 18.

Whether the bank would be held liable for the payment of such tax in a proceeding against it, *quere? Id.*

CLASSIFICATION OF PROPERTY.

SEC. 821. [When, by whom, and how classified.]—The board of supervisors of each county shall, at their meeting in January in each year, classify the several descriptions of property to be assessed, for the purpose of equalizing such assessment; and the county auditor shall deliver to each assessor in the county, on or before the fifteenth day of January in each year, a certificate of such classification, together with a suitable plat of his township on which to check each parcel of land assessed, and suitable books in duplicate, properly ruled and headed, in which to enter the following items:

1. The name of the individual, corporation, company, society, partnership, or firm, to whom any property shall be taxable;

2. His or their lands, by township, range, section, or part of section, and when such part is not a congressional division or subdivision, some other description sufficient to identify it; and town lots, naming the town in which they are situated, and their proper description by number and block, or otherwise, according to the system of numbering in the town.

A failure to comply with this provision of the statute, by describing land assessed sufficient to identify it, will defeat the assessment thereof; and the same principle applies also to personal property. *Roberts v. Deeds*, 57 Iowa, 320.

Where the description of land assessed is insufficient to identify it a sale thereof for taxes, and a tax deed, will be void, and the defect in the description cannot be cured by extraneous evidence. *Id.*

While the *capital* of national banks cannot be taxed by state authority, the *shares* of stockholders therein may be, in a rate not exceeding that imposed upon the shares of banks organized in and by the authority of the state. *Hubbard et al. v. The Board of Supervisors of Johnson County*, and other cases, 23 Id., 130.

In the case of the assessment of a tax wholly unauthorized, it is not necessary, before filing a petition to enjoin its collection, for the aggrieved party to make application for relief to the board of supervisors. *Id.*

In a proceeding to restrain the collection of such unauthorized tax, the county treasurer is a proper party. *Id.*

The mains and pipes of a gas company are mere appurtenances to the realty on which the works are situated and the assessment of the realty, described by lots and blocks in a city, *held*, to include such mains and pipes; and that where they are erroneously assessed as personal property, and the tax has been paid upon the realty thus described, the treasurer has no authority to sell the same for the alleged delinquent tax on the personalty. *The Capital City Gas L. Co. v. The Charter O. Ins. Co. et al.*, 51 Id., 31.

The board of supervisors has power to classify property for the purpose of assessment, but not to fix the value in the several classes. The law requires that the assessors shall fix the value of each person's property according to his own best judgment. *Barnum v. Barber et al.*, 70 Id., 87.

3. Personal property as follows: number of cattle, number of horses, number of mules, number of sheep, number of swine over six months old, number of carriages and vehicles of ever description, with a separate column for the value of each; value of merchandise, amount of capital employed in manufacture, amount of money and credits, amount of taxable furniture, amount of stock or shares in any corporation or company, not required by law to be otherwise listed and taxed, amount of taxable farming utensils or mechanics' tools, amount of all other personal property not enumerated, and the number of polls; and a column for remarks. But no entry shall be made on said books of any animal under the age of one year, except as above provided.

DUTY OF ASSESSOR.

SEC. 822. [When to begin: how to list property.]—Each assessor shall enter upon the discharge of the duties of his office on the third Monday in January in each year, and shall, with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter, in the books furnished him for that purpose, the several items specified in the preceding section; entering the names of the persons assessed in alphabetical order so far as practicable, by allotting to each letter its requisite number of pages in each of the said books. He shall note opposite each piece or parcel of property by him assessed, in a column of his book prepared for that purpose, the number of the highway, independent school district, district township, or subdistrict in which said property is situated.

The township assessor cannot lawfully enter upon the duties of his office until the third Monday of January next after the election. *State v. Phippen*, 62 Iowa, 54, 55.

SEC. 823. [Assess values: penalty for refusal to take oath.]—The assessor shall list every person in his township, and assess all the property, personal and real, therein, except such as is heretofore specifically exempted; and any person who shall refuse to assist in making out a list of his property, or of any property which he is by law required to assist in listing, or who shall refuse to make the oath required by the next section, shall forfeit the sum of one hundred dollars, to be recovered in the name of the county for the use of common schools therein; and the assessor shall assess such person according to the best information he can get.

SEC. 824. [Same.]—The assessor shall administer an oath, or affirmation, to each person assessed, to the effect that he has given in a full, true, and correct inventory of all the taxable property owned by him, and all property which he is required by law to list, to the best of his knowledge and belief; and in case any one refuses to make such oath or affirmation, the assessor shall note the fact in the column of remarks opposite such person's name, and should it afterwards appear that such person so refusing has not given a full list of his property, or that which he was by law required to list, any property so omitted shall be entered on the book at double its ordinary assessable value, and taxed accordingly.

Where a taxpayer fraudulently conceals a large portion of his property from the assessor, and thus avoids paying taxes upon it, the county cannot maintain an action against him, or his estate, to recover the amount of the tax which ought to have been paid on the concealed property. *Appanoose County v. Vermillion, et al.*, 70 Iowa, 365.

This section of the code requires the tax-payer, when his property is listed, to make oath or affirmation, that he has given in a full, true and correct inventory of all property which he is required to list for taxation; and section 823 provides the penalty for refusing to do so, when required by the assessor. *Held* that the statute being penal must be strictly construed, and that the penalty was not incurred by refusing to subscribe printed affidavits which the assessors pre-

mented to the defendants and requested them to subscribe, without offering to administer to them the oath or affirmation prescribed by the statute. *Marion County v. Kruidenier*, 72 Iowa, 92.

SEC. 825. [Deliver books to township clerk and county auditor.]—Each assessor shall, on or before the first Monday in April of each year, deliver to the clerk of his township one of the assessment books, to be used by the trustees for the equalization of assessments, and for the levy of taxes for township and highway purposes. Said book shall have the several columns of numbers and values correctly footed up, and amount of personal property assessed to each person carried forward into a column under the head of "total personal property;" the other book he shall return to the office of the county auditor, on or before the third Monday in May of each year, which book shall be a correct copy of the first, after the same has been corrected by the township board of equalization.

See opinion of DAY, J., in *Rhyno v. Madison Co.*, 43 Id., 634.

While it is required by this section that the assessor shall return the assessment book to the county auditor, yet there was no provision of the code, or law in force in 1868, that required any notice whatever to be taken of such fact in the minute book, or that an assessment had been made. Per SNEEVERS, CH. J., in *Easton v. Savery et al.*, 44 Iowa, 655.

Lands granted by the United States to the counties as swamp lands are not subject to taxation so long as they are held and owned by the counties. Nor are they taxable for any year in which they may be conveyed by a county if the assessment for that year be completed before the conveyance is made. *Sully v. Poorbaugh*, 45 Id., 453.

When lands are acquired from the government after the close of the assessment for the current year, they are not subject to assessment for taxation until the following year. *Tallman v. Treasurer of Butler Co.*, 12 Id., 531; *Des Moines Nav. and R. Co. v. Polk Co.*, 10 Id., 1.

SEC. 826. [Owner unknown.]—When the name of the owner of any real estate is unknown, it shall be lawful to assess such real estate without connecting therewith any name, but inscribing at the head of the page the words, "owners unknown;" and such property, whether lands or town lots, shall be listed, as near as practicable, in the order of the numbers thereof; and no one description shall comprise more than one town lot, or more than the sixteenth part of a section or other smallest subdivision of the land according to the government surveys, except in cases where the boundaries are so irregular that it cannot be described in the usual manner in accordance with such surveys.

Lands may be sold in tracts greater than forty acres when so assessed; for while subdivisions that are assessed separately, or are in fact distinct, cannot be sold in gross, a subdivision or tract, though greater than forty acres, may be sold in a body if thus assessed; and such sale will not, for that reason, be declared illegal, when it does not appear that the taxes due upon the tract could have been satisfied by the sale of a part thereof. *Corbin v. DeWolf*, 25 Iowa, 124; *Ware v. Thompson*, 29 Id., 65; *Stewart v. Corbin*, 25 Id., 144; *Eldridge v. Kuehl*, 29 Id., 160.

A tax deed is void upon its face, which shows several tracts of land sold together for a gross sum. *Ware v. Thompson*, 29 Id., 65.

That a tax deed is void because it shows a sale *en masse* does not of itself render the sale void. Unless it is made to appear that the land was thus sold, the sale itself would not be thereby invalidated. *Id.* Per WRIGHT, J.

Lands of known owners may be properly sold for delinquent taxes in tracts greater than forty acres, and when nothing appears to the contrary from the face of the deed, it will be presumed that the owners were known, and that the sale in other respects was authorized. *Bulkley v. Callanan*, 32 Id., 461.

When land is assessed to the owner and also to an "unknown owner," for the same tax, the latter assessment is void, and sale thereunder confers no title on the purchaser. *Nichols v. McGlathery et al.*, 43 Id., 189.

For further cases holding sales in gross to be void, see *Boardman v. Bourne*, 20 Id., 134; *Byam v. Cook*, 21 Id., 392; *Furgeson v. Heath*, Id., 438; *Harper v. Sexton*, 22 Id., 442; *Penn v. Clemans*, 19 Id., 373; *Weaver v. Grant*, 39 Id., 294; *Greer v. Wheeler*, 41 Id., 85; *Hurlburt v. Dyer*, 36 Id., 474; *Ackley v. Sexton*, 24 Id., 320.

The fact that the land was assessed as belonging to an unknown owner, when the records of the county disclosed the name of the owner, will not invalidate a sale of the land for taxes. The presumption will obtain that the assessor did his duty, and that the name of the owner was in fact unknown to him. *The Corning Town Co. v. Davis*, 44 Id., 622.

The term "tract" or "parcel" is properly applied to an entire section, and a tax deed for a section is valid. *Martin v. Cole*, 38 Id., 141.

Lands assessed to unknown owners in forty acre tracts may be properly advertised and sold in quarter sections. *Clark v. Thompson*, 37 Id., 536; *Stone v. Same*, Id.

A tax deed conveying a quarter section *en masse*, and reciting an offer by the purchaser of the whole amount of taxes due thereon, shows a sale *en masse*, though there is a recital contained in the deed setting out each forty and the amount of taxes due on each. *Id.*

A description in the assessment, as six acres, will, in the absence of proof to the contrary, be regarded as six acres in the form of a square. *Immegart v. Gorgas*, 41 Id., 439.

The use and nature of the property must determine whether or not several lots, assessed to one owner and sold *en masse*, should be regarded as one lot. Where two lots were occupied and used for a purpose, the building partly on each, it was held that they might be sold for taxes together as one tract. *Weaver v. Grant*, 39 Id., 294.

SEC. 827. [Penalty for failure of duty.]—If any assessor shall fail or neglect to perform any of the duties required of him by this chapter, at the time and in the manner specified, he shall be liable to a fine of not less than twenty nor more than five hundred dollars, to be recovered in an action brought in the district court in the name of the county, and the judgment shall be against him and his bondsmen.

SEC. 828. [Auditor of state to publish revenue laws.]—The auditor of state is hereby authorized and required to cause to be published in pamphlet form, the revenue laws of this state for the benefit of township assessors; and shall cause the same to be distributed to the county auditors, who shall distribute the same to the township assessors of their respective counties.

TOWNSHIP BOARD OF EQUALIZATION.

SEC. 829. [Who composes.]—The township trustees shall constitute a board of equalization of their respective townships, and have power to equalize the assessments of all tax-payers within the same, except in such cities and incorporated towns as elect a township assessor, in which case the city council shall be the board of equalization, and shall perform such duties in substantially the same manner, as is required of a township board of equalization, by increasing or diminishing the valuation of any piece of property, or the entire assessment of any tax-payer, as they may deem just and necessary for an equitable distribution of the burden of taxation upon all the property of the township; *provided*, that such boards shall keep a record of their proceedings.

The board of supervisors, in their classification of the property of the county for taxation, ordered that shares of bank stock should be assessed at sixty per cent of its par value, and they were so returned by the assessor, but the township trustees acting as a board of equalization for the township, reduced the assessment to forty per cent of the par value, whereupon the board of supervisors restored the assessment to the rate it had first ordered. *Held*, that while the township trustees are empowered to equalize the taxes of their township, yet the board of supervisors are charged with the duty of equalizing the taxation of the county, and accordingly may fix the rate of assessments for the townships. *Cassett v. Sherwood*, 42 Iowa, 623.

The township trustees are constituted a board for the equalization of assessments of property taxable in their township, and they possess and may exercise this power to the same extent that it was possessed by the board of supervisors prior to the enactment of chapter 89, laws of the thirteenth general assembly, and as it is now possessed by such board as between the several townships of the county. *Keck v. Board of Supervisors, etc.*, 37 Id., 547.

When the trustees have ordered a change to be made in the assessment of property belonging to an individual, it is the duty of the assessor to make the correction in the assessment book, and on his failure to do so, the proper correction may be ordered in a *certiorari* proceeding. *Id.*

The fact that a city council irregularly exercised the authority conferred upon it as a board of equalization will not deprive the property holder of the right of appeal to the circuit court. *Ingersoll et al. v. the City of Des Moines*, 46 Id., 553.

No time is prescribed in the statute within which an appeal from the board of equalization may be taken, and no bond is required to be given by the appellant. *Id.*

While an appeal will not lie directly from the assessor to the circuit court, but complaint must first be made to the board of equalization, yet one who is aggrieved need not complain more than once to the board. *Id.*

Where an appeal is taken by the tax-payer from an assessment fixed by the board of equaliza-

tion, the amount of assessment cannot be raised by the court to which the appeal is taken. *In the matter of the appeal of the Des Moines Water Co.*, 48 Id., 324.

Where plaintiff had notice of the intention of the board of equalization to increase his assessment, and he appeared and argued the question, the action of the board in increasing his assessment was not void because no record of its proceedings in that respect was made. The provisions of this section with regard to the record in such case is merely directory. *Hutchinson v. The Board of Equalization of the City of Oskaloosa*, 66 Id., 35.

SEC. 830. [Time of Meeting: duties of board.]—Said board shall meet for that purpose at the office of the township or city clerk, on the first Monday in April of each year, and continue from day to day until completed; and at such meeting they may also add to the assessment as returned by the assessor, any taxable property in the township, city, or incorporated town, not included therein, placing the same to the name of the owner, if known, and assessing the value thereof.

The provisions of this section, requiring the board of supervisors, at their regular meetings in June, to add to the assessment any taxable property omitted by the assessor, is merely directory as to time, and a correction of this character made at their September meeting, whereby property omitted by the assessor from his lists was made to bear its due proportion of the public burden, was held authorized and valid. *Hill et al. v. Wolfe et al.*, 28 Iowa, 577.

The case is not varied as to personal property by the fact that the assessment for the county had, before the insertion of the omitted property, been returned to and acted on by the state board of equalization. *Id.*

SEC. 831. (As amended by section 1, ch. 109, 18th g. a.) [May correct assessment.]—Any person who may feel aggrieved at anything in the assessment of his property, may appear before said board of equalization in person, or by agent, at the time and place mentioned in the preceding section, and have the same corrected in such manner as to said board may seem just and equitable, and the assessors shall meet with said board and correct the assessment books as they may direct. Appeals may be taken from all boards of equalization to the circuit court of the county where the assessment is made [within sixty days after the adjournment of said board of equalization, but not afterward].

The remedy for an erroneous assessment is by application to the board of equalization, from whose decision an appeal may be taken to the circuit court. *Mandamus* will not lie to compel the officers of a county to strike out an assessment alleged to be erroneous. *Meyer v. Dubuque County*, 43 Iowa, 592. See, as to appeal, *Ingersoll v. Des Moines*, 46 Id., 553.

When the trustees have ordered a change to be made in the assessment of property belonging to any person it is the duty of the assessor to make the correction on the assessment book. On his failure to do so, the proper correction may be ordered in a *certiorari* proceeding. *Keck et al. v. Board of Supervisors of Keokuk County*, 37 Id., 547.

Where a party who, being satisfied with the assessment made by the assessor, appeared at the proper time before the board of equalization, and, upon inquiry, was assured by it that no change would be made in such assessment, made no further appearance before the board, and the board subsequently, and without notice to the party, raised his assessment to more than double the amount fixed by the assessor, it was held that there was a right of appeal from the action of the board. *Ingersoll v. Des Moines*, 40 Id., 533.

The fact that a board of equalization irregularly exercised the authority conferred upon it in the equalization of property assessed will not deprive a property holder of the right of appeal to the circuit court. *Ingersoll v. The City of Des Moines*, 46 Id., 553.

While an appeal will not lie directly from the assessor to the circuit court, but application must be first made to the board of equalization for a correction of the assessment, yet one who is aggrieved need not make more than one such application. *Id.*

The remedy of a party against whom taxes are *erroneously* assessed, not *illegally*, is by application to the board of equalization for a correction of the error, and not by a suit in equity to enjoin the collection of the tax. *Macklot v. The City of Davenport*, 17 Id., 379.

Proceedings by appeal to correct assessments of property for taxation are triable by equitable proceedings, without a jury, in the circuit court, and *de novo* in the supreme court. *Davis et al. v. The City of Clinton*, 55 Id., 549.

The defense that the power of assessment given by this section to the board of equalization to add to the assessment returned by the assessor any taxable property in the township * * * not included therein, cannot be constitutionally exercised without notice to the person assessed, will not be considered if the omission of notice has not been pleaded, and, if the party depends upon the omission of notice, the burden of proof rests upon him to show it. *King v. Parker et al.*, 34 N. W. R., 451.

In an appeal from the action of the board of equalization under section 831, as amended by chapter 109, laws of 1880, providing for appeals being taken to the circuit court, and that the question of the liability to assessment shall be justly and equitably determined, evidence may be admitted in addition to the matters shown by the record of the proceedings before the board of equalization. *Grimes v. The City of Burlington*, 37 N. W. R., 106.

(CHAPTER 109, LAWS OF 1880.)

An Act to amend section 831, chapter 1, title VI, of the code of Iowa, in relation to boards of equalization.

SECTION 1. [**Amendment of section 831 of code.**]*—Be it enacted by the general assembly of the state of Iowa:* That section 831 of the code of Iowa be amended as follows: by adding to the end of said section 831 the following words: ["Within sixty days after the adjournment of such board of equalization, but not afterward."]

SEC. 2. [**Assessor must inform owner of the valuation, and his rights.**]—The assessor shall, before administering the oath or affirmation as provided in section 824 of the code, to the person assessed, inform him of the valuation put upon his property, and notify him that if he feels aggrieved, to appear before the board of equalization and show why the assessment should be changed.

SEC. 3. [**Board must decide on valuations.**]*—At the first meeting of the board of equalization of any township, town or city, they shall decide what assessments should, in their opinion, be raised, and make an alphabetical list of names of the individuals whose assessment it is proposed to raise, and post a copy of the same in a conspicuous place in the office or place of meeting of said board, and also in each post-office located in said township, town or city, and the board shall, if in their opinion some assessments should be raised, hold an adjourned meeting, with at least one week intervening, after posting of said notices before final action thereon, which notices shall state the time and place of holding such adjourned meeting.*

Approved March 24, 1880.

(Took effect by publication in newspapers March 30, 1880.)

Conceding that section 2 of this chapter is unconstitutional, because it relates to a subject not embraced in the title of the act, as required by section 29, of article 3 of the constitution, yet such objection does not extend to the other sections of the act, and these are not rendered invalid for that reason. *Henkle v. The Town of Keota*, 68 Iowa, 334.

(CHAPTER 28, LAWS OF 1884.)

TAXATION OF CERTAIN RAILROAD LANDS.

An Act to provide for the assessment and taxation of lands within the state of Iowa, granted to railroad companies or corporations, which have become earned but not patented.

SECTION 1. [**Land earned but not patented to be taxed.**]*—Be it enacted by the general assembly of the state of Iowa:* That all lands lying within the state of Iowa, which have been heretofore granted or may be hereafter granted to any railroad company or corporation by the general government to the state of Iowa, and by the state granted to any such railroad company or corporation, shall be subject to assessment and taxation within the counties wherein situated from and after the year the same may be earned, to the same extent as though patents had been issued to, and the title of record was in such railroad companies or corporation. The fact that such lands are claimed by more than one such company or corporation shall in no way affect the liability of such lands to assessment and

levy, *provided*, nothing herein contained is intended to subject any lands to taxation for the past that were not taxable prior to the passage of this act.

SEC. 3. (Sec. 2.) Parol evidence shall be admissible to prove when said lands were earned.

SEC. 4. (Sec. 3.) [**Repeal.**—All acts or parts of acts inconsistent with this act are hereby repealed.

Approved March 20, 1884.

COUNTY BOARD OF EQUALIZATION.

SEC. 832. [**Who compose: time.**—The board of supervisors shall constitute a county board of equalization, and equalize the assessments of the several townships, cities, and incorporated towns of their county, at their regular meeting in June of each year, substantially as the state board equalize assessments among the several counties of the state.

The board of supervisors has jurisdiction to increase or diminish the valuation of personal property in any town or township in the county, or may add or deduct a given percentage to or from the assessed valuation. *Harney et al. v. The Board of Supervisors of Mitchell Co.*, 44 Iowa, 203.

The board of supervisors does not have jurisdiction to determine the right of a municipal corporation to assess a tax, nor has such board the authority to abate the tax levied by a district township, upon the ground that the right to levy it is in another township. *The District Township of Taylor v. Moore et al.*, 39 Id., 605.

Under section 822, the board of supervisors has no authority to increase the assessment of the property of an individual. Taxes levied under a valuation thus increased are not simply irregular, but illegal. *Rood v. Board of Supervisors of Mitchell Co.*, 39 Id., 444.

If a tax is illegal, and not merely irregular, its collection may be restrained by injunction. *Id.*

The record of the board of supervisors being incomplete, its failure to show that there was an equalization by the board did not affect the validity of a tax deed. *Easton v. Savery*, 44 Id., 654.

It is not competent for the board of supervisors, as a board of equalization, to make a correction of the assessment as between individuals nor between different portions of the same district, although such district embraces two civil townships in one assessorial district; but their powers are limited to securing uniformity between the several assessorial districts in the county. *Getchell v. The Board of Supervisors of Polk Co.*, 51 Id., 107.

The board of supervisors, as a board of equalization, has no authority to add to the assessment roll or tax list property not assessed, its duty being limited to equalizing the value of property assessed by the proper officer. *Royce v. Jenney et al.*, 50 Id., 676.

The board of supervisors have no authority to determine the right of a municipal corporation to assess a tax, nor has such board authority to abate the tax levied by a district township upon the ground that the right to levy it is in another township. *The District Township of Taylor v. Moore et al.*, 39 Id., 605.

SEC. 833. [**County auditor to send abstract to auditor of state.**—Each county auditor shall, on or before the third Monday in June in each year, make out and transmit to the auditor of state an abstract of the real and personal property in his county, in which he shall set forth:

1. The number of acres of land in his county, and the aggregate value of the same, exclusive of town lots, returned by the assessors as corrected by the county board of equalization;
2. The aggregate value of real property in each town in the county, returned by the assessor as corrected by the county board of equalization;
3. The aggregate value of personal property in his county;
4. An abstract of the aggregate value and number of cattle, the aggregate value and number of horses, the aggregate value and number of mules, the aggregate value and number of sheep, the aggregate value and number of swine over six months old, as the same are returned by the assessors of his county.

STATE BOARD OF EQUALIZATION.

SEC. 834. [**Who composes: where and when to assess: duties.**]—The executive council shall constitute the state board of equalization, and shall meet at the seat of government on the second Monday of July in each year in which real property is assessed. The auditor of state shall be clerk of the board by virtue of his office, and shall lay before it the abstracts transmitted to him by the county auditors, as required by the preceding section, and then the board shall proceed to equalize the valuation of real property among the several counties and towns in the following manner:

1. They shall add to the aggregate valuation of real property of each county, which they shall believe to be valued below its proper valuation, such percentage in each case as will raise the same to its proper valuation;

2. They shall deduct from the aggregate valuation of real property of each county, which they shall believe to be valued above its proper valuation, such percentage in each case as will reduce the same to its proper valuation.

SEC. 835. [**Determine rate of state tax.**]—The state board shall also determine each year, at the same time, the rate of state tax to be levied and collected, not exceeding two mills on the dollar.

SEC. 836. [**When to complete duties.**]—Said board shall keep a full record of their proceedings, and they shall finish their equalization on or before the first Monday of August, immediately after which the auditor of state shall transmit to each county auditor a statement of the percentage to be added to, or deducted from the valuation of real property in his county, and a statement of the rate of state tax fixed as aforesaid. The county auditor shall add to or deduct from the valuation of each parcel of real property in his county the required percentage; rejecting all fractions of fifty cents or less in the result, and counting all over fifty cents as one dollar.

AUDITORS SHALL TRANSCRIBE ASSESSMENTS.

SEC. 837. [**How.**]—After the equalization in June, hereinbefore provided, and before the first Monday in November, the county auditor shall transcribe the assessments of the several townships into a suitable book, to be provided at the expense of the county, properly ruled and headed with distinct columns in which shall be entered the names of tax-payers, descriptions of lands, number of acres and value, number of town-lots and value, value of personal property, and each description of tax, with a column for polls, and one for payments.

SEC. 838. [**Consolidated tax.**]—All taxes which are uniform throughout any civil township or independent school district, shall be formed into a single tax, entered upon the tax list in a single column, and denominated a consolidated tax; and each tax-receipt shall show the percentage levied for each separate fund.

LEVY.

SEC. 839. [**Time for making: entered of record.**]—At the regular meeting in September in each year, the board of supervisors shall levy the requisite tax for the current year in accordance with law, and shall record the same in the proper book, and the county auditor shall, as soon as practicable, complete the tax list by carrying out in a column by itself the consolidated tax, highway tax, polls, irregular tax, if any be levied, and total tax, and after adding up each column of said taxes, he shall, in his abstract at the end of each township, incorporated town, or city list, apportion the consolidated tax among the respective funds to which

it belongs, according to the number of mills levied for each of said funds showing a summary of the total amount of each distinct tax.

A levy of taxes when none appeared of record cannot be proved by parol. A party claiming under a sale for the taxes of that year must show that a record once existed which has been lost or destroyed. Otherwise the sale is void. *Moore v. Cooke*, 40 Iowa, 290.

A levy made at the June session instead of September will not invalidate the same. *Easton v. Savery*, 44 Id., 654.

SEC. 840. [To pay bonded indebtedness.]—It shall not be lawful for the board of supervisors of any county to levy taxes in any one year for the payment of bonded indebtedness, except as provided in section two hundred and ninety-one, chapter 1, title 4 of this code, including judgments founded on such indebtedness, of more than three mills on the dollar upon the last corrected valuation. But this shall not be construed to reduce the rate of taxation below the rate fixed for one year, in any county in which a specific rate was fixed by the vote of such county authorizing the issue of such bonds.

SEC. 841. [Errors corrected by auditor.]—The county auditor may correct any clerical or other error in the assessment or tax book, and when such correction, affecting the amount of tax, is made after the books shall have passed into the hands of the treasurer, he shall charge the treasurer with all sums added to the several taxes, and credit him with all the deductions therefrom and report the same to the supervisors.

The omission of the assessor to insert the name of a person whom he intended to assess jointly with another, as the owners of the property assessed, is an error that may be properly corrected by the clerk of the board of supervisors (now auditor) under this section. *Conway v. Younkin*, *Treas.*, 28 Iowa, 295.

The auditor cannot, under this section, increase the assessment of property, the valuation upon which he thinks too low, when it is not shown that such valuation was the result of a mistake or error, or that it was not proportionate to that put upon other property. *Jones v. Tiffin*, *Treas.*, 24 Id., 190.

Nor would a ratification of such act by the board of supervisors have the effect to vindicate this act. *Id.*

Where certain wild land was omitted from the township assessor's book, and so was not assessed, but the auditor, discovering the mistake, after the return of the assessor's book, entered the land on the tax book, and affixed the valuation for the purpose of taxation at three dollars an acre, the board of supervisors having by resolution directed that the wild lands in that township be assessed at that rate, *held* that the auditor had authority to assess the land under sections 841 and 851 of the code, and that his assessment was valid. *Parker v. Van Steenburg*, 68 Id., 174.

When the county auditor, in transcribing the assessment roll, finds land taxed to one not the owner thereof, he has authority, under sections 837 and 841 of the code to substitute the name of the owner as shown by the plat book in his custody, and such assessment to the owner is notice to a purchaser at a tax sale that the land is taxed to the owner. *Adams v. Snow*, 65 Id., 435.

(CHAPTER 99, LAWS OF 1878.)

COLLECTION OF TAXES IN CITIES ACTING UNDER SPECIAL CHARTER.

An Act to promote the collection of revenue in incorporated cities acting under special charters, and to legalize the taxes heretofore levied therein, and sales made thereunder. [Additional to code, title VI, "Of revenue."]

SECTION 1. [City council may certify to county auditor, etc.]—*Be it enacted by the general assembly of the state of Iowa.* That the council of each municipal corporation, acting under a special charter may, if they deem it expedient, provide by ordinance for certifying to the auditor of the county in which such city is situated on or before the first Monday of September of each year, or such other time as may be fixed by law for the levy of state and county taxes, the percentage or number of mills on the dollar of tax levied for all city purposes by them on the taxable property within the corporation for the year then ensuing, as shown by the assessment roll of said city for said year, and the county auditor,

when such certification is made, is required to place the same on the tax books of the county in the same manner as state and county taxes are placed thereon, which tax for municipal purposes shall be collected and paid over to the proper officer by the county treasurer, with the same restriction, powers and liabilities, and under the same regulations as to power, mode and manner of proceeding in every respect as in relation to state and county taxes, and in all things relating to the sale of real and personal property, he is authorized and required to proceed according to the provisions of the statutes regulating the sale of property for delinquent state and county taxes, and in all sales for such or any delinquent taxes for municipal purposes, if there be other delinquent taxes due from the same person, or a lien on the same property, the sale shall be for all the delinquent taxes, and such sales and all sales made under or by virtue of this act, shall be of the same validity, and in all respects be deemed and treated as though such sales had been made for delinquent state or county taxes exclusively.

SEC. 2. [Acts of city officers legalized.]—That all acts of the officers of cities incorporated under special charters, in heretofore certifying the taxes levied or rate of taxes to the county auditor, and all collections and tax sales made thereunder, be and the same are hereby declared in all respects as valid, binding, effective and conclusive as if the power to so certify and sell had been expressly conferred by law, but nothing herein contained shall have the effect to make valid any sale for taxes which would be invalid under any other provision of law.

Approved, March 23, 1878.

TAX BOOK AND LIST.

SEC. 842. [Auditor to make form of.]—The county auditor, when making up the tax book of the county, and before said book is placed in the hands of the county treasurer for collection of the taxes therein, shall designate each piece or parcel of real estate sold for taxes and not redeemed, by writing in a plain manner opposite to each such piece the word "sold."

SEC. 843. (*As amended by ch. 132, 21st g. a.*) [Treasurer's authority: informality.]—The county auditor shall make an entry upon the tax list showing what it is, and for what county and year it is, and shall then deliver it to the county treasurer on or before the [thirty-first day of December], taking his receipt therefor; and such list shall be full and sufficient authority for the county treasurer to collect taxes therein levied. But no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, or sales, or other proceedings for the collection of taxes under this title.

Under the revision it was held that the warrant provided for in section 748 was not essential to the validity of a tax-sale of land. *Parker v. Sexton* 29 Iowa, 421; *Hurley v. Powell et. al.*, 31 Id., 64; *Rhodes v. Sexton*, 33 Id., 541; *Johnson v. Case*, 30 Id., 308; *Stewart v. Corbin*, Id., 144, and other cases.

No warrant is required by the code. The tax-list is sufficient authority to the treasurer. This section has no application to taxes levied in aid of railroads. *Harwood v. Brownell*, 48 Id., 657.

SEC. 844. [Aggregate certified to auditor of state.]—At the time of the delivery of said list to the treasurer, the auditor shall make to the auditor of state a certified statement showing the aggregate valuation of lands, town property, and personal property in the county, each by itself, and also the aggregate amount of each separate tax as shown by said tax book.

SEC. 845. [To enter taxes unpaid for previous years: sale void.]—The treasurer, on receiving the tax book for each year, shall enter upon the same in separate columns, opposite each parcel of real property or person's name, on which or against whom any tax remains unpaid for either of the preceding years, the year or years for which such delinquent tax so remains due and unpaid. And any sale for the whole or any part of such delinquent tax, not so entered, shall be invalid.

It is the duty of the treasurer to bring forward and enter opposite the realty as unpaid tax upon personal property, and where he fails to do so a sale of the land for taxes is invalid as against one who has in the meantime acquired a lien thereon. *Cummings v. Easton*, 46 Iowa, 183.

The action of *mandamus* to compel the county treasurer to enter such tax upon the tax books, would not be barred by the statute of limitations before three years after the certificate of the township trustees was made, if at all. *Id.*

See *Jiska v. Ringgold County et al.*, 57 Id., 630, cited under section 843, *post*.

The sales of land for taxes divests the land of the lien of all prior unpaid taxes, and the rule operates as well in favor of the owner who redeems from the sale as the purchaser at the tax sale. *Hough v. Easley*, 47 Id., 330.

The validity of a tax voted in aid of a railroad in 1863, but which was not certified up by the township trustees until 1876, was held not to depend upon its extension on the tax books in the year in which it was voted, and the fact that it was not so extended would not prevent it from being afterward entered thereon as an unpaid tax of a former year. *Harwood v. Brownell*, 48 Id., 657.

In an action to quiet title to certain separate tracts of land, and to set aside certain tax deeds under which the defendants claimed title, it was held that, under this section, the tax sales under which defendants claim title were made for delinquent taxes which were not carried forward upon the tax books of subsequent years, as required, were invalid. *Barkz v. Early et al.*, 72 Id., 273. So in *Hooper v. Sac County*, Id., 230, a sale of land for delinquent taxes not brought forward as required by this section of the code, held, void.

Where the owner of certain land became delinquent for personal taxes for certain years, but such taxes were never carried forward, nor did they appear on any subsequent tax list against or opposite the land, nor opposite the name of the owner, as required by section 845 of the code, but the treasurer in the following year made a separate book in which he entered the amount of such taxes, the name of the person taxed, and the page where found on the tax list. Held, that a sale of the land for such taxes was invalid, as against a purchaser of the land, without actual knowledge of the delinquent personal taxes. *Dows et al. v. Dale et al.*, 37 N. W. Rep., 1.

A sale of land for the taxes of 1875, made at an adjourned sale in February, 1877, where the treasurer failed to note in the tax books of 1876 that the taxes of 1875 were delinquent, as required by section 845, of the code, held invalid. *Gardener v. Early et al.*, 69 Id., 42.

SEC. 846. [Treasurer to collect; illegality in proceedings.]—The treasurer, after making the above entry, shall proceed to collect the taxes, and the list shall be his authority and justification against any legality in the proceedings prior to receiving the list; and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years.

SEC. 847. [Notice when land has been sold.]—Each county treasurer shall, when any person offers to pay taxes on any real estate marked "sold," notify such person that such property has been sold for taxes, and inform him for what taxes said property was sold, and at what time said sale was effected.

The failure of the treasurer to notify a person offering to pay taxes on a tract of land which has been sold for taxes, and so marked, will not invalidate the tax deed, nor will a failure of the auditor to so mark lands "sold" affect the validity of the sale ordered. *Playter v. Cochran*, 37 Iowa, 258.

SEC. 848. [To certify amount required to pay taxes and redeem: compensation for.]—The county treasurer shall certify, in writing, the entire amount of taxes and assessments due upon any parcel of real estate, and all sales of the same for unpaid taxes or assessments shown by the books in his office, with the amount required for redemption from the same, if still redeemable, whenever he shall be requested so to do by any person having any interest in said real estate, and paid or tendered his fees for such certificate at the rate of fifty cents for the first parcel in each township, incorporated town, or city, and ten cents for each subsequent parcel in the same township, town, or city. Each description in the tax list shall be reckoned a parcel in computing the amount of such fees.

Where the purchaser of real property obtained from the treasurer a certificate that there were no delinquent taxes on the property, and the tax books did not show any tax to be due thereon, but it was afterwards found that there were delinquent taxes due thereon at the time, which had not been brought forward on the tax books, as required by section 845, he was held to be an innocent purchaser and would take the property free from all liens for taxes. And it was further held that if such delinquent taxes were brought forward on the tax books after the purchase, they would not constitute a lien on the property as against the purchaser. *Jiska v. Ringgold County*, 57 Iowa, 630.

SEC. 849. [Effect of certificate.]—Such certificate, with the treasurer's receipt showing the payment of all the taxes therein specified, and the auditor's certificate of redemption from the tax sales therein mentioned, shall be conclusive evidence for all purposes and against all persons, that the parcel of real estate in said certificate and receipt described, was, at the date thereof, free and clear of all taxes and assessments, and sales for taxes or assessments, except sales wherein the time of redemption had already expired, and the tax purchaser had received his deed.

SEC. 850. [Treasurer liable for error.]—For any loss resulting to the county, or any subdivision thereof, or to any tax purchaser, or tax payer, from an error in said certificate or receipt, the treasurer and his sureties shall be liable on his official bond.

SEC. 851. [May assess property omitted.]—The county treasurer shall assess any real property subject to taxation, which may have been omitted by the assessor, board of equalization, or county auditor, and collect taxes thereon, and in such cases he is required to note opposite the tract or lot assessed the words, "by treasurer"; *provided*, that such assessment shall be made within two years after the tax list shall have been delivered to him for collection, and not afterward.

Where the assessor or other proper officer had failed to assess certain lands, and the treasurer discharged the duty within two years, but failed to note the fact that the assessment was made by himself, *held*, that the omission did not affect the legality of the assessment, and the fact and time when it was made could be shown by parol evidence. *The C. R. & M. R. R. Co. v. Carroll County*, 41 Iowa, 153.

Equity will not interfere to restrain the collection of taxes authorized by law, on account of errors or irregularities in the assessment. *Id.*

SEC. 852. [Owner to have property omitted assessed.]—In all cases where real property subject to taxation shall not have been assessed by the township assessor or other proper officer, the owner thereof, by himself or his agent, shall have the same properly assessed by the treasurer and pay the taxes thereon; and no failure of the owner to have such property assessed, or to have the errors in the assessment corrected, and no irregularity, error, or omission in the assessment of such property, shall affect in any manner the legality of the taxes levied thereon, or affect any right or title to such real property which would have accrued to any party claiming or holding under and by virtue of a deed executed by the treasurer as provided for by this title, had the assessment of such property been in all respects regular and valid.

The tax sale will not be rendered invalid by an error in the assessment or the amount of the tax, provided any portion of the taxes for which the land was sold was legal; and that evidence of such errors might in such case be properly excluded. *Eldridge v. Kuehl*, 27 Iowa, 160; *Sulley v. Kuehl*, 30 Id., 275.

SEC. 853. (*As amended by ch. 133, 21st g. a.*) All taxes upon real estate shall, as between vendor and purchaser, become a lien upon such real estate on and after the [thirty-first day of December] in each year.

See, also, *Patterson v. Baumer*, 43 Iowa, 477; *The Corning Town Co. v. Davis*, 44 Id., 622.

CHAPTER 2.

OF THE COLLECTION OF TAXES.

SECTION 854. [What receivable in payment.]—Auditor's warrants shall be received by the county treasurer in full payment of state taxes, and county warrants shall be received at the treasury of the proper county for the ordinary county tax, but money only shall be received for the school tax. Highway taxes may be discharged and highway certificates of work done received as provided by law.

SEC. 855. [Paid in legal tender and national bank notes.]—The county treasurers are authorized and required to receive in payment of all taxes by them collected, together with the interest and principal of the school fund, treasury notes issued as legal tender by the government of the United States, and the notes issued by the banks organized under, and in accordance with, the conditions of the acts of the congress of the United States entitled, "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the redemption thereof," approved February 25, 1863.

SEC. 856. [Same received by state treasurer.]—The treasurer of state is hereby required to receive of the several county treasurers the above mentioned notes in payment of any claims the state may have against any county for any part of the permanent school fund, or for any taxes due the state; and the said treasurer shall pay out said notes in redemption of outstanding auditor's warrants.

SEC. 857. (*As amended by ch. 194, 20th g. a.*) [Taxes: when due.]—(No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, unless otherwise provided, at some time between the first Monday in January and the first day of March following, and pay his taxes in full; or he may pay the one-half thereof before the first day of March succeeding the levy and the remaining half thereof before the first day of September following; *provided*, that in all cases where the half of any tax has not been paid before the first day of April succeeding the levy thereof, the whole amount of taxes charged against such entry shall become delinquent from the first day of March following such levy; and in case the second installment of any taxes be not paid before the first day of October succeeding its maturity, penalty shall be computed on such installment from the first day of September designating the maturity of such installment; *provided, also*, that in all cases where taxes are paid by installment as herein provided, each of such payments, except road taxes, shall be apportioned among the several funds for which taxes have been assessed, in their proper proportions. And if any one neglect to pay his taxes at or before maturity, as herein provided, the treasurer may make the same by distress and sale of his personal property not exempt from taxation, and the tax-list alone shall be sufficient warrant therefor.)

The board of supervisors may employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty. *Wilhelm v. Cedar County*, 50 Iowa, 254.

SEC. 858. [Notice of sale given: expenses: proceeds.]—When the treasurer distrains goods, and the owner shall refuse to give a good and sufficient bond for the delivery of said goods on the day of sale, he may keep them at the expense of the owner, and shall give notice of the time and place of their sale within five days after the taking, in the manner constables are required to give notice of the sale of personal property under execution; and the time of sale shall not be more than twenty days from the day of taking, but he may adjourn the sale from time to time, not exceeding five days in all, and shall adjourn at least once when there

are no bidders, and in case of adjournment he shall put up a notice thereof at the place of sale. Any surplus remaining above the taxes, charges of keeping and fees for sale, shall be returned to the owner, and the treasurer shall, on demand, render an account in writing of the sale and charges.

SEC. 859. [**Deputies: compensation: delinquent taxes.**—Immediately after the taxes become delinquent, each county treasurer shall proceed to collect the same by distress and sale of the personal property of the delinquent taxpayers, in the manner prescribed in the preceding section, and for this purpose he shall, within sixty days after the taxes become delinquent, appoint one or more deputies to aid and assist him in collecting the delinquent taxes in his county. Each deputy so appointed shall receive, as compensation for his services and expenses, the sum of five per cent on the amount of all delinquent taxes collected and paid over by him, which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes and interest; and in the discharge of his duties as such assistant collector, should it become necessary to make the delinquent taxes by distress and sale he shall be entitled to receive the same compensation. In addition to the five per cent provided for in this section, as constables are entitled to receive for the sale of property on execution. But this section shall not apply, so far as it authorizes the appointment of deputies, to any county in which township collectors of taxes are elected, and the owners or agents of land that has been sold for delinquent taxes shall have the same privilege and extension of time for paying taxes as other taxpayers whose land has not been so sold.

The treasurer may seize personal property for the payment of taxes, and sell the same, notwithstanding a portion of the land of the owner is advertised for sale for the payment of the same taxes. Personal property may be seized at any time before the sale of the land. *Emerick v. Sloan*, 18 Iowa, 139.

A tax-deed is conclusive that the treasurer complied with his duty in endeavoring to collect the tax by distress and sale of the personal property of the delinquent taxpayer before selling the real estate. *Stewart v. Corbin*, 25 Id., 144.

Sections 859 and 860 provide for the collection of delinquent taxes by a deputy collector. The receipt, therefore, of a deputy collector of delinquent taxes has the same force and effect as that of the treasurer. *Jones v. Welsing*, 52 Id., 220.

Where a person was employed by private persons to render services in the capacity of deputy collector and treasurer, and was permitted to render the services in that capacity, he can only recover therefor the compensation allowed by law: and an agreement by such persons to pay him a greater compensation for such services than that fixed by statute, held wholly void. *Fawcett v. Eberly et al.*, 28 Id., 544.

SEC. 860. [**When treasurer is resisted.**—If the treasurer, or his deputy, be resisted or impeded in the execution of his office, he may require any suitable person to assist him therein, and if such person refuse the aid, he shall forfeit a sum not exceeding ten dollars to be recovered by civil action in the name of the county, and the person resisting shall be liable as in the case of resisting the sheriff in the execution of civil process.

See *Jones v. Welsing*, 52 Iowa, 220, noted under section 859.

SEC. 861. [**Taxes certified to treasurer of any other county.**—In all cases of delinquent taxes, in any county where the person upon whose property the same were levied shall have removed into another county of the state, leaving no property within the county where the taxes were levied, out of which the same can be made, the treasurer of the county where said taxes are delinquent, shall make out a certified abstract of said taxes as they appear upon the tax book, and forward the same to the treasurer of the county in which the person resides, or has property, who is owing said taxes, whenever the treasurer transmitting said abstract has reason to believe that said taxes can be collected thereby.

SEC. 862. [**Force and effect of.**—The treasurer forwarding, and the one receiving, said abstract, shall each keep a record thereof, and upon the receipt and filing of said abstract in the office of the treasurer to whom the same is sent, it shall have the full force and effect of a levy of taxes in that county, and the col-

lection of the same shall be proceeded with in the same manner provided by law for the collection of other taxes.

SEC. 863. [**Penalty.**]—The officer collecting taxes so certified into another county, shall, in addition to the penalties provided by law on delinquent taxes, assess and collect the further penalty of twenty per cent on the whole amount of such taxes, inclusive of the penalties thereon.

SEC. 864. [**Return made.**]—The officer receiving said abstract, shall, whenever in his opinion the taxes are uncollectible, return the abstract with the indorsement thereon of "uncollectible," and in case said taxes are collected, the officer receiving the same shall transmit the amount to the treasurer of the county where said taxes were levied, less the penalty provided by section eight hundred sixty-three of this chapter.

DELINQUENT—LIEN—PENALTY.

SEC. 865. (*As amended by ch. 194, 20th g. a.*) [**Delinquent taxes: a lien drawing interest.**]—(All taxes due and unpaid on the first day of March or the first day of September, shall become delinquent and draw interest as herein-after provided; and taxes upon real property are hereby made a perpetual lien thereon against all persons except the United States and this state; and taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title; and the treasurer is authorized and directed to collect the delinquent taxes by the sale of any property upon which the taxes are levied, or any other personal or real property belonging to the person to whom the taxes are assessed.)

See *Jiska v. Ringgold County*, 57 Iowa, 630, cited under section 848, *ante*.

Taxes on personal property do not become a lien on real property until they are *due*, and they do not become due by the mere assessment of the property for taxation. Whether they become due at the time of the levy or subsequently, when the books are placed in the hands of the treasurer, *quære*; but until they are due the owner of real estate may convey it free from any lien for such taxes. *Castle, Trustee, v. Anderson et al.*, 69 Id., 428.

Taxes levied upon personal property become a lien on any realty which the owner of such property may possess, or which he may acquire, but not on the personalty itself; and when such personal property is sold and transferred to another after the levy of the taxes thereon and before payment thereof, it cannot be subjected to the payment of such tax. *Jaffray & Co. v. Anderson et al.*, 66 Id., 718.

SEC. 866. (*Ch. 194, 20th g. a.*) [**Penalty on delinquent taxes.**]—(The treasurer shall continue to receive taxes after they become delinquent until collected by distress and sale; and if one-half of the taxes charged against any entry on the tax-book in the hands of a county treasurer be not paid before the first day of April after the same has been charged; or if the remaining half of such taxes has not been paid before the first day of October after its maturity, he shall collect, in addition to the tax of each tax-payer so delinquent, as penalty for non-payment, interest on such delinquent taxes, at the rate of one cent per month thereafter until paid; *provided*, that in all cases where the half of any taxes has not been paid before the first day of April after the same has been charged on the tax-books, penalty as above shall be collected on the whole amount of taxes charged against such entry from the first of March succeeding the levy; and *provided, also*, that the penalty prescribed by this section shall not apply upon taxes levied by any court to pay judgment on city or county indebtedness, but upon such taxes no other penalty than the interest, which such judgment draws, shall be collected; and *provided further*, nothing in this chapter shall be construed to alter the present rules governing the collection of road taxes, save that all such tax collected by the county treasurer shall be included in the first installment. and *provided further*, that the penalties provided by this section shall not apply to or be collected upon any taxes levied in aid of the construction of any railroad in this state.)

A sale of land for taxes frees it in the hands of the purchaser, from any and all liens thereon for delinquent taxes for prior years. *Preston v. Van Gorder*, 31 Iowa, 250; *Bowman v. Thompson*, 36 Id., 565; *Hough v. Easley*, 47 Id., 330.

Taxes upon personal property are a lien upon any real estate owned or acquired by the taxpayer. *Garrettson v. Scofield*, 44 Id., 35; *Cummings v. Easton*, 46 Id., 183, *Paulson v. Rule et al.*, 49 Id., 576.

The deed of the county treasurer for real property sold for state and county purposes, does not divest the property in the hands of a purchaser of the lien of the city for unpaid city taxes, in a city organized under special charter. *Dennison v. The City of Keokuk*, 45 Id., 266.

A tax on personal property becomes a lien upon real estate acquired by the tax-payer subsequent to the assessment. *Cummings v. Easton*, 46 Id., 183.

Where penalties for non-payment of taxes accrued, and commenced to run under the law of the revision of 1860, which was repealed by this section, the liability of the tax-payer was not affected by such repeal. *The C. R. & M. R. Ry Co. v. Carroll County*, 41 Id., 153, 190.

This section does not apply to special assessments in cities, but only to general taxes when collected by the county treasurer. *Ankeney v. Henningsen*, 54 Id., 699.

See *Jiska v. Ringgold County*, 57 Id., 630, cited under section 848, ante.

(CHAPTER 29, LAWS OF 1874.)

REMISSION OF PENALTY AND INTEREST ON PERSONAL PROPERTY TAXES.

An Act to remit the penalty and interest on delinquent personal property taxes in certain cases.

SECTION 1. [When board may remit penalties, etc.]—*Be it enacted by the general assembly of the state of Iowa:* That in all cases where the county treasurer in any county in this state has neglected for the term of four years, or more, to bring forward the delinquent taxes on personal property, on the tax books, as required in section 845, chapter 1, title VI, of the code, or has for four years or more neglected to collect said tax by distress and sale of personal property or real estate, upon which said tax is a lien, it shall be the duty of the board of supervisors of the county to remit all of the penalties and interest that may have accrued on such delinquent taxes, on the payment by the person liable for the same of the original amount of such tax.

Approved March 18, 1874.

(Took effect by publication in newspapers, April 5, 1874.)

This act is not in conflict with the state constitution as impairing the obligation of contracts. *Beecher v. The Board of Supervisors, etc.*, 50 Iowa, 538.

MISCELLANEOUS.

SEC. 867. [Form of receipt: effect of.]—The treasurer shall, in all cases, make out and deliver to the tax-payer a receipt, stating the time of payment, the description and assessed value of each parcel of land, and the assessed value of personal property, the amount of each kind of tax, the interest on each, and costs, if any, giving a separate receipt for each year; and he shall make the proper entries of such payments on the books of his office. Such receipt shall be in full of the party's taxes for that year, but the treasurer shall receive the full amount of any county, state, or school tax, whenever the same is tendered, and give a separate receipt therefor.

The tax-payer has the right to pay the full amount of any one tax listed against him, while refusing to pay others; and where a plaintiff deposited a sum of money with the county treasurer, with instructions not to apply it to the payment of certain specified taxes, and the treasurer, receiving no further instructions, after the first of April used it *pro tanto* for the discharge of the taxes which plaintiff had forbidden to be paid: *Held*, that plaintiff was not bound by the act of the treasurer, and that the money should have been applied as directed by the plaintiff. *The Iowa R. L. Co. v. Carroll County*, 39 Iowa, 151.

The payment of taxes to a deputy collector after the land had been sold for such tax, and with-

out knowledge of the sale by the owner, will not vitiate the sale, and the purchaser is entitled to a *mandamus* to compel the issuance to him of a treasurer's deed. *Jones v. Welsing*, 52 Id., 220.

Where a tax-payer, in writing tendered payment in full of certain specified taxes, and demanded receipts therefor, it was *held*, that such tender suspended the running of interest upon the taxes embraced in the tender. *Id.*

A tax deed of any undivided interest in real estate, sold for taxes upon the whole, is invalid. *Cragin v. Henry et al.*, 40 Id., 158.

Where lands omitted by the assessor or clerk have been placed upon the tax list by the treasurer, penalties commence to run from the time when such entry was in fact made, if so placed thereon after the time when the taxes would have become delinquent in case the lands had been regularly assessed and placed on the tax list at the proper time. *The C., R. & M. R. R. Co. et al. v. Carroll County*, 41 Id., 153, 175.

SEC. 868. [Treasurer apportion consolidated tax and make report.]

—The treasurer of each county shall, on or before the tenth day of each month, apportion the consolidated tax of each civil township or independent school district in his county, collected during the preceding month, among the several funds to which it belongs, according to the number of mills levied for each fund contained in said consolidated tax, and having entered the amount of tax for each fund, including other taxes collected during the preceding month, upon his cash account, he shall report the amount of each distinct tax to the county auditor, who shall charge him up with the same.

SEC. 869. [Auditor to keep accounts: each fund kept separate.]—

The county auditor shall keep full and complete accounts with the county treasurer, with each separate fund or tax by itself, in each of which accounts he shall charge him with the amounts in his hands at opening of such account, whether it be delinquent taxes, notes, cash, or other assets belonging to such fund, the amount of each tax for each year when the tax book is received by him, and all additions to each tax or fund, whether by additional assessments, interest on delinquent taxes, amount received for peddlers' licenses or other items, and shall credit the treasurer on proper vouchers, for money disbursed, for double and erroneous assessments, including all improper and illegal assessments, the correction or remission of which causes a diminution of the tax, and for unavailable taxes, or such as have been properly and legally assessed, but which there is no prospect of collecting.

SEC. 870. [Treasurer to refund taxes when directed by supervisors.]

—The board of supervisors shall direct the treasurer to refund to the tax-payer any tax, or any portion of a tax, found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon, and in case any real property subject to taxation shall be sold for the payment of such erroneous tax, interest or cost as above mentioned, the error or irregularity in the tax may at any time be corrected as above provided, and shall not affect the validity of the sale, or the right or title conveyed by the treasurer's deed, if the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, and the property had not been redeemed from sale.

Where lands are sold for more than the legal tax due, the excess may be recovered from the county treasury under this section. *Harper v. Sexton*, 22 Iowa, 442; *Rhodes v. Sexton & Son*, 33 Id., 540.

And where a void, illegal, or erroneous tax has been paid, the person paying the same is entitled to recover the same back under this section; and if the board of supervisors refuse to order it refunded, he may bring an action against the county. *Lauman v. Des Moines County*, 29 Id., 310; *Isbell v. Crawford County*, 40 Id., 102.

Where a tax sale of land is made for an aggregate tax, a part only of which is illegal, such illegal tax will not affect the validity of the sale, or the right and title conveyed by the treasurer's deed. *Eldridge v. Kuehl*, 27 Id., 169; *Parker v. Sexton & Son*, 29 Id., 421; *Sulley v. Kuehl*, 30 Id., 275; *Rhodes v. Sexton & Son* 33 Id., 540.

To entitle one who has voluntarily paid taxes to have the same refunded to him in accordance with this section the tax must be shown to be erroneous or illegal in assessment or levy. An action will not lie to recover from the county for taxes, paid under a misapprehension in regard

to the ownership of the taxed property, where the tax payer had full knowledge of all the facts upon which his claim of title was based. *The Dubuque & S. C. R. Co v. The Board of Supervisors, etc.*, 40 Id., 16.

Where taxes to aid in the construction of a railroad were voted in two or more townships in a county, in one, after a part of the taxes had been collected, the tax was declared illegal by the supreme court, it was held, that the treasurer was not authorized to refund the illegal taxes collected out of the taxes lawfully collected from the other townships, and that *mandamus* would lie to compel him to pay the latter over to the company. *The D. M. & R. Co. v. Lowry*, 51 Id., 486.

This section provides for the refunding of a tax erroneously, though voluntarily paid, and if the board of supervisors, upon application for that purpose, refuse to refund, an action may be maintained against the county therefor. *Richards v. Wapello County*, 48 Id., 507.

Where erroneous and illegal taxes, which could not have been lawfully enforced, have been paid by the tax payer, he may maintain an action under this section to recover the same; and his failure to pursue other remedies to defeat the collection will not be a waiver of his right of recovery. *Dickey v. The County of Polk*, 58 Id., 237.

A sale of land for taxes after they have been paid, through mistake of the treasurer, is void, and if the owner shall voluntarily redeem from such sale, he cannot recover from the county under this section the sum paid to redeem. *Morris v. The County of Sioux*, 42 Id., 416.

A cause of action for the recovery from the county of taxes illegally assessed, and paid in ignorance of that fact, accrues at the very moment of payment, and the action is barred after the lapse of five years from that time. *Callanan v. Madison County*, 45 Id., 561.

It is not necessary that the tax be adjudged to be illegal or erroneous before the cause of action accrues. *Id.*

While the provisions of chapter 171, laws of 1868, requiring a registration of voters, were mandatory and imperative, and a tax voted at an election where the voters had not registered, to aid in the construction of a railroad was illegal, yet an action will not lie to compel the county treasurer to refund the amount of the tax after it has been collected and paid over to the railroad company. *Butler v. The Board of Supervisors of Fayette County*, 46 Id., 326.

Under an ordinance subjecting a city to the liabilities imposed upon counties by section 870, an action against the city will lie for the recovery of an illegal or erroneous tax. *Fallon v. The City of Burlington*, 39 Id., 543.

A cause of action for the recovery from the county of taxes illegally assessed, although paid in ignorance of that fact, accrues at the very moment of payment, and the action will be barred after the lapse of five years from that time, and it is not necessary that the tax should be adjudged illegal before the cause of action shall accrue. *Callanan v. The County of Madison*, 45 Id., 561. To the same effect are *Hamilton v. The City of Dubuque*, 50 Id., 213; *Brown & Sully v. Painter*, 44 Id., 368; *Beecher v. The County of Clay et al.*, 52 Id., 140.

Where a school district from which an illegal tax had been collected, and by which the tax was expended, was afterward subdivided, it was held that the county treasurer in refunding such tax under this section of the code should apportion the amount refunded between the different districts occupying the territory from which it was collected. *Dist. Tp. of Spencer v. District Tp. of Riverton*, 56 Id., 85.

Where taxes are erroneously exacted and paid, as contemplated in this section of the code, it is the duty of the board of supervisors to order the county treasurer to refund the same, not out of the general county fund, but out of the several funds to which the tax was apportioned when collected; but where an order to refund was refused, and an appeal was taken therefrom to the district court, held that the court properly refused to enter judgment against the county for such portions of the taxes as had been collected by the county treasurer for road and school districts, and paid over at the times provided by law, without proof that there remained in the treasury funds belonging to such districts which could properly be applied to the satisfaction of the judgment. *Iowa Ry Land Co. v. Woodbury County*, 64 Id., 212.

Where plaintiff was assessed for his moneys and credits, without any deduction being made for his debts, and he made no claim to the assessor for such deduction, and made no appearance before the board of equalization in relation thereto, but paid the tax levied pursuant to the assessment, it was held that the tax was not illegal in the contemplation of this section, and the county supervisors had no power to refund any portion thereof, and that an action would not lie against the county for the recovery thereof. *Leonard v. Madison County*, 64 Id., 418.

The words "erroneously or illegally exacted or paid" include taxes paid by a purchaser at tax sale, for which the land was illegally sold, because the taxes were not brought forward on the tax lists as required by section 845 of the code, and the words "such erroneous tax," afterwards occurring in said section, are equally inclusive. *Parker v. Cochran, Id.*, 757.

Where the plaintiff, a member of a partnership, was personally assessed for property belonging to the partnership, it was held to be a case of erroneous assessment merely; that the plaintiff's only remedy was before the board of equalization under this section of the code, and that the county was not liable to refund the tax after payment as under section 870, where a tax has been

erroneously or illegally exacted or paid as contemplated by that section. *Harris v. Fremont County*, 63 Id., 639.

A district embracing a portion of the territory from which such tax has been collected may maintain an action for contribution against another district, to which the treasurer has refunded the whole tax. *Dist. Tp. of Spencer v. Riverton*, 56 Id., 85.

One who has paid to the county treasurer a tax in aid of a railroad, which is afterwards adjudged to be illegal and non-collectible, is not entitled to a judgment in an action against the county, in the nature of an order requiring the treasurer to repay the tax out of the fund remaining in the hands of the treasurer, or to direct the supervisors to issue an order to the treasurer to that effect, but his remedy is by *mandamus* against the treasurer or supervisors, or both, to compel them to do their duty and return the tax illegally collected. *Eyerly v. Jasper County*, 72 Id., 149.

SEC. 871. (*As amended by ch. 194, 20th g. a.*) [When and how made.]—On the first Monday in December in each year, the county treasurer is required to offer at public sale at his office, all lands, town lots, or other real property on which taxes of any description for the preceding year or years shall remain due and unpaid, and such sale shall be made for and in payment of the total amount of taxes, interests and costs due and unpaid on such real property.

A tax deed which recites that the sale was begun and publicly held on the first Monday of December, instead of the first Monday of October, as provided by this section, is not void upon the ground that it shows upon its face that the sale was made at a time not authorized by law. When from any good cause, the property cannot be duly advertised and offered for sale on the first Monday of October, he is authorized by section 886 of the code, to make the sale on the first Monday of the next succeeding month in which it can be made. *Eldridge v. Kuehl*, 27 Iowa, 160.

The sale of land for taxes is required to be made for all taxes of every description "for the preceding year or years" then delinquent, and the sale for the taxes of one year frees the land, in the hands of the purchaser, from any and all liens thereon for delinquent taxes for prior years. *Preston v. Van Gorder*, 31 Id., 250; see also, *Litchfield v. Hamilton County*, 40 Id., 69; *Shoemaker v. Lacey*, 45 Id., 422.

But the deed of the treasurer of lands sold for state and county taxes does not divest the lien for city taxes of a city organized under special charter, which were due and unpaid at the time of the sale. *Dennison v. City of Keokuk*, 45 Id., 266.

Nor will a sale for city taxes for one year, divest the lien of the city for unpaid taxes of prior years. The lien of the city is prior to that of the purchaser. *Id.*

A court of equity will not interfere to stay the collection of taxes authorized by law, to which the property is justly liable, on account of irregularities. *Conway v. Younkin*, 28 Id., 295; *Litchfield v. Hamilton County*, 40 Id., 69.

This section requires the county treasurer to offer lands on which taxes are delinquent, at public sale, and at a time authorized by law, and where neither of these requirements is observed the sale will be invalid. *Butler v. Delano*, 42 Id., 350. To the same effect is *Besore v. Dosh et al.*, 43 Id., 211.

The "taxes" mentioned in this section for which if delinquent sale shall be made as therein required, mean all state and county taxes only, and not taxes voted in aid of a railroad. *Crowell v. Merrill et al.*, 60 Id., 53.

The fact that the tax sale register does not show an offering for sale of lands on the first Monday of October, is not conclusive evidence that they were not so offered, nor sufficient to overcome the presumption in favor of the validity of the tax deed. *Bullis v. Marsh et al.*, 56 Id., 747.

Notwithstanding this section directs that a tax sale "shall be made for and in payment of the total amount of taxes, interest and costs unpaid" on the land, yet where the taxes are due and delinquent for successive years, and the sale is made for a part only of such years, and a deed is made pursuant to such sale, such deed will not be set aside at the instance of the owner of the patent title. (Following *Preston v. Van Gorder*, 31 Id., 250, and other cases); *Kessey v. Connell*, 68 Id., 430.

(For the government of tax sales in Lee county the following act was passed:)

(CHAPTER 46, LAWS OF 1874.)

TAX SALES IN LEE COUNTY.

An Act to amend chapter 2, title VI, of the code, in relation to tax sales and redemption of property in counties having two county seats.

SECTION 1. [Sales to be at place where taxes are collectible.]—*Be it enacted by the general assembly of the state of Iowa:* That in counties divided into two districts for the collection of taxes, and where there are two county seats, the sales of lands and property for delinquent taxes, in each collection district, shall be sold at the county seat, or the place where the taxes for each district are collected, and the deputy treasurer and the recorder or his deputy, at such county seat, or place, shall be authorized, and are hereby declared authorized and empowered, to do and perform all the duties required of the treasurer and auditor of such county.

SEC. 2. [Record: where kept.]—The records of such sales, and all matters and things pertaining to the same, shall be kept by, and in the office of, the deputy treasurer, and the recorder, or his deputy, as is required to be kept by the treasurer and auditor.

SEC. 3. [Property sold to be redeemed.]—All property sold under the provisions of this act shall be redeemed of the recorder or his deputy, and the certificate of redemption so issued shall be countersigned by the deputy treasurer, and the deputy treasurer and recorder, or his deputy, shall be authorized and empowered to do and perform all the duties in relation to such redemption as *is* (are) required of the treasurer and auditor of the county.

SEC. 4. [Deputy treasurer to execute deeds.]—At the expiration of the time for redemption, as required by sections 890, 891, 892, 893, 894, 895, chapter 2, title VI, of the code, the deputy treasurer is hereby authorized to make, execute, acknowledge, and deliver good and sufficient deeds to the purchaser or holder of the sale certificate, and to do and perform all other acts and duties required by law of the treasurer of the county in regard to the same.

Approved March 18, 1874.

(CHAPTER 79, LAWS OF 1876.)

TAX SALES.

An Act to authorize the sale of lands and town lots for taxes in certain cases, for an amount less than the taxes, interest and costs due thereon. (Additional to code, chapter 2, title VI: "Of the collection of taxes.")

SECTION 1. (*As amended by ch. 194, 20th g. a.*) [County treasurer on first Monday in December shall sell.]—*Be it enacted by the general assembly of the state of Iowa:* That it shall be the duty of the several county treasurers of this state, on the first Monday of (December) in each year, or (at) any adjourned sale thereafter, to offer and sell at public sale, to the highest bidder therefor, all lands and town lots which then remain liable to sale for delinquent taxes, and which have heretofore been advertised and offered at public sale and passed for want of bidders, for two or more years, by giving general notice of such sale for six weeks previous thereto in the official papers of each of their respective counties, which said notice shall refer to and embrace the general provisions of this act; and in

case of redemption of any real estate sold under the provisions of this act, the purchaser shall only receive the amount paid and a *pro rata* proportion of the penalty, interests and costs.

SEC. 2. [To ascertain interest and penalties to be paid for redemption.]—That in ascertaining the interest and penalties to be paid upon the redemption of such real estate from such sale, the sum due on any piece or parcel of real estate sold under and by virtue of the provisions of this act, shall be taken to be the full amount of taxes, interest and costs due on such parcel at the time of such sale; and all the provisions of the revenue laws of Iowa, not inconsistent with this act, shall apply to such sale, and to the redemption of any real estate sold by virtue of this act; and the amount so paid for any parcel of real estate shall be apportioned *pro rata* among the different funds to which it belongs.

SEC. 3. [Unavailable tax to be reported to state auditor.]—The amount of taxes due on any real estate sold under the provisions of this act, in excess of the amount for which the same was sold, shall be credited, as unavailable tax, to the county treasurer, by the county auditor, apportioning the amount among the different funds to which the same belongs. The amount of such excess due to funds belonging to the state, shall be reported by the county auditor to the auditor of state as unavailable, who shall give the county credit for the same.

Approved March 11, 1876.

When land liable to sale for delinquent taxes has been advertised and offered for two years or more, but not sold for want of bidders, and is finally advertised and sold for less than the whole amount of taxes, interest and penalty due thereon at the time of the sale under this chapter, the owner cannot redeem the same from such sale without paying the full amount of the taxes due at the time of sale, with the interest and penalty thereon. An offer to pay the amount for which the land was sold, with interest and penalties, is not sufficient to effect redemption, nor to justify the treasurer in withholding a deed from the purchaser at tax sale. *Soper v. Espeset*, 63 Iowa, 326.

SEC. 872. [Notice: what to contain.]—The notice to be given of such sale shall state the time and place thereof, and contain a description of the several parcels of real property to be sold for the delinquent taxes of the preceding year, and such real property as has not been advertised for the taxes of previous years and on which the taxes remain due and delinquent, and the amount of taxes and amount of interest and costs against each tract, and the name of the owner, when known, or person, if any, to whom taxed.

As to the effect of sales of several tracts at one sale for the gross amount of taxes due see *ante*, notes to section 826.

SEC. 873. (As amended by ch. 194, 20th g. a.) [How published.]—The county treasurer shall give such notice by causing the same to be published once in each week for three successive weeks, the last publication to be at least one week prior to the day of sale, in some newspaper printed in such county, if any such there be, or if not, then in the nearest newspaper in this state having a general circulation in such county; and also by causing a copy of such notice to be posted on the door of the county court house at least four weeks before the day of sale. But no newspaper shall be selected unless it has two hundred regular weekly subscribers, and has been regularly printed and published for at least three months preceding the fifteenth of November of said year in the same county, and has had at least twenty actual subscribers in the county wherein the delinquent property is situated, for at least three months preceding the fifteenth of November of that year. And in all cases where the treasurer may doubt the qualifications of any paper as above fixed, he shall require proof thereof by the affidavit of the publisher.

Where real property has been once duly advertised for sale for taxes, the sale thereof may be made at any time thereafter, pursuant to adjournments regularly made, and need not be again advertised. *Hurley v. Street*, 29 Iowa, 429.

SEC. 874. [Cost of publication: notice filed.]—The treasurer shall charge and collect, in addition to the taxes and interest, a sum not exceeding twenty cents

on each tract of real property advertised for sale, which sum shall be paid into the county treasury, and the county shall pay the costs of publication, but in no case shall the county be liable for more than the amount charged to the delinquent lands for advertising, and if the treasurer cannot procure the publication of said notice for that sum, or, if for any other reason the treasurer is unable to procure the publication of said notice, he shall post up written notices of said sale in four of the most public places in his county four weeks before sale, and notice so given shall have the same force and effect as though the same had been published in a newspaper. In that case, he shall, before making such sale, file in the office of the auditor of his county, a copy of said notice with his certificate indorsed thereon, setting forth that said notice had been posted up in four of the most public places in his county four weeks before the sale, which said certificate shall be subscribed by him and sworn to before said auditor, and shall be presumptive evidence of the facts therein stated.

Under this section, the treasurer is authorized to collect of delinquents, twenty cents for each tract advertised. *McClintock v. Sutherland*, 35 Iowa, 487.

But where several lots or tracts are assessed together, and a gross amount of tax levied thereon, and so advertised, they will be regarded as constituting but one tract, and liable for but one advertising fee. *Id.*

When taxes are delinquent upon a whole section, belonging to one owner, and lying in one contiguous body, it is the duty of the treasurer to advertise the whole tract in a single description, and not divide it up into sixteen descriptions. *The C. R. & M. R. R. Co. et al. v. Carroll County*, 41 Id., 153.

SEC. 875. [Hour and place of sale.]—The county treasurer shall, at his office on the day of the sale, at the hour of ten o'clock in the forenoon, offer for sale, separately, each tract or parcel of real property advertised for sale, on which taxes and costs shall not have been paid.

See *Martin v. Cole*, 38 Iowa, 141, as to what constitutes a separate "tract or parcel" of real property.

As to what constitutes a sale as required by the statute, see *Butler v. Delano*, 42 Id., 350.

SEC. 876. [Purchaser: homestead liable.]—The person who offers to pay the amount of taxes due on any parcel of land, or town lot, for the smallest portion of the same is to be considered the purchaser, and when such purchaser shall designate the portion of any tract of land or town lot for which he will pay the whole amount of taxes assessed against any such tract or lot, the portion thus designated shall, in all cases, be considered an undivided portion. In all cases where the homestead is listed separately as a homestead, it shall be liable only for the taxes thereon.

Where, under the laws in force at the date of the levy of a tax, the homestead is exempt from sale for any taxes except those levied thereon though not separately listed, a subsequent change in the law will not affect the right of the owner. At a sale made for the taxes thereon the homestead could not be sold in connection with other lands, in such manner as to compel the owner to pay taxes assessed upon such other lands in order to save his homestead from absolute loss. *Penn v. Clemans*, 19 Iowa, 372.

Under this section of the code a purchaser at tax sale who offers to pay the taxes for less than the whole of a tract of land, acquires an undivided interest in the whole tract. *Brundage v. Maloney*, 52 Id., 218.

A sale of a tract of land, part of which constitutes the homestead of the delinquent tax-payer, is, under this section, void *in toto*. *Stewart v. Corbin*, 25 Id., 144. Following *Penn v. Clemans supra*. But see *Salter v. The City of Burlington*, 42 Id., 531, where it is held that, to exempt the homestead from liability for taxes accruing upon other property, it must be listed separately as a homestead. That the homestead is the only real property of the tax-payer, does not relieve him from the necessity of listing it separately, in order to thus limit its liability. This last case was decided upon the law of the revision of 1860, section 759 of which provided that the taxes due from any person upon personal property should be a lien upon *any real estate* owned by such person.

Section 876 of the code contemplates that land sold at tax sale shall bring the whole amount of taxes due. But chapter 79, laws of 1876, provides that in certain cases lands at such sales may sold for less than the amount of taxes due. A tax deed recited that the land therein conveyed was struck off to the highest bidder, for an amount less than the delinquent taxes. *Held*

that there being no evidence to the contrary, the sale would be presumed lawfully made under the latter statute. *Griffin v. Tittle et al.*, 37 N. W. R., 167.

SEC. 877. [Sale continued.]—The treasurer shall continue the sale from day to day as long as there are bidders, or until the taxes are all paid.

Where a tax deed, regular in form, recited that the land was sold January 4, and the treasurer testified that the sales of the land in the county for delinquent taxes begun upon that day, and were continued from day to day until the 18th, and that he entered all the sales as of the date of the commencement; it was *held* that a sale of land at any time during the continuance of the sale was valid, and that the recording of the sale as of the first day did not impair the title. *Phelps v. Meade et al.*, 41 Iowa, 470.

Where the treasurer announced that the sale of lands for delinquent taxes would be adjourned from day to day and posted a notice to that effect, but instead of resuming the sale, and adjourning it to the following or any day thereafter, he made no further offer of the lands for sale until the agent of the purchaser handed him a list of tracts, and offering in behalf of the person whose name was set opposite each tract to take the same for the taxes delinquent thereon, and the treasurer struck off the entire list as this indicated; *Held*, that the sale was invalid and should be set aside. *Butler v. Delano*, 42 Id., 350.

SEC. 878. [Re-sale.]—The person purchasing any parcel or part thereof shall forthwith pay to the treasurer the amount of taxes and costs charged thereon, and on failure to do so, the said parcel shall at once again be offered as if no such sale had been made. Such payments may be made in the same funds receivable by law in payment of taxes.

SEC. 879. [Owner may pay before sale.]—Any person owning or claiming lands, or town lots, advertised for sale as aforesaid, may pay to the county treasurer, at any time before the sale thereof, the taxes due thereon with interest, cost of advertising, and all the costs which may have accrued up to the time of such payment.

SEC. 880. [Letters and figures used: informality: effect of.]—In all advertisements for the sale of real property for taxes, and in entries required to be made by the county auditor, treasurer, or other officer, letters and figures may be used as they have been heretofore, to denote townships, ranges, sections, parts of sections, lots, blocks, date, and the amount of taxes, interest, and costs. And no irregularity or informality in the advertisement shall affect in any manner the legality of the sale, or the title to any real property conveyed by the treasurer's deed under this chapter, but, in all cases, the provisions of this chapter shall be sufficient notice to owners of the sale of their property.

In addition to the rule of liberal construction (code, sections 45, 2528) the revenue law in this and other sections provide that any irregularity, informality, error, etc., shall not affect the validity of the proceedings, or the title derived thereunder. (See code, sections 852, 880, 903, 904.) Per COLE, CH. J., in *McCready v. Sexton & Son*, 29 Iowa, 380.

SEC. 881. [Certificate of publication.]—The treasurer shall obtain a copy of said advertisement, together with a certificate of the due publication thereof, from the printer or publisher of the newspaper in which the same shall have been published, and shall file the same in the office of the county auditor, and such certificate shall be substantially in the following form:

I, A B, publisher (or printer) of the, a newspaper printed and published in the county of, and state of Iowa, do hereby certify that the foregoing notice and list were published in said newspaper once in each week for three successive weeks, and the last of which publications was made on the day of, A. D. 18, and that copies of each number of said paper in which said notice and list were published, were delivered by carrier or transmitted by mail to each of the subscribers to said paper, according to the accustomed mode of business in this office.

A B,
 Publisher (or printer) of the

STATE OF IOWA, }
 COUNTY. } ss.

The above certificate of publication was subscribed and sworn to before me by the above named A B, who is personally known to me to be the identical person described therein, on the day of, A. D. 18....

C..... D.....,
 County Auditor county, Iowa.

SEC. 882. [Auditor to attend sales: duty: treasurer to keep record.]

—The county auditor shall attend all sales of real property for taxes made by the treasurer, and make a record thereof in a book to be kept by him for that purpose, therein describing the several parcels of real property on which the taxes and costs were paid by the purchaser, as they are described in the list or advertisement on file in his office, stating in separate columns the amount as obtained from the treasurer's tax list, of each kind of tax, interest, and costs for each tract or lot, how much and what part of each tract or lot was sold, to whom sold, and date of sale. The treasurer shall also keep a book of sales in which, at the time of sale, he shall make the same records. He shall also note in the tax list, opposite the description of the property sold, the fact and date of such sale.

See *Boardman v. Bourne*, 20 Iowa, 136, where this section, with others, is cited.

SEC. 883. (As amended by ch. 194, 20th g. a.) [Sale adjourned.]—When all the parcels of real property advertised for sale shall have been offered, and a portion thereof shall remain unsold for want of bidders, the treasurer shall adjourn the sale to some day not exceeding two months from the time of adjournment, due notice of which day shall be given at the time of adjournment, and also by keeping a notice thereof posted in a conspicuous place in the treasurer's office; but no further advertisement shall be necessary. On the day fixed for the re-opening of the sale, the same proceedings shall be had as provided hereby for the sale commencing on the first Monday in December. And further adjournments shall be made from time to time, not exceeding two months, and the sales shall be thus continued until the next regular annual sale, or until all the taxes shall have been paid.

The sale may be adjourned from time to time without re-advertising, where the lands have been once duly advertised. *Hurley v. Street*, 29 Id., 429.

SEC. 884. [Penalty on auditor and treasurer for failure of duty.]—

If any treasurer or auditor shall fail to attend any sale of lands as required by this chapter, either in person or by competent deputy, he shall be liable to a fine of not less than fifty nor more than three hundred dollars, to be recovered by an action in the district court against the treasurer or auditor, as the case may be, and his bondsmen. And if such officer or deputy shall sell, or assist in selling, any real property, knowing the same to be not subject to taxation, or that the taxes for which the same is sold have been paid, or shall knowingly and willfully sell, or assist in selling, any real property for payment of taxes to defraud the owner of such real property, or shall knowingly and willfully execute a deed for property so sold, he shall be liable to a fine of not less than one thousand nor more than three thousand dollars, or to imprisonment not exceeding one year, or to both fine and imprisonment, and to pay the injured party all damages sustained by any such wrongful act, and all such sales shall be void.

SEC. 885. [Same.]—If any county treasurer or auditor shall hereafter be, either directly or indirectly, concerned in the purchase of any real property sold for the payment of taxes, he shall be liable to a penalty of not more than one thousand dollars, to be recovered in an action in the district court, brought in the name of the county against such treasurer or auditor, as the case may be, and his bondsmen; and all such sales shall be void.

If the treasurer is himself the purchaser at tax sale, or is directly or indirectly interested or

concerned in such purchase, the sale is void. Per WRIGHT, J., in *Henderson v. Oliver*, 28 Iowa, 20.

So also the deputy of the county treasurer is prohibited from acquiring an interest in lands sold at tax sale, and where he entered upon the books a sale as made to a person who was not present, and who subsequently assigned the certificate to him, it was held to be invalid. *Ells v. Peck et al.*, 45 Id., 112.

Such a sale, however, is not absolutely void, but voidable only, and the fraud of the officer will not defeat the title based thereon when held by a subsequent purchaser for value without notice, save upon proper proceedings instituted therefor. *Id.*

The act of the county treasurer in bidding off lands at a tax sale conducted by himself as agent for the purchaser, from whom he had received money to be so invested and from whom he was to receive a certain per cent as compensation, is fraudulent and renders the sale invalid. *Corbin v. Beebe*, 35 Iowa, 336; *Everett v. Beebe*, 37 Id., 452.

Where a tax sale is set aside on the ground that the treasurer who conducted the sale bid in the land as agent of the purchaser, the owner must pay the purchaser the amount which he would have had to pay to the treasurer in satisfaction of all the taxes if they had not been paid by the purchaser. The purchaser in such case is held to have acquired the right of the state and county in this respect. *Everett v. Beebe*, 37 Id., 452.

A tax sale will not be held fraudulent because a clerk or employe in the treasurer's office bid in the land for the purchaser, nor by the fact that some time subsequently he became interested in the property. *Lorain v. Smith*, 37 Iowa, 67.

Where a tax sale is set aside on the ground that the treasurer who conducted the sale bid in the land as agent for the purchaser, the owner must pay the purchaser the amount which he would have had to pay to the treasurer in satisfaction of all the taxes if they had not been paid by the purchaser. The purchaser in such case is held to have acquired the right of the state and county in this respect. *Everett v. Beebe*, 37 Id., 452.

And in an action at law to recover real estate, the defendant relying upon a tax title, the plaintiff may defeat such title on the ground of fraud at the tax sale. A separate proceeding for this purpose is not necessary. *Id.*

SEC. 886. [Sale at any other time.]—If, from neglect of officers to make returns, or from any other good cause, real property cannot be duly advertised and offered for sale on the first Monday of October, the treasurer shall make the sale on the first Monday of the next succeeding month in which it can be made, allowing time for the publication as provided in this chapter.

A tax deed which recites that the sale was begun and publicly held on the first Monday of December instead of the first Monday of October, as directed in section 883 of the code, is not void upon the ground that it shows upon its face that the sale was made at a time not authorized by law. Section 886 authorizes a sale on the first Monday of the next succeeding month after October for good cause. *Eldridge v. Kuehl*, 27 Iowa, 160; *Love v. Welch et al.*, 33 Id., 192.

The treasurer may, under this section, when from any cause the property cannot be duly advertised and offered for sale on the first Monday of October, make the sale on the first Monday of the next succeeding month in which it can be made, allowing time for publication. The reasons for postponing the sale need not appear of record. *Sully v. Kuehl*, 30 Id., 275.

A tax deed which recites that the sale took place on the first Monday in November, is not for that reason void. *Easton v. Savery*, 44 Id., 654. See, also, *Eldridge v. Kuehl*, 27 Id., 160.

CERTIFICATE OF PURCHASE.

SEC. 887. [How made: what contain.]—The county treasurer shall make out, sign, and deliver to the purchaser of any real property sold for the payment of taxes as aforesaid, a certificate of purchase, describing the property on which the taxes and costs were paid by the purchaser, as the same was described in the records of sales, and also how much and what part of each tract or lot was sold, and stating the amount of each kind of tax, interest, and costs for each tract or lot for which the same was sold, as described in the records of sales, and that payment had been made therefor. If any person shall become the purchaser of more than one parcel of property, he may have the whole included in one certificate, but each parcel shall be separately described.

The "certificate of sale" for taxes made by the treasurer and delivered to the purchaser at the tax sale, is competent evidence to show the manner of sale, etc., when offered by either party in a controversy as to the sufficiency of the tax title; but where there is a difference between such

certificate and the record of sale, the former must yield to the latter. *McCready v. Sexton & Son*, 29 Iowa, 356.

The certificate of purchase given to the purchaser by the treasurer does not pass the title to the land sold. Until the time of redemption has expired the legal title remains in the owner, and is not forfeited to the state. *Williams v. Heath*, 22 Id., 519, 524.

SEC. 888. [**Certificate assignable.**—The certificate of purchase shall be assignable by indorsement, and an assignment thereof shall vest in the assignee, or his legal representative, all the right and title of the original purchaser; and the statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence of such assignment. In case said certificate is assigned, then the assignment of said certificate shall be placed on record in the office of the county treasurer in the register of tax sales.

The assignee of a tax certificate acquires no greater right than the original purchaser, and his title is subject to all informalities attending the sale. *Watson v. Phelps*, 40 Iowa, 482.

One who holds under a quitclaim deed from the assignee of a tax certificate which is void for fraudulent combination of bidders, is not entitled to protection as an innocent purchaser, the grantee in a quitclaim deed not being regarded as a *bona fide* purchaser without notice of outstanding equities. *Id.*

Where a tax purchaser assigned his certificate to another, the assignment not being recorded, and after three years from the date of the sale, but before the execution of the treasurer's deed, executed a quitclaim deed to the prior owner of the property, held, that the quitclaim deed conveyed no title, and that the assignment of the certificate was valid. *Smith v. Stephenson*, 45 Id., 645.

The assignee of a tax certificate holds it subject to all the infirmities by which it would have been affected in the hands of the original tax purchaser. *Light v. West*, 42 Id., 138.

Where fraud in the sale is alleged and proven and it is also alleged that the assignee is not a *bona fide* holder of the title under the tax deed, the claimant under the tax deed must show that he is a *bona fide* holder, and the burden of proof in the first instance rests upon him. *Id.*, and cases cited.

SEC. 889. [**When purchaser pays subsequent taxes.**—The county treasurer shall also make out, sign, and deliver to the purchaser of any real property sold for taxes aforesaid, duplicate receipts for any taxes, interest, and costs, paid by said purchaser, after the date of such purchase for any subsequent year or years, one of which receipts said purchaser shall present to the county auditor, to be by him filed in his office, and a memorandum thereof entered on the register of sales. And if he neglect to file such duplicate receipt with the auditor before the redemption, such tax shall not be a lien upon the lands, and the person paying such tax shall not be entitled to recover the same of the owner of such real estate.

If the purchaser of land at tax sale shall fail to file with the auditor duplicate receipts for any subsequent taxes upon such land, paid by him, the taxes so paid do not become a lien upon the land, and the reimbursement of the tax purchaser therefor is not a condition of redemption. *Kennedy v. Bigelow et al.*, 43 Iowa, 74.

When the title to real estate is in controversy, and the taxes thereon are voluntarily paid by one of the parties to the controversy, whose claim is afterwards adjudged to be invalid, he cannot recover the amount so paid from the owner. *Garrigan v. Knight*, 47 Id., 525.

The provisions of this section, requiring a purchaser at tax sale, upon paying subsequent taxes, to file with the auditor the duplicate receipt, in order to recover the tax upon redemption of the land, does not apply to one who has procured his tax deed, and pays taxes on the land as owner thereof. *Thode, Guardian, v. Spofford et al.*, two cases, 65 Id., 294.

This section, requiring the filing of duplicate tax receipts, has nothing to do with the amount which the holder of the patent title must pay to redeem, when redemption is effected by a suit in equity; but in such case the redemptioner is required to pay the interest and penalty provided by section 890 of the code on each installment of taxes which has been paid by the purchaser. *Slyfield v. Barnum et al.*; *Clark v. Same*, 71 Id., 245.

REDEMPTION.

SEC. 890. (*As amended by ch. 45, 19th g. a.*) [**How effected.**—Real property, hereafter sold under the provisions of this chapter, may be redeemed at any time before the right of redemption is cut off, as hereinafter provided, by the payment to the county auditor of the proper county, to be held by him subject to the order

of the purchaser, of the amount for which the same was sold, and [ten] per centum of such amount immediately added as a penalty, with ten per cent interest per annum on the whole amount thus made from the day of sale, and also the amount of all taxes, interest and costs paid for any subsequent year or years, and a similar penalty of [ten] per centum added as before on the amount of the payment for each subsequent year, with ten per cent interest per annum on the whole of such amount or amounts from the day or days of payment, unless such subsequent taxes shall have been paid by the person for whose benefit the redemption is made, which fact may be shown by the treasurer's receipt; and provided further, that such penalty for the non-payment of the taxes of any such subsequent year or years shall not attach, unless such subsequent tax or taxes shall have remained unpaid until the first day of March after they become due, so that they have become delinquent, nor shall any of said penalties apply in the cases mentioned in the last clause of section eight hundred and sixty-six of this chapter.

Under section 13, chapter 173, laws of 1862, a penalty of thirty per cent was added to the amount of the bid and had to be paid by the purchaser in making redemption, and the same penalty was also added to subsequent taxes paid by the purchaser. *Mulligan v. Hintrager*, 18 Iowa, 171.

The wife has such an interest in the homestead owned by her husband as to entitle her to redeem the same from tax sale. And, under the revision (section 779), this right continued until one year after she became discoverd. *Pfiffner v. Krampf*, 28 Id., 27; *Adams v. Beale*, 19 Id., 61.

A person whose land had been sold for taxes, upon hearing of it, went to the clerk to redeem the same, who, finding the record of a second sale that had been subsequently made, by mistake, for the taxes of the same year, and never having observed the other sale, advised the owner that it required a certain amount to redeem, which was thereupon paid by him, the clerk delivering to him a certificate of redemption from such second sale. The owner had no knowledge of but one sale, and he intended to, and supposed he was, redeeming from a valid sale. Held, that on these facts the owner was entitled to redeem after the period of redemption had expired, on the ground of mistake of fact, upon his paying to the holder of the tax deed the redemption money with penalty and interest. *Noble v. Bullis*, 23 Id., 559.

If a land owner pays, tenders, or in good faith and without negligence attempts to pay his taxes and fails, through the fault of the officers charged with the duty of receiving the money and making the proper records, a sale and deed of the land will not be upheld. *Id.*

The agent of a person who owned several parcels of land left with the clerk a sum of money with directions that the clerk and treasurer examine the tax records, pay all taxes due upon the principal's lands and redeem from tax sales of the same, if any had been made; they subsequently returned to him a portion of the money, with certain tax receipts, and the assurance that there was no record of tax sale, that the sale to the defendant not being discovered until he demanded a deed; held, that the agent was justified in relying upon the assurance of the officers that no sale had been made, and that the owner was not chargeable with negligence in failing to discover the facts of the sale. DAY, J., dissenting. *Id.*

Where the holder of a judgment procured a tax deed of lands of the judgment debtor, which by agreement between them was to be subject to redemption by the payment of the judgment, it was held that other claimants to the land, against whom but for such agreement the tax sale would convey an absolute title, could only redeem therefrom by complying with the terms of the agreement. *Jordan et al. v. Brown et al.*, 56 Id., 281.

The law authorizing redemption from tax sales is to be liberally construed in favor of the land owner whose estate will be divested by the sale. *The Corning Town Co. v. Davis*, 44 Id., 622; *Rice v. Nelson*; 27 Id., 148; *Adams v. Beale*, 19 Id., 61; *Burton v. Hintrager*, 18 Id., 348.

It is the duty of the proper officer to impart correct information to parties applying to redeem from tax sales, and their mistake, error or negligence, will support the right of redemption after the execution of the tax deed. *Corning Town Co. v. Davis*, 44 Id., 622.

This case, though not expressly, yet virtually overrules *Bolinger v. Henderson*, 23 Iowa, 165, which was a case where the plaintiff upon learning that his lot had been sold for delinquent taxes, applied within the term of redemption to the clerk, and informed him that he desired to redeem the lot from all tax sales, whereupon the clerk issued to him a certificate of redemption from a sale made in a subsequent year to the sale in question, and assured him that was all there was against the lot, and it was held that upon these facts the plaintiff was not entitled to redeem after the expiration of the period therefor. See dissenting opinion of DAY, J., in *Corning Town Co. v. Davis*, 44 Id., 634.

That the owner of land failed to pay the taxes or redeem from tax sale, through oversight or under the belief that the taxes had been paid, will not relieve him from the effects of his omis-

sions or warrant the setting aside of the sale. These are not mistakes from the effect of which equity will grant relief. *Playter v. Cochran*, 37 Id., 258.

The owner in fee simple of land which has been sold for taxes is only entitled to redeem within three years from the sale, and cannot insist upon that right after the period has expired, whether a deed has been made or not. *Pearson v. Robinson*, 44 Id., 413.

Since land cannot be twice sold for taxes at the same sale, although the taxes be delinquent thereon for two years, and the second sale being invalid, the purchaser is not entitled to a deed, and redemption therefrom is not necessary. *Shoemaker v. Lacy*, 45 Id., 422; same case, 39 Id., 277.

A mortgagee has such an interest in property sold for taxes as entitles him to redeem. *Floyd v. Bunce*, 41 Id., 660.

An agreement between the purchaser at tax sale and the owner, that the latter shall be allowed further time for redemption, is a valid one, and may be enforced. Interest at ten per cent per annum upon taxes paid and penalties, from the time the agreement was made, may be collected by the purchaser. *Shoemaker v. Porter et ux.*, 41 Id., 197.

A payment to the auditor, by the owner of land sold for taxes, of the amount necessary to redeem from the sales of two years, has the effect to redeem from both sales, notwithstanding the auditor fails to issue a certificate showing a redemption from both, and the treasurer executes a deed under the sale not recited in the certificate. *Corbin v. Stewart*, 44 Id., 543.

In redeeming but a part of lands sold in gross, the purchaser, or the clerk [auditor] when acting in his stead, has the right to demand only the money paid at the tax sale for the part redeemed, with the penalties and interest thereon, regardless of the fact whether the property was assessed and taxed at more or less than its actual relative value. *Penn v. Clemans*, 19 Id., 373.

Where one sale was invalid because of several parcels being sold together, while the other sales were valid, it was held that the plaintiff must pay the amount of legal taxes paid by defendant under the first sale, with six per cent interest thereon; and must also pay the statute penalty and interest upon the other sales and subsequent taxes paid by defendant. *Id.*

A guardian may redeem the lands of his ward, which have been sold for taxes, at any time before the execution of the tax deed, by making payment to the county auditor of the amount due. *Witt, Guardian, v. Meinhirter*, 57 Id., 345.

The owner of land sold for taxes, in redeeming is not required to pay the amount of any tax paid by the purchaser, with penalties, interest and costs, for any year prior to that for which the sale was made. *Sheppard et al. v. Clark et al.*, 58 Id., 371.

A tax deed made after the owner had paid to the clerk the amount necessary to redeem from the sale, is unauthorized and void. The failure of the clerk to notify the treasurer will not defeat the redemption. *Fenton v. Way et al.*, 40 Id., 196.

The failure of the county treasurer (now auditor) to make the proper entry of a redemption of land from tax sale will not invalidate the redemption. *Byington v. Bookwalter*, 7 Id., 512.

Where a tax deed was issued by mistake after redemption, and the purchaser paid subsequent taxes, he was held entitled to recover the taxes so paid with six per cent interest thereon, tender of the same having been made by the owner. *Id.*

Redemption from a tax sale will not remove the lien of a former sale for delinquent taxes, and the rights of the purchaser at the former sale will not be affected by the redemption from the subsequent one. *Gray v. Coan et al.*, 40 Id., 327.

A purchaser of lands which had been sold for taxes prior to his purchase, is not entitled to redeem on the ground that after the transaction he had asked the treasurer if there were unpaid taxes, and was informed there were none, at the same time making no inquiry as to tax sales. *Moore v. Hamlin*, 38 Id., 482.

A person having no interest in the land has no right to redeem it from tax sale; and a redemption by such person does not divest the title of the tax purchaser, or inure to the benefit of the prior owner. *Penn v. Clemans*, 19 Id., 373; *Byington v. Bookwalter*, 7 Id., 512.

A party holding a deed for an unassigned right of dower in certain real estate has such an interest therein as entitles him to redeem the same from tax sale. And he may thus redeem not merely a part, or to the extent of his dower interest, but the whole estate. *Rice v. Nelson*, 27 Id., 148.

It may be laid down as a general rule that any right, whether in law or equity, whether perfect or inchoate, in possession or action, or whether in the nature of a charge or incumbrance on the land, amounts to such ownership as will entitle the party holding it to redeem the land from tax sale. *Id.* See, also, *Adams v. Beall et ux.*, 19 Id., 61.

The heir of a mortgagee of real estate has such an interest therein as entitles him to redeem the land from a tax sale made for delinquent taxes thereon, at any time within one year after attaining his majority. *Burton v. Hintrager*, 18 Id., 348.

A tender of a sum of money for the purpose of redemption of land from tax sale, is an admission that the amount tendered is due, and is a waiver of any irregularity in the assessment or sale. *Id.* See, also, *Brayton v. Delaware County*, 16 Id., 44.

The purchaser of real estate at tax sale, cannot recover of the owner the repayment of taxes paid after the redemption thereof. *Byington v. Allen*, 11 Id., 3; *Same v. Walsh*, Id., 27.

An acceptance by the tax purchaser of the amount paid by the owner to the treasurer to redeem lands from tax sale, operates as a ratification of the act of the officer in issuing a certificate of redemption. *Byington v. Hampton*, 13 Id., 23.

The time of redemption of lands sold for taxes is governed by the law under which it was sold, and not that under which it was assessed. *Negus v. Yancy & Smith*, 22 Id., 57.

Where in a proceeding to redeem from tax sales it was found that one of the sales was invalid by reason of several tracts having been sold together, while the other sales were valid, the plaintiff was held to the payment of the amount of legal taxes paid by defendant, with interest thereon at six per cent, under the invalid sale; and the statute penalty and interest thereon in the invalid sales, together with the subsequent taxes paid by the defendant. *Curl v. Watson*, 25 Id., 35.

Where the owner of land was an inmate of the county poor-house, which land had been sold for taxes, prior to the expiration of the time of redemption, the supervisors directed the county auditor to draw a warrant on the county treasurer for a sum sufficient to redeem the land, and thereupon the auditor, without drawing the warrant, or receiving the money from any source, issued a certificate of redemption to the county, and the owner subsequently conveyed the land by deed to the county. The warrant on the treasurer was not issued until more than two months after the certificate of redemption. Held, that under this section of the code, assuming that the county was authorized to redeem, there having been no payment to the auditor at the time of issuing the certificate, the purchaser at the tax sale was entitled to a deed upon the expiration of the period of redemption. *Reeves v. Bremer Co.*, 34 N. W. R., 794.

Where the notice to redeem from a tax sale is directed to a person other than the one to whom the land is taxed, it is no notice at all and does not cut off the right of redemption as against one who takes a tax deed under the sale; and in such case the period of limitation does not begin to run from the date of the tax deed. *Slyfield v. Barnum*, 71 Iowa, 245.

One who goes into a court of equity to redeem his land from a tax sale and deed, must refund to the purchaser the taxes paid by him on the property subsequent to the execution of the deed, with the interest and penalty provided by section 890 of the code, whether duplicate receipts for such taxes have been filed with the auditor or not. *Elliott v. Parke*r, 72 Id., 746.

SEC. 891. [Certificate of redemption.]—The county auditor shall, upon application of any party to redeem any real property sold under the provisions of this chapter, and being satisfied that said party has a right to redeem the same, and upon the payment of the proper amount, issue to such party a certificate of redemption setting forth the facts of the sale substantially as contained in the certificate of sale, the date of the redemption, the amount paid, and by whom redeemed, and he shall make the proper entries in the book of sales in his office, and shall immediately give notice of such redemption to the county treasurer. Such certificate of redemption shall then be presented to the treasurer, who shall countersign the same and make the proper entries in the books of his office, and no certificate of redemption shall be held as evidence of such redemption without such signature of treasurer.

The county treasurer has no right to disregard the act of the county auditor in permitting redemption from tax sale to be made, and to execute a tax deed after such redemption; and an action will not lie against the treasurer for a refusal to execute a deed to the purchaser in such case. *Hartman v. Anderson*, 43 Iowa, 309.

SEC. 892. [Minors and lunatics.]—If real property of any minor or lunatic is sold for taxes, the same may be redeemed at any time within one year after such disability is removed, in the manner specified in the following section, or such redemption may be made by the guardian or legal representative under section eight hundred and ninety, at any time before the delivery of the deed.

The right of a minor to redeem, after attaining his majority, lands sold at tax sale during his minority, is limited to his own interest therein, and does not extend to that of other owners or tenants in common holding interests with him. *Jacobs v. Porter et al.*, 34 Iowa, 341; *Stout v. Merrill*, 35 Id., 47.

It was held in *Curl v. Watson*, 25 Id., 35, that a person owning any interest in real property subject to redemption from tax sale, might redeem the whole property; and that the purchaser could require him to redeem the whole, if any. See, also, *Meyers v. Copeland*, 20 Id., 22; *Burton v. Hintrager*, 18 Id., 343. The apparent conflict with these cases is explained by COLE, J., in *Jacobs v. Porter*, *supra*. See, also, *Miller v. Porter*, 35 Id., 166.

This section gives to minors the right to redeem their land sold for taxes, after the deed has been made. *Tallman v. Cooke*, 39 Id., 402.

The minor must be the owner of the lands sold for taxes at the time of such sale to be entitled to an extension of the time of redemption beyond the three years prescribed by law. A subsequently acquired title does not invest a minor with such right. *Burton v. Hintrager*, 18 Id., 343.

As the law stood under section 779 of the revision of 1860, a married woman was permitted to redeem her lands sold for taxes at any time within one year after the termination of her coverture. *Meyers v. Copeland et al.*, 20 Id., 22; *Pfiffner v. Krappel*, 28 Id., 27. The code, however, makes no such provision in respect to married women as was contained in that section.

An action by a minor, under the next section, to redeem from a tax sale, is not barred until one year after he has attained his majority. *Rankin v. Miller*, 43 Id., 11.

The production from the custody of the guardian of a minor, who was a near relative, of an acknowledged deed of land, sold after the date of such deed for delinquent taxes, was held not to make a *prima facie* case of ownership in the minor, at the time of the tax sale, entitling him to redeem therefrom. *Walker v. Sargent*, 47 Id., 448.

An action by the heir of a minor to redeem from tax sale must be commenced within one year after the death of the minor. *Gibbs v. Sawyer*, 48 Id., 443.

SEC. 893. [How redeemed after deed made.]—Any person entitled to redeem lands sold for taxes after the delivery of the deed, shall redeem the same by an equitable action in a court of record, in which all persons claiming an interest in the land derived from the tax sale, as shown by the record, shall be made defendants, and the courts shall determine the rights, claims, and interest of the several parties, including liens for taxes and claims for improvements made on the land by the person claiming under the tax title. And no person shall be allowed to redeem land sold for taxes in any other manner after the service of the notice provided for by the next section, and the execution and delivery of the treasurer's deed.

Under this section a guardian may redeem the real estate of his ward, which has been sold for taxes, after the execution of the tax deed by an action in equity. *Witt, Guardian, v. Meuhirter*, 57 Iowa, 545.

The assignee of a mortgage claiming under a tax sale, whose assignment is not of record, is not a necessary party defendant to an action to redeem from tax sale, and he is concluded by a decree in such action to which all the persons shown by the record to claim an interest through the tax sale are made parties. *Van Gorden v. Hanna*, 72 Id., 572.

EXECUTION OF DEED — NOTICE GIVEN.

SEC. 894. [Before deed is made notice to be given.]—After the expiration of two years and nine months after the date of sale of the land for taxes, the lawful holder of the certificate of purchase may cause to be served upon the person in possession of such land or town lot, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided by law for the service of original notices, a notice signed by him, his agent or attorney, stating the date of sale, the description of the land or town lot sold, the name of the purchaser, and that the right of redemption will expire and a deed for said land be made, unless redemption from such sale be made within ninety days from the completed service thereof. Service may be made upon non-residents of the county by publishing the same three times in some newspaper printed in said county, and if no newspaper is printed in said county, then in the nearest newspaper published in this state. But any such non-resident may file with the treasurer of the county a written appointment of some resident of the county where his lands or lots are situated, as agent upon whom service shall be made, and in such case, personal service of said notice shall be made upon said agent. Service shall be deemed completed when an affidavit of the service of said notice, and of the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent, or attorney, shall have been filed with the treasurer, authorized to execute the tax-deed. Such affidavit shall be filed by said treasurer, and entered upon the records of his office, and said record or affidavit shall be presumptive evidence of the completed service of notice herein required, and until ninety days after the service of said notice, the right of redemption from such sale shall not expire. Any person swearing falsely to any fact or statement contained in said affidavit, shall be deemed guilty of perjury and pun-

ished accordingly. The cost of serving said notice, whether by publication or otherwise, together with the cost of the affidavit, shall be added to the redemption money.

For the purpose of making service of the notice required by section 894 of the code, the owner of the legal title to the land will be deemed in possession in the absence of evidence to the contrary. Such notice may be served by the holder of the certificate of sale in person. *Hall & Spencer v. Guthridge*, 52 Iowa, 408.

The provision requiring service of the notice upon the person in whose name the land is taxed has reference to the person in whose name it is taxed at the time of the service, and not at the date of the sale. *Id.*

Redemption may be made from a tax sale at any time within ninety days after the proof of service of the notice required by this section has been filed in the treasurer's office. *Cummins v. Wilson et al.*, 59 Id., 14. Citing and following *Swope v. Prior*, 58 Id., 412.

The affidavit of the publisher of a newspaper of notice of the time of expiration of the time for redemption of land from tax sale is not a compliance with this section, nor is such defect cured by the additional affidavit of the holder of the certificate, that publication was made for three consecutive weeks without stating *when* the publication was made. Such proof of notice does not limit the time within which the owner may redeem. *Ellsworth v. Cordrey*, 63 Id., 675.

The right to redeem land sold for taxes expires ninety days after completed service of the notice required by this section, whether the deed is then executed or not. *Ellsworth v. Low et al.*, 62 Id., 178; *Long v. Smith*, Id., 331.

Where a purchaser at tax sale offered to pay the taxes upon a forty acre tract of land "for fourteen" acres of the tract, and the language of the bid was followed in the notice of the expiration of the time of redemption and in the tax deed, it was held that notice and deed were void for uncertainty of description. *Poindexter v. Doolittle*, 54 Id., 52.

A party has ninety days after the filing of an affidavit of the service of the notice required by this section within which to redeem lands from tax sale; and a tax deed, executed prior to the expiration of such period after the affidavit is filed, is invalid. *Swope v. Prior et al.*, 58 Id., 412.

This section in requiring notice of the expiration of the time for redemption of land sold at tax sale to be served on the "person in possession," has reference to the person in actual possession only, and does not require such notice to be served on the owner of land in the actual possession of no one. *Parker v. Cochran*, 64 Id., 757. Citing *Fuller v. Armstrong*, 53 Id., 683.

The mere request of a purchaser at tax sale, made to the foreman of a newspaper in which notice of the expiration of time of the redemption is published, to make affidavit to the fact of such publication and return it to the treasurer, does not constitute such foreman agent of the purchaser within the meaning of this section. *Chambers v. Haddock*, Id., 556.

When land sold for taxes was unfit for cultivation, and was not actually occupied by any one, but was used as a timber lot, by the owner, who lived in the same county, from which he got his wood until the timber was all removed, held that he was in possession of the land in such sense as to be entitled to personal service of the notice to redeem from the sale, and that service by publication only was not sufficient to cut off the right of redemption. *Ellsworth v. Low et al.*, 62 Id., 178.

A valid tax deed cannot be executed until ninety days after the completed service of the notice required by law. *Long v. Smith et al.*, 62 Id., 329, 331.

The person upon whom this section requires the holder of a certificate of tax sale to serve notice of his application for a deed is the person in whose name the land is taxed at the time the notice is served. And where the person in possession of the land had been the owner of it, and it had been taxed to him for previous years; but he had sold and conveyed to the plaintiff who was a resident of the county, but who had failed to record his deed, and there was nothing in the records to show that plaintiff was the owner, and no taxes had yet been levied upon it for the year in which the notice was given, but it had been assessed to the plaintiff and the assessment book returned to the auditor, held that the land was "taxed" to the plaintiff in contemplation of the statute, and that notice to him was necessary in order to cut off his right to redeem. *Heaton v. Knight*, 63 Id., 686.

Where land sold for taxes is taxed to an unknown owner, and no one is in possession of it, there is no necessity to serve notice of the expiration of the period of redemption upon any one in order to make a tax deed therefor valid. *Id.*, following *Tuttle v. Griffith*, Id., 455; and *Fuller v. Armstrong*, 53 Id., 683.

Where land has been sold for taxes, and when the notice is given by publication only, it must be directed to the person in whose name the land is taxed. If addressed to another, even though that other be the real owner, a tax deed issued pursuant thereto will be invalid. *Hiller v. Farnham et al.*; *Van Gorder v. Hiller et al.*, 65 Id., 227.

Where one seeks to redeem from a tax sale and deed, where the deed is void for the want of the notice required by this section, he is not required to show that he has tendered to the holder of the deed the amount necessary to redeem the land. *Adams v. Snow*, Id., 435, 439.

Where defendant had a valid tax certificate, on which he had a right, at the commencement of the suit, to give the proper notice of expiration of redemption and take his deed in ninety days after the service of the notice, *held*, that the plaintiff (holder of the patent title) had the right to redeem from the sale, and to do so he was bound to pay the taxes and penalties provided by law, regardless of the statute of limitations. *Long v. Smith*, 67 Id., 25. See, also, *Harber v. Sexton*, 66 Id., 211.

A fair construction of the statute requires that a separate notice to redeem from a tax sale should be given to the person in possession of each tract of land, or the person to whom it is taxed; and a notice to W, and some fifteen other persons named therein, and unknown owners, and referring to the land in question and some fifteen other descriptions, is not a sufficient notice to cut off the right of redemption. *White v. Smith*, 68 Id., 313.

Proof of the service of notice to redeem from a tax sale must be made by the affidavit of the owner of the certificate of purchase, his agent or attorney, and the affidavit of the proprietor of the newspaper in which the notice was published is not sufficient. *Rice v. Bates et al.*, Id., 393.

For a case of defective proof of service of notice see *Kessey v. Cornwell*, Id., 430.

When the affidavit of publication of notice to redeem from a tax sale named the person to whom the notice was addressed as G. B., when the person to whom it was in fact properly addressed, as appeared from the copy of the notice attached to the affidavit, was P. B., *held* that it was sufficient as against P. B. *Rice v. Haddock*, 70 Id., 318.

An affidavit of the publication of notice of the expiration of the period of redemption made by the proper party, that states that such notice was served on the owner of the land sold for taxes, "by causing the same to be published in the *Algona Republican*, a weekly newspaper published in the county," where the land was situated, is sufficient proof of service of the notice "by publishing the same in some newspaper printed in the county in which the land is situated, as required by this section. *Nycum v. Raymond*, 34 N. W. R., 819.

Where a person purchased real estate at tax sale in partnership with another, and took the certificate in his own name, in dividing the certificates with his partner, he wrote his name on one and delivered it to his partner, with the object of transferring it, *held* that such partner was the "lawful holder" of the certificate and the proper person to give the notice, notwithstanding the informality of the assignment. *Swan v. Whaley et al.*, 35 N. W. R., 440.

SEC. 895. [When deed shall be made.]—Immediately after the expiration of ninety days from the date of service of the written notice hereinbefore provided, the treasurer then in office shall make out a deed for each lot or parcel of land sold and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase. The treasurer shall demand twenty-five cents for each deed made by him on such sales, but any number of parcels of land bought by one person may be included in one deed, if desired by the purchaser.

Where the county treasurer has made a tax deed so imperfect and irregular as not to pass the title, he may, on his own motion, where the law has been substantially complied with, make a second or other deed, correct in fact and regular in form, so as to invest the purchaser with the legal title. *McCready v. Sexton & Son*, 20 Iowa, 356; *Parker v. Sexton & Son*, Id., 421; *Hurley v. Street*, Id., 428; *Johnson v. Chase*, 30 Id., 202; *Gray v. Coan*, Id., 536; *Genther v. Fuller*, 36 Id., 604.

But when the treasurer has made and delivered to the purchaser a valid deed in compliance with the statute and the sale, he cannot divest or in any manner affect the title thus conveyed by the execution of a second deed. *Bulkley v. Callanan*, 32 Id., 461.

Where a tax deed does not conform in its recital to the facts, the treasurer is authorized to execute a second and correct deed, but he has no power to execute a deed which shall misstate the facts respecting any proceedings prior to its execution, and such deed if executed would be void. *Gould v. Thompson*, 45 Id., 450.

See, as to the effect of assignment of certificate upon lien for prior taxes, *Bowman v. Eckstine*, 46 Id., 583.

The notice required by sections 894 and 895, is not necessary to be given in cases where the sale was made before the enactment of those sections. *Robinson v. First National Bank, etc.*, 48 Id., 354.

SEC. 896. [Form of.]—Deeds executed by the treasurer shall be substantially in the following form:

Know all men by these presents, that whereas the following described real property, viz.: (here follows the description) situated in the county of.....; and state of Iowa, was subject to taxation for the year (or years) A. D.... ..; and whereas the taxes assessed upon said real property for the year (or years) aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas, the treasurer of said county did, on the.....day of....., A. D.

18...., by virtue of the authority in him vested by law, at (an adjournment of) the sale begun and publicly held on the first Monday of, A. D. 18...., expose to public sale at the office of the county treasurer in the county aforesaid, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest, and costs then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, A. B., of the county of....., and state of, having offered to pay the sum of.....dollars and.....cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property, for (here follows the description of the property sold) which was the least quantity bid for; and payment of said sum having been by him made to said treasurer, said property was stricken off to him at that price; and whereas, the said A. B. did, on the.....day of....., A. D. 18...., duly assign the certificate of the sale of the property as aforesaid and all his right, title, and interest to said property to E. F., of the county of....., and state of,; and whereas, by the affidavit of....., filed in said treasurer's office on the.....day of....., A. D...., it appears that due notice has been given, more than ninety days before the execution of these presents, to..... and of the expiration of the time of redemption allowed by law; and whereas, three years have elapsed since the date of said sale, and said property has not been redeemed therefrom as provided for by law.

Now, therefore, I, C. D., treasurer of the county aforesaid, for and in consideration of said sum to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said A. B. [or E. F.] his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him the said A. B. [or E. F.] his heirs and assigns forever; subject, however, to all the rights of redemption provided by law. In witness whereof, I, C. D., treasurer as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name on this.....day of....., 18....

STATE OF IOWA, }
COUNTY. } ss.

I hereby certify that before me,....., in and for said county, personally appeared the above named C. D., treasurer of said county, personally known to me to be the treasurer of said county, at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as treasurer of said county, and acknowledged the execution of the same to be his voluntary act and deed as treasurer of said county, for the purposes therein expressed.

Given under my hand [and seal] this..... day of....., A. D. 18....

The recital in a tax deed, regular in form, that the certificate of tax sale had been assigned to the grantee, is sufficient to establish the fact. *Stahl v. Roost et ux.*, 34 Id., 475.

EFFECT OF DEED.

SEC. 897. [Vests title in purchaser.]—The deed shall be signed by the treasurer in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds; and, when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest, and estate of the former owner, in and to the land conveyed, and also all the right, title, interest, and claim of the state and county thereto, and shall be presumptive evidence in all the courts of this state, in

all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts:

1. That the real property conveyed was subject to taxation for the year or years stated in the deed;
2. That the taxes were not paid at any time before the sale;
3. That the real property conveyed had not been redeemed from the sale at the date of the deed;
4. That the property had been listed and assessed;
5. That the taxes were levied according to law;
6. That the property was duly advertised for sale;
7. That the property was sold for taxes as stated in the deed. And it shall be **conclusive evidence** of the following facts:

1. That the manner in which the listing, assessment, levy, notice, and sale were conducted was in all respects as the law directed;
2. That the grantee named in the deed was the purchaser;
3. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed, by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser were done, except in regard to the points named in this section, wherein the deed shall be presumptive evidence only.

[**What must be proved to defeat title.**—And in all controversies and suits involving the title to real property claimed and held under and by virtue of a deed executed substantially as aforesaid by the treasurer, the person claiming title adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state, or, that there had been an entire omission to list or assess the property, or to levy the taxes, or to give notice of the sale, or to sell the property; but no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title aforesaid; *provided*, that in any case where a person had paid his taxes, and through mistake in the entry made in the treasurer's books or in the receipt, the land upon which the taxes were paid was afterwards sold, the treasurer's deed shall not convey the title; *provided further*, that in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same, or in the purchaser to defeat the same, and if fraud is so established such sale and title shall be void.

A tax deed is by the statute made evidence of a compliance with the requirements of the law anterior to the execution of the deed; and a party claiming under such deed is not bound, as preliminary to his right to introduce the same in evidence, to first prove an assessment, levy, advertisement, etc. *Allen v. Armstrong*, 16 Iowa, 508.

A tax deed, regular in form, is *prima facie* evidence that all of the essential prerequisites to the exercise of the taxing power have been complied with, notwithstanding it has been held that the portion of the statute making the deed *conclusive* evidence of such essentials is unconstitutional. *McCready v. Sexton & Son*, 29 Id., 356; *Hurley v. Woodruff*, 30 Id., 259.

The provisions of section 784 of the revision of 1860, making the tax deed *conclusive* evidence

of matters vital and essential to any valid exercise of the taxing power, were first questioned by the supreme court in *Allen v. Armstrong, supra*.

While as to the *fact* of an assessment, levy, and sale, the tax deed is not conclusive, and it is not competent for the legislature to make it so, yet it is conclusive as to the *manner* thereof. *Bulkley v. Callanan*, 32 Id., 461. See, also, as holding the same doctrine, *Hubbard v. Board of Supervisors*, 20 Id., 134; *Eldridge v. Kuehl*, 27 Id., 160; *McCready v. Sexton & Son, supra*; *Martin v. Cole*, 33 Id., 141.

A tax deed is conclusive as to the *manner* in which the sale was conducted: and if the deed shows that the sale was made in a manner which under some circumstances would have been proper, those circumstances will conclusively be presumed to have existed. *Ware v. Little*, 35 Id., 234.

It was held in that case that the provision of the revenue law making the deed conclusive evidence of due notice of the sale is valid and binding, as such notice is not essential to an exercise of the taxing power. *Id.*

It was again doubted in *Adams v. Beale*, 19 Id., 61.

In *McCready v. Sexton & Son*, 29 Id., 356, it was held that the clause of the revenue law which made the treasurer's deed conclusive evidence of the regularity of all prior proceedings, was unconstitutional, as depriving a person of his property without due process of law, so far as respects the essential prerequisites for the exercise of the taxing power, such as the assessment, levy, sale, and the like; as to non-essentials, or matters merely directory, it was held constitutional. To the same effect are *Rima v. Cowan*, 31 Id., 125; *Hurley v. Powell, Levy & Co.*, Id., 64; *Powers v. Fuller*, 30 Id., 475.

The tax deed is *prima facie* evidence of the *fact* of assessment, and this *prima facie* case is not overcome by the introduction of the assessor's book, in which it does not appear who was the assessor, whether he qualified before entering upon the discharge of his duties, nor when the assessment was made. The omitted facts may be shown by other evidence than the assessment book. *Genther v. Fuller*, 36 Id., 604.

But the *prima facie* evidence of the fact of assessment furnished by the tax deed, may be overcome by the introduction of the records of the board of supervisors which fail to show any assessment, provided the records are complete and free from mutilation. *Easton v. Savery*, 44 Id., 654.

The same rule applies in respect to a levy. *Early v. Whittingham*, 43 Id., 162.

The tax deed is *prima facie* evidence of the *fact* of sale, and conclusive evidence of the *manner* thereof, and the regularity of the proceedings. *Levit v. Watson*, 37 Id., 93.

A tax deed showing that the land was sold at an adjourned sale, without citing the causes for adjournment, is at least *prima facie* evidence that the sale was properly held, and that proper cause for the adjournment existed. *Lorain v. Smith et al.*, Id., 67.

A tax deed is *conclusive* evidence that the property was listed and assessed at the time and manner required by law. *Easton v. Perry et al.*, Id., 681; *McCready v. Sexton & Son*, 29 Id., 356.

The deed is *prima facie* evidence of the assessment, and conclusive evidence of the advertisement of the sale. *Madson v. Sexton*, 37 Id., 562; *Allen v. Armstrong*, 16 Id., 503; *McCready v. Sexton & Son*, 29 Id., 356.

Where no invalidity appears on the face of the tax deed it is, it seems, conclusive evidence that the sale was conducted in the *manner* required by law. *Smith v. Easton*, 37 Id., 584. See, also, *Jeffrey v. Brokaw*, 35 Id., 505.

As to all matters relating to the *manner* of sale, the tax deed is conclusive; and this rule of the statute prevails in equity cases as in actions at law. *Clark v. Thompson*; *Stone v. Same*, 37 Id., 536.

But the record of a tax sale will prevail as against recitals in a certificate. *Id.*

A memorandum of the treasurer showing an adjournment of the sale cannot be received in evidence to contradict or invalidate the tax deed. *Id.*

The provisions of section 734 of the revision (397 of the code), do not apply to the case of one resisting a tax deed upon the ground that the land embraced in the deed was not in fact assessed. In so far as that section of the revision made the deed conclusive evidence of the *fact* of assessment, it was unconstitutional. *Immegart v. Gorgas et al.*, 41 Id., 439. Following *McCready v. Sexton & Son*, 29 Id., 356.

The deed is not conclusive of the *manner* of the assessment in such a sense as to cure indistinctness in the description upon the assessor's books, and identify the land sold as that assessed. *Id.*

Where an assessment is void for want of sufficient description of the land, a sale and deed thereof will transfer no interest in the property; and the purchaser cannot recover the amount which would be required to redeem under a valid tax sale. *Roberts v. Deeds et al.*, 57 Id., 320.

If there has been a *bona fide* sale, in substance or in fact, the tax deed is conclusive evidence that it was done at the proper time and in the proper manner. *Phelps v. Meade et al.*, 41 Id., 470; *Gould v. Thompson*, 45 Id., 450.

The statute has received the same construction by the supreme court of the United States in *Callanan v. Hurley*.

It is only in a qualified sense, however, that the tax deed is conclusive evidence of the regularity of the sale, it being always competent to show fraud committed by the officer conducting the sale, or the purchaser. *Butler v. Delano*, 42 Id., 350.

The *prima facie* evidence of an assessment, afforded by a tax deed, will be overcome where there are no records showing that there was any assessment, levy or sale for a certain year, nor evidence that such records had once existed and been lost. *Early v. Whittingham*, 43 Id., 162.

Proof that there was no public sale of the land, and that the sale occurred at a time to which there had been no adjournment of the prior sale, will overcome the *prima facie* evidence of the sale presented by the deed. *Thompson v. Ware*, Id., 455.

Where parol evidence had been admitted on the trial to show that the land embraced in a tax deed was sold *en masse* with other parcels, the jury should have been instructed either that the deed was conclusive of the regularity of the sale, or that there was no question before them on that point. *Chandler v. Keiler*, 44 Id., 413.

Where the certificate of sale and tax deed describe land having no necessary identity with that which has been taxed and upon which taxes are delinquent, they do not themselves constitute sufficient evidence to uphold the tax deed, but rather negative it. *The Blair Town Lot Co. v. Scott*, Id., 143.

A tax deed conveys no title where the evidence shows that the taxes were paid before the sale. *Waters v. Glats*, 29 Id., 437.

The deed is only *prima facie* evidence that the taxes were unpaid before the sale or not redeemed from the sale, and the establishment of either fact defeats it. *Fenton v. Way*, 40 Id., 196.

A tax deed which shows a sale to have been in forty-acre tracts will not be defeated by evidence tending to show a sale in quarter-sections. *Sibley v. Bullis*, 40 Id., 429.

The owner of land may defeat the tax sale by showing fraud committed by the officer conducting the sale, or by the purchaser. *McCready v. Sexton & Son*, 29 Id., 356; *Corbin v. Beebe*, 36 Id., 336.

This may be done in defense to an action at law. A separate proceeding to establish the fraud and annul the sale is not necessary. *Corbin v. Beebe*, *supra*.

The act of the treasurer in bidding off lands at a tax sale conducted by himself, as agent of the purchaser from whom he had received money to be so invested, and from whom he was to receive a certain per centum as compensation, is fraudulent, and vitiates the sale. *Corbin v. Beebe*, 36 Id., 336.

To enable one, resisting a tax title, to defeat it by showing fraud on the part of the officer conducting the sale, it is not necessary to show payment or tender of payment of taxes. The restrictions imposed upon one defending against a tax title by section 897 of the code (section 784, revision), do not apply to the defense of fraud pointed out in the proviso of the section. *Id.*

Fraud committed by a purchaser at tax sale, as, by combination with other purchasers, will not defeat the title of a subsequent purchaser without notice of the fraud, and for value. *Van Shaack v. Robbins*, 36 Id., 201.

Where a combination was entered into by bidders at a tax sale, to the effect that they will not bid against each other, or that they will bid in turn, the sale is void. *Kerwer v. Allen*, 31 Id., 578; *Light v. West*, 42 Id., 138; *Pearson v. Robinson*, 44 Id., 413; *Eason v. Mawkinney*, 37 Id., 601; *Martin v. Cole*, 38 Id., 141; *Van Shaack v. Robbins*, 36 Id., 201; *Sibley v. Bullis*, 40 Id., 429.

Where a tax purchaser subsequently assigned his certificate to another who had an agent bidding for him at the same sale, the latter announcing for whom his bids were made, it was *held* there was no illegal combination vitiating the sale. *Pearson v. Robinson*, 44 Id., 413.

That one acts as the agent of two purchasers at a tax sale does not *per se* constitute fraudulent and illegal combination. *Id.*

Where there has been no levy, the sale is absolutely void, and a good faith purchaser for value acquires no title thereunder, because this is a defect which the records of the county disclose, but where the assessment and other jurisdictional steps are regular, fraud may defeat the sale, but it will not render it a nullity. *Ellis v. Peck*, 45 Id., 112.

That the treasurer made a mistake and deceived the agent of the owner, by representing that the taxes had been paid for a certain year, are not sufficient to invalidate a sale for the unpaid taxes of that year, unless some collusion or fraudulent combination be shown between the treasurer and the purchaser. *McGahan v. Carr*, 6 Id., 331.

As to when evidence of misconduct of tax purchaser will not be admitted to impeach sale, see *Eldridge v. Kuehl*, 27 Id., 160.

Where a party attacking the validity of a tax title avers that he is ready and willing and offers to pay to the opposite party the amount paid by him at the tax sale, together with all subsequent taxes, interest and costs, it is error for the court to render judgment setting aside the tax sale, without requiring the payment of the money so tendered. *Corbin v. Woodbine*, 33 Id., 297.

It is the tax deed and not the sale that divests the owner of his title, and if redemption is duly made from the sale before execution of the deed it divests the lien of the tax, and leaves it as free as before. *Lake v. Gray*, 35 Id., 44.

Where the tax deed recites the sale to have been made on the 26th day of February, when in fact it was made on the 26th day of January of the same year, the sale will not be thereby rendered invalid. *Hurlburt v. Dyer*, 36 Id., 474.

A mortgagor or one claiming under him, cannot defeat the lien of the mortgage by acquiring a tax title upon the land. *Fair v. Brown et al.*, 40 Id., 209.

A lien holder cannot acquire a title by purchase at tax sale which will defeat the lien of another incumbrancer. *Id.*; see also *Garretson v. Scofield*, 44 Id., 35.

A tenant in common cannot acquire a tax title to defeat the interest of his co-tenant, the interest he acquires being held for the benefit of the latter. And the rule is the same where one is the assignee of a tax certificate, and afterwards becomes a tenant in common, before he receives the tax deed. *Flinn v. McKinley*, 44 Id., 68; see also *Austin v. Barrett*, Id., 488.

Where a party claims under two tax sales of the same property, upon the first sale being shown to be void, it is competent to introduce the second deed to establish his title. *Mallory v. French*, 44 Id., 133.

The purchase of lands at a tax sale by one claiming to be the owner thereof is invalid, and confers no right or title thereto. *Thomas v. Stickle*, 32 Id., 71.

A tax deed is conclusive evidence that the treasurer took proceedings to collect the tax by distress and sale of personal property of the delinquent tax payer, before selling real estate. *Stewart v. Corbin*, 25 Id., 145.

Where a tax deed is set aside for fraud or other causes, the holder thereof may recover from the owner of the land an amount equal to the sum which would have been necessary to discharge the land from taxes if they had not been paid by the purchaser. *Besore v. Dosh*, 43 Id., 211.

When land is assessed to the owner and also to an "unknown owner" for the same tax, the latter assessment is void, and a sale thereunder confers no title on the purchaser. *Nichols v. McGlathery*, Id., 189.

Where the agent of a purchaser of lands sold for taxes selected certain lands upon which the taxes were delinquent which he desired to purchase, and thereupon the treasurer marked and entered them upon the books as sold, the sale was held void. *Miller v. Corbin et al.*, 46 Id., 150.

Such sale being fraudulent as against the owner of the land, his right to question the tax title is not defeated by the provisions of section 897 of the code, even though he has not paid all the taxes due on the land. *Id.*; also, *Corbin v. Beebe*, 36 Id., 336.

A tax deed, by the provisions of this section, vests in the purchaser all the interest of the holder of the patent title, and the latter may avail himself of the statute of limitations as a defense against the contract to convey the same, as the patent owner could have done. *Byington v. Stone et al.*, 51 Id., 317.

A tax deed is not conclusive evidence of the giving of the notice when the time for redemption from the sale would expire. *Wilson v. Crafts*, 56 Id., 450; *Reed v. Thompson*, Id., 455.

Where the notice given of the expiration of the time of redemption from a tax sale, and the proof of the service thereof, are regular on their face, and a deed is executed in accordance therewith, any person asserting the invalidity of the deed, on the ground that the notice was not served as the proof shows, or was not served on the proper person, has the burden of overcoming the *prima facie* evidence furnished by the papers. *Wilson v. Crafts*, *supra*.

The validity of a tax deed cannot be questioned on the ground that it shows on its face that several tracts of land were sold in mass, after the expiration of five years from the date of its execution. *Bullis v. Marsh et al.*, 56 Id., 747.

Nor can the legality of a tax deed, voidable only, be questioned after the expiration of five years from the completion of the sale. *Id.*

A tax deed is conclusive evidence that the lands described therein were properly advertised for sale, and at least *prima facie* evidence that a proper adjournment was made to the day on which the sale took place. It is not essential that the adjournment should be shown by the records. *Id.*

While it is provided in this section that "no person shall be permitted to question the title acquired by a treasurer's deed, without first showing that he, or the person under whom he claims title, had title to the property at the time of sale," yet where the persons questioning the tax title are allowed to testify that they were owners of the property at the time of the sale, and are not required to produce the second evidence of their title, this is a sufficient basis for the introduction of other evidence assailing the tax title. *Hintrager v. Kiene et al.*, 62 Id., 606.

Where defendant held a tax title to land, which was invalid for several reasons apparent on the tax records, but of which it was not shown that defendant had any actual knowledge, and defendant in an action in which the plaintiff was made a party by published notice, procured a decree by default, quieting the title to the land in it, held, that since the tax deed was presumptive evidence under this section of the regularity of all prior proceedings, and was all the evidence necessary to obtain the decree, the defendant could not be charged with notice of the irregularities appearing in the records so as to be guilty of fraud in presenting its deed as evidence of a valid title, and that the plaintiff could not, after the lapse of two years, have the decree set aside on the ground of fraud in procuring it. *Brownell v. The Storm Lake Bank*, 63 Id., 754.

A tax deed issued pursuant to a sale that the treasurer had no power to make is not conclusive, and does not estop the holder of the patent title from asserting that the sale was made in violation of section 845 of the code. *Gardner v. Early, et al.*, 69 Id., 42.

Where defendants claimed title under the government, but failed to trace their title to the United States, *held* that they were not in a situation to question the tax title under this section of the code, not even to pleading the limitation contained in section 902. *Varnum v. Shuler et al.*, Id., 92. See also *Lockridge v. Dagget*, 54 Id., 332.

This section of the code does not require that a claimant of land sold for taxes, before he can maintain an action to cancel the tax deed, must first tender to the tax title holder the taxes he has paid, with interest and penalties. It is enough to aver in the petition a readiness to reimburse him, whenever the amount shall be ascertained by the court. *Taylor v. Ormsly Bros. et al.*, 66 Id., 109.

One who claims under a tax deed, though his claim may not be good against a prior owner, has sufficient interest to entitle him to question the validity of a subsequent tax title. This section was designed only to prevent the interference of strangers. *Adams v. Burdick et al.*, 68 Id., 666.

Subdivision 3 of section 897, providing that no one shall be permitted to question the title acquired by a treasurer's deed, without showing "that all taxes due upon the property have been paid by such person, or the person under whom he claims title" is not complied with by a statement in the petition, in an action to set aside tax deeds and to enforce the right to redeem, that plaintiff offers to pay the taxes, if it shall be determined that he was entitled to redeem. *Maxwell v. Palmer*, 35 N. W. R., 659.

One cannot question the validity of a tax title unless he, or the person under whom he claims, had title to the land at the time of the tax sale. But such title cannot be shown by proof that Porter C. M. had title from the government, and by the introduction of the record of a deed to such person made by P. C. M., and acknowledged by Peter C. M.: nor by the introduction of the record of the deed alone, without the acknowledgment, for then there would be no proof of the execution of the deed by P. C. M. *Bower v. Hallock*, 71 Id., 218. See also *Foster & Co. v. Ellsworth*, Id., 262.

Where in an action to quiet title to land sold for taxes, the defendant claimed under, and gave in evidence a patent from the state of Iowa, and a copy of the patent to the state from the United States, it was *held* that the patent from the state was *prima facie* title which was a sufficient compliance with the statute to enable the defendant to question the plaintiff's tax title. *Callanan et al. v. Wayne County*, 36 N. W. R., 654.

SEC. 898. [Previous sales not affected by code.]—The provisions of this title shall not affect sales heretofore made, or tax deeds given in pursuance of sales made before the taking effect of this code.

Under this section of the code the notice required by sections 894 and 895, to be given the owner and occupant of land sold for taxes, before the execution of a tax deed therefor, is not necessary in cases where sales were made before the enactment of those provisions. *Robinson v. The First National Bank, etc.*, 48 Id., 354.

SALES WRONGFULLY MADE.

SEC. 899. [County to hold purchaser harmless.]—When by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer and his bondsmen will be liable to the county to the amount of his official bond; or the purchaser, or his assignee, may recover directly of the treasurer, in an action brought to recover the same in any court having jurisdiction of the amount, and judgment shall be against him and his bondsmen; but the treasurer or his bondsmen shall be liable only for his own or his deputy's acts.

It was held in *Coulter v. Mahaska County*, 17 Iowa, 92, that, under section 785 of the revision, which was the same as 899 of the code, the county was not liable to the purchaser at a tax sale of lands sold by mistake or wrongfully, after chapter 173, of the laws of 1862, took effect, for the penalty of thirty per cent and interest thereon at ten per cent.

Where there has been a sale of land for taxes after the same were fully paid, the purchaser may recover of the county under this section. But if the owner redeems from such sale he cannot recover from the county the amount paid to redeem. *Morris v. The County of Sioux*, 42 Iowa, 416.

Whenever land is sold at tax sale on which no tax was due, the county must hold the purchaser harmless. *Hospers v. Wyatt et al.*, 63 Id., 264.

When by mistake of the treasurer, lands are sold for taxes which had previously been paid, the purchaser may, at any time, within five years after he discovers the mistake, maintain an action against the county for the money paid by him on the sale. *The Storm Lake Bank v. Buena Vista County*, 66 Id., 128.

SEC. 900. [Repealed and substituted by § 145, 16th g. a.: repealed and substituted by ch. 101, 17th g. a. Interest acquired by purchaser in school or university lands, etc.]—[Whenever any school or university land, bought on a credit, is sold for taxes, the purchaser at such sale shall only acquire the interest of the original purchaser in such lands, and no sale of any such lands for taxes shall prejudice the rights of the state or university therein, or preclude the recovery of the purchase money or interest due thereon; and in all cases where real estate is mortgaged, or otherwise encumbered, to the school or university fund, the interest of the person who holds the fee shall alone be sold for taxes, and in no case shall the lien or interest of the state be affected by any sale of such encumbered real estate made for taxes.

The foregoing provisions shall be extended to and shall include all lands exempted from taxation by the provisions of this title, including lands of the United States and of this state, or of any county, township, city, incorporated town, or school district, including agricultural college lands, swamp lands, burial grounds, fair grounds, public squares, public groves, or public ornamental grounds, and to any legal or equitable estate therein held, possessed or claimed for any public purpose, and no assessment or taxation of any such lands, nor the payment of any such taxes by any person, or the sale or conveyance for taxes of any such lands, shall in any manner affect the right or the title of the public therein, or prejudice the public thereto; nor shall any such payment or sale confer upon the purchaser or person who pays such taxes, any right or interest in such land adverse or prejudicial to the public right, title or ownership thereto.

(As amended by ch. 101, 17th g. a.) *Provided*, That this section shall not in any manner affect or prejudice the rights of any person or party to any action now pending, which was commenced prior to the 4th day of July, 1876.)

The purchaser, at a sale for taxes of lands incumbered by mortgage to the school fund, takes the same subject to such incumbrance. *Jasper County, for use, etc., v. Rogers et al.*, 17 Iowa, 254.

Under section 811 of the revision, the substance of which is embodied in section 900 of the code, it was held that when the state becomes the purchaser of lands under the foreclosure of a mortgage executed to secure school funds loaned, it takes the property purchased unincumbered by any liens for delinquent taxes; and a purchaser of the same lands from the state acquires a title free of such liens. *Helphrey v. Ross*, 19 Id., 40.

A tax sale of real estate mortgaged to the school or university fund passes only the interest of the person who holds the fee title, and does not affect the mortgage or any incumbrance existing thereon in favor of either of such funds. *Crum v. Cotting*, 22 Id., 411.

Semble, that under the provisions of our statute, the title derived at a tax sale is not a derivative one, and as such, subject on the one hand to incumbrances and equities existing against the former owner, and on the other hand, clothed with rights and equities held by him against third persons, but a new and independent title, derived from the sovereign power under which the tax is levied, paramount to all previous interests, and freed from all incumbrances except in so far as specially provided in favor of the school and university funds. *Id.*

The rule that the interest of the state in property mortgaged to the school fund, and held by it as security, will not be affected by the sale of such property for taxes, but that the interest only of the mortgagor is thereby affected, applies to all sales made after the enactment of section 811 of the revision, whether the taxes accrued after or before. *The State v. Shaw*, 23 Id., 67.

A sale for taxes of land mortgaged to the school or university fund conveys only the interest of the mortgagor, and does not divest the lien of the mortgage. *Lovelace v. Berryhill*, 36 Id., 379.

If the mortgage has been foreclosed, the purchaser at the foreclosure sale takes the title free from the lien for taxes, etc. *Id.*

That the mortgage was made to the board of trustees of the state university instead of the university, does not change the rule. *Id.*

When land mortgaged to the school fund is sold for taxes accruing subsequent to the mortgage the purchaser takes it subject to the mortgage. *The County of Winnebago v. Brones, Adm'r*, 68 Id., 682.

SEC. 901. [When land not subject to taxation is sold.]—Whenever it shall be made to appear to the satisfaction of the county treasurer, either before the execution of a deed for real property sold for taxes, or if the deed be returned by the purchaser, that any tract or lot was sold which was not subject to taxation, or upon which the taxes had been paid previous to the sale, he shall make an entry opposite such tract or lot on the record of sales, that the same was erroneously sold, and such entry shall be evidence of the fact therein stated. And in such cases the purchase money shall be refunded to the purchaser as provided by this chapter.

LIMITATION OF ACTIONS.

SEC. 902. [Action must be brought within five years after recording deed: exceptions.]—No action for the recovery of real property sold for the non-payment of taxes shall lie unless the same be brought within five years after the treasurer's deed is executed and recorded as above provided; *provided*, that where the owner of such real property sold as aforesaid, shall, at the time of such sale, be a minor or insane, or convict in the penitentiary, five years after such disability shall be removed shall be allowed such person, his heirs, or legal representatives to bring their action.

The limitation embraced in this section commences to run from the date of the execution and recording of the treasurer's deed, instead of from the time the land was struck off to the bidder at the sale. The word *sale*, as used in section 790 of the revision, was construed to mean a completed sale which vested the title in the purchaser, and placed him in a position to have the legality thereof tested in the courts. *Eldridge v. Kuehl*, 27 Iowa, 160. The same holding followed in *Henderson v. Oliver*, 28 Id., 20; *McCready v. Sexton & Son*, 29 Id., 356.

This section does not preclude the person claiming under the tax sale and deed from bringing an action against the original owner of land sold for taxes, within the five years to cut off the right of such owner, and to quiet the title in himself. *Stevenson v. Bonesteel*, 30 Id., 286.

An action for the recovery of lands sold for taxes cannot be maintained, except in the case of minors and other cases excepted by the statute, after the lapse of five years from the date of the execution and recording of the tax deed. *Thomas v. Stickle*, 32 Id., 71; *Douglass v. Tullock*, 34 Id., 262.

It was the purpose of the statute to cure all irregularities in the mode and manner of sale which, within the limitation fixed, might have rendered the sale invalid. It was accordingly held that, a tax deed, showing the land sold in bulk, was not excepted from the operation of the statute. *Id.*

The possession of land by the holder of the patent title, necessary to bar an action to recover the same by one claiming under a tax title, need not be of the adverse, hostile and exclusive character required under the general statute of limitations; but any visible possession, which would enable the holder of the tax title to begin his action for the land, is sufficient.

The holder of a tax deed who seeks to recover the land from the patent owner must begin his action within five years after he becomes entitled to his deed; and he cannot prevent the running of the statute against himself by neglecting to procure his deed after it is due; (see *Hintrager v. Hennessy*, 46 Id., 600;) but the rights of the owner of the patent title as against the tax title do not end under the statute until five years after the tax deed is actually made and recorded. Accordingly, where the land was wild and unoccupied when sold for taxes, and continued so for some years after the tax deed was made and recorded, but, within five years after the latter date, but more than five years after the tax deed was due, the owner of the patent title asserted his right to the land by taking possession, an action by the owner of the tax title to recover the possession was barred by the statute. *Executor of Griffiths v. Carter*, 64 Id., 193.

The holder of a tax deed to unoccupied land has constructive possession thereof. *Rice v. Haddock*, 70 Id., 318.

The validity of a title acquired under a tax sale cannot be questioned after the lapse of five years from date of the execution and recording of the deed. *Jeffrey v. Brokaw et al.*, 35 Id., 505.

Under this section an action by a purchaser at tax sale for the possession of distinct parcels of land which were sold in gross, and of which the original owner remained in undisturbed, adverse possession for more than five years after the deed was recorded, is barred. *Brown & Sully v. Painter*, 38 Id., 456. Followed in *Laverty et al. v. Sexton & Son*, 41 Id., 435.

No objections to the tax deed or proceedings prior thereto, or irregularities in the manner of assessment and levy, will operate to defeat the bar of the statute of limitations. *Pierce v. Weara*, 41 Id., 378.

Held, that an action for the recovery of land held and occupied under a tax deed based upon a *fictitious* sale is not barred in five years. *Early v. Whittington*, 43 Id., 162.

The party in possession under such tax deed and sale, is entitled to receive from the owner a sum equal to all he has paid for subsequent taxes, with interest at six per cent. *Id.*

In an action by the owner of land, who has been in continued possession, to set aside a tax deed to such land which was recorded more than five years prior to the commencement of the action, the holder of the tax deed is barred from setting up title thereunder. *Wallace v. Sexton & Son*, 44 Id., 257.

The purchaser of land at a tax sale cannot maintain an action for its recovery after five years have elapsed from the date of recording the tax deed, where the owner has been in open, adverse possession during that period. *Peck v. Sexton Son*, 41 Id., 566. Following *Brown & Sully v. Painter*, 38 Id., 456; see, also, *Lavery v. Sexton & Son*, 41 Id., 438; *Wallace v. Sexton & Son et al.*, 44 Id., 257.

When the owner of land sold for delinquent taxes continues in the actual possession thereof, a purchaser at a tax sale must bring his action for the recovery of the land within five years from the time *his right to a deed* becomes perfect, and he cannot by delaying the taking his deed, prevent the running of the statute of limitations against him. *Hintrager v. Hennessy* 46 Id., 600; *Thornton v. Jones*, 47 Id., 397.

Where the purchaser at tax sale failed for more than *eleven years* to apply for his deed, it was *held* that the owner would be justified in presuming an abandonment of his right thereto by the purchaser, and that such purchaser could not afterwards defeat the title of the owner's grantee. *Ockendon v. Barnes et ux.*, 43 Id., 615.

An action by a tenant in common to recover possession of the common property, which is fraudulently held by his co-tenant and to which the latter has acquired a tax deed, is not barred at the expiration of five years from the recording of the deed. *Austin et al. v. Barrett*, 44 Id., 488.

The fact that the owner of lands in this state resided in a state in rebellion, when the taxes accrued, does not excuse him from their payment. *Finley v. Brown et al.*, 22 Id., 538.

If the sale for taxes is not simply irregular but absolutely void, it will not be protected by the statute of limitations. The owner of the land will not be charged with constructive notice of such sale. *Nichols v. McGlathery*, 43 Id., 189.

An action by the purchaser at a tax sale to recover possession of the property sold for delinquent taxes, is barred after the expiration of five years from the time when he became entitled to a deed. *Hintrager v. Hennessy*, 46 Id., 600.

Where a tax sale is void and the purchaser not being in possession of the land, he cannot avail himself of the statute of limitations against the former owner. *Miller v. Corbin et al.*, Id., 150.

An action to set aside a tax deed, by the original owner, will not be barred in five years from the time of the execution of the tax deed where the tax sale was void, or the taxes for which the land was sold had been paid. *Patton v. Luther et ux.*, 47 Id., 236.

The original owner of unoccupied lands, sold for taxes, who has remained in the constructive possession of the same until more than five years after the execution of a tax deed, void for the reason that the taxes had been paid, may maintain an action to quiet his title and remove the cloud created by the tax deed. *Id.*

Four years after the execution and recording of a tax deed, the holder of the patent title went into actual possession of the land, which was, up to that time, unoccupied prairie. After the expiration of five years from the recording of the tax deed the purchaser brought an action to recover the possession. *Held*:

1. That the limitation provided in section 902 of the code commenced to operate upon the tax deed at the time of the recording thereof, and the bar to an action to recover possession thereunder became complete at the expiration of five years.

2. Both patent owner and tax purchaser are to be regarded as continually claiming title from the time the deed is recorded, and neither has any right under the statute not enjoyed by the other.

3. It is within the province of the legislature to provide that an action for the recovery of lands, held by the assent or sufferance of the owner, and not adversely, will be barred within a prescribed time, and section 902 of the code is an exercise of this power. ADAMS, J., *dissenting*. *Barrett v. Love*, 48 Id., 103.

The holder of a tax deed will be deemed to be in the possession of unoccupied land, and if such possession is uninterrupted during five years from the date of the execution and recording of the tax deed, the title acquired thereby becomes perfect and complete. BECK, CH. J., and ROTHROCK, J., *dissenting*. *Moingona Coal Co. v. Blair*, 51 Id., 447.

Where the defendant claimed title under a tax deed recorded November 8, 1869, the plaintiff, claiming as owner of the patent title, went into possession of the land in 1875, prior to which it had been vacant and unoccupied, it was *held* that an action for its recovery by the owner of the patent title was barred by section 902 of the code, and that his possession was that of a mere trespasser. 51 Id., 1.

The holder of a tax deed may recover possession as against a stranger after the lapse of five years from the recording of the tax deed. *Lockridge v. Daggett et al.*, 47 Id., 679.

The owner in possession of real property may maintain an action to quiet his title against the adverse claim of the holder of a tax title barred by the statute of limitations. *Tabler v. Callanan*, 49 Id., 362.

Where prairie land remains unoccupied for five years after the execution of a tax deed thereto, the possession is deemed to follow the tax title, and the holder thereof may maintain an action to protect such possession. *Lewis v. Soule et al.*, 52 Id., 11. Following *Moingona Coal Co. v. Blair*, 51 Id., 447. BECK, Ch. J., and ROTHROCK, J., *dissenting*.

Where land remains unoccupied the title of a holder of a tax deed thereto becomes perfect at the expiration of five years from the date of its execution. *Bullis v. Marsh*. 56 Id., 747. Following *Moingona Coal Co. v. Blair*, 51 Id., 447.

The statute of limitations can be pleaded to an action for possession under a tax deed only by the true owner of the land, and his title pleaded must be one upon the strength of which he could recover if plaintiff in the action. *Lockridge v. Daggett et al.*, 54 Id., 332.

The special limitation of five years, imposed by this section, applies only to actions between the holder of the tax deed and the owner of the land at the time of the sale, or those claiming through or under him. Actions between the former owner and other claimants are governed by the general statute of limitations. *Id.*

Where the time for redemption from tax sale expired, and a deed was executed prior to the taking effect of the code, an action on such deed is governed, as to the statute of limitations, by the provisions of the revision. *Baily v. Howard*, 55 Id., 290.

The cutting of timber and hay upon land by the owner of the patent title, under a claim of exclusive right, constitutes such acts of possession as will support the plea of the statute of limitations against the holder of a tax deed executed more than five years prior to the commencement of the action. *Forey v. Bigelow et al.*, 56 Id., 381.

The possession of land by the holder of the patent title, necessary to bar an action to recover the same by one claiming under a tax title, need not be of the adverse, hostile and exclusive character required under the general statute of limitations; but any visible possession, which would enable the holder of the tax title to bring his action for the land, is sufficient. *Executor of Griffith v. Carter*, 64 Id., 193.

An action brought by the holder of a tax deed, more than five years after the deed was due, to recover the land from the former owner, who had taken possession thereof within five years after the tax deed was filed for record, but more than five years after it was due, was held barred by the statute under the doctrine announced in *Executor of Griffith v. Carter*, 64 Id., 193; *Cassady v. Sapp*, Id., 203.

One who relies upon the statute of limitations as in this section provided, to avoid the cancellation of an invalid tax deed, must show that the deed has been recorded, because, until recorded, the statute does not begin to run in its favor. *Scroggs v. Garver*, 69 Id., 680.

In December, 1876, plaintiff procured a tax deed for the land in controversy, which was invalid on account of defective proof of service of the notice required by statute. In December, 1883, plaintiff perfected his proof of service, and April 1st, 1884, procured another tax deed. April 15, 1884, defendant, who was the owner of the patent title, took possession of the land, which never before had been occupied. Plaintiff brings this action to recover the land and to quiet his tax title, and the defendant pleads the statute of limitations. *Held*, that since the defendant did not take possession until after plaintiff had obtained his valid deed, plaintiff's action, being brought within five years from the date of that deed being executed and recorded, was not barred by the statute. *Adams v. Griffin*, 66 Id., 125.

Where notice of the expiration of the time of redemption from a tax sale was duly given, but the proof of the service of the notice, though made by the proper party, was defective only in not stating some of the facts required by the statute, *held* that the proof of service and the deed issued thereon were not void, but were sufficient after the lapse of five years, to enable the holder of the deed successfully to plead the statute of limitations (sec. 902) against the holder of the patent title in an action for the land. *Trulock v. Bentley et al.*, 67 Id., 602.

A tax deed, reciting as proof of service of the notice of expiration of time of redemption, an affidavit of a newspaper publisher, showing the publication of such notice, is sufficient in form, although in fact the proper proof of service was not filed with the treasurer, to put in operation the special statute of limitations, as in this section, providing that no action for the recovery of land sold for taxes shall be brought unless within five years from the execution and recording of the treasurer's deed therefor. *Bolin v. Francis et al.*, 34 N. W. R., 447.

Where the notice to redeem from tax sale is directed to a person other than the one to whom the land was taxed, it is no notice at all, and does not cut off the right of redemption as against one who takes a tax deed under the sale; and in such case the period of limitation provided in this section does not begin to run from the date of the tax deed. *Clark v. Barnum et al.*, 71 Id., 245.

The statutory limitation of five years, provided in this section, usually begins to run against the

holder of a tax title at the date when he is entitled to receive his deed; but that rule does not apply where his title, which the law presumes to be perfect, is not called in question within that time by any act of the owner of the patent title, because, until it is called in question, he has no occasion to bring an action to quiet his tax title. *Francis v. Griffin*, 72 Id., 23. See, also, *Moin-gona Coal Co. v. Blair*, 51 Id., 447; *Adams v. Griffin*, 66 Id., 125; *Griffith v. Carter*, 64 Id., 193.

SEC. 903. [Acts of officers in fact valid.]—In all suits and controversies involving the question of title to real property held under and by virtue of a treasurer's deed, all acts of assessors, treasurers, auditors, supervisors, and other officers *de facto* shall be deemed and construed to be of the same validity as acts of officers *de jure*.

That an assessor was not duly qualified when, acting as an officer *de facto*, he assessed property, does not invalidate such assessment, or affect the validity of a sale for taxes. *Allen v. Armstrong*, 16 Iowa, 508.

To support the acts of one on the ground that he is an officer *de facto*, they must have been done under color of the office whose duties should have been discharged by the person filling it. *Bailey v. Fisher*, 38 Id., 229.

At a general election the people of F township elected two assessors, one for the township, the other for the town of A, situated within such township. The assessor elected for the town, following a custom, assessed land outside of the town; *held*, that the assessment, so far as it included land outside of the town, was a nullity, and a sale for taxes under it was void. *Id.*

The acts of officers *de facto* are of the same validity as those of officers *de jure*. *Peirce v. Weare*, 41 Id., 378.

In an action to enjoin the opening of a highway because not legally established, damages cannot be recovered for opening it without legal notice. *Tharp v. Witham*, 65 Id., 566.

Where notice of the expiration of the time for redemption from a tax sale was duly given by publication, but the proof of such service was made, not by the holder of the certificate, or of his agent, as the law requires, but by the publisher of the newspaper in which it was published, *held* that the deed issued upon such insufficient proof was not void, even though it recited how the proof was made, but that it was sufficient after the lapse of five years, to enable the holder successfully to plead the statute of limitations against the holder of the patent title in an action to redeem the land. *Bolin v. Francis et al.*, 72 Id., 619.

SEC. 904. [When assessed to wrong person.]—No sale of real property for taxes shall be considered invalid on account of the same having been charged in any other name than that of the rightful owner, if the said property be in other respects sufficiently described.

SEC. 905. [Certified copies of books evidence.]—The books and records belonging to the offices of the county auditor and county treasurer, or copies thereof, properly certified, shall be deemed sufficient evidence to prove the sale of any real property for taxes, the redemption thereof, or the payment of taxes thereon.

PEDDLERS.

SEC. 906. (*As amended by ch. 62, 15th g. a.*) [Amount of tax.]—A tax for state purposes shall be levied upon peddlers of merchandise not manufactured in this state, for a license to peddle throughout the state for one year as follows: Upon each peddler of watches or jewelry, or either of them, thirty dollars; upon each peddler of clocks, fifty dollars; upon each peddler of dry goods, fancy articles, notions, or patent medicines, as follows: upon each peddler thereof, ten dollars; upon each peddler who pursues his occupation with a vehicle drawn by one animal, twenty-five dollars; if drawn by two and less than four, fifty dollars; if drawn by four or more animals, seventy-five dollars; [*provided, however, that nothing in this section shall apply to wholesale dealers in any of the above enumerated articles who use wagons for the delivery of goods sold at wholesale prices and by the box or package.*]

SEC. 907. [License: how obtained: penalty for selling without.]—Such license may be obtained from the auditor of the county upon paying the proper tax to the treasurer thereof, and may issue for a less period than one year for the proportionate amount of tax, and all such licenses shall state the date of the

expiration of the same; and any person so peddling without a license, or after the expiration of his license, is guilty of a misdemeanor, and the person actually peddling is liable, whether he be the owner of the goods or not. Upon conviction of peddling without a license as aforesaid, the offender shall forfeit and pay to the county treasurer, in addition to the fine imposed upon him for the misdemeanor, double the amount of license for one year as fixed by section nine hundred and six of this chapter.

(CHAPTER 131, LAWS OF 1876.)

IN RELATION TO PUBLIC SHOWS.

An Act to regulate circuses and other public shows.

SECTION 1. [To exhibit outside any city or town, license must be obtained from county auditor.]—*Be it enacted by the general assembly of the state of Iowa:*—That before any person can exhibit any traveling show or circus, not prohibited by law, or show any natural or artificial curiosity, or exhibition of horsemanship in a circus or otherwise, for any price, gain, or reward, in any county, outside of the limits of any city or incorporated town, he shall obtain a license therefor from the county auditor upon the payment to the county treasurer of such sum as may be fixed by the board of supervisors, not exceeding one hundred dollars for each and every place in the county at which such show or circus may exhibit.

SEC. 2. [Fine for violation of section 1.]—If any person shall exhibit any show above contemplated without having first obtained such license, he shall be deemed guilty of a misdemeanor and punished accordingly, and shall forfeit and pay double the amount fixed for such license, for the use and benefit of the school fund.

(Took effect by publication in newspapers, March 29, 1876.)

CHAPTER 3.

PROVISIONS FOR THE SECURITY OF THE REVENUE.

SECTION 908. [County responsible for state tax.]—Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double, or erroneous assessments, as hereinafter provided.

SEC. 909. [When treasurer is a defaulter.]—If any county treasurer prove to be a defaulter to any amount of state revenue, such amount shall be made up to the state within the next three coming years by additional levies, in such manner as to annual amounts as the board of supervisors may direct. In such cases the county can have recourse to the official bond of the treasurer for indemnity.

The bond of a county treasurer purporting to be executed "unto the county of Warren and state of Iowa," was held to be a bond given for the security of the county and not of the state. *The State v. Henderson*, 40 Iowa, 242.

The theory of the revenue law is opposed to the notion that a county treasurer's bond is intended, in part, for the security of the state, each county being responsible to the state for the state revenue. *Id.*

SEC. 910. [Interest on warrants: how receipted.]—When interest is due and is allowed by the treasurer of any county or the state treasurer, on the redemption of auditor's warrants, or county warrants the same shall be receipted on the

warrants by the holder of the same, with the date of the payment, and no interest shall be allowed by the auditor of state or board of supervisors except such as is thus received.

SEC. 911. [Penalty of discounting warrants.]—If the state treasurer or any county treasurer discount auditor's warrants at less than the amount due thereon, either directly or indirectly, or through third persons, they shall be liable to a fine not exceeding one thousand dollars, to be prosecuted as other fines.

SEC. 912. [Code, § 912 amended by ch. 155, 17th g. a.]—(County treasurers shall be liable to a like fine for loaning out, or in any manner using for private purposes, state, county or other funds in their hands, except that when permitted by the board of supervisors of their respective counties, by resolution entered of record, they may deposit any such funds in any bank or banks chartered by the laws of the state, or any national or private banks in this state, to any amount not exceeding an amount to be fixed by such resolution: *providing*, that before any such deposit is made the bank in which it is proposed to make the same shall first file a bond with sureties to be approved by the treasurer and the board of supervisors in double the maximum amount permitted to be deposited as aforesaid, and conditioned to hold the treasurer making the deposits of the county harmless from all loss by reason of such deposit or deposits. Said bond shall be filed with the county auditor, and an action may be brought thereon either by said treasurer or the county, as the board of supervisors may elect. And the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor, to be prosecuted by the attorney-general in the name of the state. But nothing done under the provisions of this act shall alter or affect the liability of the treasurer or the securities on his official bond.)

See *State v. Brandt*, 41 Iowa, par. 7 of opinion, 612.

County treasurers are prohibited from loaning out, or in any manner using for private purposes state or county funds in their hands, and depositing such funds in a bank on account, even where no interest is to be paid by the bank, is a loaning within the meaning of the statute, and the fact that the county does not provide a safe or suitable place where its money may be kept, will not release the treasurer from liability if he deposits in bank, where by reason of the failure of the bank, it is lost. *Lowry v. Polk County*, 51 Iowa, 50.

PAYMENTS BY COUNTY TREASURER.

SEC. 913. [Supervisors to settle with treasurer.]—At their regular meetings in January and June, of each year, the board of supervisors shall make a full and complete settlement with the county treasurer, and they shall make and certify to the auditor of state all credits to the treasurer for double or erroneous assessments, and unavailable taxes, also all dues for state revenue interest, or delinquent taxes, sales of land, peddlers' licenses, and other dues, if any; also the amounts collected for these several items, and revenues still delinquent, each year to itself. Said reports shall be forwarded by mail.

A county treasurer and his sureties are liable, on his official bond, for moneys received by him from tax payers, in partial payment of taxes. *Warren County v. Ward et al.*, 21 Iowa, 84.

The sureties on a treasurer's bond are not liable for his delinquencies prior to the execution of the bond. *Id.*

A judgment against a treasurer and his sureties upon his first bond, for a breach in refusing to account for moneys received after its execution, and before the execution of a second bond, is no bar to an action on the second bond for a failure to account for moneys received after its execution, but during the same term of office. *Id.*

SEC. 914. (As amended by ch. 122, 17th g. a. and ch. 194, 20th g. a.) [When, and how payments made to treasurer of state: penalty for failure.]—The treasurer of each county shall, on or before the fifteenth day of each month, prepare a sworn statement of the amount of money in his hands on the first day of that month belonging to the state treasury, and forward the same by mail to the

auditor of state, and he shall, each year, unless otherwise directed by the state auditor, pay into the state treasury, on or before the fifteenth day of [April] all the money due the state remaining in his hands on the first day of [April], and on or before the fifteenth day of [December], all the money due the state remaining in his hands on the [tenth] day of [December]; he shall also, at any time when directed by the auditor of state, forthwith pay into the state treasury, or to the treasurer of any county, any or all the money due the state and remaining in his hands. In case the treasurer of any county shall fail to prepare and forward the statement required in this section, he shall forfeit and pay for each and every failure a sum not less than one hundred nor more than five hundred dollars, to be recovered in an action brought in the name of the state auditor, against him and his bondsmen, in any court of record.

SECURITY OF THE REVENUE.

SEC. 915. (Repealed by section 2, chapter 122, laws of 1878.)

SEC. 916. [**Duty of auditor of state and supervisors.**]—The state auditor shall make and transmit to each county auditor, on the first day of May of each year, a statement of the county treasurer's account with the state treasurer, which account shall be submitted by said auditor to the board of supervisors at their next meeting, and if they find the same to be incorrect in any particular, they shall forthwith certify the facts in relation to the same to the auditor of state.

SEC. 917. [**Treasurer to settle with supervisors, etc.**]—When a county treasurer goes out of office, he shall make a full and complete settlement with the board of supervisors, and deliver up all books, papers, moneys, and all other property appertaining to the office, to his successor, taking his receipt therefor. The board of supervisors shall make a statement, so far as state dues are concerned, to the auditor of state, showing all charges against the treasurer during his term of office, and all credits made, the delinquent taxes and other unfinished business charged over to his successor, showing to what year and to what account the amount so paid over belongs. They shall also see that the books of the treasurer are correctly balanced before passing into the possession and control of the treasurer elect.

The board of supervisors of a county may, under the general authority given them by sections 303 and 917 of the code, accept a promissory note in lieu of the official bond of a defaulting treasurer. *Sac County v. Hobbs et al.*, 72 Id., 69.

SEC. 918. [**State treasurer keeps funds separate: state and county to account.**]—The state treasurer shall keep each distinct fund coming into his possession as public money, in a separate apartment of his safe, and, at each quarterly settlement with the state auditor, he shall count each fund in the presence of the auditor to see if the same agrees with the balance found on the books. The total amount acknowledged to belong to each fund shall be exhibited before the count. County treasurers shall account with such persons as the board of supervisors may direct in like manner, and a report of such accounting shall be made to the board at their next meeting, by the person so appointed by them.

SEC. 919. [**Penalty for failure to perform duty.**]—If any county auditor, or county treasurer, or other officer shall neglect or refuse to perform any act or duty specifically required of him by any provision of this title, such officer shall be deemed guilty of a misdemeanor and indicted therefor; and, being found guilty, shall be fined in any sum not exceeding one thousand dollars, for the payment whereof his bondsmen shall also be liable; and he and his bondsmen shall also be liable to an action on his official bond for the damages sustained by any person through such neglect or refusal.

(CHAPTER 88, LAWS OF 1886.)

CONSOLIDATION OF COUPON WITH GENERAL REVENUE FUND.

An Act authorizing the consolidation of the coupon fund in the state treasury, with the general revenue fund.

WHEREAS, There is now in the state treasury an unused balance of one hundred and fifty-one dollars and thirty-five cents, known as the coupon fund; and,

WHEREAS, There is no probability of the same ever being called for use of said fund and the same is being carried from year to year as a coupon fund, thus keeping open and unsettled an unnecessary account in the state treasurer's office; and,

WHEREAS, There is no authority in law for the transfer of said funds; therefore,

Be it enacted by the general assembly of the state of Iowa:

SECTION 1. [**Transferred to general revenue fund.**]—That the said fund known as the coupon fund be and the same is hereby consolidated with the general revenue fund.

SEC. 2. [**Auditor and treasurer to cover into general revenue fund.**]—That the auditor and treasurer of state be and they are hereby authorized to cover the unpaid balance of said coupon fund into the general revenue fund, and that any outstanding coupons or warrants that may hereafter be drawn upon or presented for payment, and which are payable from said coupon fund, shall be paid out of and charged to the general revenue fund.

(Approved April 8, 1886.)

(CHAPTER 113, LAWS OF 1876.)

AUTHORIZING THE AUDITOR OF STATE TO PAY BACK TO COUNTIES ANY BALANCE DUE.

An Act to authorize the auditor of state to cause to be paid back to counties entitled thereto, any excess on revenue paid into the state treasury. (Additional to code, chapter 3, title VI: "Provisions for the security of the revenue.")

SECTION 1. [**Duty of auditor.**]—*Be it enacted by the general assembly of the state of Iowa:* That the auditor of the state be and he is hereby authorized and empowered to draw his warrant on the state treasury, in favor of any county in this state for the amount of any excess in any fund or tax due the state from said county excepting the state taxes.

SEC. 2. [**To forward warrant for any excess to county entitled.**]—Whenever it shall appear from the books in his office, that there is a balance due any county, and in excess of any revenue due the state, except state taxes, it shall be his duty to draw his warrant for such excess, in favor of the county entitled thereto, and forward the said warrant by mail or otherwise, to the county auditor of the county to which said money belongs, and charge the amount so sent to the said county.

SEC. 3. [**Duty of county auditor.**]—The county auditor to whom said warrant is sent, shall immediately upon receipt thereof deliver the same to the county treasurer of his county and charge the amount of the warrant to said county treasurer in the same manner as any other fund is charged on the books of his office, and the county auditor shall also, on receipt of said warrant from the auditor of state, acknowledge receipt of the amount of said warrant to said state auditor.

(Took effect March 25, 1876, by publication in newspapers.)

(CHAPTER 57, LAWS OF 1878.)

RELATING TO THE ESTABLISHMENT OF A STATE DEPOSITORY.

An Act authorizing the establishment of a state depository in the city of Des Moines for the collection of drafts, checks and certificates of deposit received by the treasurer of state on account of state dues.

SECTION 1. [Treasurer of state with advice of executive council may designate bank as depository.]—*Be it enacted by the general assembly of the state of Iowa:* That the treasurer of state, with the advice and approval of the executive council, may designate one or more banks in the city of Des Moines as a depository for the collection of any drafts, checks and certificates of deposit that may be received by him on account of any claims due the state.

SEC. 2. [Banks so designated shall give security.]—That the bank or banks designated as such depository shall be required to give security to the state, to be approved by the executive council, for the prompt collection of all drafts, checks, certificates of deposit, or coupons, that may be delivered to such depository by the treasurer of state for collection; and also for the safe keeping and prompt payment, on the treasurer's order, of the proceeds of all such collections; also, for the payment of all drafts that may be issued to said treasurer by such depository.

SEC. 3. [Treasurer may deposit drafts, etc., in bank.]—That the treasurer of state, on the receipt of any draft, check or certificate of deposit, on account of state dues, may place the same in such depository for collection, and it shall be the duty of such depository to collect the same without delay, and shall charge no greater per cent for such collection than the minimum per cent charged to other parties and notify the treasurer when collected. On the receipt of such notice, the treasurer shall issue his receipt to the party entitled thereto, as now required by law.

SEC. 4. [This act not to release state or county treasurer from any liability.]—That the provisions of this act shall in no way release the treasurer of state, or his bondsmen, or any county treasurer, or his bondsmen, from any liability now imposed by law.

SEC. 5. That all acts and parts of acts inconsistent with this act are hereby repealed.

(Took effect March 25, 1876, by publication in newspapers.)

TITLE VII.

OF HIGHWAYS, FERRIES, AND BRIDGES.

CHAPTER 1.

OF ESTABLISHING HIGHWAYS.

SECTION 920. [Jurisdiction over.]—The board of supervisors has the general supervision over the highways in the county, with power to establish and change them as herein provided, and to see that the laws in relation to them are carried into effect.

The board of supervisors is invested with power to erect all bridges in the county which may be necessary, and which the public convenience may require; and may levy a tax for that purpose not exceeding three mills on the dollar. *Bell v. Foutch*, 21 Iowa, 119.

The board of supervisors have power, at their discretion, to establish and change highways, of which bridges erected by the public constitute a part; and where a bridge has fallen down which they refuse to rebuild, *mandamus* will not lie to compel them to do so. *The State, ex rel. Houck, v. Morris et al.*, 43 Id., 192.

Where the county auditor has illegally established a highway forty feet wide, the board of supervisors has jurisdiction to vacate the same. *The State v. Wagner*, 45 Id., 482.

The board of supervisors is not authorized under this section to lay out a highway over land within the limits of a corporate town, even though said land be unplatted and used for agricultural purposes. The jurisdiction of highways within the corporation limits resides exclusively in the corporation. *Gallaher v. Head et al.*, 33 N. W. R., 620.

SEC. 921. [Width.]—Highways hereafter established must be sixty-six feet in width, unless otherwise directed; but the board of supervisors may, for good reasons, fix a different width, not less than forty feet, and they may be increased or diminished within the limits aforesaid, altered in direction, or discontinued, by pursuing substantially the steps herein prescribed for opening a new highway.

The county auditor has no power to establish a highway of less than sixty-six feet in width, the power to establish such an one being vested in the board of supervisors alone, who may exercise it for good and sufficient reasons. *The State v. Wagner*, Id., 482; see also *Patterson v. Vail*, 43 Id., 145.

SEC. 922. [Petition.]—Any person desiring the establishment, vacation, or alteration of a highway, shall file, in the auditor's office of the proper county, a petition in substance as follows: To the board of supervisors of county: The undersigned asks that a highway, commencing at, and running thence and terminating at, be established, vacated, or altered (as the case may be).

A petition which asks for "the appointment of a commissioner to open a road," instead of following the language of the statute and ask for "the establishment of a road," is a substantial compliance with the statute. So, also, a notice of the time when the application for the road will be made, using the same language, is sufficient. *McCollister v. Shuey*, 24 Iowa, 362.

Proceedings in the establishment of a road will not be annulled on *certiorari* unless it is shown that the inferior tribunal has exceeded its jurisdiction, or is otherwise acting illegally. *Id.*

While the language of this section allows unimportant deflections from the particular route or line designated in the petition and notice, these must be within the *termini* of the road asked to be established, and the commissioner has no power to extend the road beyond such *termini*, and a report establishing such extension, though approved by the county judge, was held null and void. *The State v. Molly*, 18 Id., 525.

SEC. 923. [**Bond.**].—Before filing such petition the auditor shall require the petitioner to file in his office a bond, with sureties to be approved by such auditor, conditioned that all expenses growing out of the application will be paid by the obligors in case the contemplated highway is not finally established, altered, or vacated, as asked in the petition.

This section is merely directory, and where a petition for a road was filed and a road established thereon without the filing of a bond, as the statute directs, it was held that the proceedings were valid and the road legally established. *State v. Barlow*, 61 Iowa, 572.

SEC. 924. [**Auditor appoint commissioner.**].—If satisfied that the foregoing prerequisites have been complied with, the auditor shall appoint some suitable and disinterested elector of the county a commissioner to examine into the expediency of the proposed highway, alteration, or vacation thereof, and report accordingly.

As to the power of the board to delegate authority to the clerk, see *The State v. Kimball*, 23 Iowa, 531.

DUTY OF COMMISSIONER.

SEC. 925. (*As amended by ch. 50, 18th g. a.*) [**Not confined to matter of petition.**].—The commissioner is not confined to the precise matter of the petition, but may inquire and determine whether that or any highway in the vicinity, answering the same purpose and in substance the same, be required; but such highway must not be established through any burying ground which is exempt from execution; nor through any garden, orchard, or ornamental ground contiguous to any dwelling house, [nor] so as to cause the removal of any building without the consent of the owner.

SEC. 926. [**Convenience considered.**].—In forming his judgment, he must take into consideration both the public and private convenience, and also the expense of the proposed highway.

SEC. 927. [**Report.**].—After a general examination, if he shall not be in favor of establishing the proposed highway, he will so report, and no further proceedings shall be had thereon.

Under this section the adverse report of the commissioner appointed to examine into the expediency of establishing or vacating a highway puts an end to all proceedings in the matter; neither the auditor nor board of supervisors has jurisdiction to appoint another commissioner, and, upon a favorable report by him, to make the proposed location or change. *Cook v. Trigg et al.*, 52 Iowa, 709. There would seem to be no reason why, after an adverse report by the commissioner, the board could not entertain a new petition or application for the road, or a change thereof.

SEC. 928. [**To lay out highway.**].—If he deems such establishment expedient, he may proceed at once to lay out the highway as hereinafter directed, and may report accordingly, if the circumstances of the case are such as to enable him to do so without pursuing the course pointed out in the next section.

SEC. 929. [**Survey made.**].—If the precise location of the highway cannot be otherwise given, he must cause the line of the highway to be accurately surveyed and plainly marked out.

SEC. 930. [**Commissioner sworn.**].—Any commissioner, other than the county surveyor, must be sworn to faithfully and impartially discharge his duty as such commissioner, and, after being thus qualified, he shall have power to swear the assistants employed to a faithful and impartial performance of their respective duties in laying out the highway described in his commission.

That the officer who administered the oath to the commissioner appointed by the board of supervisors to examine and report upon the proposed road was not empowered to administer oaths will not defeat the action of the commissioner nor render the establishment of the road invalid. *Woolsey v. The Board of Supervisors, etc.*, 32 Iowa, 130.

SEC. 931. [**Mile posts and stakes set up.**].—Mile posts must be set up at the end of every mile and the distance marked thereon, and stakes must be set at each

change of direction, on which shall be marked the bearing of the new course. Stakes must also be set at the crossing of fences and streams, and at intervals in the prairie not exceeding a quarter of a mile each; in the timber, the course must be indicated by trees suitably blazed.

SEC. 932. [**Bearing trees: monuments.**].—Bearing trees must, when convenient, be established at each angle and mile post, and the position of the highway relative to the corners of sections, the junction of streams, or any other natural or artificial monument, or conspicuous object, must, as far as convenient, be stated in the field notes and shown on the plat.

The provisions of sections 931 and 932, relating to fixing mile posts and other monuments, and the making of field notes and plat, are directory, and a failure to comply therewith will not render the proceeding invalid. *McCullister v. Shuey*, 24 Iowa, 362.

SEC. 933. [**Plat and field notes.**].—A correct plat of the highway, together with a copy of the field notes of the surveyor, if one has been employed, must be filed as part of the commissioner's report.

SEC. 934. (*As amended by ch. 80, 19th g. a.*) [**Report: day fixed for claiming damages.**].—Within thirty days from the day of his appointment, the commissioner must file his report in the auditor's office, and if it be in favor of the establishment of the highway [shall report the number of bridges required, if any, and the probable cost thereof, on the proposed highway], the auditor must appoint a day, not less than sixty nor more than ninety days distant, when the matter will be acted upon; on or before which day, all objections to the establishment of the highway and claims for damages by reason of the establishment thereof, must be filed with the auditor.

The fact that the final action of the board of supervisors in respect to the establishment of the highway was had on a day subsequent to the one fixed by the board for such an action, will not be sufficient to invalidate the establishment of the road where there is no showing that the consideration of the case was not properly continued by the board from the day fixed to the day upon which final action was in fact had. *Woolsey v. The Board of Supervisors, etc.*, 32 Id., 130.

Where the time fixed for the final hearing in a proceeding to change a public road was less than sixty days from the report of the commissioner, while the petition, notice, and other steps were regular and in compliance with the statute, it was *held*, that the irregularity did not render the proceedings void, nor vulnerable to a collateral attack. *The State v. Kinney*, 39 Id., 226.

SEC. 935. [**Auditor fix day for commissioner to begin.**].—The time for the commissioner to commence the examination shall be fixed by the auditor, and if he fails to so commence, or to report as prescribed in the preceding section, the auditor may fix another day or extend the time for making such report, or may appoint another commissioner.

NOTICE—HIGHWAY ESTABLISHED.

SEC. 936. (*As amended by ch. 109, 19th g. a.*) [**Notice served on each land owner or published.**].—Within twenty days after the day is fixed by the auditor as above provided, a notice shall be served on each owner or occupier of land lying in the proposed highway, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county, in the manner provided for the service of original notice in actions at law; and such notice shall be published for four weeks in some newspaper printed in the county, if any such there be, which notice may be in the following form:

To all whom it may concern: The commissioner appointed to locate, vacate, or altar (as the case may be) a highway commencing at.... ..in county, running thence [giving the names of the owners of the land through which the proposed road passes as they appear on the transfer books of the auditor's office] (described in general terms all the points as in the commissioner's report) and terminating at...., has reported in favor of the establishment, vacation or alteration

thereof, and all objections thereto or claims for damages must be filed in the auditor's office on or before noon of the . . . day of . . . , A. D. . . . , or such highway will be established, vacated or altered without reference thereto.

I. R. , county auditor.

The notice which is required to be given to each owner of land lying in or adjacent to a proposed highway must be served upon those who are shown by the transfer books in the auditor's office to be the absolute owners. One who claims to be the owner under a title bond, or other contract for conveyance, is not entitled to be personally served with notice. *Wilson v. Hathaway*, 42 Id., 173.

The legislature has the constitutional power to provide for the condemnation of the right of way for public highways upon notice by publication in newspapers, and by the posting of notices. *Id.*

It is not necessary in order to give the county board of supervisors jurisdiction to establish a highway, that an affidavit of the publication of notice required by this section has been filed in the auditor's office. If the auditor is satisfied, as the next section provides, that such notice has been given, it is sufficient, unless it be shown by a preponderance of evidence that notice has in fact not been given. *Pagels v. Oaks et al.*, 64 Id., 193. See *The State v. Weimer*, Id., 243.

Under section 936 of the code, notice of a proposed highway must be personally served upon the owner of the abutting land, as shown by the transfer books, when he resides in the county; but where the owner is a non-resident, the notice must be served upon the occupant of the land, if there be one. *Alcott v. Acheson*, 49 Id., 569.

Notice must be given of the pending of an application for the establishment of a highway to confer jurisdiction upon the board of supervisors, and unless it appear to have been given, jurisdiction will not be presumed. *The State v. Anderson*, 39 Id., 274, following *The State v. Berry*, 12 Id., 58.

Jurisdiction will be presumed where it appears from the record that the court establishing the road decided that sufficient notice had been given. *McCollister v. Shuey et al.*, 24 Id., 362.

No presumption can be entertained in favor of the jurisdiction of the board of supervisors to establish a highway; and where defendant was indicted for obstructing an alleged highway over his land, but the record failed to show that any notice had been served upon him of the proceedings for the establishment of the highway, or that he had in any way waived such notice, and there was no evidence *aliunde* (if such evidence were competent) of such notice or waiver, held that the proceedings were without jurisdiction and void, and that a conviction under the indictment could not be sustained. *The State v. Weimer*, 64 Id., 243.

A highway was established over and across the defendant's railroad right of way without any notice to it, other than by publication. Defendant is a foreign corporation, but had agents in the county where the highway was established. Held that the notice by publication was sufficient under this section of the code. *The State, ex rel. Patrick, v. The C., B. & Q. R'y Co.*, 63 Id., 135.

SEC. 937. [Auditor may establish highway.]—If no objections or claims for damages are filed on or before noon of the day fixed for filing the same, and the auditor is satisfied the provisions of the preceding section have been complied with, he shall proceed to establish such highway as recommended by the commissioner upon the payment of costs. If such costs are not paid within ten days, the auditor shall report his action in the premises to the board of supervisors at their next session, who may affirm the action of the auditor or establish such highway at the expense of the county.

While the county auditor is, by this section, authorized, in certain contingencies, to establish highways, he cannot establish one of forty feet in width. *The State v. Wagner*, 45 Iowa, 482, 484.

The filing of objections to the establishing of a highway or claims for damages, deprives the auditor of jurisdiction in the matter, which must stand continued until the next session of the board of supervisors. If mere claims for damages only are filed, their payment before the day set for final hearing by the the auditor will not authorize him to proceed and establish the highway. *Pussler v. Hershire*, 52 Id., 568.

SEC. 938. [New notice given.]—If the auditor is satisfied the notice has not been served and published as provided in section nine hundred and thirty-six of this chapter, he shall appoint another day, and cause such notice to be served or published as provided in said section, and thereafter proceed as provided in the preceding section.

SEC. 939. [When referred to supervisors.]—If objections to the establishment of the highway or claims for damages are filed, the further hearing of the

application shall stand continued to the next session of the board of supervisors, held after the commissioners appointed to assess damages have reported.

DAMAGES CLAIMED.

SEC. 940. [**Appraisers appointed.**]—When claims for damages are filed, and on the day appointed for filing the same, the auditor must appoint three suitable and disinterested electors of the county as appraisers to view the ground on a day fixed by him, and report upon the amount of damages sustained by the claimants; such report shall be made and filed in the auditor's office within thirty days after the day they are appointed.

The owner of land through which a road is finally established, will not, on appeal from the award of damages made by the appraisers, be allowed for removing and resetting a fence which he had erected in the track of the proposed road pending the application and after the award. *Holton v. Butler*, 22 Iowa, 557.

One who is not injured by the vacation of a highway in any other sense than the public generally cannot maintain an action for damages therefor. *Ellsworth v. Chickasaw County*, 40 Id., 571.

An appeal lies from an order of the board of supervisors refusing to appoint appraisers to assess the damages of an applicant through whose premises the road is located, on the ground that such application was not made within the time allowed by law. *Warner v. Doran*, 30 Id., 521.

SEC. 941. [**In writing.**]—All claims for damages and objections to the establishment, vacation or alteration of the highway must be in writing, and the statements in the application for damages shall be considered denied in all the subsequent proceedings.

SEC. 942. [**Appraisers notified.**]—The auditor shall cause notice of their appointment to be given to each of the appraisers, fixing the hour at which they are to meet at the office of the auditor, or of some justice of the peace therein named.

SEC. 943. [**Vacancies filled.**]—If the appraisers are not all present within one hour of the time thus fixed, the auditor or justice, as the case may be, shall fill the vacancies by the appointment of others. The appraisers must be sworn to discharge their duty faithfully and impartially.

SEC. 944. [**Time: final action postponed.**]—Should the report not be filed in time, or should any other good cause for delay exist, the auditor may postpone the time for final action on the subject, and may, if expedient, appoint other commissioners.

SEC. 945. [**Costs.**]—Should no damage be awarded the applicant therefor, the whole of the costs growing out of his application shall be paid by him.

FINAL ACTION.

SEC. 946. [**Testimony received: establish conditionally.**]—When the time for final action arrives, the board of supervisors may hear testimony, receive petitions for and remonstrances against the establishment, vacation or alteration, as the case may be, of such highway, and establish, vacate or alter, or refuse to do so, as in their judgment, founded on the testimony, the public good may require. Said board may increase or diminish the damages allowed by the appraisers, and may make such establishment, vacation or alteration, conditioned upon the payment in whole or in part of the damages awarded, or expenses in relation thereto.

When damages are allowed, the road cannot be finally established until they are paid. *Horton v. Hoyt*, 11 Iowa, 496, 497.

Sections 941 and 946, of the code, relate simply to the manner of recovery of damages, after they have been allowed. They do not determine when they are recoverable. *Brady v. Shinkle*, 40 Id., 576.

When the board of supervisors granted a change in a country road upon condition that the petitioners should "put it in good traveling condition," and after the new road was built, established the change; it was held that this did not render the county liable for injuries caused by a defect in a small bridge constructed as part of the road. *Taylor v. Davis County*, Id., 295.

The board is required to vacate and alter roads, or refuse to do so, as in their judgment the public good may require. Per ROTHROCK, J., in *Mastelar v. Edgerton*, 44 Id., 495.

But they cannot grant relief in case of mistake made in the location of a road by agreement of land owner. *Id.*

The board of supervisors in establishing a highway are required to determine whether it is likely to be of sufficient public utility to justify the county in incurring the expense of its establishment, and to this end must consider, not only the public necessity for it, but also the cost of its construction. *Nelson et al. v. Goodykoontz et al.*, 47 Id., 32.

It was accordingly held in this case that where the board of supervisors had established a highway, and ordered the expense to be paid by the county, and had allowed claims for damages to property owners, who appealed from such allowance and recovered larger awards on appeal, the board of supervisors had the authority to reconsider its action establishing the road, upon the ground that it was not of sufficient public utility to justify the county in paying the damages assessed by the court. *Id.*

An order establishing a highway without directing compensation to the owner of the land taken, is not unconstitutional where such owner makes no claim for damages in the method pointed out by law. *Abbott v. The Board of Supervisors, etc.*, 36 Id., 354.

An order of the board of supervisors establishing a highway upon condition that the damages assessed by the appraisers be paid by the petitioners, may be appealed from by a land owner dissatisfied with the appraisal, *McNichols v. Wilson et al.*, 42 Id., 385.

Where an order establishing a highway upon the payment of a certain sum claimed as damages by a land owner is made in a proper proceeding, it assumes the character of a binding adjudication, and parties cannot avoid the same by subsequently presenting another petition for the establishment of the same road and obtaining another order therefor from the board of supervisors, conditioned on the payment of a smaller sum. In such case the latter proceeding is unauthorized and void and will be so declared on *certiorari*. *Hubert v. Anderson et al.*, 35 Id., 578.

The establishment of a highway will not be deemed irregular because during the contest before the board of supervisors, one of the supervisors refused to be sworn as a witness unless the board required it, when the proposed evidence was merely cumulative, and a correct decision in no manner alone depended thereon. *Brown v. Ellis*, 26 Id., 85.

Nor will an order establishing a road on condition that payment of expenses be made by the applicants, be held defective because no time was fixed by the board for such payment. *Id.*

While a person through whose land a public highway is located is entitled to compensation under the constitutional clause guaranteeing compensation where private property is taken for public use, yet he is entitled to it only in the manner pointed out and provided by law, and if he fails to apply therefor or within the time prescribed by the statute, or applying his claim is rejected, and he takes no step by appeal or otherwise to reverse such order of disallowance, he cannot afterward resist the right of the public to open the road, upon the ground that the compensation guaranteed by the constitution has not been made to him. *Dunlap v. Pulley*, 28 Id., 469.

SEC. 947. [Unconditional order.]—In the latter case, a day shall be fixed for the performance of the condition, which must be before the next session of the board, and if the same is not performed by the day thus fixed, the board shall, at such session, make some final and unconditional order in the premises.

SEC. 948. [Order entered of record.]—Any order made or action taken in the establishment of a highway, shall be entered in the highway record, distinguishing between those made or taken by the auditor, and those by the board of supervisors.

SEC. 949. (As amended by ch. 19, 15th g. a.) [Plat and field notes recorded.]—After the highway has been finally established, the plat and field notes must be recorded by the auditor [and he shall certify the same to the township clerk, and the township clerk shall certify to and direct,] the supervisor of highways to have the same opened and worked, subject to the provisions of the next section.

When the board of supervisors establish a highway, it is the duty of the county auditor to notify the township clerk, whose duty it is to notify the highway supervisor to have the same opened and worked. *Gallaher v. Head et al.*, 72 Iowa, 174.

SEC. 950. [Fences.]—A reasonable time must be allowed to enable the owners of land to erect the necessary fences adjoining the new highway; and when crops have been planted or sowed before the highway is finally established, the opening thereof shall be delayed until the crop is harvested.

Where an order was made that a highway be established when all legal claims for damages

were paid, a person over whose land the road was located was held not liable to prosecution for obstructing the highway by permitting his fences to remain as they were before such order, until he had notice to remove his fence, or that the highway was fully established in compliance with the order. *The State v. Ratcliff*, 32 Iowa, 189.

SEC. 951. [**Minors: insane persons.**]-The rights and interests of minors and insane persons, in relation to the establishment, vacation, and alteration of highways, and all matters connected therewith, are under the control of their guardians.

SEC. 952. [**Streets in villages.**]-All public streets of towns or villages not incorporated, are a part of the highway; and all supervisors of highways, or persons having charge of the same, in the respective districts of such towns or villages, shall work the same as provided by law.

SEC. 953. [**Cities or incorporated towns.**]-Such portions of all highways as lie within the limits of any city or incorporated town, shall conform to the direction and grade, and be subject to all regulations of other streets in such town or city.

SEC. 954. [**Lands of state institutions.**]-Highways or streets shall not be established or opened across the lands reserved by the state for its various institutions lying adjacent thereto, without the express consent of the general assembly.

IN TWO OR MORE COUNTIES.

SEC. 955. [**Supervisors to act in concert.**]-The establishment, vacation or alteration of a highway, either along or across a county line, may be effected by the concurrent action of the respective boards of supervisors in the mode above prescribed; except that the auditor of neither county can make the final order in such case. The commissioners in such cases must act in concert, and the highway will not be deemed established, vacated or altered in either county until it is so in both.

SEC. 956. [**Distinctions abolished: concurrent action required.**]-Hereafter there shall be no distinction between highways heretofore known as state roads and county roads; both are alike subject to the provisions of this chapter. Highways established by the concurrent action of the board of supervisors of two or more counties, can only be discontinued by the concurrent action of the board of supervisors of the several counties in which the same may be situated, but such highways shall be treated in all other respects as provided in this title.

CONSENT HIGHWAYS.

SEC. 957. [**How established**]-Highways may be established without the appointment of a commissioner, provided the written consent of all the owners of the land to be used for that purpose be first filed in the auditor's office; and if it is shown to the satisfaction of the board of supervisors, that the proposed highway is of sufficient public importance to be opened and worked by the public, they shall make an order establishing the same, from which time only shall it be regarded as a highway.

Highways may be established in this state by a dedication and prescription, and such highways are not rendered illegal by sections 957 and 967 of the code. *Baldwin v. Herbst*, 54 Iowa, 168.

SEC. 958. [**When survey necessary.**]-If a survey for the establishment of the highway named in the preceeding section is necessary, the board of supervisors, before ordering such survey, may require the parties asking for the establishment of such highway to pay, or secure the payment of, the expenses of such survey.

APPEALS.

SEC. 959. [From what taken: how perfected.]—Any applicant for damages claimed to be caused by the establishment of any highway, may appeal from the final decision of the board of supervisors to the circuit court of the county in which the land lies; but notice of such appeal must be served on the county auditor within twenty days after the decision is made. If the highway has been established on condition that the petitioners therefor pay the damages, such notice shall be served on the four persons first named in the petition for the highway, if there are that many who reside in the county.

The owner of the land affected by a highway may appeal from the assessment of the damages, although the order establishing the road is upon the condition that the damages shall be paid by the petitioners for the highway. *McNichols v. Wilson et al.*, 42 Iowa, 385.

The claimant for damages for taking his land for a public highway may appeal, and have the question as to the amount of damages he is entitled to tried in court by a jury. And it is not necessary to the exercise of this right that he should have made a motion before the board of supervisors to set aside the report of the appraiser, or formerly claimed an appeal. *Sigafoos v. Talbot et al.*, 25 Id., 214; to the same effect is *Prosser v. Wapello County*, 18 Id., 327; *Deaton v. Polk County*, 9 Id., 594.

The opinions of witnesses as to the amount of damages sustained by a party are not admissible. No extension of the rule, allowing witnesses properly qualified to give opinions as to the value of property is allowable. *Id.*

Where a claimant of damages upon the establishment of a highway was awarded \$50 by the appraisers, which the board of supervisors refused to allow, on the ground that the claimant was not the owner of the premises affected, from which order he appealed, it was held that the appeal was in effect from the final decision of the board refusing to allow plaintiff any damages, and that the court erred in dismissing the appeal. *Vancleave v. Clark et al.*, 37 Id., 184.

An appeal is the proper remedy in the case of damages for the establishment of a highway, and not *certiorari*. *Spray & Barnes v. Thompson et al.*, 9 Id., 40; *Deaton v. Polk County*, 9 Id., 594.

Where a claimant for damages appeals from an order establishing a highway, in which his claims for damages were disallowed, and no damages paid him from the county treasury, the notice of appeal should be served on the county auditor, and the county should be regarded as defendant, since it may, in further proceedings, become liable for damages and costs; and in such case the petitioners ought not to be served with notice of the appeal. *Raymond v. Clay County*, 68 Id., 130.

SEC. 960. An appeal may also be taken by the petitioner for the highway as to amount of damages, if the establishment of the highway has been made conditional upon his paying the damages, by his serving notice of such appeal on the county auditor and applicant for damages within twenty days after the decision of the board of supervisors, and filing a bond in the office of such auditor, with sureties to be approved by him, conditioned for the payment of all costs occasioned by such appeal, unless the appellant fails to recover a more favorable judgment in the circuit court than was allowed him by such board.

Where damages are claimed by a person through whose land a road is established by the board of supervisors, such person may appeal and have the question as to the amount of damages he is entitled to tried by a jury. And it is not necessary to the exercise of this right that he should have made a motion before the board of supervisors to set aside the report of the appraisers, or formally claimed an appeal. *Sigafoos v. Talbot et al.*, 25 Iowa, 214.

The voluntary appearance of the appellee, who has not been served with the notice of appeal, for the purpose of moving to dismiss the appeal, does not constitute a waiver of the requirement of the statute. *Id.*

SEC. 961. [Transcript filed.]—In the cases contemplated in the two preceding sections, the auditor shall, within ten days after the notices aforesaid are served and filed in his office, make out and file in the office of the clerk of said court, a transcript of the papers on file in his office and proceedings of the board in relation to such damages. The claimant for damages shall be plaintiff, and the petitioner for the highway defendant, except the damages have been ordered paid out of the county treasury, in which case the county shall be defendant.

SEC. 962. [**Proceedings in circuit court.**]-The amount of damages the claimant is entitled to shall be ascertained by said circuit court in the same manner as in actions by ordinary proceedings, and the amount so ascertained shall be entered of record, but no judgment shall be rendered therefor. The amount thus ascertained shall be certified by the clerk to the board of supervisors, who shall, thereafter, proceed as if such amount had been by them allowed the claimant as damages.

SEC. 963. [**Judgment for costs.**]-If the appeal has been taken by the claimant, the petitioner for the highway, or the county, must pay the costs occasioned by the appeal; but the county shall pay only when the damages have been ordered to be paid out of the county treasury. If the petitioner for the highway appeals, he must pay the costs, unless the claimant recovers a less amount than was allowed him by the board, in which case the costs shall be paid by the claimant. Judgment shall be rendered in accordance with the foregoing provisions.

Where the owner of land appeals from the award of damages by the appraisers, he is entitled to a judgment for costs, notwithstanding the amount awarded him on the appeal was the same as that given him by the appraisers. *Hanrahan v. Fox et al.*, 47 Iowa, 102.

A claimant for damages for the establishment of a highway upon his land, who appeals from the award made by the board of supervisors, must pay the clerk's fee for docketing the appeal, although under this section the costs of the appeal must in the end be paid by the petitioner for the road. *Scott v. Lasell et al.*, 71 Id., 180.

LOST FIELD NOTES.

SEC. 964. [**Resurvey ordered.**]-When by reason of the loss or destruction of the field notes of the original survey, or in cases of defective surveys or record, or in cases of such numerous alterations of any highway since the original survey, that its location cannot be accurately defined by the papers on file in the proper office, the board of supervisors of the proper county may, if they deem it necessary, cause such highway to be resurveyed, platted, and recorded as hereinafter provided.

Where a road was duly surveyed in 1852, and all the necessary and proper steps were taken for its establishment, but the clerk failed to file the field notes and plat, and no entry can be found declaring the establishment of the road, the board of supervisors has power, under this section, to order a new survey. But if there never had been any proceedings, there would be nothing upon which to base such an application or action. *Blake v. Bailey*, 20 Iowa, 124; see, also, *McCullister v. Shuey*, 24 Id., 363, 368.

This section does not authorize the board of supervisors to cause a highway to be resurveyed, where the line of road, as originally surveyed and established, can be traced on the ground by the recorded field notes thereof. *Blair v. Boesch et al.*, 59 Id., 554.

The resurvey of a highway, ordered under the provisions of section 964 of the code, will not constitute the establishment of one where none had been previously established. *Carey v. Weitzgenant*, 52 Id., 660.

As to when a resurvey of a road is proper, where the papers have been lost, see *Ackerson et al. v. Van Vleck et al.*, 72 Id., 57.

SEC. 965. [**Plat and field notes filed: notice given.**]-A copy of the field notes, together with a plat of any highway surveyed under the provisions of the preceding section, shall be filed in the office of the county auditor, and, thereupon, he shall give public notice by publication in some newspaper published within the county, or, if no paper is published in his county, by posting such notice in five of the most public places in the vicinity of such survey, that such survey has been made, and that at some term of the board of supervisors, not less than twenty days from the publication, they will, unless good cause be shown against so doing, approve of such survey and plat and order them to be recorded as in cases of the original establishment of a public highway,

SEC. 966. [**Power of supervisors: record evidence.**]-In case objection shall be made by any person claiming to be injured by the survey made, the board of supervisors shall have full power to hear and determine upon the matter, and may, if deemed advisable, order a change to be made in the survey. Upon the final

determination of the board, or in case no objection be made at the term named in the notice of the survey, they shall approve of the same and cause the field notes and plat of the highway to be recorded as in case of the establishment or alteration of highways, and thereafter such records shall be received by all courts as conclusive proof of the establishment and existence of such highway, according to such survey and plat.

SEC. 967. [**Highway plat book made.**—If the same has not been heretofore done in any other manner, the county auditor shall, within six months after this code takes effect, cause every highway in his county, the legal existence of which is shown by the records and files of his office, to be platted in a book to be obtained and kept for that purpose, and known as the "highway plat book." Each township shall be platted separately, on a scale of not less than four inches to the mile, and such auditor shall have all changes in or additions to the highways legally established, immediately entered upon said plat book, with appropriate references to the files in which the papers relating to the same may be found.

See *Baldwin v. Herbst*, 54 Iowa, 168, cited in note to section 957, *ante*.

SEC. 968. [**Copy furnished township clerks.**—Within the time aforesaid, the auditor shall furnish to the township clerks a certified copy of said plat book, so far as the same relates to their respective townships, which shall be carefully preserved in the office of said clerks. The auditor shall notify said clerks of all changes made in the plat book relative to the highways, so far as the same relate to their townships respectively; on receipt of which said clerks shall immediately make corresponding changes on the maps in their respective offices.

(CHAPTER 111, LAWS OF 1876.)

IN RELATION TO CONSTRUCTION OF CATTLE-WAYS.

An Act in relation to the construction of cattle-ways across the public highway.
(Additional to code, chapter 1, title VII: "Of highways.")

SECTION 1. [**Board of supervisors may grant permission to construct across highway: proviso.**—*Be it enacted by the general assembly of the state of Iowa:* Upon application by any person to the board of supervisors of any county for permission to construct a cattle-way across, over or under any public highway, the board may grant the same; *provided*, said cattle-way shall not interfere with the travel upon such highway; but the person who applies for such cattle-way shall construct the same at his own expense, and be responsible for all damages that may arise from its construction, or from the same not being kept in good condition, and that the grade of the highway over the cattle-way shall not exceed one foot in ten.

SEC. 2. [**If owner of land fails to make repairs: duty of road supervisor.**—If the person on whose land such cattle-way is constructed fails to keep the same in good repair, then it shall be the duty of the road supervisor to make all repairs necessary and charge the same to the owner of the land upon which such cattle-way is constructed, and upon his refusal or failure to pay, the supervisor shall recover the same in an action brought in his own name in any court having competent jurisdiction; which money when collected, shall be expended for improving or repairing the public highway, in the road district where such cattle-way is constructed. *Provided*, That no person shall construct any cattle-way so as to obstruct the freedom of the public in watering at any running stream.

Approved March 15, 1876.

SEC. 3. (Any person or persons desiring to build a cattle-way across a public highway, under a township bridge, may apply to the board of trustees of the township wherein such bridge is located at the regular April meeting of such board. The said board of trustees may grant such right upon such application, and prescribe such conditions in regard to the maintenance of said bridge and cattle-way as they may deem just and proper.)

Approved March 24, 1888.

(The above section 3 was added to chapter 111 by chapter 92, laws of 1888.)

CHAPTER 2.

OF WORKING HIGHWAYS.

SECTION 969. [Power and duties of trustees.]—The township trustees of each township shall meet on the first Monday in April, or as soon thereafter as the assessment book is received by the township clerk, and on the first Monday in October in each year. At the April meeting said trustees shall determine:

1. Upon the amount of property tax to be levied for highways, bridges, guide-boards, plows, scrapers, tools and machinery adapted to the construction and repair of highways, and for the payment of any indebtedness previously incurred for highway purposes, and levy the same, which shall not be less than one nor more than five mills on the dollar on the amount of the township assessment for that year;

2. Whether any portion of said tax shall be paid in labor, and, if so, what portion may be so paid;

3. Upon the amount that will be allowed for a day's labor done by a man, and by a man and team, on the highway;

4. At the October meeting, said trustees shall divide their respective townships into such number of highway districts as they may deem necessary for the public good, and, at said meeting, they shall settle with the township clerk and supervisors of highways.

The power of the township trustees to divide their townships into road districts extends only to so much of the townships as is not embraced within a city, and their power to levy a tax is co-extensive with the same territory. *Marks v. The County of Woodbury*, 47 Iowa, 452.

Mere irregularities in the levy of a road tax by the township trustees do not affect the validity of the tax or defeat its collection. *The Iowa R. Land Co. v. Sac County*, 39 Id., 124; *The Same v. Carroll County*, Id., 151; *Cedar Rapids & Missouri R. R. Co. v. Carroll County*, 41 Id., 153; *The S. C. & St. P. R. Co. v. The County of Osceola et al.*, 45 Id., 168.

Taxes levied by a township for road purposes are, so far as the county is concerned, special in their character, and when they have been collected by the county treasurer and by him paid to the township clerk, they cannot be recovered back from the county, even though they have been illegally collected. *Stone v. The County of Woodbury*, 51 Id., 522.

Where the township trustees had set apart as a general township fund one-half of the taxes levied, which fund it was the duty of the road supervisor to collect and pay over to the township clerk, but which he expended for bridge materials, held a misappropriation of the funds for which he was liable on his official bond. *Wells, Clerk, etc., v. Stomback et al.*, 59 Iowa, 376.

This section confers on the township trustees the power to re-district their townships for highway purposes, and when by the exercise of such power a road supervisor, elected for a certain district, is made a resident of another district, he ceases to be a supervisor under sec. 781, par. 5 of code. *Mauck v. Luck*, 70 Iowa, 266.

SEC. 970. [General township fund: clerk to give bond: custody of implements.]—The trustees shall set apart such portion of the tax specified in the preceding section of this chapter as they may deem necessary for the purpose of purchasing the tools and machinery and paying for the guide-boards mentioned in said section, and the same shall constitute a general township fund; and

such trustees shall require the township clerk to give bond in such sum as they deem proper, conditioned as the bonds of county officers, which bond, and the sureties thereon, shall be approved by said trustees. Said clerk shall take charge of and properly preserve and keep in repair such tools, implements, and machinery as may be purchased with said general township fund, and shall have authority to determine at what time the supervisors of the several districts may have the custody and use of the same or any part thereof, and shall be responsible for the safe keeping of the same, when not in the custody of some one of the supervisors for use in working the highways in his district, and shall receive such compensation as the trustees shall provide to be paid out of such fund.

SEC. 971. [Control of fund.]—The trustees shall order and direct the expenditure of the general township fund.

The township trustees have not control over the road fund in the hands of the township clerk, except that part of it which may be set apart for general township purposes; the balance is to be expended in his discretion by the road supervisor, and he has a right to demand and receive it from the township clerk. *Henderson v. Simpson*, 45 Iowa, 519.

TOWNSHIP CLERK.

SEC. 972. [Furnish supervisor with plat.]—The township clerk shall furnish each supervisor, to be by him transferred to his successor in office, with a copy of so much of the map or plat furnished such clerk by the auditor as relates to the highways in the district of such supervisor, and, from time to time, to mark thereon the changes in or additions to such highways as the same are certified to him by the auditor.

The map required by this section to be delivered by the township clerk to the road supervisor, confers no additional authority upon him. The map is in no sense to be considered as process or authority for his action. *Mosier v. Vincent*, 34 Iowa, 478.

SEC. 973. [And tax list: duty of county auditor.]—The township clerk shall, within four weeks after the trustees have levied the property tax, make out a tax list for each highway district in his township, which list shall be in tabular form and in alphabetical order, having distinct columns for lands, town lots, and personal property, and carry out in a column the amount of the tax on each piece of land and town lot, and on the amount of personal property belonging to each individual; and he shall carry out the amount of tax, to be paid in money, due from each individual in a column by itself; which list shall contain the names of all persons required to perform two days' labor upon the highway as poll tax; and to enable the township clerk to make out such tax list the assessor shall furnish the township clerk of each township, on or before the first day of April of each year, a correct copy of the assessment list of said township for that year, which list shall be the basis of such tax list. The county auditor shall furnish the several township clerks of his county with printed blanks necessary to carry into effect the provisions of this chapter,

SEC. 974. [List: what to contain: authority to collect taxes.]—The township clerk shall make an entry upon such tax list showing what it is for, what highway district, and for what year, and shall attach to the list his warrant under his hand, in general terms, requiring the supervisor of such district to collect the taxes therein charged as herein provided; and no informality in the above requirements shall render any proceedings for the collection of such taxes illegal. The clerk is hereby required to cause such lists to be delivered to the proper supervisors of his township within thirty days after the levy, and take receipts therefor; and such list shall be full and sufficient authority for the supervisor to collect all taxes therein charged against resident property-holders in his district.

SEC. 975. [When taxes have not been paid.]—The township clerk shall, on or before the second Monday in October in each year, make out a certified list

of all land, town lots, and personal property on which the highway tax has not been paid, and the amount of tax charged on each parcel of land, town lot, or personal property, designating the district in which the same is situated, and transmit the same to the auditor, who shall enter the amount of tax to each piece of land or town lot and person taxed for personal property in the column ruled for that purpose, the same as other taxes, and deliver the same to the county treasurer, charging him with the same, which shall be collected by such treasurer, in the same manner that county taxes are collected; and in case the township clerk shall fail or neglect to make such return, he shall forfeit and pay to the use of the township for highway purposes, a sum equal to the amount of tax on said land, which may be collected by suit on his official bond before any court having competent jurisdiction.

A court of equity will not relieve the owner of property from the payment of road taxes, on account of irregularities in the manner of their return to the proper officer. *The Cedar Rapids & R. R'y Co. v. Carroll County*, 41 Iowa., 153; *The Ia. R. R Land Co. v. Sac County*, Id., 152; *The S. C. & St. P. R'y Co. v. The County of Osceola*, 45 Id., 168.

SEC. 976. (As amended by ch. 45, 22d g. a.) **The county treasurer shall, on the last Monday in [April] and [October] of each year, pay to the township clerk all the highway taxes belonging to his township which are at such times in his hands, taking the duplicate receipts of such clerk therefor, one of which shall be delivered by such treasurer, on or before the first Monday in [May] and [November] in each year, to the trustees.**

(CHAPTER 36, LAWS OF 1880.)

An Act in relation to highway taxes.

SECTION 1. [Duty of county auditor.]—*Be it enacted by the general assembly of the state of Iowa:* That it shall be the duty of the auditor to provide a column which shall show the road district to which the highway taxes belong, as transmitted by the township clerks, according to section 975 of the code of 1873.

SEC. 2. [Duty of county treasurer.]—That it shall be the duty of the county treasurer, when he pays to township clerks highway taxes, according to section 976, to furnish, at each time and to each clerk, a statement showing the road district or districts to which it belongs.

Approved March 12, 1880.

SUPERVISOR—POWER, DUTIES.

SEC. 977. (As amended by ch. 167, 16th g. a.) [Where reside: who serve.]—The supervisor must reside in the district for which he is elected or appointed, and no person shall be required to serve as supervisor who is exempt from performing labor on the highway.

SEC. 978. Each supervisor shall be required to give bond in such sum and with such security as the township clerk may deem requisite, and conditioned that he will faithfully and impartially perform all the duties devolving upon him, and appropriate all moneys that may come into his hands by virtue of his office according to law, [and in case] of a vacancy occurring in any highway district within a township, the township [clerk] shall fill such vacancy by appointment.

SEC. 979. [Notice to: penalty for refusal to serve.]—The township clerk shall notify each supervisor within five days after his election or appointment, and if he shall fail to appear before said township clerk, unless prevented by sickness, within ten days, and give bond and take the oath of office, he shall forfeit and pay the sum of five dollars, and in case of his failing or refusing to pay the

same, his successor in office shall collect the said amount by suit or otherwise, and apply the same to the repairing of highways in his district.

SEC. 980. [**To post notices.**]-The supervisor shall, within ten days after receiving the tax list specified in sections nine hundred and seventy-three and nine hundred and seventy-four, post up in three conspicuous places within his district, written notices of the amount of highway tax assessed to each tax payer in said district.

SEC. 981. [**How tax expended.**]-The supervisor shall cause all tax collected by him to be expended for the purpose specified in section nine hundred and sixty-nine of this code, on or before the first day of October of that year, except the portion set apart for a general township fund as provided in said section, which shall be by the supervisor paid over to the township clerk from time to time as collected, and his receipt taken therefor.

SEC. 982. [**Of each district expended therein.**]-The money tax levied upon the property in each district, except that portion set apart as a general township fund, whether collected by the supervisors or county treasurer, shall be expended for highway purposes in that district, and no part thereof shall be paid out or expended for the benefit of another district.

The destination of these funds is fixed by law, and there is no discretion to be exercised by the township trustees in regard thereto. Per ADAMS, J., in *Henderson v. Simpson*, 45 Iowa, 522.

SEC. 983. [**Who to perform labor.**]-The supervisors shall require all able-bodied male residents of his district between the ages of twenty-one and forty-five, to perform two days' labor upon the highway between the first day of April and September of each year.

SEC. 984. [**Notice of time and place of working: receipts given.**]-The supervisor shall give at least three days notice of the day or days and place designated to work the highways to all persons subject to work thereon, or who are charged with a highway tax within his district, and all persons so notified must meet said supervisor at such time and place with such tools, implements and teams as the supervisor may designate, and shall labor diligently under the direction of the supervisor for eight hours each day; and for such two days' labor performed, the supervisor shall give to the person a certificate, which certificate shall be evidence that such person has performed labor on the public highway, and shall exempt such person from performing labor in payment of highway poll tax in that or any other highway district for the same year. And the supervisor shall give any person who may perform labor in payment of his highway poll tax, if demanded, a receipt showing the amount of money earned by such labor, which shall be evidence of the payment of said tax to the amount specified in the receipt.

SEC. 985. (*As substituted by ch. 21, 16th g. a.*) [**Penalty for failure to attend or work.**]- (Each person liable to perform labor on the public highway as poll tax, who shall fail or neglect to attend, either in person or by satisfactory substitute, at the time and place appointed, with the designated tool, implement, or team, having had three days notice thereof, or, having attended, shall spend his time in idleness, or disobey the supervisor, or fail to furnish said supervisor, within five days thereafter, some satisfactory excuse for not so attending, shall forfeit and pay to said supervisor the sum of three dollars for each day's delinquency; and in case of failure to pay such forfeit within ten days, the supervisor shall recover the same by action in the name of the supervisors, and no property or wages belonging to said person shall be exempt to the defendant on execution. Said judgment to be obtained before any justice of the peace in the proper township, which money when collected shall be expended on public highways.)

SEC. 986. (*As amended by ch. 200, 20th g. a.*) [**Compensation of road supervisor.**]- (The supervisor shall be allowed the sum of two dollars per day for each day's labor, including the time necessarily spent in notifying the hands and making

out his return, which sum shall be paid out of the highway fund, after deducting his two days' work. When there is no money in the hands of the clerk with which to pay the said supervisor, he shall be entitled to receive a certificate for the amount of labor performed, which certificate shall be received in payment of his own highway tax for any succeeding year.)

SEC. 987. [Supervisor to report: what contain.]—The supervisors of the several districts of each township shall report to the township clerk on the first Monday of April and October of each year, which report shall embrace the following items:

1. The names of all persons in his district required to perform labor on the public highway, and the amount performed by each;

2. The names of all persons against whom suits have been brought, as required by section nine hundred and eighty-five, and the amount collected of each;

3. The names of all persons who have paid their property highway tax in labor, and the amount paid by each;

4. The names of all persons who have paid their property tax in money, and the amount paid by each;

5. A correct list of all non-resident lands and town lots on which the highway tax has been paid, and the amount paid by each;

6. A correct list of all non-resident lands and town lots on which the highway tax has not been paid, and the amount of tax on each piece;

7. The amount of all moneys coming into his hands by virtue of his office, and from what sources;

8. The manner in which moneys coming into his hands by virtue of his office have been expended, and the amount, if any, in his possession;

9. The number of days he has been faithfully employed in the discharge of his duty;

10. The condition of the highways in his district, and such other items and suggestions as said supervisor may wish to make, which report shall be signed and sworn to by said supervisor and filed by the township clerk in his office.

SEC. 988. [Amount due for labor certified to auditor.]—If it appears from such report that any person has failed to perform the two days labor required, or any part thereof, and that the supervisor has neglected to collect the amount in money required to be paid in case of such failure, the clerk shall add the amount required to be paid in case of such failure to such person's property tax and certify the same as required in section nine hundred and seventy-five, and the auditor shall enter the same on the proper tax list, and the treasurer shall collect the same as required in said section nine hundred and seventy-five.

SEC. 989. (As amended by ch. 87, 21st g. a.) [May not cut shade trees.]—(The supervisor is not permitted to cut down or injure any tree growing by the wayside which does not obstruct the highway, and which stands in front of any town lot, enclosure, or cultivated field, or any ground reserved for any public use, where such tree is intended to be preserved for shade or ornament, by the proprietor of the land, on or adjacent to which the tree is standing; and it shall not be lawful for the supervisor to enter upon any enclosed or unenclosed lands for the purpose of taking timber therefrom without first receiving permission from the owner or owners of said lands, (nor to destroy or injure the ingress or egress to any property, or to turn the natural drainage of the surface water to the injury of the adjoining owners.)

Where a highway or street in a city or town has been acquired by prescription, the fee remaining in the land owner, he has a right to all things connected therewith, such as trees upon, or mines and quarries under, the land over which the highway passes, subject only to the right of passage by the public, and the incidental right of repairing and keeping it in proper condition. *Overman v. May*, 35 Iowa, 89.

In thus keeping the highway in repair the proper officer may use the stone within its limits in a

reasonable and proper manner for that purpose. But this does not authorize him to quarry stone in the bed of the river spanned by a bridge, constituting part of the highway, to repair other streets. *Id.*

A road supervisor will not be enjoined at the instance of a land owner from removing trees standing in the highway adjacent to, and in front of, such owner's premises, unless such removal is demanded by the wants of the public travel. *Bills v. Belknap*, 36 Id., 583.

SEC. 990. (As amended by ch. 52, 17th g. a.) [**Damages caused by unsafe bridge or highway.**]-When notice in writing, that any bridge or any portion of the public highway is unsafe, the supervisors shall be liable for all damages resulting from the unsafe or impassable condition of the highway or bridge, after allowing a reasonable time for repairing the same. (And if there is in the district any bridge erected or maintained by the county, then, in that event, he shall, on such notice of the unsafe condition of such bridge, as soon as he reasonably can, obstruct passage on such bridge, and use strict diligence in notifying at least one member of the board of supervisors of his county in writing of the unsafe condition of such bridge; and if he fails so to obstruct and notify, he shall be liable for all damages growing out of the unsafe condition of such bridge, occurring between the time he is so notified and such time as he neglects in obstructing such passage; and any person who shall remove such obstruction shall be liable for all damages occurring to any person resulting from such removal. *Provided*, that nothing herein contained shall be construed to relieve the county from liability for the defects of said bridge.)

SEC. 991. [**Extraordinary repairs.**]-For making [such extraordinary repairs, the supervisor may call out any or all the able-bodied men of the district in which they are to be made, but not more than two days at a time without their consent, and persons so called out shall be entitled to receive a certificate from the supervisor, certifying the number of days of labor performed, which certificate shall be received in payment for highway tax for that or any succeeding year at the rate per day established for that year.

It is the duty of counties to construct and maintain in proper condition for public use "county bridges" within their limits, and they are liable for all injuries resulting from their negligent construction, or the failure to keep them in repair. *Chandler v. Fremont Co.*, 42 Id., 58; *Moreland v. Mitchell Co.*, 41 Id., 394.

County bridges are those which require in their construction an expenditure of money beyond the means at the disposal of the road districts, and those which have been constructed by the county. *Id.*

Where it appeared by the evidence that the entire cost of the bridge did not exceed seventy-five dollars, that to repair the defect therein would have cost about five dollars, and that the road district had ample means to construct and repair the bridge; *held* that the county was not liable. *Chandler v. Fremont Co.*, *supra*.

It is the duty of the county in which a bridge is situated to make all repairs requiring an extraordinary expenditure of money; and this duty involves the corresponding liability for damages resulting from a neglect to make the same. *Wilson & Gustin v. Jefferson County*, 13 Iowa, 181.

This liability of the county exists only in respect to defects in bridges of the larger class, "county bridges" proper, which are built under their statutory power to make and repair bridges. The repair of roads and highways devolves upon the several road districts, and it is the supervisor, after notice in writing, and not the county, that is liable for injuries caused by the defective condition of the road or bridge. *Barrett v. Brooks*, 21 Id., 144; *Bell v. Foutch*, Id., 119; *Brown v. Jefferson Co.*, 16 Id., 339; *Soper v. Henry Co.*, 23 Id., 264; *McCullum v. Black Hawk Co.*, 21 Id., 409; *Wilson & Gustin v. Jefferson Co.*, 13 Id., 181.

"County bridges," to which county liability attaches, are such only as require for their erection an extraordinary expenditure of money—such bridges as cannot be constructed with the limited means under the control of the respective road districts of the county, or such as have been constructed by the county. *Chandler v. Fremont County*, 42 Id., 58.

Where an injury results from the negligent construction of a county bridge, or the failure to keep it in repair, the county is liable and cannot escape liability by showing, in a given case, that the injury occurred by reason of an unsound plank which the road supervisor might have replaced. *Huston v. Iowa County*, 43 Id., 456. See also *Krause v. Davis County*, 44 Id., 141, which holds the same doctrine.

SEC. 992. [Penalty.]—If any able bodied man, when duly summoned for any such purpose, fails to appear and labor diligently by himself or substitute, or send satisfactory excuse therefor, or to pay the value of such work in money at any time before suit is brought, he is liable to a fine of ten dollars, to be recovered by suit before any justice of the peace in the name of the supervisor, and for the use of the highway fund of the district.

A man who is not able-bodied does not come within the purview of this section, and is not liable to the penalty prescribed therein for a failure to appear when summoned by the road supervisors to perform labor on the roads. *Martin v. Gadd*, 31 Id., 75.

Nor will the failure of such person to make his condition known to the supervisor, nor the fact that he sent a substitute who was rejected for incompetency, change the rule. *Id.*

SEC. 993. [Obstructions moved.]—The supervisor shall remove obstructions in the highways caused by fences or otherwise, but he must not throw down or remove fences which do not directly obstruct the travel upon the highway, until reasonable notice in writing, not exceeding six months, has been given to the owner of the land enclosed in part by such fence.

The supervisor has no right, under this and kindred sections, to throw down a fence projecting into the highway, though not directly obstructing the travel thereon, without first notifying the owner to remove the same, even where the fence is built after the establishment of the road. *Mosher v. Vincent*, 34 Id., 478.

If a road supervisor fails to remove obstructions in the highway, *mandamus* is the appropriate action for compelling him to perform his duty. *Patterson v. Vail et al.*, 43 Id., 142.

Under section 993, a fence projecting into the highway, which does not obstruct public travel, cannot lawfully be removed by the road supervisor until notice, not exceeding six months in extent, has been given to the owner of the land enclosed thereby. *Blackburn v. Powers*, 40 Id., 631; *Mosher v. Vincent*, 34 Id., 478.

To obstruct a highway it is not necessary that it be rendered impassable, and trees which stand therein in such positions as to interfere with travel should be removed by the road supervisors. *Patterson v. Vail et al.*, 43 Id., 142.

The owner of the fence is entitled to reasonable notice to remove it, and reasonable notice is such as would enable him to take it away without injury to the fence or crops enclosed. *Id.*

What constitutes a reasonable time for the removal of a fence, condemned by the road supervisor as a direct obstruction of public travel, is a question of fact for the determination of the jury. *Mosher v. Vincent*, 39 Id., 607; *Blackburn v. Powers*, 40 Id., 681.

SEC. 994. [Highway to be kept in good condition: boards.]—The supervisors shall keep the highways in as good condition as the funds at his disposal will permit, and shall place guide-boards at cross-roads and at the forks of the highway in his district; said boards to be made out of good timber, the same to be well painted and lettered, and placed upon good substantial hard wood posts, to be set four feet in and to be at least eight feet above ground.

SEC. 995. [Canada thistles.]—The supervisor of highways, when notified in writing that any Canada thistles are growing upon any vacant or non-resident lands or lots within his district, the owner, agent or lessee of which is unknown, shall cause the same to be destroyed and make return in writing to the board of supervisors of his county, with a bill for his expenses or charges therefor, which shall be audited and allowed by said board and paid from the county fund; and the amount so paid shall be entered up and levied against the lands or lots on which said thistles have been destroyed, and collected by the county treasurer the same as other taxes and returned to the county fund.

SEC. 996. [Supervisors settle with trustees.]—The supervisors are required to meet the township trustees at the meeting on the first Monday in October in each year, at which time there shall be a settlement of the accounts of such supervisors connected with the highway fund, for putting up guide-boards and for any other services; and after payment of the supervisors, the trustees shall order such distribution of the fund in the hands of the township clerk as they

may deem expedient for highway purposes, and the clerk shall pay the same out as ordered by the trustees.

The fund to be distributed under this section is such unexpended balance as there may be of the money originally set apart by the trustees as the general township fund; all the other money is to be expended by each supervisor in the road district where collected, and the fact of its coming into the hands of the clerk is a mere incident in its collection. *Henderson v. Simpson*, 45 Id., 522.

The township clerk and not the trustees, is the legal custodian of the funds of a road district, so far as road supervisors are required to account therefor; and the trustees cannot maintain an action upon the bond of the road supervisor because of his failure to account for such funds. *Keller v. Bare et al.*, 62 Id., 468.

SEC. 997. [When no further orders to be issued.]—Should there be no money in the treasury on final settlement of the supervisors with the trustees, said trustees shall order the township clerk to issue orders for the amount due the supervisors. The orders so issued shall be numbered with the number of the district to which they belong, and shall be received the same as money in the payment of highway tax in the district to which they are issued.

The orders issued by direction of the township trustees in settlement with road supervisors, as provided in this section, may be drawn upon the township clerk, and when so drawn are payable out of the general township fund, and an action of *mandamus* may be maintained to enforce their payment. *Tobin v. The Township of Emmetsburg et al.*, 52 Id., 81. [This action should have been entitled against the officers by name, and not against the township, as it is not a corporation.]

The township trustees have no authority to purchase tools and machinery for working highways, upon credit, to be paid for out of levies of future years, and in advance of the levying and setting apart of the tax must precede the purchase. *Wells v. Grubb et al.*, 58 Id., 384.

SEC. 998. [Neglect to perform duty: penalty.]—Any supervisor failing or neglecting to perform the duties required by this chapter, shall forfeit and pay for the use of the highway fund of his district the sum of ten dollars; the township clerk shall, in case of such failure or neglect, commence suit in his name for the collection of the same, before any justice of the peace within the proper township.

SEC. 999. [Hedges may be planted in highway.]—Where any owner or occupant of land adjoining or abutting upon any highway may desire to plant a hedge upon the line of the same, he shall be allowed to build his fence upon such highway; but he shall not build the fence more than five feet within the outer line of said highway, and said fence may be built on both sides of all highways of fifty feet or more in width at the same time. Such owner or occupant shall not be allowed to occupy such highway as aforesaid for more than ten years, and not more than six months before such hedge shall be planted, and at the expiration of such time he shall remove such fence upon the order of the supervisor of the district where such highway is situated.

SEC. 1000. [Persons meeting to turn to right: penalty.]—Persons meeting each other on the public highways shall give one half of the same by turning to the right. All persons failing to observe the provisions of this section shall be liable to pay all damages resulting therefrom, together with a fine, not exceeding five dollars, which fine shall be appropriated to repairing the highways in the district where the violation occurred; but no prosecution shall be instituted except on complaint of the person wronged.

(CHAPTER 55, LAWS OF 1886.)

UNDER-GROUND TILE DRAIN ACROSS PUBLIC HIGHWAY.

An Act to allow under-ground tile drain across public highway, and defining the duties of road supervisors relative to the same, and repeal section 1225, chapter 2, title 10, of the code of Iowa.

SECTION 1. [**Drains across highways.**]*—Be it enacted by the general assembly of the state of Iowa:* When any water course or natural drain crosses any public highway in the state of Iowa, and the adjoining or abutting land owner wishes to cross said highway with an under-ground tile drain for an outlet, or to connect with another under-ground tile drain, they shall notify the road supervisor having supervision over that public highway to be crossed, in writing, specify the depth of the drain and size of tile to be used in crossing said highway, and give the road supervisor twenty days time to construct said under-ground tile drain.

SEC. 2. [**Supervisor shall construct drain.**]*—*When the road supervisor receive said written notice, he shall order said under-ground tile drain constructed across said highway, and pay for the tile and construction of the same out of any money or fund in his command.

SEC. 3. [**In case of failure.**]*—*If the supervisor fails to construct said under-ground tile drain within the twenty days time, then the abutting or adjoining land owner may go upon the highway and construct said under-ground tile drain across said highway, and he shall receive pay for constructing the same, including tile used in crossing said highway, out of any money or fund, belonging to such road district, provided he shall leave the highway in as good condition as it was before the drain was constructed.

SEC. 4. [**Code, section 1225, repealed.**]*—*That section 1225, chapter 2, title 10, of the code of Iowa, is hereby repealed.

Approved March 30, 1886.

(CHAPTER 200, LAWS OF 1884.)

IMPROVEMENT OF HIGHWAYS.

An Act to promote the improvement of highways. (Additional to code, title VII, chapter 2; and superseding section 986.)

SECTION 1. [**One-mill tax authorized in each county.**]*—Be it enacted by the general assembly of the state of Iowa:* That the board of supervisors of each county may at the time of levying taxes for other purposes, levy a tax of not more than one mill on the dollar of the assessed value of the taxable property in their county, which tax shall be collected at the same time and in the same manner as other taxes are collected and shall be known as the county road fund, and shall be paid out only on the order of the board of supervisors for work done on the highways of the county in such places as the board shall determine, and the county treasurer shall receive the same compensation for collecting this tax as he does for collecting corporation taxes; *provided,* that the amount levied by the board of township trustees under section 969 of the code, together with the amount thus levied, shall not be in excess of five (5) mills.

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

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

(SEC. 3. Substitute for section 986, as printed herein.)

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

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

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

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

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

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

SEC. 10. [75 per cent of tax expended.]—The trustees shall cause at least seventy-five per cent of the township highway tax to be properly expended for highway purposes by the fifteenth day of July each year.

SEC. 11. [Funds of districts placed to credit of general township.]—In all cases where the one highway district plan shall be adopted, the highway funds belonging to the several road districts in the township, prior to the change, shall be placed to the credit of the general township highway fund, and all claims for work done or material furnished for road purposes, and unsettled for prior to the change, shall be paid out of such funds.

SEC. 12. [Who to qualify and give bond.]—The trustees shall require the

township clerk, contractor, and superintendent, contemplated in this act, each to qualify, as other township officers, and to execute a bond with approved sureties, for twice the amount of money likely to come into their hands, respectively, by reason of this act.

SEC. 13. [**Compensation of trustees.**]—The trustees shall receive the same compensation per day for time necessarily spent in looking after the highways, as they do for other township business; the county treasurer shall receive the per cent for collecting the highway taxes contemplated in this act, that he does for collecting corporation taxes; and the township clerk shall receive two per cent of all the money coming into his hands by reason of this act, and by him paid out for road purposes.

SEC. 14. [**Nine hours a day's work.**]—Nine hours' faithful service for a man, or man and team, shall be required for a day's work on the road; *provided*, that except on extraordinary occasions no person shall be required to go more than three miles from his place of residence to work on the road; and for the purposes of this act, the residence of a man with a family shall be construed to be where his family reside(s), and for a single man it shall be at the place where he is at work.

SEC. 15. [**Law as applies to contractors.**]—The powers, duties and liabilities imposed on highway supervisors, so far as consistent with this act, shall apply with equal force to contractors, superintendents and assistants contemplated in this act.

SEC. 16. [**When system takes effect.**]—In all cases where the one highway district for the township shall have been adopted, it shall be competent for the township trustees to designate when the same shall take effect as to the working of the roads.

SEC. 17. [**Repealing.**]—Sections four (4) to fifteen (15) inclusive, of this act shall apply and be in force only in such townships as adopt the one highway district plan provided for in this act.

SEC. 18. All acts and parts of acts so far as inconsistent with this act are hereby repealed.

Approved April 14, 1884.

(CHAPTER 88, LAWS OF 1880.)

TO AUTHORIZE USE OF SURPLUS BRIDGE FUND ON HIGHWAYS.

An Act to give county boards of supervisors the right to improve the highways in certain cases.

SECTION 1. [**Counties may improve highways.**]—*Be it enacted by the general assembly of the state of Iowa:* That whenever any county in this state is free from debt, and has a surplus in its bridge fund, after providing for the necessary repairs of bridges in its county, then the board of supervisors of such county may, out of such surplus, make improvements on the highways upon the petition of one-third of the resident freeholders of any township in said county; but in no case shall they be authorized to run the county in debt for such improvements of the highways, and whenever they shall make such improvements they shall let the work by contract to the lowest responsible bidder, after having advertised for proposals in some newspaper printed in the county, for not less than fourteen days previous to the letting of said contract.

Approved March 23, 1880.

(CHAPTER 85, LAWS OF 1886.)

HIGHWAYS MAY BE ESTABLISHED BY BOARDS OF SUPERVISORS ALONG STREAMS.

An Act to give discretionary power to the board of supervisors in their respective counties to change and establish highways along streams where they can avoid building a bridge or bridges across said stream.

SECTION 1. [Boards of supervisors may change highways along streams.]—*Be it enacted by the general assembly of the state of Iowa:* That the board of supervisors shall have the power to change and establish highways along streams where they can avoid building a bridge or bridges over said stream, and said highway shall be placed in good traveling condition by said county board of supervisors; and all cost accruing in the establishment of said road shall be paid out of the county bridge fund.

SEC. 2. [May appoint three persons to assess damages.]—The board of supervisors shall have power, wherever such highway is necessary to be established, at their regular session, to appoint three disinterested persons to assess the damages of the same.

SEC. 3. [Appeal.]—In all cases the party or parties aggrieved by said assessment may appeal to the circuit court, but the party or parties appealing must give sufficient bond for costs, to be approved by the clerk of said court.

Approved April 8, 1886.

CHAPTER 3.

OF FERRIES AND BRIDGES.

BRIDGES.

SECTION 1001. [Public: part highway.]—Bridges erected or maintained by the public, constitute parts of the highway, and must not be less than sixteen feet in width.

The board of supervisors have power at their discretion to establish and change highways, of which bridges erected by the public constitute a part, and when a bridge has fallen down, which they refuse to rebuild, *mandamus* will not lie to compel them to do so. *The State, ex rel. Houck, v. Morris et al.*, 43 Iowa, 192.

When the county will be liable for injuries resulting from defects in bridges, see notes to section 991, *ante*.

A city is liable for personal injuries resulting from the defective condition of a bridge within its corporate limits. *Rusch v. The City of Davenport*, 6 Id., 443.

Where the board of supervisors had in their individual capacity consented to a change in a contract for the construction of a bridge, and after the bridge was completed appointed a committee to examine the same, with power to accept or reject it, *held*, that the appointment of the committee with the powers indicated, and a subsequent qualified acceptance by the board, did not amount to a ratification of the change in the contract. *Mallory v. Montgomery County*, 48 Id., 681.

If the contractor could neither compel the board of supervisors to accept the bridge, nor recover for constructing the same without their acceptance, it follows that when they made their acceptance conditional upon his taking one thousand dollars therefor, the limitation of his recovery to that amount could not be made to depend upon his receiving it in full satisfaction. *Id.*

That the board contracted for the construction of a bridge of less than the width provided by law would not affect the contractor's right of action on the contract. *Id.*

SEC. 1002. [Penalty for fast driving over.]—Any person riding or driving faster than a walk across any bridge maintained at the public charge, shall be sub-

ject to pay the following penalties: When the bridge is twenty-five feet in length, and does not exceed one hundred, the sum of one dollar for each offense; when it is over one hundred, and does not exceed two hundred feet in length, the sum of three dollars for each offense; where it is over two hundred, and does not exceed three hundred feet in length, the sum of five dollars for each offense; and the further additional sum of one dollar for each offense for every hundred feet in length in excess of three hundred, to be recovered by civil action in the name and for the county in which the bridge is situated. If the bridge is situated in more than one county, the action is maintainable in or by either.

TOLL BRIDGES.

SEC. 1003. [**How established.**]—The board of supervisors may grant license for the erection of toll bridges across any water course or other obstruction which justifies the establishment of such bridge, and which calls for an expenditure that cannot be met without serious inconvenience to the revenues of the county. In granting such licenses, preference shall be given to the owner of the land on which the bridge is proposed to be located, if he applies for the privilege, and is, in other respects, a competent person to erect such bridge.

SEC. 1004. [**Supervisors grant license: right of way.**]—When any corporation or individual shall obtain from the board of supervisors license for the construction of a toll bridge across any of the streams of this state, such corporation or individual may take and appropriate so much private property as shall be necessary for a right of way therefor and all approaches thereto, in such width as such corporation or individual may desire, not exceeding sixty feet.

SEC. 1005. [**Damages assessed.**]—If the owner of the property over which such way extends shall refuse to grant the same, and the damages therefor cannot be settled by agreement, all damages which the owner, or any person having an interest in or improvement upon the property to be taken, will sustain by reason of the appropriation of such property, shall be assessed, and the right of way taken on the application of either party under the provisions of chapter three of title ten of this code.

SEC. 1006. [**Where extremities lie in different counties or states.**]—Where the extremities of the bridge lie in different counties, a license must be procured from each of such counties, and if different rates of toll are fixed by the different boards of supervisors, each has power to fix the rates of travel which is going from its own county. A similar principle shall be observed where only one of the extremities of the bridge is within this state.

SEC. 1007. [**Period for which licenses granted.**]—Such licenses may be granted to continue for any period not exceeding fifty years, and the rate of toll may be fixed, in the first instance, in such a manner as to be unalterable within any stipulated period not exceeding ten years; after that time it shall be under the control of the board of supervisors.

SEC. 1008. [**Other bridges or ferries.**]—The board of supervisors is also authorized to stipulate in the license that no other bridge or ferry shall be permitted across the same obstruction within any distance not exceeding two miles of such bridge, and for a period not exceeding ten years; any violation of the terms of such stipulation is a nuisance, and he who causes it is guilty of a misdemeanor.

SEC. 1009. [**Failure of duty.**]—When it is made to appear to the board of supervisors, after ten days notice to the person licensed, that he fails substantially to perform his duties according to law, the board may revoke his license.

SEC. 1010. [**Day or night: rate of toll.**]—All toll bridges must be so regulated as to allow persons to pass at any hour of the night or day, but the board of

supervisors may, in its discretion, in fixing the rates of toll, permit a greater amount to be collected during certain hours of the night time.

FERRIES.

SEC. 1011. [**License: supervisors' power to grant.**]—The board of supervisors has power to grant such ferry licenses as may be needed within its county, for a period not exceeding ten years.

SEC. 1012. [**Rates of ferries fixed by boards.**]—The board may prescribe the rates of ferriage, as well as the hours of the day or night during which the ferry must be attended, both of which may, from time to time, be changed at the discretion of the board.

SEC. 1013. [**Extent of privilege.**]—In granting a ferry license, the board of supervisors has power to make the privilege granted exclusive, for a distance not exceeding one mile in either direction from said ferry, in which case no person shall keep a public ferry within the prescribed distance, unless, after twenty days notice to the person who has obtained such privilege, it is made to appear to the board that the public good requires both ferries, and a new license is issued for the second ferry accordingly. The notice herein required must be served personally on the owner, or on the person in charge of the ferry boat.

SEC. 1014. [**Preference: to whom given.**]—In granting a ferry license, preference must be given to the keeper of a previous ferry at the same point, and if it be a new ferry, preference shall be given to the owner of the land; but if there is no such, or if, after giving the same notice as is required by the last section, he fails to make application for such license, or if, in the opinion of the board, he is an improper person to receive the same, it may be conferred upon any other proper applicant.

The keeper of a ferry has no *right*, under this section, to a renewal of his franchise. The section is simply directory, pointing out him as the one better prepared to serve the public than others, but directing, also, that if, in the opinion of the supervisors, he is an improper person to be intrusted with the franchise, it may be conferred on any other proper applicant. Per BECK, J., in *Lippencott v. Allander*, 23 Iowa, 538. But see *Same v. Same*, 25 Id., 445, where it is held that an appeal will lie from the action of the board of supervisors revoking a ferry license.

A public ferry franchise can be conferred only by the government, and must be founded on grant, license or prescription. Ownership of the soil upon each side of the stream does not confer the right to establish thereon, without grant or license, a public ferry at which tolls are charged. The owner may establish a private ferry for the convenience of himself and family, and at which he may ferry for a compensation fixed by contract expressed or implied, when not forbidden by statute, and when this does not injure or affect any established public ferry. *Prosser v. Wapello County*, 18 Id., 327.

On establishing a ferry, preference should be given in awarding the franchise to the owner of the land on which it is established, if he is a proper person to receive and exercise the same. *Id.*

The granting of a ferry franchise does not authorize the grantee thereof to use the land of another without his consent or without making compensation therefor. *Id.*

And on the application of the riparian owner, the licensee of the ferry will be enjoined from landing his boat on the land of such owner. *Prosser v. Davis*, Id., 367.

A ferry license is not vacated nor the franchise lost by the death of the party to whom it was granted, but passes to his representatives. *Lippencott v. Allander*, 27 Id., 460.

SEC. 1015. [**Opposite shores in different counties.**]—Where the opposite shores of the stream are in different counties, a license from either is sufficient, and the board of supervisors first exercising jurisdiction by granting a license, retains that jurisdiction during the term of such license.

SEC. 1016. [**One shore within the state.**]—Where one side of a river is within this state, the board of supervisors possesses the same power, so far as the shore of this state is concerned, as though the river lay wholly within this state.

SEC. 1017. [**License not to issue until bond is filed.**]—The board of supervisors, upon being satisfied that the requirements of this chapter have been complied with, and that a ferry is needed at such a place, and that the applicant is a

suitable person to keep it, must grant the license, which, however, shall not issue until the applicant files a bond, with sureties to be approved by the board or auditor, in a penalty not less than one hundred dollars, with the condition that he will keep the ferry in proper condition for ferrying, and attend the same at all times fixed by the board for running the same, that he will neither demand nor take any illegal tools, and that he will perform all other duties which are, or may be, enjoined on him by law, which bond shall be filed in the county auditor's office.

SEC. 1018. [**United States express and mail.**—Every ferryman must transport the public expresses of the United States and of this state, and also the United States mail, at any hour of the day or night.

A public ferryman is a common carrier and subject to like duties and responsibilities. *Slimmer v. Merry*, 23 Iowa, 90.

The fact that a ferryman may be liable to a city, whose ferry license he has obtained, for a violation of its ordinances in not keeping his boats in running order, does not bar an action against him by an individual who has sustained damage therefrom. *Id.*

The rule which holds common carriers upon the high seas to a strict liability, applies with all its force, and with equal propriety, to carriers upon the inland waters of our country. *Id.*

While the exclusive power conferred upon a city to grant a ferry license does not authorize it to grant an exclusive license, yet such power is conferred when it is authorized to grant or refuse a license. *B. & H. Co. Ferry Co. v. Davis*, 48 Id., 133.

PROVISIONS APPLICABLE TO BOTH FERRIES AND TOLL BRIDGES.

SEC. 1019. [**License entered of record.**—All licenses for ferries and toll bridges must be entered upon the records of the board of supervisors, and shall contain the rates of toll allowed.

SEC. 1020. [**Rates of toll: where posted.**—The rates of toll must be conspicuously posted up at each extremity of the bridge, or on the boat, door of the ferry house, or some other conspicuous place near the ferry.

SEC. 1021. [**Failure to post: penalty for.**—The failure to have such list posted up as aforesaid justifies any person in refusing the payment of tolls, and where such failure is habitual, the property of the bridge or ferry is liable to pay twenty-five dollars, and the action therefor may be brought in the name of the county against such proprietor, or on the bond of the proprietor of the ferry; the amount recovered in either case to be paid into the county treasury.

SEC. 1022. [**Notice of application to be posted before granting license.**] Before a license can be granted for either a bridge or ferry, notice of the intended application therefor must be posted up in at least three public places on each side of the river, if both are within the state, and in the township and neighborhood in which the proposed bridge or ferry is to be erected or kept, at least twenty days prior to the making such application.

SEC. 1023. [**Penalty for taking illegal toll.**—The taking of illegal toll by the grantees of any of the licenses herein contemplated, subjects the offender to the penalty of twenty-five dollars for every such offense, to be recovered by suit on the bond of such licensee, or against him individually, by the person who paid the illegal toll for his own benefit, or he may bring suit in the name of the county, in which case the proceeds shall go into the county treasury.

SEC. 1024. [**Forfeiture.**—A failure in other respects to comply substantially with the terms fixed by the board, works a forfeiture of any of the licenses herein authorized, and also subjects the party guilty of such failure to damages for all the injury resulting therefrom, for which he is liable on his bond.

SEC. 1025. [**Refusal to pay tolls: penalty.**—Any person who refuses to pay the regular tolls established and posted up in accordance with the provisions of this chapter, or who shall run through or pass around the toll gates with a view of avoiding the payment of just tolls or dues, forfeits the sum of five dollars for every offense, which, together with costs of suit, may be recovered by the

person entitled to such toll by civil action; but nothing herein contained shall prevent a person from fording a stream across which a toll bridge or ferry has been constructed.

SEC. 1026. [**Rules established.**].—The proprietor of any bridge or ferry authorized by this chapter, may establish rules for the regulation of passengers, travelers, teams and freight passing or traveling thereon, and may enforce those rules by penalties, not exceeding five dollars for any one offense, which penalties may be recovered by civil action in the name of the proprietor aforesaid; but such rules must be published by being conspicuously posted up before they can be thus enforced.

SEC. 1027. [**Franchise sold.**].—Any of the franchises contemplated in this chapter are subject to execution, and shall be sold as personal property, and be subject to the same rights and consequences, except that the purchaser may take immediate possession of the property.

SEC. 1028. [**What goes with it.**].—The sale of any such franchise carries with it all the material, implements, rights of way, and works of whatever kind, necessary for, or ordinarily used in, the exercise of such franchise.

SEC. 1029. [**Free ferry established.**].—Nothing in this chapter contained shall be so construed as to prevent any person, city, incorporated town, or village, from establishing a free ferry at any point where a license to keep a ferry has been granted under the provisions of this chapter; *provided*, that where said free ferry is established, said person or company shall pay a reasonable compensation to the persons owning said ferry for all boats, ropes, and other material, if the same be fit for use; and when said free ferry is established at a point at or near where a license has been granted to an individual, such individual shall be exonerated from any further obligation in relation to the ferry. Bond and security shall be given in like manner by the person or company establishing the free ferry as required in this chapter.

SEC. 1030. [**Mill owners.**].—Nothing in this chapter shall be so construed as to prevent owners of mills from crossing themselves or customers free of charge.

RAILWAY AND TOLL BRIDGES.

SEC. 1031. [**Supervisors to control location.**].—Any railway or bridge company that now is, or hereafter may be, incorporated in pursuance of the laws of this state, or of the states of Wisconsin, Illinois, Kansas, Nebraska, or Dakota, is authorized to construct a railway bridge across the Mississippi, Missouri or Big Sioux rivers, connecting with the eastern or western terminus, as the case may be, of any railway abutting on the Iowa bank of either of said rivers, at such place as shall be designated therefor by the board of supervisors of the county wherein such abutting is to be made, and extending toward a point on the opposite bank that may be selected by such company.

SEC. 1032. [**Plan to be approved.**].—No bridge shall be built under the provisions of the preceding section, until the plan thereof has been submitted to and approved by the board of supervisors of the county in which the bridge is to be partly located.

SEC. 1033. [**For teams and passengers: toll for.**].—Any such company may, with the consent of said board of supervisors, construct such bridge with suitable highways and footways for teams and foot passengers, and charge such rates of toll therefor as may be approved by said board.

SEC. 1034. [**Ferry established.**].—Any such company may establish a ferry across said rivers at or near the termini of its road, for the sole purpose of crossing the freight and passengers of such highway, until the bridge is ready for use.

SEC. 1035. [**Navigation.**].—No bridge erected under the provision of this chapter shall be so located or constructed as to unnecessarily impede, injure, or obstruct the navigation of said rivers.

SEC. 1036. [**Bonds and stock issued.**—Any such company may issue its bonds or obligations for an amount not exceeding the cost of such bridge, and of its road in the state, and may secure the payment thereof by a mortgage on the same, and may issue certificates of common and preferred stock; the preferred stock to be issued only on condition that the holders of the common stock give their written consent thereto.

SEC. 1037. [**Resident director: process served on.**—Each company acting under the provisions of this chapter shall elect at least one director, who shall be a citizen of and reside in the state of Iowa, and such company shall be liable to be sued in any court of competent jurisdiction in this state, and service of the original notice on said resident director shall be sufficient notice to the company of the pendency of the action.

(CHAPTER 40, LAWS OF 1878.)

BRIDGES ON COUNTY LINE ROADS.

An Act to provide for the construction and maintenance of county bridges on county line roads, where site of bridge is wholly within one or the other county. Additional to code, chapter 3, title VII; "Ferries and bridges."

SECTION 1. [**On county line road, bridge may be built wholly in one county.**—*Be it enacted by the general assembly of the state of Iowa:* That whenever a county line road intersects a stream of sufficient width to require a county bridge, and the point of intersection does not afford a suitable site for the construction of such bridge, and there is a good site for the erection of a bridge wholly within one or the other of said counties, at a reasonable distance from the county line, the boards of supervisors of the respective counties to be benefited by said bridge may make the necessary appropriations for the construction and maintenance of such bridge, the same as they might do if said bridge was located on county line.

Approved March 15, 1878.

(CHAPTER 147, LAWS OF 1884.)

SIDEWALKS ON HIGHWAYS.

An Act relating to sidewalks on highways. [Additional to code, chapter 7, title 7.]

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

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

Approved April 5, 1884.

(Took effect by publication in newspapers.)

TITLE VIII.

OF THE MILITIA.

CHAPTER 1.

MILITARY CODE.

(Chapter 1 of this title was repealed by chapter 125, laws of 1878, and that chapter was repealed by chapter 74, of the laws of 1880.)

(CHAPTER 74, LAWS OF 1880.)

An Act to provide a military code, and for the organization, government and support of the state militia, and to repeal chapter 15, laws of the seventeenth general assembly.

SECTION 1. [**Honorably discharged soldiers exempt.**]*—Be it enacted by the general assembly of the state of Iowa:* That all able-bodied male citizens of the state, between the ages of eighteen and forty-five years, who are not exempted from military duty according to the laws of the United States, shall constitute the military force of this state: *Provided*, that all persons who have served in the United States service, and have been honorably discharged therefrom, are exempt from duty under the military laws of this state; but nothing herein contained shall be construed to prohibit any person from becoming a member of any military organization, or holding any office in the militia of this state.

SEC. 2. [**Duties of assessors in taking list of militia.**]*—Assessors in each township are required to make and return to the county auditor of their respective counties, at the time of making the annual assessment, a correct list of persons subject to military duty, which list may be revised and corrected by the board of supervisors, and the county auditor shall, in the month of June in each even numbered year, or at such other time as the governor may direct, certify to the adjutant-general a true copy of said list, and in each odd numbered year he shall certify to the number of names on said list.*

SEC. 3. [**Shall be ordered out when a requisition is made by the president.**]*—When a requisition shall be made by the president of the United States for troops, the governor, as commander-in-chief, shall, by his proclamation, order out for active service the militia of the state, or such portion thereof as may be necessary, designating the same by draft, if a sufficient number shall not volunteer, and may organize the same, and commission officers therefor; and when so ordered out for service, the militia shall be subject to like regulations, and receive from the state like compensation and subsistence, as are prescribed by law for the army of the United States.*

SEC. 4. [**In case of insurrection, etc., may be ordered out.**]*—The commander-in-chief shall have power, in case of insurrection, invasion, or breaches of the peace, or imminent danger thereof, to order into the service of the state such*

of its military force as he may deem proper, and under the command of such officers as he shall designate.

SEC. 5. [**Sheriff can call on any commandant: when.**].—In case of any breach of the peace, tumult, riot, or resistance to process of this state, or imminent danger thereof, it shall be lawful for the sheriff of any county to call for aid upon the commandant of any military force within his county, immediately notifying the governor of such action; and it shall be the duty of the commandant upon whom such call is made, to order out in aid of the civil authorities the military force, or any part thereof, under his command.

SEC. 6. [**Senior officer to command unless otherwise ordered.**].—The command of any force called into service under sections 4 and 5 shall devolve upon the senior officer of such force, unless otherwise specially ordered by the commander-in-chief.

SEC. 7. [**Compensation of officers and enlisted men.**].—The military forces of this state, when in the actual service of the state in time of insurrection, invasion, or immediate danger thereof, shall, during their time of service, be paid, by an appropriation specially made therefor, the following sums each for every day actually on duty:

To each general, field and staff officer.....	\$ 4 00
To every other commissioned officer.....	2 50
To every non-commissioned staff officer.....	2 00
To every other enlisted man.....	1 50

SEC. 8. [**Compensation when called out by sheriff.**].—All officers and soldiers, while on duty or assembled therefor pursuant to the order of any sheriff of any county in cases of riot, tumult, breach of peace, or whenever called upon to aid the civil authorities, shall receive the same compensation as provided for in section seven, and such compensation shall be audited, allowed and paid by the supervisors of the county where such service is rendered, and shall be a portion of the county charges of said county, to be levied and raised as other county charges are levied and raised.

SEC. 9. (*As amended by ch. 65, 20th g. a.*) [**Name: number of regiments limited.**].—The active militia shall be designated “the Iowa national guard,” and shall consist of six (6) regiments of infantry, and shall be recruited by volunteer enlistments.

SEC. 10. [**Entire state compose two brigades.**].—The entire state shall be composed of not more than two brigades, to be commanded by two brigadier-generals. The commander-in-chief shall assign all regiments, battalions and companies to such brigades as he shall think proper. All enlistments therein shall be for five years, and made by signing enlistment papers prescribed by the adjutant-general, and taking the following oath or affirmation, which may be administered by the enlisting officer, to-wit:

[**Oath.**].—“You do solemnly swear (or affirm) that you will bear true allegiance to, and that you will support the constitution of, the United States and the state of Iowa, and that you will serve the state of Iowa faithfully in its military service for the term of five years, unless sooner discharged or you cease to become a citizen thereof; that you will obey the orders of the commander-in-chief and such officers as may be placed over you, and the laws governing the military forces of Iowa—so help you God.”

SEC. 11. [**Staff of commander-in-chief.**].—The staff of commander-in-chief shall consist of an adjutant-general, an inspector-general, a quartermaster-general, a commissary-general, and a surgeon-general, and such other officers as he may think proper to appoint. The adjutant-general shall rank as a major-general. He

shall issue and transmit all orders of the commander-in-chief, with reference to the militia or military organizations of the state, and shall keep a record of all officers commissioned by the governor, and of all general and special orders and regulations, and of all such matters as pertain to the organization of the state militia and the duties of an adjutant-general, and, except in times of war or public danger, he shall perform the duties of the quartermaster-general as required by law, without additional compensation therefor. He shall have charge of the state arsenal and grounds, and shall receive and issue all ordnance stores and camp equipage on order of the commander-in-chief. He may appoint, with the approval of the governor, an ordnance-sergeant, at a salary of not more than \$500 per year, who shall, under the direction of the adjutant-general, take charge of the state arsenal and grounds, and shall aid and assist him in the discharge of his duties. He shall furnish, at the expense of the state, such blanks and forms as shall be approved by the commander-in-chief. He shall also, on or before the first day of October next preceding the regular session of the general assembly, and at such other times as the governor shall require, make out a full and detailed account of all the transactions of his office, with the expense of the same for the preceding two years, and such other matters as shall be required by the governor. He shall reside at the state capital and shall hold his office during the pleasure of the governor, and shall receive for his services \$1,500 per year.

SEC. 12. [Election of generals of brigades.]—The generals of brigades shall be elected by the officers and enlisted men of each brigade respectively, and shall hold their office for five years, or until removed by court-martial or resignation. On recommendation of brigade commanders, the governor shall appoint and commission the brigade staff as follows: Assistant-adjutant-general, with rank of lieutenant-colonel; assistant-inspector-general, with rank of major; surgeon, with rank of major; quartermaster, with rank of captain; commissary, with rank of captain; and two aids-de-camp, with rank of first-lieutenant; judge-advocate, with rank of major.

SEC. 13. (As amended by ch. 65, 20th g. a.) [Regiments, how organized.]—A regiment shall consist of eight companies. The colonel and lieutenant-colonel and major of all regiments shall be elected as hereinafter provided. The regimental staff shall consist of a surgeon, with rank of major; assistant-surgeon, with rank of captain; chaplain, with rank of captain; adjutant, with rank of first lieutenant; quartermaster, with rank of first lieutenant; who shall be appointed and commissioned by the governor, on recommendation of the regimental commander. The colonel of each regiment shall appoint by warrant, countersigned by the adjutant, a sergeant-major, quartermaster-sergeant, commissary-sergeant, hospital steward, color-sergeant, ordnance-sergeant, drum-major, fife-major and one bugler, who shall constitute the non-commissioned staff. All field officers shall hold their offices for five (5) years. The commissions of all staff officers shall expire when the officer nominating them or his successor shall make new nominations to their respective offices, and such nominations shall be confirmed by the commander-in-chief.

SEC. 14. [Organize a band.]—The generals of brigades, and regimental commanders, may cause to be organized and enlisted a band, under the leadership of the principal musician of his command, not to exceed sixteen (16) in number, who shall be subject to the orders of such leader, and shall be under the command of such brigade, or regimental commander, and shall be subject to the same regulations as are prescribed for other enlisted men.

SEC. 15. [Organization of a company.]—A company shall consist of a captain, a first lieutenant, a second lieutenant, five sergeants, four corporals, two musicians and not less than forty nor more than sixty-four privates and non-commissioned officers. Company officers shall be elected by members of the company, and shall hold their offices for five (5) years. All non-commissioned officers of

companies, on recommendation of their captains, shall be appointed by the warrant of the regimental commander, countersigned by the adjutant. All elections of line officers shall be ordered by the regimental commander. All elections of field and general officers shall be ordered by the commander-in-chief. The orders for such election shall be sent to the commanding officer of the company in which said election is ordered, who shall in turn issue his special order for such election, giving at least six days' notice thereof, posting said order in three public places accessible to the members of his command, and where practicable, the same shall be published in one or more newspapers in the county where said company is located. All voting shall be by ballot, and no voting by proxy shall be legal; and a majority of all votes cast shall be necessary to elect. The senior officer present at such elections shall preside. The returns of elections, properly attested, shall be made promptly within five days from the date of election, to the commanding officer of the regiment, who shall promptly forward the result of said election to the brigade commander, who shall report the same to the adjutant-general of the state, by whose approval the commander-in-chief will issue commissions accordingly: *Provided*, that at the organization of a new company the election shall be conducted under such regulations as the adjutant-general shall prescribe.

SEC. 16. [**By-laws.**]-Every company and regiment may make by-laws for its own government not in conflict with this act or general orders or regulations, which shall be binding upon the members.

SEC. 17. [**Term of service and when begun.**]-Every officer and soldier of the Iowa national guard shall be held to duty for the full term of five (5) years, unless regularly discharged for good and sufficient cause by the commandant of his regiment, approved by the commander-in-chief: *Provided*, that said term of five (5) years shall in all cases commence from the time such officer or soldier shall have become an active member of any band, company, regiment or brigade organized or commissioned under the laws of this state, and now belonging thereto. All persons serving five (5) years consecutively in the national guard shall, on application, be entitled to an honorable discharge, exempting them from military duty except in time of war or public danger.

SEC. 18. [**Military regulations.**]-The organization, equipment, discipline and military regulations of the Iowa national guard shall strictly conform to the regulations for the government of the army of the United States, in all cases except as herein otherwise provided, and all orders and regulations governing troops, not in conflict with the constitution of this state and the provisions of this act, shall be binding upon all members of the Iowa national guard.

SEC. 19. [**Exemptions on account of military duty.**]-Every officer and soldier of the Iowa national guard shall be exempt from jury duty, from head or poll tax of every description, during the term he shall perform military duty. The uniforms, arms, and equipments of every member of the state guard shall be exempted from all suits, distresses, executions, or sales for debt or payment of taxes. The Iowa national guard shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance at drills, parades, encampments, and the election of officers, and in going to and returning from the same.

SEC. 20. [**Drill by companies.**]-The commandant of each regiment shall order monthly or semi-monthly, day or evening drills, by the companies of his command, and the members thereof shall receive no compensation for their services while attending such drills.

SEC. 21. (*As amended by ch. 65, 20th g. a.*) [**Parade for drill each year.**]-The Iowa national guard may parade for drill not less than three nor more than five days annually, by company, regiment, or brigade, as ordered by the commander-in-

chief. [And for the time spent in such encampment, each soldier and officer shall receive as compensation therefor the sum of \$1.50 per day, to be paid under such provisions as the commander-in chief may direct.] The quartermaster-general shall provide transportation to and from all such parades or encampments. The commissary-general, under the direction of the commander-in-chief, shall provide the subsistence for all forces so encamped, such subsistence to conform as near as practicable to the ration prescribed by the general regulations of the army of the United States, and to be issued in kind.

SEC. 22. [**Field or camp duty.**]-The commanding officer of any encampment may cause those under his command to perform any field or camp duty he shall require, and may put under arrest during such encampment or parade any member of his command who shall disobey a superior officer, or be guilty of disorderly or unmilitary conduct, and any other person who shall trespass on the parade or encampment grounds, or in any way interrupt or molest the orderly discharge of duty by members of his command; and he may prohibit the sale of all spirituous or malt liquors within one mile of such encampment, and enforce such prohibition by force, if necessary; *provided, however, that nothing herein contained shall be construed to interfere with the regular business of any liquor dealer whose place of business shall be situated within said limits.*

SEC. 23. [**Target practice.**]-For the use of the Iowa national guard in target practice, the adjutant-general shall issue to each infantry or cavalry company, on the requisition of the commanding officer thereof, an amount not exceeding one thousand rounds of fixed ammunition in each year, and for the use of the artillery he shall issue in each year not exceeding fifty pounds of powder to each company.

SEC. 24. [**New company or regiment to receive ordnance, when.**]-Upon the organization of any company or regiment of the national guard, on the requisition of its commanding officer and the approval of the governor, the adjutant-general shall issue all necessary ordnance and ordnance stores: *Provided, however, that when any arms or munitions are delivered to any commander, he shall execute and deliver to the adjutant-general a bond, payable to the people of the state of Iowa, in sufficient amount, and with sufficient sureties, to be approved by the governor, conditioned for the proper use of such arms and munitions, and return of the same, when requested by the proper officers, in good order, wear, use, and unavoidable loss and damage excepted. All arms shall be kept at the company or regimental armory.*

SEC. 25. [**Inspection.**]-Such inspection of the Iowa national guard shall be made as the commander-in-chief may from time to time direct.

SEC. 26. [**Making false certificate or return punished.**]-Any officer or soldier of the Iowa national guard knowingly making any false certificate, or false return of state property in his hands, or willfully neglecting or refusing to apply all money drawn from the state treasury for the purpose named in the requisition therefor, shall be guilty of embezzlement and fraud, and shall be punished in the manner as provided for like offenses in the criminal code of this state.

SEC. 27. [**Uniform.**]-The several regiments of the Iowa national guard shall adopt the present dress uniform of the army of the United States.

SEC. 28. [**Uniform of officers.**]-The field, staff and line officers of the Iowa national guard shall provide themselves with the uniform prescribed for officers of the same rank in the United States army, within ninety days from the date of commission.

SEC. 29. [**Penalty for failing to return arms, etc., to armory.**]-Every officer or soldier who shall willfully neglect to return to the armory of the company, or place in charge of the commanding officer of the company to which he belongs, any arms, uniform or equipment, or portion thereof, belonging to the state, within six days after being notified by said commanding officer to make such

return, or to place the same in his charge, shall be fined not more than fifty dollars, or imprisoned not more than thirty days.

SEC. 30. [**Penalty for injuring military property.**—Every person who shall willfully or wantonly injure or destroy any uniform, arm, equipment, or other military property of the state, and refuse to make good such injury or loss; or who shall sell, dispose of, secrete, or remove the same, with intent to sell or dispose thereof, shall be fined not more than two hundred dollars, or imprisoned not more than six months, or both.

SEC. 31. [**Penalty for absence from drill.**—Every soldier absent without leave or sufficient excuse from any parade, drill or encampment, shall be fined two dollars (\$2) for each day of absence; and for any unsoldierly conduct at drill, parade or encampment he may be fined not more than ten dollars (\$10), such fines to be collected by civil suit; and all suits for the collection of fines shall be brought in the name of the state of Iowa, for the use of the company to which the soldier fined belongs; but in no case shall the state pay any costs of such suit. Nothing herein shall be construed to prevent any company or band imposing such fines upon its members as it may think proper in its by-laws, which fines may be enforced in the same manner as hereinbefore provided for the collection of fines for absence from drill, parade or encampment.

SEC. 32. [**Appointment and duty of judge-advocate.**—A judge-advocate, with the rank of major, shall be appointed for each brigade, and hold office during the pleasure of the commander-in-chief, who shall perform the duties of such office in the court-martial held in his district; and no other person shall prosecute or defend in such court; but when he shall be unable to attend, from any cause, or shall be disqualified by interest or relationship, the commander-in-chief may designate the judge-advocate of another brigade to act in his place.

SEC. 33. [**Trial by court-martial.**—Commissioned officers, for neglect of duty, disobedience of orders or unsoldierly or ungentlemanly conduct, may be tried by court-martial, provided that no sentence of any court-martial shall affect the life, liberty or property of any citizen of Iowa, according to the regulations provided in like cases in the army of the United States. The commander-in-chief, by order, shall designate the time and place of holding such courts, and the names of officers composing it, consisting of not less than three nor more than six. The senior officer named shall preside, and shall be of superior rank to the officer on trial, when practicable. Witnesses for the prosecution and defense may be summoned to attend by subpoena signed by the judge-advocate. Any witness, duly summoned, who shall fail to appear and testify may be, by warrant of the president of the court, directed to the sheriff or any constable, arrested and treated as in like cases before civil courts. The fees of all witnesses shall be the same as allowed in civil cases, to be taxed, with the necessary expenses of the judge-advocate and the court, by the president of the court, and paid by the state treasurer, on the auditor's warrant, to the judge-advocate, who shall pay all expenses of the trial, when received by him.

SEC. 34. [**Sentences of courts-martial.**—The sentences of courts-martial shall be approved or disapproved by the commander-in-chief, who may mitigate or remit any punishment awarded by sentence of court-martial, when such sentence shall have been approved by the brigade commander. The record of all the proceedings, and the sentence of a court-martial in every case, with the order approving or disapproving it, shall be deposited in the office of the adjutant-general.

SEC. 35. [**Military commission.**—Every brigade and regimental commander in the Iowa national guard is hereby authorized to appoint a military board or commission, of not less than three nor more than five officers, whose duty it shall be to examine the capacity, qualifications, propriety of conduct and efficiency of any commissioned officer in his command, who may be reported to the board of

commission; and upon the report of said board, if adverse to such officer, and if approved by the commander-in-chief, the commission of such officer shall be vacated: *Provided, always*, that no officer shall be eligible to sit on such board whose rank or promotion would in any way be affected by the proceedings; and two members, at least, shall be of equal or superior rank with the officer examined; and if any officer shall refuse to report himself, when directed, before such board, the commander-in-chief may, upon the report of such refusal by his commander, declare his commission vacated.

SEC. 36. [**Unlawful for other than regularly organized militia to organize.**]-It shall not be lawful for any body of men whatever, other than the regularly organized volunteer militia of this state and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade within the limits of this state without the license of the governor thereof, which license may at any time be revoked: *Provided*, that nothing herein contained shall be so construed as to prevent social or benevolent organizations from wearing swords.

SEC. 37. [**To provide a uniform.**]-Every soldier of the Iowa national guard shall provide and keep himself provided with a uniform, according to the rules and regulations prescribed by law, and subject to such restrictions, limitations and alterations as the commander-in-chief may direct.

SEC. 38. [**Appropriation for uniforms.**]-In lieu of uniforms being furnished in kind by the state, there shall annually be paid to each soldier having complied with section 37, the sum of four dollars, to be paid under such provisions as the commander-in-chief may direct, unless a majority of the members of a company prefer to own their uniforms, in which case there shall be no payment to the members of said company as herein contemplated, but the said uniforms shall be the property of the members of said company, respectively furnishing the same; but in no event shall the state be liable for the payment of any money in lieu of uniforms or for any purpose contemplated by this act, unless such payment can be made without exceeding the annual appropriation provided for by this act.

SEC. 39. [**Uniforms belong to the state: when.**]-In all other cases except those provided for in the preceding section, all uniforms and other military property shall belong to the state and be used for military purposes only; and each soldier, upon receiving a discharge or otherwise leaving the military service of the state, or upon demand of his commanding officer, shall forthwith surrender the said uniform, together with all other articles of military property that may be in his possession, to said commanding officer.

SEC. 40. [**Postage, etc.**]-There shall be allowed annually, for postage, stationery and office incidentals to each brigade headquarters, the sum of \$25; to each regimental headquarters the sum of \$25, and to each company headquarters the sum of \$10.

SEC. 41. [**Armory rent, etc.**]-There shall be allowed annually to each company for armory rent, fuel, lights, and like necessary expenses, the sum of \$50.

SEC. 42. [**Clerical assistance for adjutant-general.**]-Such clerical assistance shall be employed in the adjutant-general's office as shall, in the opinion of the governor, be actually necessary, and any persons so employed shall receive, for the time they may be actually necessarily on duty, such compensation as the governor may prescribe.

SEC. 43. [**Regulations.**]-The commander-in-chief is authorized to make and publish regulations for the government of the Iowa national guard, in accordance with existing laws.

SEC. 44. [**Military offenses punished.**]-Any soldier guilty of a military offense may be put and kept under guard by the commander of a company, regi-

ment or brigade, for a time not extending beyond the term of service for which he is then ordered.

SEC. 45. (*As amended by ch. 65, 20th g. a.*) [**Disbandment of companies.**]—The commander-in-chief shall disband any company of the Iowa national guard when it shall fall below a proper standard of efficiency, and he may order special inspections with a view to disbandment.

SEC. 46. [**Construing the word "soldier."**]—In this chapter the word "soldier" shall include musicians, and all persons in the volunteer or enrolled militia, except commissioned officers, and the word "company" shall include battery.

SEC. 47. [**Medical staff.**]—The medical staff of the Iowa national guard shall have charge of that branch of the service, under the supervision of the surgeon-general.

SEC. 48. [**Surgeon may draw supplies.**]—A surgeon in charge in the field or at a camp of instruction may draw, on requisition, such medical stores and supplies as in his judgment may be needed, and for which he shall account, on forms provided by the quartermaster-general.

SEC. 49. [**Surgeon-general.**]—The surgeon-general may prescribe the necessary forms and blanks for the work of his department, and all subordinate surgeons of the Iowa national guard will obey his orders, and report, as often as he may prescribe, the transactions of their department.

SEC. 50. [**Time of officer and soldier not extended.**]—Nothing in this act shall be construed to extend the time of any officer beyond the time for which he was elected, or that of any soldier beyond the time for which he was enlisted.

SEC. 51. [**\$20,000 appropriated annually.**]—There is hereby appropriated the sum of twenty thousand dollars per annum, or so much thereof as may be necessary, out of the state treasury, not otherwise appropriated, for the purposes named in this act. "And all warrants against said appropriation necessary to carry out the provisions of this act shall be drawn by the auditor of state upon the state treasurer, upon the certificate of the adjutant-general, approved by the governor; and no indebtedness shall be created under the provisions of this act not covered by the appropriation herein made."

SEC. 52. [**Repealing clause.**]—Chapter 125, acts of the seventeenth general assembly, and all other acts or portions of acts in conflict herewith, are hereby repealed.

(Took effect by publication in newspapers March 30, 1880.)

(CHAPTER 65, LAWS OF 1884.)

TO AMEND THE MILITARY CODE.

An Act to amend chapter 74, laws of the eighteenth general assembly.

SECTION 1. [**Reducing number of regiments to six.**]—*Be it enacted by the general assembly of the state of Iowa:* That section 9, chapter 74, laws of the eighteenth general assembly, be amended by striking out the word and figure "nine" and inserting in lieu thereof the word and figure "six."

SEC. 2. [**§ 13, chapter 74, 18th g. a., amended.**]—That section 13 of said chapter of said laws be amended by striking out in the first sentence of said section the words "not less than" and the words "nor more than ten."

SEC. 3. [**§ 45 id. amended.**]—That section 45 of said chapter of said laws be amended, by striking out all of said section after the words "with a view to disbandment."

SEC. 4. [**§ 21 id. amended.**]—That section 21 of said chapter be and is hereby amended by inserting after the words, "as ordered by the commander-in-chief,"

the words "and for the time spent in such encampment each soldier and officer shall receive as compensation therefor the sum of \$1.50 per day, to be paid under such provisions as the commander-in-chief may direct."

SEC. 5. [**\$15,000 additional annual appropriation.**—For the purpose of carrying out the provisions of chapter 74, laws of the eighteenth general assembly, as herein amended, there is hereby made the additional appropriation of fifteen thousand dollars per annum, or so much thereof as may be necessary, out of any money in the state treasury not otherwise appropriated, and all warrants against said appropriation shall be drawn by the auditor of state upon the state treasurer upon the certificate of the adjutant general, approved by the governor.

Took effect by publication in newspapers.

(CHAPTER 66, LAWS OF 1876.)

AIDS-DE-CAMP.

An Act authorizing the governor to appoint aids-de-camp, additional to section 1054, chapter 1, title VIII, of the code.

SECTION 1. [**Governor may appoint.**—*Be it enacted by the general assembly of the state of Iowa:* That the governor is hereby authorized to appoint four aids-de-camp with the rank of lieutenant colonel of cavalry.

Approved March 9, 1876.

(CHAPTER 136, LAWS OF 1880.)

BADGE OF HONOR FOR DISCHARGED SOLDIERS.

An Act to provide for a badge of honor, to be given by the state of Iowa, to every honorably discharged soldier of the state, and to every citizen of the state who served in the navy of the United States during the rebellion.

SECTION 1. [**Commission to devise a design.**—*Be it enacted by the general assembly of the state of Iowa:* That the executive council, the adjutant-general of the state of Iowa, the register of the state land office, be and are hereby appointed a commission to devise a design for, and report on the cost of, a badge of honor, to be given by the state of Iowa to every soldier enlisted in the state of Iowa and honorably discharged from the army; and also to every citizen of this state who served in the navy of the United States, and was honorably discharged therefrom after having served his country therein during the late war of the rebellion.

SEC. 2. That they be required to report therein to the next general assembly of the state of Iowa for action on their report.

Approved, March 25, 1880.

(CHAPTER 178, LAWS OF 1884.)

BURIAL OF SOLDIERS AND SAILORS.

An Act to provide for the burial of honorably discharged soldiers, sailors or marines, who may hereafter die without leaving means sufficient to defray funeral expenses, and to provide head-stones to mark their graves.

SECTION 1. [**Boards of supervisors to designate person to attend to burial, etc.**—*Be it enacted by the general assembly of the state of Iowa:* It shall be the duty of the board of supervisors in each of the counties of this state to designate some suitable person in each township, whose duty it shall be to cause to be

decently interred, the body of any honorably discharged soldier, sailor or marine, who served in the army or navy of the United States during the late war, who may hereafter die without leaving sufficient means to defray funeral expenses. Such burial shall not be made in any cemetery or burial ground used exclusively for the burial of the pauper dead.

[**Proviso: not to exceed \$35 each.**]*—Provided,* The expenses of such burial shall not exceed the sum of thirty-five dollars, and *provided further,* that in case surviving relatives of the deceased shall desire to conduct the funeral, and are unable or unwilling to pay the charges therefor, they shall be permitted so to do, and the expenses shall be paid as herein provided.

SEC. 2. [**Head-stone for grave.**]*—*The grave of any such deceased soldier, sailor or marine, shall be marked by a head-stone containing the name of the deceased and organization to which he belonged or in which he served.

Provided, Such head-stone shall not cost more than the sum of fifteen dollars, and shall be of such design and material as may be approved by the board of supervisors.

SEC. 3. The expenses of such burial and head-stone shall be paid by the county in which such soldier, sailor or marine shall have died. And the board of supervisors of such county is hereby authorized and directed to audit the account and pay the said expenses, in a similar manner as other accounts against such county are audited and paid.

Approved April 7, 1884.

(CHAPTER 163, LAWS OF 1880.)

COMMISSIONER OF IMMIGRATION.

An Act to provide for the appointment of a commissioner of immigration, and to define his duties, and to make an appropriation to pay the expense thereof.

SECTION 1. [**Appointment of.**]*—Be it enacted by the general assembly of the state of Iowa:* That a commissioner of immigration for the state of Iowa shall be appointed by the governor, by and with the advice of the executive council, who shall hold his office for the period of two years from the first day of May, 1880.

SEC. 2. [**Keep an office at Des Moines, etc.**]*—*Said commissioner shall keep an office in the city of Des Moines, and shall give his time and attention to such efforts as may be specially approved by the executive council to induce capital and industry to seek investment and employment in the development and improvement of the agricultural, manufacturing and mining resources of the state.

SEC. 3. [**\$10,000 appropriated.**]*—*There is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, the sum of five thousand dollars a year for two years, to be expended by such commissioner, under the general direction and special approval of the executive council, in showing to the United States the natural advantages and resources of the state of Iowa. Said money to be drawn from time to time upon the recommendation of the governor, which shall include the salary of the commissioner.

SEC. 4. [**File an itemized statement with auditor.**]*—*At the expiration of each three months after his appointment such commissioner shall make and file in the office of the auditor of the state an itemized statement, duly verified by his oath, showing when, to whom, and for what purpose the funds drawn by him have been expended.

SEC. 5. Said commissioner shall receive a salary of twelve hundred dollars per annum, to be paid quarterly.

Approved March 26, 1880.

TITLE IX.

OF CORPORATIONS.

CHAPTER 1.

OF CORPORATIONS FOR PECUNIARY PROFIT.

SECTION 1058. (*As amended by ch. 86, 22d g. a.*) [**Who may incorporate.**]
Any number of persons may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction, ownership, operation and maintenance of canals, railways, bridges, or other works of internal improvement; and the purchase, ownership, operation and maintenance of any railroad sold or transferred under power of sale or foreclosure of any mortgage or deed of trust, but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided.

SEC. 1059. [**Powers.**]
Among the powers of such body corporate are the following:

1. To have perpetual succession;
2. To sue and be sued by its corporate name;
3. To have a common seal, which it may alter at pleasure;
4. To render the interests of the stockholders transferable;
5. To exempt the private property of its members from liability for corporate debts, except as herein otherwise declared;
6. To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy;
7. To establish by-laws, and make all rules and regulations deemed expedient for the management of their affairs in accordance with law.

The possession of the powers granted by sections 1058 and 1059, and the right to exercise all the incidental powers essential to a proper enjoyment of the powers specifically conferred, constitute the franchise of the corporation, which exists in virtue of contract between the state and the corporation, and may not be essentially abridged or impaired by the legislature. *Per DAY, J., in Rodedmacher v. The M. & St. P. R. R. Co., 41 Iowa, 301.*

In a proceeding by a judgment creditor of a corporation to subject property of an individual stockholder to its payment, it is a sufficient defense that, by the articles of incorporation, the stockholders are not individually liable beyond the amount of unpaid stock subscribed by them, and that defendant's subscription has been fully paid. *Spence & Garlick v. Iowa Valley Con. Co., 36 Id., 407.*

A change in the name of a corporation can only be effected by changing the articles of incorporation, and of this change the best evidence is the articles themselves. *The C. D. & M. R. R. Co. v. Keisel, 43 Id., 39.*

The powers of a corporation organized under this chapter, for the purpose of effecting the objects of its creation, are as broad and comprehensive as those of an individual, except where the exercise of the asserted power is expressly prohibited. *Thompson v. Lambert, 44 Id., 239-244, and cases cited in opinion of SEEVERS, CH. J.*

A corporation may make an oral or unwritten contract, the same as an individual. *Baker v. Johnson County, 33 Id., 151; Merrick v. The Burlington & Warren Plank Road Co., 11 Id., 74.*

For the purpose of carrying out the objects of the corporation, its powers are as extensive as those of an individual where they are not expressly limited, and it may borrow money and execute a mortgage on the corporate property. *Thompson v. Lambert, and Weber v. Scott Co. Agr. Society, 44 Id., 239.*

The legislature can in no manner control or interfere with the property of a private corporation. *Id.*

A corporation organized under the general law of this state, and which was authorized by its articles of incorporation to "purchase and hold, sell or exchange, any real estate or other property deemed desirable in the transaction of its business," was held to have power to make a valid and binding contract for the purchase of shares of its own stock. *The Iowa Lumber Co. v. Foster et al.*, 49 Id., 25.

SEC. 1060. (*As substituted by ch. 23, 17th g. a.*) [**Articles to be recorded.**]—[Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, and recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor; the recorder must record such articles as aforesaid, within five days after the same are filed in his office, and certify thereon the time when the same was filed in his office, and the book and page where the record thereof will be found. The said articles and certificate of recorder shall be then recorded in the office of the secretary of state, in a book kept for that purpose.]

The filing of articles of incorporation in the office of the secretary of state is not essential to the validity of a corporation, nor will the failure to file them render the private property of stockholders liable for the debts of the corporation. *First Nat. Bank of Davenport v. Davis*, 43 Id., 424. DAY and ADAMS, JJ., *contra*.

SEC. 1061. (*As amended by ch. 57, 21st g. a.*) [**Highest amount of indebtedness fixed.**]—Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock. *Provided further*, that the provisions of this section shall not apply to the debentures of bonds of any company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unencumbered real estate worth at least twice the amount loaned thereon.

NOTICE PUBLISHED.

SEC. 1062. [**For what time.**]—A notice must also be published, for four weeks in succession, in some newspaper as convenient as practicable to the principal place of business.

SEC. 1063. **Such notice must contain:**

1. The name of the corporation and its principal place of transacting business;
2. The general nature of the business to be transacted;
3. The amount of capital stock authorized, and the times and conditions on which it is to be paid in;
4. The time of the commencement and termination of the corporation;
5. By what officers or persons the affairs of the corporation are to be conducted, and the times at which they will be elected;
6. The highest amount of indebtedness to which the corporation is at any time to subject itself;
7. Whether private property is to be exempt from corporate debts.

SEC. 1064. (*As substituted by ch. 23, 17th g. a.*) [**When it may commence business.**]—[The corporation may commence business as soon as the articles are filed in the office of the recorder of deeds, and their doings shall be valid if the publication in a newspaper is made, and articles recorded in the office of the secretary of state within three months from such filing in the recorder's office.]

SEC. 1065. (*As amended by ch. 88, 22d g. a.*) [**Change of articles.**]—[That any of the provisions of the articles of incorporation may be changed at any annual

meeting of the stockholders or special meeting called for that purpose; but said changes shall not be valid unless recorded and published as the original articles are required to be; and said changes in the articles need only be signed and acknowledged by the officers of said corporation.]

SEC. 1066. [**Dissolution.**]—No corporation can be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles.

SEC. 1067. [**Notice of.**]—The same period of newspaper publication must precede any such premature dissolution of a corporation as is required at its creation.

SEC. 1068. [**Individual property made liable.**]—A failure to comply substantially with the foregoing requisitions in relation to organization and publicity, renders the individual property of the stockholders liable for the corporate debts. But this section shall not be deemed applicable to railway corporations and corporations, and stockholders in railway companies shall be liable only for the amount of stock held by them in said companies.

A failure to comply with the requirements of sections 1161 and 1162 of the revision, was held not to render the private property of the stockholders liable for the debts of the corporation as contemplated in section 1166 of the revision (section 1063 of the code). *McKellar v. Stout*, 14 Iowa, 359.

The Davenport Railway Construction Company, organized for the purpose of furnishing materials for building and equipping railways, is a railway corporation within the meaning of the statute, exempting stockholders from liability beyond the amount of their stock. *First Nat. Bank of Davenport v. Davies*, 43 Id., 424; *Langan & Noble v. The I. & N. Const. Co.*, 49 Id., 317, 324.

The word "and" in section 1068 of the code should read as "or," and stockholders of a corporation are held liable where there is a failure to comply substantially with the requirements of the statute with respect to organization or publicity. *Eisfield v. Kenworth et al.*, 50 Id., 389.

The failure to publish a notice of incorporation is a failure subjecting the stockholders of the corporation to individual liability. *Id.*

Stockholders in a corporation which has failed to comply with the requirements of the law necessary to render their property exempt from the corporate debts are primarily liable for such debts, and may be sued without the property of the organization being first exhausted. *Marshall v. Harris et al.*, 55 Id., 182.

DURATION.

SEC. 1069. [**How renewed.**]—Corporations for the construction of any work of internal improvement, or for the business of life insurance, may be formed to endure fifty years; those formed for other purposes cannot exceed twenty years in duration; but in either case they may be renewed, from time to time, for periods not greater respectively than was at first permissible, if three-fourths of the votes cast at any regular election for that purpose be in favor of such renewal, and if those wishing a renewal will purchase the stock of those opposed to the renewal at its fair current value.

By this section, the duration of a corporation, organized for any other purpose than the construction of works of internal improvement, cannot exceed twenty years. After the lapse of that time from its organization, it must expire by limitation of law, although its articles provide for a longer duration. Per DAY, J., in *Union Agricultural & Stock Association v. Neill*, 31 Iowa, 95.

Whether the provisions of this section limiting the life of corporations for pecuniary profit apply to religious corporations, *quaeritur?* *Byers et al. v. McCartney et al.*, 62 Iowa, 339.

SEC. 1070. [**For agricultural, horticultural, and cemetery purposes.**]—Corporations for agricultural and horticultural purposes, and cemetery associations, may be formed to endure any length of time that may be provided in the articles of incorporation; but the general assembly may, at any session, fix a time when all such corporations shall be dissolved. Such corporations shall not own to exceed nine sections of land, and the improvements and necessary personal property for the proper management thereof; and the articles of incorporation shall provide a mode by which any member may, at any time, withdraw therefrom, and

also the mode of determining the amount to be received by such member upon withdrawal and for the payment thereof to such member, subject only to the rights of the creditors of such corporation.

FRAUD, CONSEQUENCES OF.

SEC. 1071. [Penalty for.]—Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities, shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from such fraud, may also recover damages therefor against those guilty of participating in such fraud.

In an action for damages under this section against an officer or stockholder of a corporation, for failure to comply with the articles of incorporation, it must be averred and shown what particular article defendant has failed to comply with, wherein he failed to comply, and that such failure was with intent to defraud. *White v. Hosford*, 37 Iowa, 566.

So, also, if it is claimed that the defendants intended to deceive the public or individuals in relation to the means and liabilities of the corporation, the particular act or acts done in this respect must be alleged. In either case it must appear that the plaintiff has sustained damages by reason of the fraudulent acts complained of. *Id.*

Fraud must be established to authorize the recovery of damages against members of a corporation under this section of the code; it does not give a right of action for negligence or mismanagement. *Hoffman v. Dickey et al.*, 54 Id., 135.

In order to hold a stockholder of a corporation liable for intentional fraud, sufficient to show an intention to deceive, there must have been some act fraudulently done with that intention. *Miller v. Bradish*, 69 Id., 278.

In an action for damages on account of false representations inducing the purchase of corporate stock, where the defendants are alleged to be officers of the corporation, *held*, that the presumption of innocence which obtains in criminal and penal cases does not obtain in defendant's favor, and that a preponderance of the evidence is all that is required to justify a recovery. *Fayville et al. v. Shehan et al.*, 68 Id., 241.

SEC. 1072. [Diversion of funds deemed a fraud.]—The diversion of the funds of the corporation to other objects than those mentioned in their articles and in the notices published as aforesaid, if any person be thereby injured, and the payment of dividends which leave insufficient funds to meet the liabilities of the corporation, shall be deemed such frauds as will subject those therein concerned to the penalties of the preceding section, and such dividends, or their equivalent, in the hands of individual stock-holders shall be subject to said liabilities.

The funds contemplated in sections 1071 and 1072 must be proved in order to make the stockholders of an impecunious corporation individually liable. Fraud will not be presumed. *Spense & Garlick v. Iowa Valley Construction Co.*, 36 Iowa, 407, 411.

The officers of a corporation are chargeable with fraud if they shall receive in payment for stock property at a valuation known to be in excess of its real value, and thereon shall issue paid-up certificates of stock. *Osgood & Moss v. King*, 42 Id., 478.

Where money borrowed by a corporation is misappropriated by the officers, the lender, in the absence of any participation in the fraud, will not be affected thereby, and such misappropriation constitutes no defense to an action for the recovery of the money loaned, either on behalf of the corporation or a stockholder. *Thompson v. Lambert*, 44 Id., 239.

If the stockholders or any of them shall have been cognizant of such misapplication of the funds borrowed by the corporation, and shall have participated in any advantages resulting therefrom, they will be estopped from afterward setting up such misapplication as a defense in an action by the lender against the corporation to recover his money. *Id.*

It is the duty of the stockholders to take immediate steps, upon learning of the misapplication of corporate funds, to prevent it, and if, with knowledge of the illegal act, they remain silent and permit it to be carried into effect, they are bound thereby. *Id.*

The doctrine of *ultra vires* will be applied to the contracts of private corporations only when such contracts remain wholly executory. *Id.*

The word "funds" as used in this section, includes all the resources of a corporation, and not merely the cash on hand. So that the statute is not violated by the payment of dividends when the cash on hand is not sufficient to meet liabilities, if the entire resources of the corporation are sufficient for that purpose. *Miller v. Bradish*, 69 Id., 278.

The word "liability," as used in this section, means existing indebtedness, the payment of which can be enforced, and does not include the capital stock of the corporation. *Id.*

SEC. 1073. [**Insurance companies.**]-Dividends by insurance companies, made in good faith before their knowledge of the happening of actual losses, are not intended to be prevented or punished by the provisions of the preceding section.

SEC. 1074. [**Forfeiture of.**]-Either such failure, or the practice of fraud in the manner hereinbefore mentioned, shall cause a forfeiture of all the privileges hereby conferred, and the courts may proceed to wind up the business of the corporation by an information in the manner prescribed by law.

SEC. 1075. [**Penalty for keeping false books.**]-The intentional keeping of false books or accounts by any corporation, whereby any one is injured, is a misdemeanor on the part of those concerned therein, and any person shall be presumed to be concerned therein whose duty it was to see that the books and accounts were correctly kept.

BY-LAWS—INDEBTEDNESS—TRANSFER OF SHARES—NON-USER.

SEC. 1076. [**By-laws posted.**]-A copy of the by-laws of the corporation, with the name of all its officers appended thereto, must be posted in the principal places of business, and be subject to public inspection.

SEC. 1077. [**Amount of capital stock and indebtedness posted.**]-A statement of the amount of capital stock subscribed, the amount of capital actually paid in, and the amount of the indebtedness in a general way, must also be kept posted up in a like manner; which statement must be corrected as often as any material change takes place in relation to any part of the subject matter of such statement.

See *McKeller v. Stout*, cited in note to section 1068, *ante*.

A failure to comply with the requirements of sections 1076 and 1077 of the code does not render the private property of the stockholders liable for the debts of the corporation. *Langan & Noble v. The I. & M. Const. Co. et al.*, 49 Id., 317. Nor are they so liable for a failure to comply with the provisions of section 1078, respecting the manner of keeping the books of the corporation. *Id.*

SEC. 1078. [**Transfer of shares: when valid.**]-The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by, and to whom transferred, the numbers or other designation of the shares and the date of the transfer; but such transfer shall not in any way exempt the person making it from any liability of said corporation created prior thereto. The books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same.

This section is intended as a protection to the corporation, and is designed to apply only where the sale and transfer of the stock in some way conflicts with the corporate interest. It has no application to a case of a garnishment of the company in an action against a stockholder by a third party. *Moor v. Walker et al.*, 46 Iowa, 164 (169).

A by-law of a corporation which provides that transfer of stock shall not be valid unless approved by the board of directors, while it may be enforced as a reasonable regulation for the protection of the corporation against the transfer of stock to irresponsible persons, cannot be made available to defeat the rights of third persons. *The F. & M. Bank, etc., v. Wasson*, 48 Id., 336.

The directors of a corporation have no power to issue stock for less than its par value, or with an understanding that the unpaid balance shall not be called for; and to do so is a fraud upon the law, the other stockholders and the creditors of the company, and the transaction will not be sustained, but the persons so securing the stock will be liable for the unpaid balance in an action by a creditor of the corporation, under §§ 1082 and 1084 of the code. And it is not necessary to such liability that the holder of the stock so issued should have subscribed for the same, for his acceptance of the stock, with knowledge of the facts, is sufficient to create the liability. Nor is the rule different where the corporation is insolvent, and its stock of, at most, doubtful value, and

the stock is issued to a creditor in settlement of a demand which it had no other means of paying. Accordingly, in this case, where a railway company was indebted to a construction company in the sum of \$70,000, which it was unable to pay, and, in satisfaction of the debt, it issued to the construction company certificates of stock of the face value of \$350,000, which shares were distributed among the members of the construction company, held that such members were stockholders, the same as if they had subscribed for the stock and paid 20 per cent thereon, and that they were liable, under the statute, to a creditor of the corporation, to the extent of the unpaid 80 per cent of the par value of the stock,—the \$70,000 debt, paid by the stock issued, being only 20 per cent of the par value of the \$350,000 of stock so issued. *Jackson v. Traer et al.*, 64 Id., 469.

A transfer of corporate stock is not valid as against attaching creditors of the assignor without notice, unless the transfer is entered on the books of the company, as provided in this section of the code. *The Fort Madison Lumber Co. v. Batavian Bank et al.*, 71 Id., 270.

SEC. 1079. [**Forfeiture of franchise by non-user.**]—Any corporation organized in accordance with the provisions of this chapter shall cease to exist by the non-user of its franchises for two years at any one time, but such body shall not forfeit its franchises by reason of its omission to elect officers, or to hold meetings at any time prescribed by the articles of incorporation or by-laws, provided such act be done within two years of the time appointed therefor.

SEC. 1080. [**Expiration of.**]—Corporations, whose charters expire by their own limitation, or the voluntary act of the stockholders, may, nevertheless, continue to act for the purpose of winding up their concerns.

The sale of a railroad by a corporation might amount to a voluntary dissolution, yet it would survive to the extent of its rights, and obligations growing out of the voting of a tax in aid of the road could be enforced. *The Muscatine Western R. R. Co. v. Horton*, 38 Iowa, 33.

A dissolution by the voluntary act of its stockholders does not take away the power of a corporation to act in closing up its affairs, nor the right of a creditor to relief in equity, at least from the inevitable consequences of such dissolution. *Muscatine Turn Verein v. Funk et al.*, 18 Id., 469.

SEC. 1081. [**May create sinking fund.**]—For the purpose of repairs, rebuilding, or enlarging, or to meet contingencies, or for the purpose of a sinking fund, the corporation may establish a fund which they may loan, and in relation to which they may take the proper securities.

PRIVATE PROPERTY LIABLE FOR CORPORATION DEBTS.

SEC. 1082. [**Individual liability.**]—Neither anything in this chapter contained, nor any provisions in the articles of incorporation, shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them for the purpose of defrauding creditors, and execution against the company may, to that extent, be levied upon the private property of any such individual.

Under this section stockholders are individually liable for the corporate debts to the amount of their unpaid installments on stock owned by them, and an execution against the corporation to the extent of such unpaid installments may be levied upon their private property. Per BALDWIN, CH. J., in *Bailey v. Dubuque W. R. R. Co.*, 13 Iowa, 98.

Where the subscriber to the capital stock of a corporation is sought to be held liable on a judgment against the corporation to the amount of his unpaid subscription under this section, he cannot set off against the judgment what the corporation may owe him for services, rent of property, etc. *Singer, Nimick & Co. v. Given*, 61 Id., 94.

The right of action which sections 1082, 1083, 1084 of the code give to the creditor of a corporation against a stockholder, to the extent of the unpaid balance due upon stock, accrues whenever it is clear that the corporation has no property from which the claim may be collected, and not from the time judgment is recovered against the corporation. Such judgment is not necessary for the beginning of an action against the stockholder, though it may be necessary as evidence in such action to determine the measure of recovery. REED and ADAMS, JJ., dissenting. *First Nat. Bank v. Greene*, 64 Id., 445. See also *Jackson v. Traer et al.*, Id., 470.

The directors of a corporation have no power to issue stock for less than its par value, or with an understanding that the unpaid balance shall not be called for; and to do so is a fraud upon the law, the other stockholders, and the creditors of the corporation, and the transactions will not be sustained, but the persons so securing the stock will be liable for the unpaid balance in an action

by a creditor of the corporation under sections 1082 and 1084 of the code. *Jackson v. Trear et al.*, 64 Id., 469.

Where a corporation was organized for the manufacture of a patented article, and the amount of the capital stock \$10,000, all of which was taken by defendants in exchange for their interest in the patent, which proved to be worthless, *held* that defendants were personally liable to the creditors of the corporation to the extent of the stock so taken by them severally, under sections 1082 and 1084 of the code. *Christholm Bros. v. Forney et al*; *Canterbury v. Same*; *Morse & Co. v. Same*, 65 Id., 333.

SEC. 1083. [**For corporate debts.**].—In none of the cases contemplated in this chapter can the private property of the stockholders be levied upon for the payment of corporate debts, while corporate property can be found with which to satisfy the same; but it will be sufficient proof that no property can be found, if an execution has issued on a judgment against the corporation, and a demand has been thereon made of some one of the last acting officers of the body for property on which to levy, and if he neglects to point out any such property.

SEC. 1084. [**How enforced.**].—Before any stockholder can be charged with the payment of a judgment rendered by a corporate debt, an action shall be brought against him, in any stage of which he may point out corporate property subject to levy; and upon his satisfying the court of the existence of such property, by affidavit or otherwise, the cause may be continued, or execution against him stayed, until the property can be levied upon and sold, and the court may subsequently render judgment for any balance which there may be after disposing of the corporate property; but, if a demand of property has been made as contemplated in the preceding section, the costs of said action shall, in any event, be paid by the company or the defendant therein, but he shall not be permitted to controvert the validity of the judgment rendered against the corporation, unless it was rendered through fraud and collusion.

Before a stockholder can be charged with the payment of a judgment rendered against the corporation of which he is a stockholder, a proceeding by ordinary action must be instituted against him, and his liability determined therein. *Bayliss v. Swift et al.*, 40 Iowa, 648.

After judgment has been rendered against the stockholder for the amount of his liability, an execution issued against the corporation may, to the extent of the stockholder's liability, be levied upon his private property. *Id.*

Unpaid subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of creditors, and the officers of the corporation cannot, by any agreement or arrangement with the stockholders, release them from the obligation of payment, to the prejudice of creditors. *Osgood & Moss v. King*, 42 Id., 478. • See *The County of Wapello v. The B. & M. R. R. Co.*, 44 Id., 601.

It is competent for the court, under section 1084, to render judgment against the delinquent subscriber to the capital stock of a corporation in an action founded upon a judgment against the corporation. *Singer, Nimick & Co. v. Given*, 61 Id., 94.

SEC. 1085. [**Stockholder may sue corporation.**].—When the private property of a stockholder is taken for a corporate debt, he may maintain an action against the corporation for indemnity, and against any of the other stockholders for contribution.

SEC. 1086. [**Franchise sold on execution.**].—The franchise of a corporation may be levied upon under execution and sold, but the corporation shall not become thereby dissolved, and no dissolution of the original corporation shall affect the franchise, and the purchaser becomes vested with all the powers of the corporation therefor. Such franchise shall be sold without appraisement.

SEC. 1087. [**Books produced.**].—In any proceeding by or against a corporation, or against a stockholder, to charge his private property or the dividends received by him, the court is invested with power to compel the officers to produce the books of the corporation, on the motion of either party, upon a proper cause being shown for that purpose.

SEC. 1088. [**Single person may incorporate.**].—A single individual may entitle himself to all the advantages of this chapter, provided he complies substantially with all its requirements, omitting those which from the nature of the case are inapplicable.

SEC. 1089. [Want of legal organization can not be set up.]—No body of men acting as a corporation under the provisions of this chapter shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation; nor shall any person sued on a contract made with such a corporation, or sued for an injury to its property, or a wrong done to its interest, be permitted to set up a want of such legal organization in his defense.

An action brought by a corporation cannot be defeated on the ground that its officers were not legally elected. The corporation still exists notwithstanding the illegal election. *Carrothers v. The M. Mineral Spring Co. et al.*, 61 Iowa, 681.

A bequest is included within the proper definition of the term "contract," and when the will is admitted to probate, it is to be regarded as a contract of record. It follows, therefore, under this section, that when a corporation seeks to enforce a bequest in a will duly admitted to probate, its claims cannot be resisted on the grounds that it was not legally organized; and it makes no difference that the corporation is defendant in the action, and is seeking to maintain the bequest against the assaults of the plaintiffs, who are urging against the validity of the bequest the want of legal organization in the corporation. *Quin et al. v. Shields et al.*, 62 Id., 129.

Where a person contracts with a corporation, he is concluded thereby, and cannot deny the validity of its organization and its capacity to contract. *Howe Machine Co. v. Snow*, 32 Iowa, 433; *Washington College v. Duke*, 14 Id., 14; *Franklin v. Tuogood*, 18 Id., 515; *Courtwright v. Deeds*, 57 Id., 503.

Whether the provisions of this section, which is found in chapter one, under the title, "Corporations," and which treats of corporations for pecuniary profit, are applicable also to a body of men acting as a religious corporation, treated of under chapter two of said title, *querie*. *Kirkpatrick v. The U. P. Church of Keota*, 63 Id., 372.

SEC. 1090. [Legislative control of.]—The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall, at all times, be subject to legislative control, and may be, at any time, altered, abridged, or set aside by law, and every franchise obtained, used or enjoyed by such corporation, may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good.

Every state has the power to reserve control over its own corporations—those created under its laws. Iowa has done this by this section to a certain extent, but this does not prevent foreign corporations from transacting all ordinary business in this state, nor does it indicate that the statute should be so construed as to prevent them, under proper regulation, from condemning private property. *Dodge v. The City of Council Bluffs*, 57 Iowa, 560, 565.

(CHAPTER 32, LAWS OF 1876.)

CORPORATIONS FOR PECUNIARY PROFIT LEGALIZED.

An Act to legalize corporations for pecuniary profit, organized under the provisions of chapter 52, of the revision of 1860, as amended by chapter 172, of the acts of the thirteenth general assembly.

SECTION 1. [Failing to have articles filed in time prescribed by law.]—*Be it enacted by the general assembly of the state of Iowa:* That the acts, proceedings, doings and contracts of all incorporations for pecuniary profit, organized under the provisions of chapter fifty-two of the revision, as amended by chapter one hundred and seventy-two of the acts of the thirteenth general assembly, which have organized since the taking effect of said chapter one hundred and seventy-two, which have failed to have their articles of incorporation filed in the office of the secretary of state within three months from the time such articles were filed in the office of the recorder of deeds, are hereby legalized and made valid in all respects the same as if such articles had been filed as provided in said chapter 172; *provided*, such articles shall have been filed in the office of the secretary of state prior to the passage of this act.

SEC. 2. [**Not to relieve against prior contracts.**]—That nothing in this act shall be construed so as to relieve such corporation[s] from the fulfillment of all contracts made prior to the taking effect of this act, or to relieve individual members thereof from liability to the amount of unpaid installments on stock owned by them, or transferred by them for the purpose of defrauding creditors.

(CHAPTER 57, LAWS OF 1880.)

TO RELIEVE MANUFACTURERS FROM DOUBLE TAXATION.

An Act to relieve corporations engaged in manufacturing, from double taxation in certain cases.

SECTION 1. [**Corporations for pecuniary profit to list as individuals.**]—*Be it enacted by the general assembly of the state of Iowa:* That corporations organized under the laws of this state for pecuniary profit, and engaged in manufacturing, as defined by section 816 of the code, and which have their capital represented by shares of stock, shall, through their principal accounting offices, list their real estate, personal property, and moneys and credits, in the same manner as is required of individuals; and their machinery used in their manufacturing establishments shall, for the purpose of this act, be regarded as real estate.

SEC. 2. [**Capital stock exempt from taxation.**]—The owners of capital stock of manufacturing companies, as herein provided for, having listed their property as above directed, shall be exempt from assessment and taxation.

Approved March 17, 1880.

(CHAPTER 76, LAWS OF 1886.)

FOREIGN CORPORATIONS REQUIRED TO FILE ARTICLES WITH SECRETARY OF STATE.

An Act requiring foreign corporations to file their articles of incorporation with the secretary of state, and imposing certain conditions upon such corporations transacting business in this state.

SECTION 1. [**Corporations for pecuniary profit must file articles.**]—*(Be it enacted by the general assembly of the state of Iowa:)* That hereafter any corporation for pecuniary profit other than for carrying on mercantile or manufacturing business organized under the laws of any other state or of any territory of the United States or of any foreign country desiring to transact its business, or to continue in the transaction of its business in this state, shall be and hereby is required, on and after September [first] A. D. 1886, to file with the secretary of state a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state. Said application to contain a stipulation that said permit shall be subject to each of the provisions of this act. And thereupon the secretary of state shall issue to such corporation a permit in such form as he may prescribe for the general transaction of the business of such corporation. And upon the receipt of such permit such corporation shall be permitted and authorized to conduct and carry on its business in this state. Provided that nothing in this act contained shall be construed to prevent any foreign corporations from buying, selling, and otherwise dealing in notes, bonds, mortgages, and other securities, or from enforcing the collection of

the same, in the federal courts, in the same manner, and to the same extent, as is now authorized by law.

SEC. 2. [Compliance with this act necessary to secure corporate privileges.]—No foreign corporation which has not in good faith complied with the provisions of this act, and taken out a permit, shall hereafter be authorized to exercise the power of eminent domain or exercise any of the rights and privileges conferred upon corporations until they have so complied herewith and taken out such permit.

SEC. 3. [Removal of cause to another state voids corporate permit.]—Any foreign corporation sued or impleaded in any of the courts of this state upon any contract made or executed in this state or to be performed in this state, or for any act or omission, public or private, arising, originating, or happening in the state, who shall remove any such cause from such state court into any of the federal courts held or sitting in this state, for the cause that such corporation is a non-resident of this state or a resident of another state than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this state; such forfeiture to be determined from the record of removal, and to date from the date of filing of the application on which such removal is affected, and whenever any corporation shall thus forfeit its said permit no new permit shall be issued to it for the space of three months, unless the executive council shall for satisfactory reasons cause it to be issued sooner.

SEC. 4. [Penalty for non-compliance with this act.]—Any foreign corporation that shall carry on its business and transact the same on and after September 1, 1886, in the state of Iowa, by its officers, agents, or otherwise, without having complied with this statute and taken out, and having a valid permit, shall forfeit and pay to the state for each and every day in which such business is transacted and carried on the sum of one hundred dollars (\$100) to be recovered by suit in any court having jurisdiction. And any agent, officer or employe who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein, shall be guilty of a misdemeanor, and for each offense shall be fined not to exceed one hundred dollars (\$100) or imprisonment in the county jail not to exceed thirty days and pay all costs of prosecution.

SEC. 5. [Repealing clause.]—All acts and parts of acts inconsistent with the provisions hereof are hereby repealed; *provided*, that nothing contained in this act shall relieve any company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon them or required of them or either of them by the laws now in force.

Approved April 6, 1886.

The foregoing chapter 76, laws of 1886, requiring all foreign corporations for pecuniary profit, desiring to do business in Iowa, excepting those mentioned in the act, to become domesticated in the state, and to submit to the jurisdiction of the state courts to the exclusion of the federal courts, is not, when applied to foreign railway corporations, repugnant to section 10, of article 1, of the constitution of the United States, or to section 8, article 1 thereof, which gives to congress the power to regulate commerce among the states, nor to the fourteenth amendment of that constitution, or to section 21, of article 1 of the constitution of Iowa, nor is it void as an attempt to interfere with the provision of the United States constitution respecting the jurisdiction of the national courts. *Goodrell v. Kreichbaum, Sheriff; Wingate v. Painter, Sheriff, and Barron v. Burnside, Sheriff*, 70 Iowa, 362.

These cases were, on appeal to the supreme court of the United States, reversed, that court holding the statute to be in conflict with the constitution of the United States.

CHAPTER 2.

CORPORATIONS OTHER THAN THOSE FOR PECUNIARY PROFIT.

SECTION 1091. (*As amended by ch. 71, 21st g. a. and ch. 87 laws of 22d g. a.*)
[**How created.**]—Associations for the establishment of seminaries of learning, churches, lyceums, libraries, lodges of odd fellows or masons, and other institutions of a benevolent or charitable character; (temperance societies and trades unions and other organizations of labor for the regulation, by lawful means, of prices of labor, and of hours work, and other matters pertaining to industrial pursuits); agricultural societies, subordinate granges of the patrons of husbandry, and associations for the detection of horse-thieves, and of other depredators upon property, may become incorporated in the manner directed in the preceding chapter, so far as applicable, and shall thereby become vested with all the powers and privileges, and subject to all the liabilities provided by that chapter, except as herein modified. (Corporations organized under this chapter shall endure for the period of fifty years from and after their organization, unless sooner dissolved by a vote of three-fourths of the members thereof, or by operation of law, and all corporations heretofore organized hereunder shall be extended for a like period, unless sooner dissolved in like manner).

See *Thompson v. Lambert*, 41 Iowa, 239, cited in note "a," section 1059, *ante*.

SEC. 1092. [**Articles recorded.**]—Their articles of incorporation shall be recorded by the recorder of deeds of the county where the principal place of business is kept only; but a newspaper publication is not requisite.

SEC. 1093. No dividend, nor distribution of property among the stockholders, shall be made until the dissolution of the corporation.

SEC. 1094. [**Degrees conferred.**]—Corporations of an academical character are invested with authority to confer the degrees usually conferred by such institutions.

This chapter amended by chapter 40, laws of the fifteenth general assembly. See *post*.

CHARITABLE, SCIENTIFIC AND RELIGIOUS ASSOCIATIONS.

SEC. 1095. [**How formed.**]—Any three or more persons of full age, citizens of the United States, a majority of whom shall be citizens of this state, who desire to associate themselves for benevolent, charitable, scientific, religious or missionary purposes, may make, sign and acknowledge before any officer authorized to take acknowledgments of deeds in this state, and have recorded in the office of the recorder of the county in which the business of such society is to be conducted, a certificate in writing, in which shall be stated the name or title by which such society shall be known, the particular business and objects of such society, the number of trustees, directors or managers to conduct the same, and name of the trustees, directors or managers of such society for the first year of its existence.

SEC. 1096. [**Certificate recorded.**]—Upon filing for record the certificate as aforesaid, the persons who shall have signed and acknowledged such certificate, and their associates and successors, shall, by virtue hereof, be a body politic and corporate by the name stated in such certificate, and, by that, they and their successors shall and may have succession, and shall be persons capable of suing and being sued, and may have and use a common seal, which they may alter or change at pleasure; and they and their successors, by their corporate name, shall be capable of taking, receiving, purchasing, and holding real and personal estate, and of making by-laws for the management of its affairs, not inconsistent with law.

SEC. 1097. [**Trustees or managers of: how elected.**—The society so incorporated, may, annually, or oftener, elect from its members its trustees, directors or managers at such time and place, and in such manner as may be specified in its by-laws, who shall have the control and management of the affairs and funds of the society, a majority of whom shall be a quorum for the transaction of business; and whenever any vacancy shall happen among such trustees, directors or managers, by death, resignation or neglect to serve, such vacancy shall be filled in such manner as shall be provided by the by-laws of such society. When the body corporate consists of the trustees, directors or managers of any benevolent, charitable, literary, scientific, religious or missionary institution, which is or may be established in this state, and which is or may be under the patronage, control, direction or supervision of any synod, conference, association or other ecclesiastical body in such state, established agreeably to the laws thereof, such ecclesiastical body may nominate and appoint such trustees, directors or managers, according to usages of the appointing body, and may fill any vacancy which may occur among such trustees, directors or managers; and when any such institution may be under the patronage, control, direction or supervision of two or more of such synods, conferences, associations or other ecclesiastical bodies, such bodies may severally nominate and appoint such proportion of such trustees, directors or managers as shall be agreed upon by those bodies immediately concerned. And any vacancy occurring among such appointees last named, shall be filled by the synod, conference, association or body having appointed the last incumbent.

SEC. 1098. [**Academical: meetings.**—Any corporation in this state of an academical character, the memberships of which shall consist of lay members and pastors of churches, delegates to any synod, conference or council, holding its annual meetings alternately in this and one or more adjoining states, may hold its annual meetings for the election of officers and the transaction of business in any adjoining state to this, at such place therein as the said synod, conference or council shall hold its annual meeting; and the elections so held, and business so transacted, shall be as legal and binding as if held and transacted at the place of business of the corporation in this state.

SEC. 1099. [**Election.**—In case an election of trustees, directors or managers shall not be made on the day designated by the by-laws, said society for that cause shall not be dissolved, but such election may take place on any other day directed by such by-laws.

SEC. 1100. [**Name of.**—The provisions of this chapter shall not extend or apply to any association or individual who shall, in the certificate filed with the recorder, use or specify a name or style the same as that of any previously existing incorporated society in the county.

SEC. 1101. [**Devise or bequest.**—Any corporation formed under this chapter shall be capable of taking, holding or receiving property by virtue of any devise or bequest contained in any last will or testament of any person whatsoever; but no person leaving a wife, child or parent, shall devise or bequeath to such institution or corporation more than one-fourth of his estate after the payment of his debts, and such devise or bequest shall be valid only to the extent of such one-fourth.

In an action against a county upon a contract for the construction of a county bridge, the fact that the board of supervisors entered into the contract for the construction of a bridge of less than the width prescribed by statute will not affect plaintiff's right of action. *Mallory v. Montgomery County*, 48 Iowa, 681.

SEC. 1102. [**Existing societies may reincorporate.**—The trustees, directors or stockholders of any existing benevolent, charitable, scientific, missionary or religious corporation, may, by conforming to the requirements of section ten hundred and ninety-five of this chapter, reincorporate themselves, or continue their existing corporate powers, and all the property and effects of such existing corporation shall vest in and belong to the incorporation so reincorporated or continued.

(CHAPTER 40, LAWS OF 1874.)

CORPORATIONS NOT FOR PECUNIARY PROFIT.

An Act to amend chapter 2, title IX, of the code of 1873, to authorize corporations other than those for pecuniary profit to change their name and to amend articles of incorporation.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* That title IX, chapter 2, of the code of 1873, be amended as follows:

[**Corporations not for pecuniary profit may change name, etc.**]—Any corporation other than those for pecuniary profit may change the corporate name thereof, or amend the articles of incorporation or the original certificate thereto, by a vote of the majority of the members or stockholders of the said corporation, in such manner as may be provided by the articles of incorporation thereof.

SEC. 2. [**Bodies representing ecclesiastical bodies: proceedings.**]—In case of the body corporate consisting of the trustees, directors, or managers of any benevolent, charitable, literary, scientific, religious, or missionary institution under the patronage of any synod, conference, association, or other ecclesiastical body in the state, or two or more of them, said amendment or change may originate with either of the said trustees, directors, or managers, or with either of the said patronizing bodies, but such change or amendment shall not be made without the vote of a majority of each of said trustees, directors, or managers, and of each of the said patronizing bodies, legally expressed and certified thereto by the secretary, clerk, or recording officer of such board of trustees, directors, or managers, and of each of the patronizing bodies.

SEC. 3. [**Record.**] The change or amendment of the articles of incorporation shall be recorded by the recorder of deeds as the original articles of incorporation are required to be, and the recorder shall make upon the margin of such record a reference to the book and page of the record of such original articles of incorporation; and from and after the date of such act of recording such change or amendment, shall be in full force and effect as the original articles of incorporation so amended.

SEC. 4. [**Rights and powers of corporations continued.**]—The corporation by its new name or with such amended articles of incorporation or certificate shall be entitled to all the rights, powers, immunities and franchises that it possessed before such change or amendment, and shall be liable upon all contracts, obligations, liabilities entered into, incurred, or binding on such corporation by or under the old name or articles of incorporation to the same extent and manner as though no such change or amendment had been made.

Approved March 18, 1874.

(CHAPTER 176, LAWS OF 1878.)

HOME FOR THE FRIENDLESS.

An Act to confer certain powers upon any home for the friendless incorporated under the laws of Iowa, in relation to the control and disposition of minor children who become inmates thereof.

SECTION 1. [**Shall have authority to receive and dispose of minors.**]—*Be it enacted by the general assembly of the state of Iowa:* That any home for the friendless, incorporated under the laws of this state, shall have authority to receive,

control and dispose of minor children, under the following provisions: In case of the death or legal incapacity of a father, or in case of his abandoning or neglecting to provide for his children, the mother shall be considered their legal guardian for the purpose of making surrender of them to the charge and custody of such corporation; and in all cases where the person or persons legally authorized to act as the guardian or guardians of any child, are not known, the mayor of the town or city where such "home" is located, may, in his discretion, surrender such child to said "home."

SEC. 2. [**If parents are drunkards, etc., etc.**].—In case it shall be shown to any judge of a court of record, or to the mayor, or to any justice of the peace within such city or town, that the father of any child is dead, or has abandoned his family, or is an habitual drunkard, or imprisoned for crime, and the mother of such child is an habitual drunkard, or is in prison for crime, or is an inmate of a house of ill-fame, or is dead, or has abandoned her family, or that the parents of any child have abandoned or neglected to provide for it, then such judge, mayor or justice of the peace may, if he thinks the welfare of the child requires it, surrender such child to said "home."

SEC. 3. [**Upon complaint child may be sent to "home."**].—Whenever complaint shall be made to the judge of any court of record, or to the mayor, or any justice of the peace in the city or town where said "home" is located, that any girl under the age of 14 years, or boy under the age of 12 years, is abandoned by, or is sustaining relations to his or her parents or guardians, mentioned or contemplated in section two hereof, it shall be the duty of such judge, mayor or justice to issue a warrant for the arrest of such child, and if on testimony satisfactory to said judge, mayor or justice, it shall appear that such child has no parents, or is abandoned by its parents or guardians, as contemplated in section two of this act, the said mayor, judge or justice may, if he believes the best interest of the child requires it, surrender such child to the care of said "home."

The right of appeal, within twenty days, to the district or circuit court, from the judgment of any mayor or justice of the peace shall be secured; and in any hearing before a court of record the party charged may have a trial by jury as is provided by law.

SEC. 4. [**Habeas corpus.**].—Upon hearing of any *habeas corpus* for the custody of any child, it appears that such child has been surrendered to said "home," under the provisions of this act, such surrender shall be taken by all courts of justice as presumptive that such child was legally and properly surrendered to said "home," and that said "home" was entitled to the custody and guardianship of such child under the provisions of this act.

SEC. 5. [**"Home" shall be legal guardian.**].—Such home for the friendless shall be the legal guardian of the persons of all children that shall be surrendered to it under the provisions of this act, and shall have and exercise all the right and authority of the parents of such children, under the provision of chapters 6 and 7, title 15 of the code of Iowa, and amendments thereto, regulating the apprenticing and adoption of children.

SEC. 6. [**Religious instruction.**].—If religious instruction is given any child while an inmate of such home, it shall be in the religious faith of the parents of such child, if the same be known; and when any home shall dispose of the custody of any child, it shall be to some person and of the same religious faith as its parents, unless the parent or former guardian consent otherwise.

(Took effect by publication in newspapers, April 6, 1878.)

CHAPTER 3.

OF STATE AND COUNTY AGRICULTURAL AND HORTICULTURAL SOCIETIES.

SECTION 1103. [**Meeting of directors of state agricultural society.**]

—There shall be held at the capitol of the state, on the second Wednesday of January in each year, a meeting of the board of directors of the Iowa state agricultural society, together, with the president of each county society in the state, or other delegate therefrom duly authorized in writing, who shall, for the time being, be members of the board; and at such meeting, officers and directors shall be chosen, the place for holding the next annual exhibition shall be determined, premiums on essays and field crops shall be awarded, and all questions relating to the agricultural development of the state may be considered.

SEC. 1104. [**Officers: terms.**]—The officers chosen at such meeting shall be a president, vice-president, secretary, treasurer, and five directors. The president, vice-president, secretary, and treasurer, shall serve one year, and shall be directors by virtue of their office. The other directors shall serve two years, so that the entire number of such directors in the board shall always be ten, one-half of whom shall be chosen annually. Any five members of the board shall constitute a quorum when regularly convened; and the president of the society shall have power to call meetings of the board whenever he may deem it expedient.

SEC. 1105. (Repealed by chapter 4, laws of 1874.)

SEC. 1106. [**Premium list.**]—The premium list and rules of exhibition shall be determined and published by the board of directors prior to the first of April in each year.

SEC. 1107. [**Annual report.**]—The said board of directors shall make an annual report to the governor, embracing the proceedings of said society and board of directors for the past year, and an abstract of the proceedings of the several county societies, as well as a general view of the condition of agriculture throughout the state, accompanied with such essays, statements, and recommendations as they may deem interesting and useful, which reports shall be published by the state under the supervision of the secretary of the society. The number of copies to be published shall be three thousand, all of which shall be bound in a manner and style uniform with those bound by the state for the years one thousand eight hundred and fifty-nine and one thousand eight hundred and sixty; but said binding shall not cost more than thirty cents per copy.

SEC. 1108. [**Distribution of reports.**]—The secretary of state shall distribute the reports as follows: Ten copies to the state university, ten copies to the state library, ten copies to the state agricultural college, one copy to each member of the general assembly, the remainder to the secretary of the state agricultural society, by him to be distributed to the county agricultural societies; and one copy shall be sent to the board of supervisors of each organized county in which there is no agricultural society.

DISTRICT AND COUNTY SOCIETIES.

SEC. 1109. [**Premiums awarded.**]—All county agricultural societies shall annually offer and award premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics, articles of domestic industry, and such other articles and improvements as they may deem proper. And they shall also regulate the amount of premiums and the different grades of the same, that small as well as large farmers and artisans may compete therefor.

This section authorizes county agricultural societies to offer a premium to the winner at a horse-race, or trial of speed, to be held on its fair grounds during an annual fair. *Delier v. The Plymouth County Agricultural Society*, 57 Iowa, 481.

SEC. 1110. [**List of awards published.**—]—Each county society shall publish, annually, a list of the awards and an abstract of the treasurer's account, in one or more newspapers of the county or adjoining counties, and a report of their proceedings during the year, and a synopsis of the awards. They shall also make a report of the condition of agriculture in their county, to the board of directors of the Iowa state agricultural society, which shall be forwarded by mail or otherwise to the secretary of said society on or before the first of December of each year. And the auditor of state, before issuing his warrant in favor of said societies for any amount, shall demand the certificate of the secretary of the state society that such report has been made.

SEC. 1111. [**Supervisors may appropriate aid.**—]—Whenever any county agricultural society, organized according to law, shall have procured in fee simple, free from incumbrance, land for fair grounds not less than ten acres in extent, the board of supervisors of said county may appropriate and pay to such society a sum not exceeding one hundred dollars for every thousand inhabitants in said county, to be expended by such society in fitting up such fair grounds, but for no other purpose; but not more than one thousand dollars shall in the aggregate be appropriated to any one society.

SEC. 1112. [**Entitled to aid from state.**—]—When any county or district agricultural society, composed of one or more counties, have made their report to the state society as provided in the preceding section, and raised during the year any sum of money for actual membership, they shall be entitled to an equal sum, not exceeding two hundred dollars, from the state treasury, upon affidavit of the president, secretary or treasurer of said society, that such sum was raised for the legitimate purposes of the society during the current year, accompanied by the certificate of the secretary of the state agricultural society that they have reported according to law.

SEC. 1113. [**Make report to supervisors.**—]—Each society receiving such appropriation, shall, through its secretary, make to the board of supervisors a detailed statement, with vouchers, showing the legal disbursement of all the moneys so received.

FAIRS.

SEC. 1114. (*As amended by ch. 147, 18th g. a.*) [**Gambling, etc.**—]—No person shall be permitted to sell any intoxicating liquors, wine, or beer of any kind, or be engaged in any gambling or horse-racing, either inside the enclosure where any county or district [or state] agricultural society fair is being held, or within one hundred and sixty rods thereof, during the time of holding such fair; and any person found guilty of any of the offenses herein enumerated, shall be fined in a sum not less than five nor more than fifty dollars for every such offense.

This section does not prohibit trials of speed or horse-racing as a means of improving the stock of horses, at county fairs. *Delier v. The Plymouth County Agricultural Society*, 57 Iowa, 481.

SEC. 1115. [**Permits.**—]—The president of any district or county agricultural society may grant a written permit to such persons as he may deem necessary, to sell fruit, provisions, and other necessaries to such persons as may be in attendance at any such fair, under such regulations and restrictions as the board of directors may prescribe.

SEC. 1116. [**Power to arrest.**—]—The president of any such society shall be empowered to arrest, or cause to be arrested, any person or persons, engaged in violating any of the provisions contained in section eleven hundred and fourteen of this chapter, and cause them forthwith to be taken before some justice of the

peace, there to be dealt with as provided for in said section; and he may seize, or cause to be seized, all intoxicating liquors, wine, or beer, of any kind, with the vessels containing the same, and all tools or implements used in any gambling, and may remove, or cause to be removed, all shows, swings, booths, tents, carriages, wagons, vessels, boats, or any other nuisance that may obstruct, or cause to be obstructed, by collecting persons around or otherwise, any thoroughfare leading to the enclosure in which such agricultural fair is being held; and any person owning or occupying any of the causes of obstruction herein specified, who may refuse or fail to remove such obstruction or nuisance, when ordered to do so by the president of such society, shall be liable to a fine of not less than five and not more than twenty dollars for every such offense.

HORTICULTURAL SOCIETY.

SEC. 1117. [**Meeting of.**]—There shall be held on the third Tuesday in January in each year, a meeting of the Iowa state horticultural society, for the transaction of business and the election of officers and directors, corresponding in numbers and titles to those of the Iowa agricultural society, and for like periods of time, at which the place of holding the next meeting, and the times and places of holding exhibitions shall be determined; premiums on essays may be awarded, and all questions relating to horticultural development considered.

SEC. 1118. [**District and county societies.**]—Such society shall encourage the organization of district and county societies and give them representation therein, and in every proper way further the fruit and tree-growing interests of the state.

SEC. 1119. [**Annual report.**]—The secretary of said society shall make an annual report to the governor of the state, embracing the proceedings of the society, with a bill of items showing for what purposes the money hereinafter appropriated was paid out for the past year, the general condition of horticultural interests throughout the state, together with essays, statements of facts, and recommendations as he may deem useful, to be published by the state under the supervision of the society.

SEC. 1120. (*As amended by ch. 6, 18th g. a.*) [**Printing and distribution of.**]—The number of copies of said report shall be [five] thousand, all of which shall be bound in a style uniform with the reports of said society for the year eighteen hundred and sixty-nine [1869] and eighteen hundred and seventy [1870], and shall be distributed by the secretary of state as follows: [Twelve] copies each to the governor, lieutenant-governor, secretary of state, auditor of state, state treasurer, register of state land office, attorney-general, judges of the supreme court, and to each member of the general assembly; two hundred copies to the Iowa state agricultural college, five copies to the Iowa state university, five copies to the Iowa state horticultural society, two copies to each incorporated college in the state, one copy each to the auditor and clerk of the district court of each county, to be kept in the office, and one copy to each newspaper published in the state; the remainder to be distributed by direction of said society.

(Took effect by publication February 25, 1880.)

SEC. 1121. (*As amended by ch. 128, 20th g. a.*) [**Appropriation for.**]—The sum of [twenty-five hundred] dollars is appropriated, annually, for the use and benefit of said society, and shall be paid by the auditor of state upon the order of the president of said society, in such sums, and at such times, as may be for the interests of said society; but two hundred dollars of said amount shall be awarded in premiums for the growing of forest trees in this state.

CHAPTER 4.

OF INSURANCE COMPANIES.

SECTION 1122. [**How formed: notice: certificate: attorney-general.**]—When any number of persons associate themselves together for the purpose of forming an insurance company, or for any other purpose than life insurance, under the provisions of chapter one of this title, they shall publish a notice of such intention, once in each week for four weeks, in some public newspaper in the county in which such insurance company is proposed to be located; and they shall also make a certificate, under their hands, specifying the name assumed by such company, and by which it shall be known, the object for which said company shall be formed, the amount of its capital stock, and the place where the principal office of said company shall be located; which certificate shall be acknowledged before and certified by some notary public, or clerk of a court of record, and forwarded to the auditor of state, who shall submit the same to the attorney-general for examination, and if it shall be found by the attorney-general to be in accordance with the provisions of this chapter, and not in conflict with the constitution and laws of the United States, and of this state, he shall make a certificate of the fact and return it to the auditor of state, who shall reject the name or title applied for by any company when he shall deem the same too similar to any one already appropriated by any other company, or likely to mislead the public.

SEC. 1123. [**Approval of certificate: the same recorded: powers.**]—When the certificate of said company shall have received the approval of the attorney-general and auditor of state, the company shall cause the same to be recorded as required by law for recording articles of incorporation; and said persons, when incorporated, and having in all respects complied with the provisions of this chapter, are hereby authorized to carry on the business of insurance as named in such certificate of incorporation, and by the name and style provided therein, and shall be deemed a body corporate with succession; they and their associates, successors and assigns, to have the same general corporate powers, and be subject to all the obligations and restrictions of said chapter one of this title, except as may be herein otherwise provided.

CAPITAL REQUIRED.

SEC. 1124. [**Amounts: shares: notes, etc.**]—No joint stock company shall be incorporated under the provisions of this chapter with a smaller capital than fifty thousand dollars, or a larger one than one million dollars, as may be specified in the certificate of incorporation, which stock shall be divided into shares of one hundred dollars each, of which capital not less than twenty-five per cent, and in no case less than twenty-five thousand dollars, shall be paid up in cash. The balance of the capital of said company may consist of the bonds or notes of the stockholders; nor shall any company, on the plan of mutual insurance, commence business in this state until agreements have been entered into for insurance with at least two hundred applicants, the premiums upon which shall amount to not less than twenty-five thousand dollars; of which at least five thousand dollars shall have been paid in actual cash, and for the remainder of which, notes of solvent parties, founded upon actual application for insurance made in good faith, shall have been received. No one of the notes received as aforesaid, shall amount to more than five hundred dollars; and no two thereof shall be given for the same risk, or made by the same person or firm, except where the whole amount of such notes does not exceed the sum of five hundred dollars; nor shall any note be

regarded or represented as capital stock, unless a policy be issued upon the same within thirty days after the organization of the company taking the same, upon a risk that shall be for no shorter period than twelve months. Each of said notes shall be payable, in whole or in part, at any time when the directors shall deem the same requisite for the payment of losses by fire or inland navigation, and such incidental expenses as may be necessary for transacting the business of said company. And no note shall be accepted as part of such capital stock, unless the same shall be accompanied by a certificate of a justice of the peace, notary public or clerk of the district court of the county in which the person executing such note shall reside, that the person making the same is, in his opinion, pecuniarily good and responsible for the same, in property not exempt from execution by the laws of their state; and no such note shall be surrendered while the policy for which it was given continues in force.

SEC. 1125. [**Subscription books opened.**—Having published the notice, and filed the publisher's affidavit of the publication thereof with the auditor of state, together with the certificate required by section eleven hundred and twenty-two of this chapter, the persons named in the certificate of incorporation, or a majority of them, shall be commissioners to open books for the subscription of stock to the company, at such times and places as to them may seem convenient and proper, and shall keep the same open until the full amount specified in the certificate is subscribed; or, in case the business of said company is proposed to be conducted on the plan of mutual insurance, then to open books to receive propositions and enter into agreements in the manner and to the extent specified in section eleven hundred and twenty-four of this chapter.

DIRECTORS—OFFICERS.

SEC. 1126. [**Election of and number.**—The affairs of any company organized under the provisions of this chapter shall be managed by not more than twenty-one, nor by less than five directors, all of whom shall be stockholders. Within thirty days after the subscription books shall have been filed, a majority of the subscribers shall hold a meeting for the election of directors—each share entitling the holder thereof to one vote; and the directors then elected shall continue in office until their successors have been duly chosen and have accepted the trust.

SEC. 1127. [**Annual meeting of.**—The annual meetings for the election of directors shall be holden during the month of January, at such time as the by-laws of the company may direct; *provided, however,* that if for any cause the stockholders shall fail to elect at any annual meeting, then they may hold a special meeting some day subsequent thereto for that purpose, by giving thirty days' notice thereof in some newspaper in general circulation in the county in which the principal office of the company shall be located, and the directors chosen at any such annual or special meeting shall continue in office until the next annual meeting, and until their successors, duly elected, shall have accepted.

SEC. 1128. [**Elect a president and fill all vacancies.**—The directors shall choose, by ballot, a president from their own number, and shall fill all vacancies which shall arise in the board or in the presidency thereof; and the board of directors thus constituted, or a majority of them, when convened at the office of the company, shall be competent to exercise all the powers vested in them by this chapter.

SEC. 1129. [**Appoint officers and establish by-laws.**—The directors of any such company shall have power to appoint a secretary, and any other officers or agents necessary for transacting the business of the company, paying such salaries and taking such securities as they may deem reasonable; they may ordain and establish such by-laws and regulations, not inconsistent with this chapter, or with the constitution and laws of the United States, and of this state, as shall appear to

them necessary for regulating and conducting the business of the company; and they shall keep full and correct entries of their transactions, which shall, at all times, be open to the inspection of the stockholders, and to the inspection of persons invested by law with the right thereof.

INVESTMENTS—EXAMINATION—INSURANCE.

SEC. 1130. [**Funds invested: security for loans required.**—It shall be lawful for any insurance company organized under this chapter to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages on unincumbered real estate within the state of Iowa, worth double the sum loaned thereon, exclusive of buildings, unless such buildings are insured in some responsible company, and the policy transferred to said company, and also in stocks of this state, or stocks or treasury notes of the United States—in the stocks or bonds of any county or incorporated city in this state authorized to be issued by the legislature of this state; and to lend the same, or any part thereof, on the security of such stock or bonds, or treasury notes, or upon bonds and mortgages as aforesaid and not otherwise; and to change and reinvest the same in like securities as occasion may, from time to time, require; but any surplus money over and above the paid up capital stock of any such company organized under this chapter, or incorporated under any law of this state, may be invested in or loaned upon the pledge of the public stock or bonds of the United States, or any one of the states, or the stocks, bonds, or other evidences of indebtedness of any solvent, dividend-paying institutions incorporated under the laws of the United States, except their own stock; if the current market value of such stock, bonds, or other evidences of indebtedness, shall be at all times, during the continuance of such loans, at least ten per cent more than the sum loaned thereon.

SEC. 1131. [**Assets examined by auditor: officers to certify under oath.**—Upon receiving notification that the requirements of the preceding sections have been complied with, the auditor of state shall make an examination, or cause one to be made by some disinterested person officially appointed by him for that purpose; and if it shall be found that the capital herein required of the company named, according to the nature of the business proposed to be transacted by such company, has been paid in and is possessed by it in money, or in such stock, notes, bonds, and mortgages as are required by sections eleven hundred and twenty-four and eleven hundred and thirty of this chapter, then he shall so certify; and if the examination be made by any other than the auditor, then the finding shall be certified under oath, or, if it is proposed to be a mutual insurance company, such certificate shall be to the effect that it has received and is in actual possession of the capital, premiums, or actual engagements of insurance or other securities, as the case may be, to the extent and value required by sections eleven hundred and twenty-four and eleven hundred and thirty of this chapter. The name and residence of the maker of each premium note forming part of the capital of any such proposed mutual insurance company, and the amount of such note, shall be returned to the auditor. The corporators or officers of any such company, or proposed company, shall be required to certify, under oath, to the auditor of state, that the capital exhibited to the person making the examination directed in this section, was, actually and in good faith, the property of the company so examined. The certificates above contemplated shall be filed in the office of said auditor, who shall thereupon deliver to such company a certified copy of the same, with his written permission for them to commence the business proposed in their written certificate of incorporation, which, being recorded by the recorder of the county in which the company is to be located, in a book prepared by him for that purpose, shall be their authority to commence business and issue policies; and such certified

copy of said certificates may be used in evidence for or against said company with the same effect as the originals.

SEC. 1132. [**Kinds of insurance.**]-It shall be lawful for any company organized under this chapter, or doing business in this state:

1. To insure houses, buildings and all other kinds of property against loss or damage by fire or other casualty, and to make all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or on water, or any vessel or boat, wherever the same may be;

2. [**Health and accident.**]-To make insurance on the health of individuals, and against the personal injury, disablement and death, resulting from traveling, or general accidents by land or water;

3. [**Fidelity of persons.**]-To insure the fidelity of persons holding places of private or public trust;

4. [**Personal property.**]-To receive on deposit and insure the safe keeping of books, papers, moneys, stocks, bonds and all kinds of personal property;

5. [**Live stock.**]-To insure horses, cattle and other live stock against loss, or damage by accident, theft or any unknown or contingent event whatever which may be the subject of legal insurance; to lend money on bottomry or respondentia, and to cause itself to be insured against any loss or risk it may have incurred in the course of its business, and upon the interest which it may have in any property, by means of any loan which it may have made on mortgage, bottomry or respondentia, and generally to do and perform all other matters and things proper to promote these objects.

[**Confined to one kind of insurance.**]-But no company shall be organized to issue policies of insurance for more than one of the above five mentioned purposes, and no company that shall have been organized for either one of said purposes, shall issue policies of insurance for any other; and no company organized under this chapter, or transacting business in this state, shall expose itself to loss on any one risk or hazard to an amount exceeding ten per cent on its paid up capital, unless the excess shall be reinsured by the same in some other good and reliable company. But the restrictions as to the amount of risk any company shall assume, shall not apply to any companies organized to guarantee the fidelity of persons in places of public or private trust, nor to companies that receive on deposit and guarantee the safe keeping of books, papers, moneys and other personal property.

SEC. 1133. [**Policies of.**]-All policies or contracts of insurance made or entered into by the company, may be made either with or without the seal of said company; but said policies shall be subscribed by the president, or such other officer as may be designated by the directors for that purpose, and shall be attested by the secretary thereof.

SEC. 1134. [**Transfer of stock.**]-Transfers of stock may be made by any stockholder, or his legal representative, subject to such restrictions as the directors shall establish in their by-laws, except as hereinafter provided.

CAPITAL INCREASED—REAL ESTATE.

SEC. 1135. [**How.**]-Whenever any company organized under this chapter, with less than the maximum capital limited in section eleven hundred and twenty-four hereof, shall, in the opinion of the directors thereof, require an increased amount of capital, they shall, if authorized by the holders of a majority of the stock to do so, file with the auditor of state a certificate setting forth the amount of such desired increase, not exceeding said maximum, and thereafter such company shall be entitled to have the increased amount of capital fixed by said certificate, and the examination of securities composing the capital stock thus increased,

shall be made in the same manner as provided in section eleven hundred and thirty-one of this chapter for the capital stock first paid in.

SEC. 1136. [Dividends: amount of reservation: forfeiture of charter.]—The directors, trustees, or managers of any insurance company organized under this chapter, or incorporated under any law of this state, shall not make any dividends, except from the surplus profit arising from their business; and, in estimating such profits, there shall be reserved therefrom a sum equal to forty per cent of the amount received as premiums on unexpired risks and policies, which amount, so reserved, is hereby declared to be unearned premiums; and there shall also be reserved all sums due the corporation on bond and mortgages, bonds, stocks, and book account, of which no part of the principal or interest thereon has been paid during the year preceding such estimate of profits, and upon which suit for foreclosure or collection has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and on which interest shall not have been paid; and in case of any such judgment, the interest due or accrued thereon and remaining unpaid, shall also be reserved. Any dividends made contrary to these provisions shall subject the company making it to a forfeiture of their charter.

SEC. 1137. [May own real estate.]—No company organized under this chapter shall purchase, hold, or convey any real estate, save for the purposes and in the manner herein set forth:

1. **[For accommodation of business.]**—Such as shall be requisite for its convenient accommodation in the transaction of its business;

2. **[Mortgaged as security.]**—Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for money due;

3. **[When taken in satisfaction of debts.]**—Such as shall have been conveyed to it in satisfaction of debts previously contracted in the legitimate business of the company, or for money due;

4. **[When purchased to secure debt.]**—Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debt; and it shall not be lawful for any such company to purchase, hold, or convey real estate in any other case, or for any other purpose, or acquired in any other manner, except that it may convey real estate which shall be found in the course of its business not necessary for its convenient accommodation in the transaction thereof; and all such last mentioned real estate shall be sold and conveyed within three years after the same has been deemed by the auditor of state unnecessary for such accommodation, unless the company shall procure a certificate from the said auditor, that the interest of said company will materially suffer by a forced sale, in which event the sale may be postponed for such a period as the said auditor may direct in such certificate.

DEPOSIT NOTES—LOSSES—POLICY.

SEC. 1138. [Mutual companies: notes given at organization of and subsequently.]—All notes deposited with any mutual insurance company at the time of its organization, as provided in section eleven hundred and twenty-four hereof, shall remain as security for all losses and claims until the accumulation of the profits invested, as required by section eleven hundred and thirty of this chapter, shall equal the amount of cash capital required to be possessed by stock companies organized under this chapter, the liability of each note decreasing proportionately as the profits are accumulating, but any note which may have been deposited with any mutual insurance company subsequent to its organization, in addition to the cash premiums on any insurances effected with such company, may at the expiration of the time of such insurance, or upon the cancellation by the

company of the policy, be relinquished and given up to the maker thereof, or his legal representatives, upon his paying his proportion of losses and expenses which may have accrued thereon during such term. The directors or trustees of any such company shall have the right to determine the amount of the note to be given, in addition to the cash premium, by any person insured in such company, and every person effecting insurance in any mutual company, and also his heirs, executors, administrators, and assigns, continuing to be so insured, shall thereby become members of said company during the period of insurance, and shall be bound to pay for losses and such necessary expenses as aforesaid, accruing to said company in proportion to his or their deposit note. But any person insured in any mutual company, except in the case of notes required by this chapter to be deposited at the time of its organization, may at any time return his policy for cancellation, and, upon payment of the amount due at such time upon his premium note, shall be discharged from further liability thereon.

SEC. 1139. [Settlement of losses: to what extent members are liable.]

—The directors shall, as often as they deem necessary, after receiving notice of any loss or damage, settle and determine the sums to be paid by the several members thereof as their respective portion of such loss, and publish the same in such manner as they may deem proper, or the by-laws shall have prescribed; but the sum to be paid by each member shall always be in proportion to the original amount of his deposit note, and shall be paid to the officers of the company within thirty days after the publication of said notice; and if any member shall, for the space of thirty days after personal demand, or by letter, for payment shall have been made, neglect or refuse to pay the sum assessed upon him as his proportion of any loss aforesaid, the directors may sue for and recover the whole amount of his deposit note, with costs of suit; but execution shall issue for assessments and costs as they accrue only, and every such execution shall be accompanied by a list of losses for which the assessment was made. If the whole amount of deposit notes shall be insufficient to pay the loss occasioned, the sufferers insured by said company shall receive, toward making good their respective losses, a proportionate share of the whole amount of said notes, according to the sums to them respectively insured; but no member shall ever be required to pay for any loss more than the whole amount of his deposit note.

SEC. 1140. [Policies to show whether it is a mutual or stock company.]

—Every insurance company hereafter organized as provided in this chapter, shall, if it be a mutual company, embody the word "mutual" in its title, which shall appear on the first page of every policy and renewal receipt; and every company doing business as a cash stock company shall, upon the face of its policies, express in some suitable manner that such policies were issued by stock companies.

ANNUAL STATEMENT.

SEC. 1141. [When and to whom made: what to contain.]—The president, or the vice-president and secretary of each company organized under this chapter, or incorporated under any law of this state, or doing business in this state, shall, annually, on the first day of January of each year, or within thirty days thereafter, prepare, under oath, and deposit in the office of the auditor of state, a full, true, and complete statement of the condition of such company on the last day of the month preceding that on which such statement is filed, which last statement shall exhibit the following items and facts in the following form to-wit:

First—The amount of capital stock of the company;

Second—The name of the officers;

Third—The name of the company, and where located;

Fourth—The amount of its capital stock paid up;

Fifth—The property or assets held by the company, specifying:

1. The value, as near as may be, of the real estate owned by such company;
2. [**Cash on hand.**]*—*The amount of cash on hand and deposited in banks to the credit of the company, and in what bank the same is deposited;
3. [**In transit.**]*—*The amount of cash in the hands of agents, and in the course of transmission;
4. [**Mortgages.**]*—*The amount of loans secured by first mortgage on real estate, with the rate of interest thereon;
5. [**Loans.**]*—*The amount of all other bonds and loans, and how secured, with the rate of interest thereon;
6. [**Judgments.**]*—*The amount due the company on which judgment has been obtained;
7. [**Stocks.**]*—*The amount of stocks of this state, of the United States, of any incorporated city of this state, and of any other stocks owned by the company, specifying the amount, number of shares, and par and market value of each kind of stock;

8. [**Collaterals.**]*—*The amount of stock held by such company as collateral security for loans, with amount loaned on each kind of stock, its par and market value;

9. [**Assessments.**]*—*The amount of assessments on stock and premium notes, paid and unpaid;

10. [**Interest.**]*—*The amount of interest actually due and unpaid;

11. [**Securities.**]*—*All other securities and their value;

12. [**Notes.**]*—*The amount for which premium notes have been given on which policies have been issued.

Sixth—[**Liabilities.**]*—*Liabilities of such company, specifying:

1. [**Losses.**]*—*The losses adjusted and due;
2. The losses adjusted and not due;
3. Losses unadjusted;
4. Losses in suspense and the cause thereof;
5. Losses resisted and in litigation;
6. [**Dividends.**]*—*Dividends, either in script or cash, specifying amount of each, declared but not due;
7. Dividends declared due;
8. [**Re-insurance.**]*—*The amount required to re-insure all outstanding risks, on the basis of forty per cent of the premiums on all unexpired risks;
9. [**Amounts due.**]*—*The amount due banks or other creditors;
10. [**Money borrowed.**]*—*The amount of money borrowed and the security therefor;
11. [**Other claims.**]*—*All other claims against the company.

Seventh—[**Income.**]*—*The income of the company during the previous year, specifying:

1. [**Premiums.**]*—*The amount received for premiums, exclusive of premium notes;

2. [**Notes.**]*—*The amount of premium notes received;

3. [**Interest.**]*—*The amount received for interest;

4. [**Assessments.**]*—*The amount received for assessments, or calls on stock notes, or premium notes;

5. [**Other sources.**]*—*The amount received from all other sources.

Eighth—[**Expenditures.**]*—*The expenditures during the preceding year, specifying:

1. [**Losses paid.**]*—*The amount of losses paid during said term, stating how much of the same accrued prior, and how much subsequent, to the date of the preceding statement, and the amount at which losses were estimated in such statement;

2. [**Dividends.**]—The amount paid for dividends;
3. [**Salaries.**]—The amount paid for commissions, salaries, expenses, and other charges of agents, clerks, and other employes;
4. [**Charges.**]—The amount paid for salaries, fees, and other charges of officers and directors;
5. [**Taxes.**]—The amount paid for local, state, national, internal revenue, and other taxes and duties;
6. [**Other expenses.**]—The amount paid for all other expenses, expenditures, including printing, stationery, rents, furniture, etc.;
- Ninth*—[**Risks.**]—The largest amount insured in any one risk;
- Tenth*—The amount of risks written during the year then ending;
- Eleventh*—The amount of risks in force, having less than one year to run;
- Twelfth*—The amount of risks in force, having more than one, and not over three years to run;
- Thirteenth*—The amount of risks having more than three years to run;
- Fourteenth*—The following question must be answered, viz: Are dividends declared on premiums received for risks not terminated?

Fifteenth. [**Accident companies: ticket register.**]—Each accident insurance company, or company insuring against accidents in this state, shall keep a register of tickets sold by its officers or agents, which register shall show the name and residence of the person insured, the amount of such insurance, the date of issue of such ticket, and the time the same will remain in force, and every such company shall file in the office of the auditor of state, in January in each year, a report, sworn to by the president or secretary of the company, showing the above items of the business of such company during the preceding year, and the auditor of state shall withhold the certificate of authority from any such company neglecting or failing to comply with the provisions of this section.

SEC. 1142. [**Auditor may require information.**]—The auditor of state is hereby authorized and empowered to address any inquiries to any insurance company in relation to its doings and condition, or any other matter connected with its transactions, which he may deem necessary for the public good, or for a proper discharge of his duties, and any company so addressed shall promptly reply in writing thereto.

SEC. 1143. [**Additional Exhibit.**]—The statement of any company, the capital of which is composed in whole, or in part, of notes, shall, in addition to the foregoing, exhibit the amount of notes originally forming the capital, and also what proportion of said notes is still held by such company and considered capital.

FOREIGN COMPANIES—CAPITAL REQUIRED.

SEC. 1144. (*As amended by ch. 145, 21st g. a.*) [**Amount: prerequisites to insuring.**]—No insurance company, association, or partnership, organized or associated for any of the purposes specified in this chapter, incorporated by, or organized under, the laws of any other state or any foreign government, shall, directly or indirectly, take risks or transact any business of insurance in this state, unless possessed of two hundred thousand dollars of actual paid up capital, exclusive of any assets of any such company deposited in any other states or territories for the special benefit or security of the insured therein: [*Provided*, that the foregoing provisions of this section shall not apply to foreign mutual hail insurance companies issuing policies for a term of one year or less. *Provided, further*, that foreign companies organized to insure plate glass exclusively, shall not be required to have a greater capital than one hundred thousand dollars]; and any such company, desiring to transact any business as aforesaid, by an agent or agents in this state, shall file with the auditor of state a written instrument, duly signed

and sealed, authorizing any agent or agents of such company in this state to acknowledge service of process for and in behalf of such company in this state, consenting that service of process, original, mean, or final, upon any such agent or agents, shall be taken and held as valid as if served upon the company according to the laws of this or any other state, and waiving all claim or right of error, by reason of such acknowledgment or service; and also a certified copy of their charter or deed of settlement, together with a statement, under oath, of the president or vice-president, or other chief officer, and the secretary of the company for which they may act; stating the name of the company and the place where located, the amount of its capital, with a detailed statement of the facts and items required from companies organized under the laws of this state, as per section eleven hundred and forty-one hereof; also a copy of the last annual report, if any, made under any law of the state by which said company was incorporated; and no agent shall be allowed to transact business for any company whose capital is impaired by liabilities as stated in section eleven hundred and forty-one of this chapter, to the extent of twenty per cent thereof, while such deficiency shall continue. [Any mutual fire insurance company possessed of cash assets, safely invested, amounting at least to two hundred thousand dollars over and above all its liabilities, including the reserve for insurance required by the laws of this state, shall be deemed to be possessed of two hundred thousand dollars of actual paid up capital, within the meaning of this section, and may be authorized to take risks and transact the business of insurance in this state, on complying with the requisitions of said chapter four, relating to insurance companies incorporated by or under the laws of other states; subject, however, to all the provisions of said chapter, applicable to such insurance companies, and all other acts and laws relating to insurance so far as applicable.]

Service of the original notice, in an action against an insurance company, may, under this section, be made upon any authorized agent of the company, and the fact that service was made upon an agent in another county than that in which the loss occurred does not constitute "fraud practiced by the successful party" authorizing a vacation of the judgment. *The N. Ins. Co. v. Rodecker et al.*, 47 Iowa, 162.

(CHAPTER 111, LAWS OF 1878.)

TO PREVENT THE PUBLICATION OF FALSE STATEMENTS REGARDING FIRE INSURANCE.

An Act to prevent the making and publication of false or deceptive statements in relation to the business of fire insurance. [Additional to code, title IX, chapter 4.]

SECTION 1. [Unlawful for any company or agent to make false statement of assets.]—*Be it enacted by the general assembly of the state of Iowa:* It shall not be lawful for any company, corporation, association, individual or individuals, now transacting, or now or hereafter authorized, under any existing or future laws of this state, to transact the business of fire insurance within this state, to state or represent, either by advertisement in any newspaper, magazine, or periodical, or by any sign, circular, card, policy of insurance, or certificate of renewal thereof, or otherwise, any funds or assets to be in possession of any such company, corporation, association, individual or individuals, not actually possessed by such company, corporation, association, individual or individuals and available for the payment of losses by fire, and held for the protection of holders of policies of fire insurance.

SEC. 2. [Publication of financial standing shall truly exhibit capital, etc.]—Every advertisement or public announcement, and every sign, circular, or card hereafter made or issued by any company, corporation, association, individual

or individuals, or any officer, agent, manager or legal representative thereof, now, or hereafter authorized by any existing or future laws of this state, to transact the business of fire insurance within this state, which shall purport to make known the financial standing of any such company, corporation, association, individual or individuals, shall exhibit the capital actually paid in, in cash, and the amount of net surplus of assets over all liabilities of such company, corporation, association, individual or individuals actually available for the payment of losses by fire and held for the protection of holders of their policies of fire insurance, and shall also exhibit the amount of net surplus of assets over all liabilities in the United States actually available for the payment of losses by fire and held in the United States for the protection of holders of their policies of fire insurance in the United States, including in such liabilities the fund reserved for re-insurance of outstanding risks; and shall correspond with the verified statement made by the company, corporation, association, individual or individuals making or issuing the same to the insurance department of this state next preceding the making or issuing the same. The provisions of this section shall not apply to companies, corporations or associations organized and doing business under the laws of this state.

SEC. 3. [Nothing herein to prevent publication of amount of capital in policy.]—Nothing in this act shall be construed to prohibit any insurance company or association from publishing in any policy or certificate of renewal thereof a single item showing the amount of their capital as set forth in their charter, act of incorporation, deed of settlement or articles of association under which they are authorized to transact the business of insurance.

SEC. 4. [Penalty for violating provisions of this act.]—Any violation of any provision of this act shall, for the first offense, subject the company, corporation, association, individual or individuals guilty of such violation, to a penalty of five hundred dollars, to be sued for and recovered in the name of the state, with costs and expenses of such prosecution by the district-attorney of any county in which the company, corporation, association, individual or individuals shall be located or may transact business, or in any county where such offense may be committed, and such penalty when recovered shall be paid into the treasury of such county for the benefit of the school fund of said county. Every subsequent violation shall subject the company, corporation, association, individual or individuals guilty of such violation to a penalty of not less than one thousand dollars, which shall be sued for, recovered and disposed of in like manner as for the first offense.

Approved March 25, 1878.

RISKS—AGENTS.

SEC. 1145. [Certificate required before risks taken.]—No agent shall act for any insurance company referred to herein, directly or indirectly, in taking risks or transacting business of insurance in this state, without procuring from the auditor of state a certificate of authority, stating that said company had complied with all the requisitions of this chapter.

SEC. 1146. [Make annual statements.]—The statements and evidences of investments required of foreign companies as above, shall be renewed, annually, in such manner and form as required hereby and as said auditor may direct, with any additional statement of the amount of losses incurred or premiums received in this state during the preceding period, so long as such agency continues. And said auditor, on being satisfied that the capital, securities and investments remain secure, as hereinbefore provided, shall furnish a renewal of his certificate as aforesaid. All notes taken for policies of insurance in any company doing business in this state, shall state upon their face that they have been taken for insurance, and shall not be collectible unless the company and its agents have fully complied with the laws of this state relative to insurance.

Where a promissory note, on its face negotiable, was given for insurance, but not so expressed upon its face, and was transferred for value before maturity, it was held collectible in the hands of an innocent holder. *Cook v. Weirman*, 51 Iowa, 561.

SEC. 1147. [Conform to provisions of this chapter: penalty for failure.]—Every insurance company organized under the laws of, or doing business in, this state, shall conform to all the provisions of this chapter applicable thereto, and, when necessary, any existing company shall change its charter and by-laws, so as to conform hereto, by a vote of a majority of its board of directors; and any president, secretary, or other officer of any company organized under the laws of Iowa, or any officer or person doing, or attempting to do business in this state for any insurance company organized without this state, failing to comply with any of the requirements of this chapter, or violating any of the provisions thereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not exceeding one thousand dollars, and be imprisoned in the county jail for a period not less than thirty days nor more than six months.

A failure to comply with the provisions of this section, which was taken from chapter 138, laws of 1868, will not prevent an insurance company from indemnifying itself by re-insurance for risks already assumed. *The Davenport Fire Insurance Co. v. Moore*, 50 Iowa, 619.

SEC. 1148. [Advertisements: what to contain.]—Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the state or government under the laws of which it is organized. The term agent, used in the foregoing sections, shall include any other person who shall, in any manner, directly or indirectly, transact the insurance business of any insurance company not incorporated by the laws of this state. The provisions of the foregoing sections relative to foreign companies, shall apply to all such companies, partnerships, associations, or individuals, whether incorporated or not.

EXAMINATION BY AUDITOR.

SEC. 1149. [Auditor may appoint examiners: their powers: proceedings when assets are impaired.]—The auditor of state shall, whenever he deems it expedient so to do, appoint one or more persons, not officers, agents, or stockholders of any insurance company doing business in this state, to examine into the affairs and condition of any insurance company incorporated or doing business in this state, or to make such examination himself; and the officers or agents of such company or companies shall cause their books to be opened for the inspection of the auditor or the person or persons so appointed, and otherwise facilitate such examination so far as may be in their power so to do; and for the purpose of arriving at the truth in such case, the auditor, or the person or persons so appointed by him, shall have power to examine, under oath, the officers or agents of any company, or others, if necessary, relative to the business and condition of said company; and whenever the auditor shall deem it best for the interest of the public so to do, he shall publish the result of such investigation in one or more papers of this state; and whenever it shall appear to the auditor, from such examination, that the assets and funds of any company incorporated in this state are reduced or impaired by the liabilities of said company, as described under the head of liabilities in the statement required by this chapter, more than twenty per cent below the paid-up capital stock required hereby, he may direct the officers thereof to require the stockholders to pay in the amount of such deficiency, within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney-general, who shall apply to the district or circuit court, or, if in vacation, to one of the judges thereof, for an order requiring said company to show cause why their business should not be closed; and the court, or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respec-

tive parties; and in case it shall appear to the satisfaction of said court, or judge, that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, the said court, or judge, shall decree a dissolution of said company and a distribution of its effects. The said court, or judge, shall have power to refer the application of the attorney-general to a referee, to inquire into and report upon the facts stated therein.

SEC. 1150. [**Requisition on stockholders: liability of directors.**—Any company receiving the aforesaid requisition from the auditor, shall forthwith call upon its stockholders for such amounts as will make its paid up capital equal to the amount fixed by this chapter, or the charter of said company; and in case any stockholder shall refuse or neglect to pay the amount so called for, after notice personally given, or by advertisement in such time and manner as said auditor shall approve, it shall be lawful for the said company to require the return of the original certificate of stock held by such stockholder, and in lieu thereof to issue new certificates for such number of shares as said stockholder may be entitled to in the proportion that the ascertained value of the funds of the said company may be found to bear to the original capital of the said company; the value of such shares for which new certificates shall be issued to be ascertained under the direction of said auditor, the company paying for the fractional parts of shares; and it shall be lawful for the directors of such company to create new stock and dispose of the same, and to issue new certificates therefor, to an amount sufficient to make up the original capital of the company. And in the event of any additional losses accruing upon new risks, taken after the expiration of the period limited by the said auditor in the aforesaid requisition for the filling up of the deficiency in the capital of such company, and before said deficiency shall have been made up, the directors shall be individually liable to the extent thereof.

SEC. 1151. [**Examination and proceedings in case of mutual companies.**]—If, upon such examination, it shall appear to the auditor that the assets of any company, chartered upon the plan of mutual insurance under this chapter, are insufficient to justify the continuance of such company in business, he shall proceed in relation to such company in the same manner as herein required in regard to joint stock companies; and the trustees or directors of such company are made personally liable for any losses which may be sustained upon risks taken after the expiration of the period limited by the auditor for filling up the deficiency in the capital, and before such deficiency shall have been made up. Any transfer of the stock of any company organized under this chapter, made during the pending of any investigation required above, shall not release the party making the transfer from his liability for losses which may have accrued previous to such transfer.

SEC. 1152. [**Revocation of certificate.**—The auditor of state shall be authorized to examine into the condition and affairs of any insurance company, as provided for in this chapter, doing business in this state, not organized under the laws of this state, or cause such examination to be made by some person or persons appointed by him, having no interest in any insurance company; and, whenever it shall appear to the satisfaction of said auditor that the affairs of any such company are in an unsound condition, he shall revoke the certificate granted in behalf of such company, and shall cause a notification thereof to be published in some newspaper of general circulation published in the city of Des Moines, and the agent or agents of such company are, after such notice, required to discontinue the issuing of any new policy, or the renewal of any previously issued.

FEES.

SEC. 1153. [**Amount of.**—There shall be paid by every company doing business in this state, except companies organized under the laws of the state, the following fees:

Upon filing declaration, or certified copy of charter, twenty-five dollars.

Upon filing the annual statement, twenty dollars.

For each certificate of authority, and certified copy thereof, two dollars.

For every copy of any paper filed in the department, the sum of twenty cents per folio, and for affixing the official seal to such copy, and certifying the same, one dollar.

For valuing policies of life insurance companies, ten dollars per million of insurance or any fraction thereof.

For official examinations of companies under this act, the actual expense incurred.

And companies organized under the law of this state, shall pay the following fees:

For filing and examination of the first application of any company, and the issuing of the certificate of license thereon, ten dollars;

For filing each annual statement, and issuing the renewal of license required by law, three dollars;

For each certificate of authority to its agents, fifty cents.

A city possessing the power to license insurance companies may properly graduate the amount thereof in proportion to the income of the different companies, but the annual premiums, which are in the nature of income, are not subject to taxation, by the city, as personal property. *City of Burlington v. Putnam Ins. Co.*, 31 Iowa, 102; see also *City of Dubuque v. The N. W. M. Life Ins. Co.*, 29 Id., 9.

SEC. 1154. [**Laws of other states.**—When, by the laws of any other state, any taxes, fines, penalties, license fees, deposits of moneys or of securities, or other obligations or prohibitions, are imposed, or would be imposed, on insurance companies of this state, doing, or that might seek to do, business in such other state, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing business within this state, or upon their agents here.

SEC. 1155. [**Certificate of auditor to be published annually.**—Every insurance company of the kind provided for in this chapter, doing business in this state, organized under the laws of this state or any other state or country, shall publish, annually, in two newspapers of general circulation, one of which shall be published at the capital of this state, and in case of any company organized in the state of Iowa, one of which shall be published in the county where the principal office is located, a certificate from the auditor of state that such company has, in all respects, complied with the laws of this state relating to insurance. Said certificate shall also contain a statement, under the oath of the president or secretary, of such insurance company, of the actual amount of paid-up capital, the aggregate amount of assets and liabilities at the date of such certificate, together with the aggregate income and expenditures of such company for the year preceding the date of such certificate.

SEC. 1156. (*As amended by ch. 37, laws 16th g. a.*) [**Company to pay expenses.**—The necessary expenditure of any examination made, or ordered to be made, by the auditor of state, under this chapter, shall be certified to him and paid on his requisition, by the company which is the subject of such examination. [In case of the refusal by any company to pay the requisition of the auditor of state for the necessary expenses, it shall be the duty of the auditor to suspend such com-

pany from doing business in this state until said expenses are paid; if not so paid, the same may be audited and allowed by the executive council, and paid out of any money in the treasury not otherwise appropriated.]

STATEMENTS PUBLISHED.

SEC. 1157. [**Auditor to furnish printed forms.**—The auditor of state shall cause to be prepared and furnished to each company organized under the laws of this state, and to the attorney or agent of each company incorporated by other states and foreign governments, who may apply for the same, printed forms of statements required by this chapter, and he may, from time to time, make such changes in the forms of these statements as shall seem to him best adapted to elicit from the companies a true exhibit of their condition, in respect to the several points hereinbefore enumerated.]

SEC. 1158. (*As substituted by ch. 164, 16th g. a.*) [**Auditor to make and publish report.**] [The auditor of state shall cause the information contained in the statements required of the companies organized or doing business in this state to be arranged in a tabular form, and prepare the same in a single document for printing, which report shall be made on or before the first day of May of each year, and three thousand copies shall be printed for the use of the auditor, who shall furnish a copy to each member of the general assembly and one to each newspaper printed in the state.]

SEC. 1159. [**Must be stock or mutual.**—No company organized upon the mutual plan, shall do business or take risks upon the stock plan; neither shall a company organized as a stock company, do business upon the plan of a mutual insurance company.]

SEC. 1160. (*As amended by ch. 11, 20th g. a., and ch. 93, 22d g. a.*) [**Mutual associations: number and powers limited.**—[Nothing in this chapter shall be so construed as to prevent any number of persons from making mutual pledges and giving valid obligations to each other for their own insurance from loss by fire or death, [or loss or damage by tornadoes, lightning, hail storms, cyclones or wind storms], but such association of persons shall in no case insure any property not owned by one of their number, [except such school houses or church buildings as the said companies deem proper to insure within the territory where they do business], and no life except that of their own numbers, nor shall the provisions of this chapter be applicable to such associations or companies. Each fire insurance company organized under the provisions of this chapter shall report in January of each year to the auditor of state, which report shall show the following facts:

1. Name of company;
2. Place of doing business;
3. Names of president and secretary;
4. Address of secretary;
5. Date of commencing business;
6. Amount of risks in force at the beginning of the year;
7. Amount of risks written during the year;
8. Amount of risks canceled during the year;
9. Amount of risks in force at the end of the year;
10. Amount of losses paid during the year;
11. Amount of other expenses;
12. Total expenses during the year.

These reports to be tabulated by the auditor of state, and published by him in his annual report on insurance, and one copy shall by him be sent to each company reporting as above. But no foreign life insurance company, aid society, or association for the insurance of the lives of its members and doing business on the

assessment plan, shall be allowed to do business in this state unless it has a guaranteed capital of not less than one hundred thousand dollars in the state in which it is organized, and such companies shall pay the same fees for annual reports as are now paid by stock companies.

[**Fees.**—And such companies organized under this section shall pay the same fees for annual reports as are now paid by stock companies, but such associations or companies shall receive no premiums nor make any dividends; but the word premiums herein shall not be construed to mean policy and survey fees, nor the necessary expenses of such companies.]

Mutual aid associations, organized under this section for the insurance of their own members exclusively, from loss by death, sickness or accident, need not comply with chapter 5 of title 9 of the code, relating to life insurance companies properly so called. The word "every," in section 1161, was held to be limited to stock and mutual companies in the sections following in that chapter. *The State, ex rel. Auditor, v. Iowa Mutual Aid Association*, 59 Iowa, 125.

The avowed and actual purposes of the Ancient Order of United Workmen considered by the court, and held to be an insurance company within the meaning of section 1160 of the code, and inasmuch as the supreme lodge of said order is a corporation of the state of Kentucky, and has not a guaranteed capital of \$100,000 in this state as required by said section, and held further, that it is not authorized to transact business within this state, and that its mandate to the grand lodge of this state to raise a fund to relieve overburdened jurisdictions in other states, was not binding upon the grand lodge of this state.

(CHAPTER 39, LAWS OF 1878.)

FIRE INSURANCE COMPANIES.

An Act to require fire insurance companies doing business in this state to cancel policies in certain cases. (Additional to code, chapter 4, title IX: "Of insurance companies.")

SECTION 1. [**Duty of auditor of state.**—*Be it enacted by the general assembly of the state of Iowa:* That the auditor of state shall have power, and it shall be his duty, to examine the form of all policy contracts hereafter issued, or proposed to be issued, by any fire insurance company, association, or corporation authorized by law, or that may hereafter apply to be authorized to transact the business of fire insurance in this state, and the auditor shall refuse to authorize any such company, association, or corporation to do business in this state, and shall not renew the authority or certificates of any such company, association, or corporation authorized to do business in this state, whenever the form of policy, contract, issued or proposed to be issued by any such company, association, or corporation does not provide for the cancellation of the same at the request of the insured upon equitable terms, and in case of any violation of this act, it shall be the duty of the auditor to revoke the authority of such company to do business within this state. The provisions of this act shall not apply until January 1, 1879, to any company now holding a certificate of authority from the auditor to do business in this state.

Approved March 15, 1878.

(CHAPTER 210, LAWS OF 1880.)

TO REGULATE FIRE INSURANCE.

An Act to secure policy holders in fire insurance companies from unjust forfeitures of policies.

SECTION 1. [**Non-forfeiture of policy where premium note given.**—*Be it enacted by the general assembly of the state of Iowa:* That in every instance where a fire insurance company or association doing business in this state shall

hereafter take a note or contract for the premium on any insurance policy, or shall hereafter take a premium note or contract which, by its terms or by any agreement or rule of the company or association, is assessable for the premium due on the policy for which it was given, such insurance company or association shall not declare such policy forfeited or suspended for non-payment of such note or contract, except as hereinafter provided, anything in the policy or application to the contrary notwithstanding.

SEC. 2. [Company must give notice of premium due.]—Within thirty days prior to, or at any time after the maturity of any note or contract, whether assessable or where the time of payment is fixed in the contract, given for the premium on any policy of insurance, such company or association may serve a notice in writing upon the insured that his note or an installment thereof is due, or to become due, stating the amount which will be due on the note or contract, and also the amount required to pay the customary short rates, including the expense of taking the risk up to the time the policy will be suspended under the notice in order to cancel the policy, and that unless payment is made within thirty days his policy will be suspended. Such notice may be served either personally or by registered letter addressed to the assured at his postoffice address named in or on the policy, and no policy of insurance shall be suspended for non-payment of such amount until thirty days after such notice has been served.

SEC. 3. [Assured may have policy canceled.]—The assured may, at any time after the maturity of the note, contract or installment, pay to the insurance company or association the customary short rates, including the expense of taking the risk and the cost of suit, in case suit has been commenced or judgment rendered on the note or contract, and upon such payment, if he so elect, his said policy shall be canceled, and any note or contract, or any judgment rendered thereon, shall be canceled and shall be actually void in whomsoever hands the same may be; *provided*, that the assured may, at any time before cancellation of the policy, pay to the insurance company or association the full amount due upon any note or contract, and from the date of such payment the policy shall be revived, and shall be in full force and effect; *provided*, such payment is made during the time stated in the policy and before a loss occurs. And *provided further*, that where any insurance company or association shall bring suit upon such note or contract and shall collect the same, from the time of such collection the policy shall be revived and be in full force from the time of such collection; *provided*, such collection is made during the time stated in the policy and before a loss occurs. The provisions of this act shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the application or policy to the contrary notwithstanding.

Approved March 31, 1880.

Before a fire insurance company can suspend a policy on account of non-payment of a premium note, it must, under this chapter, not only give thirty days notice to the assured of its intention to suspend in case payment is not made, but must also notify him of the amount required to pay the customary short rates, including the expense of taking the risk up to the time of the proposed suspension, and the insured does not waive the failure to give such notice by applying for an extension of time on the note. *Boyd v. The Cedar Rapids Ins. Co.*, 70 Iowa, 325.

(CHAPTER 211, LAWS OF 1880.)

RELATING TO FIRE INSURANCE.

An Act relating to insurance and fire insurance companies.

SECTION 1. [Person soliciting insurance is agent of company.]—*Be it enacted by the general assembly of the state of Iowa:* Any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the

soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding.

Where an agent of an insurance company had authority to solicit risks and issue policies, sent his clerk to solicit a risk and take an application, and the clerk knew that there was other insurance on the property, but the agent, ignorant of the other insurance, issued a policy thereon, and collected the premium, *held*, that the company was bound by the knowledge of the agent's clerk, who for the purpose of that policy must be regarded as the company's soliciting agent, and that it could not defeat an action on the policy on the ground of prior insurance, which, under the terms of the policy, would otherwise have rendered it void. *Bennett v. The Council Bluffs Ins. Co.*, 70 Iowa, 600.

SEC. 2. [Copy of application attached to policy.]—All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy or endorse thereon a true copy of any application or representations of the assured, which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving such application or representations, or any part thereof, or the falsity thereof, or any parts thereof, in any action upon such policy; and the plaintiff in any such action shall not be required in order to recover against such company or association, either to plead or prove such application or representations, but may do so at his option.

Under this provision of the statute, it is incompetent, in defense to an action on a policy of insurance, to plead or prove statements made by the assured in his application, where such statements are not reduced to writing, and a copy thereof attached to or indorsed upon the policy. *Ellis v. The Council Bluffs Ins. Co.*, 64 Iowa, 507.

SEC. 3. [Amount stated in policy prima facie of value of property.]—In any suit or action brought in any court in this state on any policy of insurance against the company or association issuing the policy sued upon, in case of the loss of any building so insured, the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy; *provided*, nothing herein shall be construed to prevent the insurance company or association from showing the actual value at the date of the policy and any depreciation in the value thereof before the loss occurred; *provided, further*, such insurance company or association shall be liable for the actual value of the property insured at the date of the loss, unless such value exceeds the amount stated in the policy, and in order to maintain his action on the policy, it shall only be necessary for the assured to prove the loss of the building insured and that he has given the company or association notice in writing of such loss, accompanied by an affidavit stating the facts as to how the loss occurred, so far as they are within his knowledge, and the extent of the loss; which notice shall be given within sixty days from the time the loss occurred; *provided, further*, that no action shall be begun within ninety days after notice of such loss has been given; all the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding.

Approved March 31, 1880.

Under chapter 211, laws of 1880, an action cannot be commenced upon a policy of fire insurance within ninety days after notice of loss has been given, even though the company may before that time declare absolutely that they will not pay the loss; the effect of the statute being to declare that the loss is not due until the expiration of that time. *Quinn v. The Capital Insurance Co.*, 71 Iowa, 615.

CHAPTER 5.

OF LIFE INSURANCE COMPANIES.

SECTION 1161. [**Conditions.**].—Every company formed for the purpose of insuring the lives of individuals, whether organized under the laws of this state or of any other state, or foreign country, shall, before issuing any policies on lives within this state, comply with the conditions and restrictions of this chapter.

SEC. 1162. [**Stock companies: capital: amount to be paid up.**].—Joint stock companies, organized under the laws of this state, shall have not less than one hundred thousand dollars of capital stock subscribed, twenty-five per cent of which shall be paid up and invested in stocks of the United States, or of this state, or in bonds and mortgages upon unencumbered real estate in the state of Iowa, worth, exclusive of improvements, at least double the sum loaned thereon, which said securities shall be deposited with the auditor of state, and upon said deposit, and satisfactory evidence to the auditor that the capital stock is all subscribed in good faith, he shall issue to said company the certificate hereinafter provided for. But no part of the twenty-five per cent aforesaid shall be loaned to any stockholder or officer of the company; the remainder of such stock shall be paid in such time as the directors or trustees of the company may direct, and the same shall be secured by the notes of the stockholders of said company. No note shall be accepted as part of such capital stock unless the same shall be accompanied by a certificate of a justice of the peace, notary public, or clerk of the district court of the county in which the person executing such note shall reside, that the person making the same is, in his opinion, pecuniarily good and responsible for the same in property not exempt from execution by the laws of this state.

SEC. 1163. [**Mutual companies: application for insurance: conditions.**].—Companies organized under the laws of this state upon the mutual plan, shall, before issuing any policies, have actual applications on at least two hundred and fifty individual lives, for an average amount of one thousand dollars each, a list of which applications, giving the name, age, residence, amount of insurance and annual premium of each applicant, shall be filed with the auditor of state, and a deposit made with said auditor of an amount equal to three-fifths of the whole annual premium on said applications, either in cash or the securities required by the foregoing section, and, on compliance with said provisions, the auditor shall issue to said mutual company the certificate hereinafter prescribed.

AGENTS—RISKS.

SEC. 1164. [**Foreign companies: prerequisites to insurance.**].—No person shall act within this state as agent, or otherwise, in receiving or procuring applications for insurance, or in any manner to aid in transacting the business of insurance referred to in section eleven hundred and sixty-one hereof, for any company or association incorporated by, or organized under, the laws of any state or government, unless such company is possessed of the amount of actual capital required of any company in this state, and the same is invested in stocks or treasury notes of the United States, or this state, or of interest paying bonds of the state in which said company is located, or where said deposits are made, or in bonds and mortgages on unencumbered real estate within the state where such company is located, but all mortgages deposited by any company under this section shall be upon unencumbered real estate worth double the amount loaned thereon; which stock and securities shall be deposited with the auditor, controller, or chief financial officer of the state by

whose laws said company is incorporated, or some other state, and the auditor of this state furnished with a certificate of such auditor, controller, or chief financial officer aforesaid, under his hand and official seal, that he, as such auditor, controller, or chief financial officer of such state, holds in trust and on deposit, for the benefit of all the policy holders of such company, the security before mentioned, which certificate shall embrace the items of security so held, and that he is satisfied that such securities are worth one hundred thousand dollars; but nothing herein contained shall be construed to invalidate the agency of any company incorporated in another state, by reason of such company having from time to time exchanged the securities so deposited with the auditor, controller, or chief financial officer of the state in which such company is located, for other stock or securities authorized by this chapter, or by reason of such company having drawn its interest and dividends from time to time, for such stocks and securities.

SEC. 1165. [**Must appoint agent upon whom legal process can be served.**—Such company shall also appoint an attorney or agent in each county in this state, in which the company has an agency, on whom process of law can be served, and such company shall file with the auditor of state a certified copy of the charter or articles of incorporation of said company, and also a certified copy of the certificate of appointment of such agent, or agents, which appointment shall continue until another agent or attorney be substituted. And in case any such insurance corporation shall cease to transact business in this state according to the laws thereof, the agents last designated, or acting as such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing actions upon any policy or liability issued or contracted while such corporation transacted business in this state; and service of such process for the causes aforesaid upon any such agent, shall be deemed a valid personal service upon such corporation; and such company shall also file a statement of its condition and affairs in the office of the auditor of state, in the same form and manner required for the annual statements of similar companies organized under the laws of this state.

SEC. 1166. (*As substituted by ch. 2, § 1, 15th g. a.*) [**Must obtain auditor's certificate before risks taken.**—No agent shall act for any company referred to in the foregoing section, directly or indirectly, in taking risks, collecting premiums, or in any manner transacting the business of life insurance in this state without procuring from said auditor a certificate of authority, stating that the foregoing requirements have been complied with, and setting forth the name of the attorney for each company, a certified copy of which certificate shall be filed in the county recorder's office of the county where the agency is to be established, and shall be the authority of such company and agent to commence business in this state, and such company, or its agent or attorney, shall, annually, by the first day of April, file with the auditor of state a statement of its affairs for the year terminating on the 31st day of December preceding, in the same manner and form provided for similar companies organized in this state.)

ANNUAL STATEMENT.

SEC. 1167. (*As amended by ch. 2, section 2, 15th g. a.*) [**By whom made.**—The president, or vice-president, and secretary or actuary, or a majority of the trustees or directors of each company organized under this chapter, shall, annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the office of the auditor of state, a statement, showing:

FIRST—NAME AND CAPITAL.

1. The name of the company and where located;
2. The name of the officers;
3. The amount of capital stock;
4. The amount of capital stock paid in.

SECOND—ASSETS.

1. The value of real estate owned by such company;
2. The amount of cash on hand;
3. The amount of cash deposited in bank, giving name of bank or banks;
4. The amount of cash in the hands of agents, and in the course of transmission;
5. The amount of bank stocks, with the name of each bank, giving par and market value of the same;
6. The amount of stocks and bonds of the United States, and all other bonds, giving names and amounts, with the par and market value of each kind;
7. The amount of loans secured by first mortgage on real estate;
8. The amount of all other bonds and loans, and how secured, with the rate of interest;
9. The amount of premium notes on policies in force;
10. The amount of notes given for unpaid stock, and how secured;
11. The amount of assessments unpaid on stock or premium notes;
12. The amount of interest due and unpaid;
13. All other securities.

THIRD—LIABILITIES.

1. The amount of losses due and unpaid;
2. The amount of losses adjusted but not due;
3. The amount of losses unadjusted;
4. The amount of claims for losses resisted;
5. The amount of money or evidences of investment borrowed;
6. The amount of dividends unpaid;
7. The amount required to safely reinsure all outstanding risks;
8. All other claims against the company.

FOURTH—INCOME DURING THE YEAR.

1. The amount of net cash premiums received;
2. The amount of premium notes received;
3. The amount of interest received from all sources;
4. The amount received from all other sources.

FIFTH—EXPENDITURES DURING THE YEAR.

1. The amount paid for losses;
2. The amount of dividends paid to policy-holders, and amount to stockholders;
3. The amount of commissions and salaries paid to agents;
4. The amount paid to officers for salaries and other perquisites;
5. The amount paid for taxes;
6. The amount of all other payments and expenditures.

SIXTH—MISCELLANEOUS.

1. The greatest amount insured on any one life;
2. The amount deposited in other states or territories as security for policy holders therein, stating the amount in each state or territory;
3. The amount of premiums received in this state during the year;
4. The amount paid for losses in this state during the year;
5. The whole number of policies issued during the year, with the amount of insurance effected thereby, and total amount of risk;
6. All other items of information necessary to enable the auditor to correctly estimate the cash value of policies, or to judge of the correctness of the valuation thereof.

SEC. 1168. [**Additional inquiries.**]—The auditor of state is authorized to amend the form of annual statement, and to propose such additional inquiries as he may think necessary to elicit a full exhibit of the standing of companies doing business in this state.

SEC. 1169. (*As substituted by ch. 169, 21st g. a.*) [**Auditor of state shall ascertain value of each policy.**]—(As soon as practicable after the filing of said statement of any company organized and doing business under the laws of this state in the office of the auditor of state, he shall proceed to ascertain the net cash value of each policy in force upon the basis of the American experience table of mortality and four and one-half per cent interest; or actuary's combined experience table and four per cent interest. For the purpose of making such valuation, the auditor may employ a competent actuary to do the same, who shall be paid by the company for which the service was rendered; but nothing herein shall prevent any company from making said valuation herein contemplated, which shall be received by the auditor upon such proof as he may determine. Upon ascertaining the net cash value of all policies in force in any company organized under the laws of this state, the auditor shall notify said company of the amount, and within thirty days after the date of such notification, the officers of such company shall deposit with the auditor the amount of such ascertained valuation of all policies in force in the securities described in section 1179 of this chapter. But no such joint stock company organized under the laws of this state shall be required to make such deposit until the cash value of the policies in force, as ascertained by the auditor, exceed the amount deposited by said company under section 1162 hereof.)

SEC. 1170. (*As substituted by section 3, ch. 2, 15th g. a.*) [**Annual certificate recorded: copy furnished agents.**]—[On receipt of the deposit and statement from any company as provided in the preceding sections, and the statement and evidence of investment according to law of foreign companies, which shall be renewed annually, the auditor shall issue a certificate setting forth the corporate name of the company; its principal office or agency in the state; that it has fully complied with the laws of this state in relation to life insurance companies, and is authorized to transact the business of life insurance for twelve months from the date of such certificate, or until the expiration of the thirty days' notice given by the auditor of the next annual valuation of its policies, said certificate to expire on the first day of April in the year following after it is issued.]

SEC. 1171. (*As substituted by section 4, ch. 2, 15th g. a.*) [**Penalty for failure to make deposit or statement: home companies.**]—[Upon the failure of any company organized in this state to make the deposit, or file the statement in the time stated herein, the auditor shall notify the attorney-general of the default, who shall at once apply to the district or circuit court, if in session, or, if in vacation, to any judge thereof, for an order requiring said company to show cause why

its business shall not be closed; and if upon hearing the company shall fail to show sufficient cause for neglecting to make the deposit, or file the statement required by this chapter, then the court shall decree its dissolution. Companies organized and chartered by the laws of any foreign state or country, failing to file the evidence of deposit and the statement within the time stated herein, shall be subject to the penalties prescribed in section 1177.]

EXAMINATION BY AUDITOR.

SEC. 1172. [**When insolvent to procure injunction: certificates from other states received.**—The auditor may at any time make a personal examination of the books, papers and securities of any life insurance company doing business in this state, or may authorize or empower any other suitable person to make such examination, and for the purpose of securing a full and true exhibit of its affairs, he, or the person selected by him to make such examination, shall have power to examine, under oath, any officer or agent of said company, or others if necessary, relative to its business and management. If, upon such examination, the auditor is of opinion that the company is insolvent, or that its condition is such as to render its further proceedings hazardous to the public or to the holders of its policies, he shall communicate the facts to the attorney-general, who shall at once apply to a judge of the supreme or district court to issue an injunction, restraining such company from transacting further business, except the payment of losses already ascertained and due, until a full hearing can be had. It shall be discretionary with the judge, either to issue the injunction forthwith or to give notice to the company, and cause a hearing to be had as in ordinary proceedings for an injunction. Upon the final hearing of the cause, he may dissolve or modify the injunction, or make it perpetual, and, if made perpetual, shall also decree what disposition shall be made of the deposit of the company in the hands of the auditor, subject to the provisions of the following section.

SEC. 1173. [**When securities vest in state for benefit of insured.**—The securities of a defaulting or insolvent company, on deposit with the auditor of state, shall vest in the state for the benefit of the policies on which such deposits were made, and the proceeds of the same shall, upon the order of the court, be divided among the holders of said policies in the proportions of the last annual valuation of the same, or applied to the purchase of re-insurance for the benefit of the policy-holders.

SEC. 1174. [**Change of securities.**—Companies shall have the right at any time to change their securities on deposit, by substituting for those withdrawn a like amount in other securities of the character provided for in this chapter, and whenever the annual valuation of policies outstanding and in force against any company is less than the amount of security then on deposit with the auditor, said company shall have the right to withdraw such excess; but twenty-five thousand dollars shall remain on deposit.

SEC. 1175. [**Interest collected.**—The auditor shall permit companies, having on deposit with him stock or bonds as security, to collect the interest accruing on such deposits, delivering to their authorized agents, respectively, the coupons or other evidences of interest as the same become due, but upon default by any company to deposit additional security as called for by the auditor, or pending any proceedings to close up or enjoin it, he shall collect the interest as it becomes due, and add the same to the securities in his hands belonging to such company.

SEC. 1176. [**Auditor's report.**—At the earliest practicable date after the returns are received from the several insurance companies the auditor shall make a report to the general assembly, of the general conduct and condition of the corporations visited by him since his last annual report, and shall include therein an

aggregate of the calculated value of all outstanding policies of life insurance, and in connection therewith, shall prepare an abstract of all the returns and statements made to him by insurance companies and agents.

SEC. 1177. (*As substituted by ch. 2, § 5, 15th g. a.*) [**Penalty for doing business without certificate: company: agent.**]—(Any company doing business in this state without the certificate required by section (1170) eleven hundred and seventy of this chapter, shall forfeit one hundred dollars for every day's neglect to procure said certificate. Any agent making insurance, or soliciting applications for any company having no certificate from the auditor, shall forfeit the sum of three hundred dollars, and any person acting for a company authorized to transact business in this state, without having the certificate prescribed in section 1166, issued by the auditor of state, in his possession, shall be liable to pay twenty-five dollars for each day's neglect to procure such certificate.)

SEC. 1178. (*As substituted by § 6, ch. 2, 15th g. a.*) (Suits brought to recover any of the penalties provided for in this chapter shall be instituted in the name of the state of Iowa by the district-attorney of the district, under the direction and by the authority of the auditor of state, and may be brought in the district or circuit court of any county in which the company proceeded against is engaged in the transaction of business, or in which the agent resides, in cases in which the proceeding is against the agent individually. Said penalties when recovered shall be paid into the state treasury for the use of the school fund.)

SEC. 1179. (*As amended by ch. 9A, laws 22d g. a.*) [**Investment of funds.**]—[No company organized under the provisions of this chapter shall invest its funds in any other manner than as follows: In bonds of the United States. In bonds of this state or of any other state if at or above par. In bonds and mortgages on unincumbered real estate within this state, or in any other state in which such company is transacting an insurance business, worth at least twice the amount loaned thereon, exclusive of improvements. In bonds of any county, incorporated city, town or independent school district within this state, or any other state in which such company is transacting an insurance business, [worth at least twice the amount loaned thereon exclusive of improvements. In bonds or other evidences of indebtedness bearing interest, of any county, incorporated city, town or school district within this state or any other state in which such company is transacting an insurance business, where such bonds or other evidences of indebtedness are issued by authority of law, and are approved by the executive council.] In loans upon its own policies, provided that the amount so loaned shall not exceed one-half of the reserve against said policy as provided in this chapter, at the time such loan is made, and that all policies upon which loans are made shall have been issued and in force at least five years.] [And a sum not exceeding five per cent of its assets may be invested in stocks of national banks now or hereafter organized under the laws of the United States.]

SEC. 1180. [**Real estate.**]—No company organized under this chapter shall be permitted to purchase, hold, or convey real estate, except for the purposes and in the manner herein set forth:

1. [**When requisite for business.**]—Such as shall be requisite for its immediate accommodation in the transaction of its business; or,

2. [**When mortgaged as security to.**]—Such as shall have been conveyed to it in good faith by way of security for loans previously contracted, or for moneys due; or,

3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or

4. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts; and no company incorporated as aforesaid, shall purchase, hold, or convey real estate in any other case, or for any other purpose.

SEC. 1181. [**When to be sold.**—All such real estate as may be acquired as aforesaid, and which shall not be necessary for the accommodation of such company in the convenient transaction of its business, shall be sold and disposed of within five years after such company shall have acquired title to the same; no such company shall hold such real estate for a longer period than that above mentioned, unless the said company shall procure a certificate from the auditor of state that the interests of the company will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such time as the said auditor shall direct in said certificate.

SEC. 1182. [**Endowment policy exempt from execution.**—A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liability for any of his or her debts.

Where a promissory note stipulated that one month after a certain policy of life insurance should become due and payable, the makers of the note, who were the insured and his wife, would pay eight hundred dollars to the payee of the note, it was *held*, that the note did not constitute a contract making the avails of the policy liable to be taken and applied in payment of the note. *Herriman v. McKee*, 43 Iowa, 185.

The proceeds of a policy of insurance upon the life of husband or wife are not exempt from the debts of the survivor, after the proceeds shall be realized. *Smedley v. Fett*, 43 Id., 607.

Under this section the proceeds of a policy of insurance on the life of an individual become the separate property of the husband, or wife and children of such individual, or, in case the insured leaves a wife and no children, to the wife, to the exclusion of other heirs, and section 2372 of the code must be construed in harmony with such provisions. *Rhode v. Bank et al.*, 52 Id., 375.

The proceeds of a policy of life insurance which is payable to another than the insured do not constitute assets of his estate, and cannot be disposed of by him by will. *McClure v. Johnson*, 56 Id., 620.

SEC. 1183. [**Fees.**—Each company contemplated in this chapter shall pay the same fees, and be liable to the same obligations as provided in sections eleven hundred and fifty-three and eleven hundred and fifty-four, of chapter four of this title.

(CHAPTER 55, LAWS OF 1876.)

RELATING TO LIFE INSURANCE.

An Act relating to life insurance and to prevent injustice to the assured. [Additional to the code, chapter 5, title IX: of life insurance companies.]

SECTION 1. [**In suits where defendant pleads habitual intoxication of assured: sufficient reply.**—*Be it enacted by the general assembly of the state of Iowa:* In all suits now or hereafter pending in any court of this state on policies of life insurance, wherein the defendant seeks to avoid liability upon the alleged ground of the intemperate habits or habitual intoxication of the assured, it shall be a sufficient reply for the plaintiff to show that such habits or habitual intoxication of the assured was generally known in the community or neighborhood where the agent of the defendant resided or did business, if thereafter the company continued to receive the premiums falling due on such policy.

SEC. 2. [**Company estopped by examining physician's certificate.**—In case where the medical examiner, or the physician acting as such, of any life insurance company doing business in this state, shall issue a certificate of health or declare the applicant a fit subject for insurance under the rules and regulations of such company, the company shall be thereby estopped from setting up in defense of suit on such policy, that the assured was not in the condition of health

required by the policy, at the time of issuing such policy, except where the same is procured by or through fraud or deceit of the assured.

SEC. 3. [If age of assured has been misstated.]—That in all cases where it shall appear that the age of the person insured has been misstated in the proposal, declaration or other instrument upon which any policy of life insurance has been founded or issued, then and in such case, the person or company issuing such policy, shall, upon the discovery of such misstatement, be permitted to demand and collect the difference of premium, if any, which would be due and payable on account of the true age of the assured, from year to year, according to the rate of premium of such person or company upon which such policy was issued; or such person or company so issuing the policy may, after the decease of the assured, deduct from the amount payable by such policy, the difference of premium, if any, which would so have been payable from year to year, by reason of any difference of age at time of issuance of such policy; and no other defense or deduction by such person or company issuing such policy, shall be permitted after the death of the person assured, on account of such misstatement of age of assured, notwithstanding any warranty of such statement of age by terms of policy or otherwise, except when it is shown by the person or company insuring, that the policy was procured by fraud in fact.

(CHAPTER 65, LAWS OF 1886.)

TO REGULATE MUTUAL BENEFIT ASSOCIATIONS.

An Act to regulate the organization and operation of mutual benefit associations.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* Every corporation or association organized under the laws of this state upon the mutual assessment co-operative or natural pre[m]ium plan, for the purpose of insuring the lives of individuals, or of furnishing benefits to the widows, heirs, orphans or legatees, of deceased members, or of paying endowments or accident indemnity, shall, before commencing business, comply with the provisions of this act.

SEC. 2. [Articles of incorporation.]—The articles of incorporation of such organizations shall show the plan of business, and shall be submitted to the auditor of state and attorney-general, and if such articles are found to comply with the provisions of this act they shall approve the same. When said articles are thus approved, they shall be recorded in the office of the recorder of deeds, in the county where such organization is located and of the the secretary of state, and a notice published as provided for under the general incorporation law of the state of Iowa. Nothing in this section shall be construed to require the incorporation of such companies already duly incorporated and operating under the laws of Iowa.

SEC. 3. [Name.]—No corporation or association organized under this act shall take any name in use by any other organization or so closely resembling such name as to mislead the public as to its identity.

SEC. 4. Each association organized under this act shall, before issuing any policy or certificate of membership, if said association has not membership sufficient to pay the full amount of the certificate or policy on an assessment it shall cause the application for insurance to have printed in red ink in a conspicuous manner along the margin of said application the words, "It is understood and agreed that the amount to be paid, when the certificate or policy issued upon this application becomes a claim, shall be dependent upon the amount collected from an assessment made to meet such claim," and they must have actual applications upon at least two hundred and fifty individual lives for at least one thousand dollars each, and shall file, with the auditor of state, satisfactory proof that the president, secretary

and treasurer of said corporation or association have each given a good and sufficient bond for five thousand dollars, for the faithful discharge of their duties as such officers; sworn copies of which bonds shall be filed with the auditor of state, also a list of said applications giving the name, age, and residence of each applicant and the amount of insurance applied for by each, together with the annual dues and the proposed assessments thereon, which statement shall be verified under oath by the president and secretary of the association.

SEC. 5. [Agent's certificate.]—No person shall act within this state as agent or otherwise in receiving or procuring applications for insurance for any assessment association (except for the purpose of taking applications for organization), unless the corporation or association for which he is acting has received a certificate from the auditor of state as provided in this act, authorizing said corporation or association to transact business in this state, nor as general or traveling agent or traveling solicitor, until he shall have received from said auditor a certificate in substance the same as that provided for in section 18 of this act, and certifying that said corporation or association has complied with the provisions of this act, and that said general traveling agent or traveling solicitor is authorized to act as such.

SEC. 6. [Assessments.]—The by-laws of any such corporation or association, and its notices of assessment, shall state the object or objects for which the money to be collected is intended, and no part of the proceeds of such assessment shall be applied to any other purpose than is stated in said notices and by-laws, and the excess beyond payment of the benefit provided for in such assessment shall be set aside and applied only to such purposes as said by-laws and notices specify.

SEC. 7. [Insurable age.]—No corporation or association organized or operating under this act, shall issue any certificate of membership or policy to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such insured member, nor shall any such certificate be assigned, except an endowment certificate, and any certificate issued or assignment made in violation of this section shall be void. Any member of any corporation, association or society operating under this act shall have the right at any time, with the consent of such corporation, association or society, to make a change in his beneficiary without requiring the consent of such beneficiary.

SEC. 8. [Report to auditor of state.]—The business year of each Iowa corporation or association organized or operating under this act shall close on the thirty-first day of December each year, and such corporation or association shall, within sixty days thereafter prepare under oath of its president and secretary and file in the office of the auditor of state a detailed statement of its assets, liabilities, receipts from each assessment and all other sources, expenditures, salaries of officers, number of contributing members, death losses paid and amount paid on each death loss, death losses reported but not paid, and answer such other interrogatories as the auditor (who shall furnish blanks for that purpose) may require, in order to ascertain its true financial condition, and shall pay upon filing each annual statement the sum of ten dollars. The auditor shall publish said annual statement in detail in his annual report, and for the purpose of verifying such statement the auditor may make, or cause to be made, an examination of the affairs of any Iowa association doing business under this act, at the expense of the association, which expense shall not exceed the necessary hotel and traveling expenses of the auditor or clerk. If the auditor appoints some person not employed in his office to make the examination, he shall, in addition to actual expenses, be allowed not to exceed five dollars per day for the time actually employed. If the said auditor shall deem it necessary for the security of the funds of the association, he may require the official bonds of the officers to be increased to an amount not to exceed double the

sum for which they are accountable, and he may require supplemental reports from any such association at such time and in such form as he may direct.

SEC. 9. [**Trust funds.**].—Any corporation or association accumulating any moneys to be held in trust for the purpose of the fulfillment of its policy or certificate, contract, or otherwise, shall invest such accumulations in bonds or treasury notes of the United States, or of this or other states, or in interest-bearing bonds of any municipal corporation in Iowa, or in notes secured by mortgage on unencumbered real estate in the state of Iowa, not to exceed forty per cent of the appraised value thereof exclusive of improvements, and shall deposit such securities with the auditor of state, who shall furnish such corporation or association with a certificate, under his seal of office, of such deposit, showing the purpose of such deposit and to what fund the same is to be applied when paid out, and also showing the aggregate liabilities of such corporation or association at the date of issuance of such certificate; *provided, however,* that such corporation or association may invest, in real estate in Iowa, such a portion of said accumulation as is necessary for its accommodation in the transaction of its business to be owned by said corporation or association, and in the erection of any building for such purpose may add thereto rooms for rental.

SEC. 10. [**Change of securities.**].—Such association may have the right at any time to change its securities on deposit by substituting for those withdrawn a like amount in other securities of the character provided for in this act.

SEC. 11. [**Withdrawal of securities.**].—The auditor shall permit corporations or associations having a deposit with him of such securities to withdraw the same upon filing with him by the president and secretary of such corporations and associations, satisfactory proof that they are to be used for the purpose for which they were originally deposited in his office.

SEC. 12. [**Collection of interest on securities.**].—The auditor shall permit corporations or associations having on deposit with him such stocks and bonds, notes or other securities, to collect and retain the interest accruing on such deposits, delivering to them respectively the evidence of interest as the same becomes due, but on default of any corporation or association to make or enforce such collection, he may collect such interest and add the same to the securities in his possession belonging to such corporation or association, less the expense of such collection.

SEC. 13. [**Foreign companies.**].—Any foreign corporation or association organized under the laws of any other state to carry on the business of insuring the lives of individuals or of furnishing benefits to the widows, orphans, heirs or legatees of deceased members, or of paying accident indemnity, or surrender value of certificate of insurance upon the mutual assessment plan, may be licensed by the auditor to do business in this state by complying with the following conditions, to-wit: Said corporation shall file with the auditor of state a copy of its charter or articles of incorporation duly certified by the proper officers of the state wherein organized, together with a copy of its by-laws, application, and policy or certificate of membership. It shall also file with said auditor a sworn statement, signed and verified by its president and secretary, which statement shall contain the name and location of the said corporation or association, its principal place of business, the name of its president, secretary and other principal officers, the number of certificates or policies in force, the aggregate amount insured thereby, the amount paid to beneficiaries in event of death or accident, the amount collected of each member on each assessment, and the purpose for which assessments are made and the authority under which they are made; the amount paid on the last death loss and the date thereof, the amount of cash or other assets owned by the company and association and how invested; and any information which the auditor may require. All said statements and papers thus filed shall show that death or surrender value of certificate of insurance or accident indemnity is in the main provided for by

assessments upon or contributions by surviving members of such corporation or association, and shall show to the satisfaction of said auditor that said corporation or association is legally organized and honestly managed, and that an ordinary assessment upon its members or other regular contribution to its mortuary fund is sufficient to pay its maximum certificate to the full limit named therein. Such foreign corporation or association shall also designate to the said auditor an attorney or agent residing in this state on whom service of process or original notice may be made; and in the event of a failure to appoint or designate such attorney, such service may be made upon the auditor who shall at once notify said company by mailing a copy of said notice to the secretary of said corporation or association, directed to his last known post office address. Any action commenced in this state by service upon such attorney or auditor may be commenced in the county of the plaintiff's residence, regardless of the residence of said attorney or auditor, and every corporation or association coming into this state shall file with the auditor of state a contract or agreement that it will not transfer any action commenced against it in any court of this state to the United States courts, which contract shall contain the provision that if such transfer is made to the United States courts, the certificate of authority issued by said auditor to do business shall be revoked or cancelled, and it shall be the duty of the auditor to promptly revoke the certificate of such corporation or association as soon as such transfer is made; and such corporation or association shall not be permitted to do business again within the state. Upon complying with the provisions of this section, and upon payment of twenty-five dollars, the auditor shall issue to such foreign corporation or association so complying, a certificate of authority to do business in this state, provided the same right is extended, by the state in which said corporation is organized, to similar corporations or associations organized in this state. After any such foreign corporation or association shall have been licensed to do business in this state, it shall make, before the first day of March of each year, to the auditor, on blanks furnished by him, the same detailed statement as provided in section 8 of this act, which statement shall be published in the annual report of the auditor, and shall also pay to the auditor, on filing such statement, a fee of twenty dollars. Whenever the auditor of this state shall have reason to doubt the solvency of any such foreign corporation or association and the failure to pay the full limit named in its certificate or policy shall be such evidence that it is not solvent and to require the auditor to investigate, he must for this or other good cause, at the expense of such corporation or association, cause an examination of its books and papers to be made, and publish and distribute his report as provided in section 8, of this act, and if in his judgment such examination establishes the fact that such corporation or association is not financially sound and is not paying its policies to the full limit named therein, or is conducting its business fraudulently, or if it should fail to make the statement required by this act, he may revoke the authority of such corporation or association and prohibit it from doing business in this state until it can again comply with the provisions of this act. If the auditor appoints some one not receiving a regular salary in his office to make the examination provided for in this section he shall be entitled to receive five dollars per day for his service in addition to his actual traveling and hotel expenses, to be paid by the association examined or by the state on approval of the executive council, if the association fails to pay the same.

SEC. 14. [Penalty for non-compliance.]—Any foreign corporation or association doing business in this state that shall refuse or neglect to comply with the provisions of this act after the space of ninety days after it takes effect, shall be deemed and be held to be doing business unlawfully, and any officer or agent of such corporation or association who shall do business in this state, or assist in, or knowingly permit the same in violation of the provisions of this act, shall be

deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars, or imprisoned in the county jail not more than six months, or both, in the discretion of the court. It shall be the duty of the county attorney to prosecute any violation of this section when sufficient evidence is presented to him to warrant a prosecution of any person charged with its violation.

SEC. 15. [Penalty for agents acting for unauthorized company.]—Any solicitor or agent taking or soliciting applications for insurance within this state, for any corporation or association doing business on the mutual assessment or natural premium plan, after ninety days from the taking effect of this act without the certificate herein provided for, or shall take applications when the assessments will not pay the certificate or policy in full, without having the application form comply with the requirements of section four (4) of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one hundred dollars for each offense, together with the costs of prosecution, including attorney's fee, and shall stand committed to the county jail until the fine and costs are paid. And the county attorney in each county shall prosecute parties charged with a violation of this section.

SEC. 16. [Proceedings in case of Iowa companies violating this law.]—Whenever any Iowa corporation or association shall fail to make its annual statement to the auditor on or before the first day of March, or is conducting its business fraudulently or not in compliance with this act, or is not carrying out its contracts with its members in good faith, then it shall be the duty of the auditor to promptly communicate the fact to the attorney-general, who shall at once commence action before the district or circuit court of the county in which said organization is located or any judge thereof, citing the officers to appear before said court or judge, and if upon a hearing of said cause, it is found to be [for] the best interests of the holders of the certificates of membership in said corporation, said court or judge shall have the power to remove any officer or officers of said corporation and appoint others in their place until the next annual election. If it is found to the interests of said holders of certificates that the affairs of said corporation be wound up, said court or judge shall so direct, and for that purpose may appoint a receiver, who shall regard all proper claims for death benefit as preferred claims. Said receiver may also, upon the approval of the court or judge, transfer the members of said association who consent thereto to some solvent Iowa assessment or natural premium association, or divide the surplus accumulated in proportion to the share due each certificate in force at the time.

SEC. 17. [Fees.]—The auditor shall receive from each foreign corporation or association doing business in this state for each certificate issued to its agents or solicitor, as provided in this act, the sum of two dollars, and from each corporation or association organized under the laws of this state the sum of fifty cents. Any other fees to be paid to said auditor not provided for in this act shall be the same as provided for in the general insurance laws of this state, in relation to life insurance companies. All fees collected by the auditor by this act shall be accounted for and paid into the state treasury in the same manner as provided in section 3778, code of 1873.

SEC. 18. [Form of certificate.]—On compliance with this act by any corporation or association the auditor shall issue a certificate setting forth: *First*—The corporate name of the association. *Second*—Its principal place of business. *Third*—The number of certificates of policies in force at the date of its last report. *Fourth*—The sum of money which an ordinary assessment for payment of a single certificate or policy would produce in each class. *Fifth*—The amount paid on its last death loss as evidenced by proof on file in his office and the date of such payment. *Sixth*—The amount of securities deposited in his office, and for

what purpose deposited. *Seventh*—That it has fully complied with the provisions of this act, and is authorized to transact business for a period of one year from April first of the year of its issue, which certificate shall be published by said association for four weeks in a newspaper of general circulation published at the principal place of business of said association.

SEC. 19. [**Penalty for fraud in procuring insurance.**—Any agent, physician, or other person, who shall knowingly and by means of concealment or false or fraudulent statements assist in securing from any such organization, or assessment association, a policy or certificate of membership on the life of any person, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars or undergo an imprisonment of not more than one year in the county jail, or both, in the discretion of the court.

SEC. 20. [**Definition of assessment company.**—Any corporation or association doing business in this state which provides in the main for the payment of death losses or accident indemnity by any assessment upon its members or upon the natural premium plan, shall for the purpose of this act, be deemed a mutual benefit association, and shall not be subject to the general insurance laws of this state, regulating life insurance. No corporation operating upon the assessment plan, promising benefits upon any other event than that of death or disability resulting from accident to the member, shall be permitted to do business in this state. But this shall not prevent any assessment life association or organization authorized by this act from providing for an equitable surrender value paid up policy or endowment upon the cancellation of any policy or certificate, provided the terms and conditions thereof are set forth in said policy or certificate of membership, and provided that such endowment or surrender value shall in the main be accumulated during the term of such policy or certificate. This act shall not relieve any corporation or assessment association, now doing business in this state, from the fulfillment of any contract heretofore entered into with its members under its policies or certificates of membership, nor shall any member be released hereby from his or her part of said contract.

SEC. 21. [**Benevolent societies exempted.**—Nothing in this act shall be construed to apply to any secret fraternal society nor any association organized solely for benevolent purposes and composed wholly of members of any one occupation, guild, profession, or religious denomination, provided that any such society or organization named above in this section, shall, by complying with the provisions of this act, be entitled to all the privileges and be amenable to the obligations of this act.

SEC. 22. [**Live-stock companies.**—The provisions of this act shall be applied to all assessment or co-operative live-stock insurance companies or associations, now existing or hereafter organized in this or other states, so far as the same can be made to apply, and the auditor of state shall have the same power and authority in regard to such companies or associations as in regard to mutual benefit associations.

SEC. 23. [**Repealing clause.**—All acts or parts of acts conflicting with this act are hereby repealed, *provided* that nothing in this act shall be construed to affect insurance companies known as fixed or level premium companies, having a mathematical annual reserve.

Became a law without the governor's approval April 2, 1886.

CHAPTER 6.

OF MUTUAL BUILDING ASSOCIATIONS.

SECTION 1184. [**How formed.**]—Any number of persons, not less than five, may associate themselves and become incorporated as provided in chapter 1 of this title, for the purpose of raising moneys to be loaned to the members of the corporation, and to other persons, and for use in buying lots or houses, or in building or repairing houses or other purposes.

SEC. 1185. [**Powers.**]—Such corporation shall be authorized and empowered to levy, assess, and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced, and premiums bid by members for the right of precedence in taking loans, as the corporation by its by-laws shall adopt; also to acquire, hold, encumber, and convey all such real estate and personal property as may be legitimately pledged to it on such loans, or may otherwise be transferred to it in due course of its business; and the dues, fines, and premiums so paid by members, in addition to the legal rate of interest on loans taken by them, shall not be construed to make the loans so taken usurious; but no person shall hold more than twenty shares in any such association.

SEC. 1186. [**Similar societies heretofore organized.**]—When mutual loan societies, or other associations heretofore organized under the laws of this state, with objects similar to those contemplated in the preceding sections, and permitting not more than twenty shares of their stock to be owned by any one member, have loaned, or shall hereafter loan, their capital or funds, or any part thereof, to their members, and have taken, or shall take, notes or obligations therefor, secured by mortgages, or otherwise, in accordance with the terms of their articles of incorporation and by-laws, such notes, obligations, and securities shall not be construed or held to be usurious by reason of any dues, fines, or premiums for the right of preference in taking such loans paid in addition to the legal rates of interest, but the same shall be valid and binding in all respects, the payment of such dues, fines, or premiums, in addition to a rate of interest not exceeding ten per centum per annum, payable annually, or at any less period, notwithstanding.

This section does not authorize building associations to receive a greater sum per annum for interest upon their loans than ten per cent of the amount actually loaned. Where a note, bearing interest, was executed by a borrower to such association, including not only the amount actually loaned to him, but also the premium paid for the loan, it was held usurious. *Hawkeye Benefit & L. A. v. Blackburn et al.*, 48 Iowa, 385.

This section does not authorize the taking of interest on premiums by building associations, and where such interest is contracted for, which renders the total interest charge greater than the legal rate on the sum actually received by the borrower, it constitutes usury. *The Burlington Mutual Loan Association v. Hendes et. al.*, 55 Id., 424.

SEC. 1187. [**Earnings to pay expenses and purchase real estate.**]—So much of the earnings of such corporations as may be necessary, not exceeding ten per cent per annum, may be set apart to defray the current expenses of said association, and for the purchase of such real estate as may be necessary for the convenient transaction of its business, and the residue of said earnings shall be transferred to the credit of the shareholders, and when said shares are fully paid, then to be paid ratably to the shareholders.

TITLE X.

OF INTERNAL IMPROVEMENTS.

CHAPTER 1.

OF MILL DAMS AND RACES.

SECTION 1188. [Owner of land to file petition.]—Any person who owns land on one or both sides of a water course, who desires to erect or heighten any dam thereon, or construct or enlarge a race therefrom, for the purpose of propelling any mill or machinery to be erected on such stream by the water thereof, may file a petition in the office of the clerk of the district or circuit court of the county in which such mill or machinery is to be erected.

The fact that a petition, filed under this section, does not show that the mill is designed to grind grain for toll, does not affect the right of the petitioner to proceed under this chapter. The statute authorizes the erection of mills and other machinery, without limitation as to the purpose for which they will be used. Per BECK, CH. J., in *Burnham v. Thompson*, 35 Iowa, 421, 425.

This chapter is not unconstitutional. *Burnham v. Thompson*, 35 Id., 421.

An appeal lies to the supreme court from an order overruling a motion to set aside the verdict and quash the writ in a proceeding *ad quod damnum*. *Id.*

When the first writ is quashed, another may thereupon be granted without notice thereof to the opposite party. *Id.*

The provisions of the statute apply, and the writ may properly issue, after the work has been commenced and is unfinished, as well as before its commencement; and damages arising after the filing of the petition in such case are allowable. *Id.*

It was said, *arguendo*, by MILLER, J., in *Stewart v. the Board of Supervisors, etc.*, 30 Id., 20, that "it has been the law of this state for more than a quarter of a century that any private citizen who will erect a mill to grind grain for toll, may erect a dam and have a writ *ad quod damnum* for the condemnation of the land overflowed, as for a public purpose"; citing laws of 1843, ch. 142; *Id.* of 1855, ch. 92 (revision, sec. 1264), *Id.* of 1866, ch. 119; and, further, that "the validity of these statutes, and that the purposes were public ones, within the meaning of the constitution, although, in the language of sec. 1278 of the revision, it be 'for private profit,' has been too often and too uniformly recognized to be now disputed"; citing *Gammell v. Potter*, 6 Iowa, 548; *Lummery v. Braddy*, 8 Id., 33; *Cowgill v. Essex Mill*, 6 Pick., 94; *Boston v. Newman*, 12 Id., 467.

While the owner of premises may lawfully erect a mill dam across an unnavigable stream, yet if it be so erected or maintained as to become prejudicial to the health or comfort of others, it thereby becomes a nuisance. *The State v. Close*, 35 Iowa, 570.

It was held under chapter 92 of the laws of 1854-55, that the mill owner alone could commence and prosecute proceedings under the act, and that the land owner injured by the erection of the dam was left to his common law remedy or to a proceeding in equity. *Hunting et al. v. Curtis*, 10 Id., 152.

Under section 1188, *et seq.*, one owning land four miles distant from the dam in a straight line and six miles by the course of the stream, and three-quarters of a mile from the bank of the stream, was held not within the statute as to who shall be defendant under this and following sections, and such owner could not, after fifteen years from the issuance of license, proceed in equity to abate a dam as a nuisance, and to recover damages for alleged injuries to his land caused by overflow and seeping. *Wilson v. Hawthorn*, 72 Id., 451.

SEC. 1189. [What to contain.]—Such petition shall describe with reasonable certainty the locality where such mill or machinery is to be erected, together with that of such dam or race, and also of the lands that will be overflowed or otherwise affected thereby, and the names of the owners thereof. The person filing the petition shall be known as plaintiff and the owners of the land as defendants.

This section leaves out the direction as to notice required by section 1265 of the revision, under which it was *held*, that the service of notice there required was not a prerequisite to the filing of the petition, but that the notice might be given after the petition had been filed. *Hoag v. Denton*, 20 Iowa, 118.

SEC. 1190. [**Order to issue for a jury: notice of served on defendants.**]—The clerk shall thereupon issue an order, to which shall be attached a copy of the petition, directed to the sheriff, commanding him to summon a jury composed of twelve disinterested electors of his county to meet on a day fixed in said order upon the lands therein described, which order, including the copy of the petition, shall be served on the defendants in the same manner and for the same length of time previous to the day fixed in the order as is required for the service of original notices. If any of said defendants are non-residents of the state, they may be served by publication as original notices in like cases are required to be served. And if any defendant is a minor or insane person who has no guardian, the clerk, at the time of issuing the order, may appoint a guardian to defend for him by indorsement on such order.

SEC. 1191. [**When lands are in another county.**]—If any of the lands are situate in a county other than that in which the petition is required to be filed, the proceedings herein referred to may take place to the same extent and in the same manner as if such lands were situated in the county where the petition is filed.

SEC. 1192. [**Jury to appraise damages.**]—The jury shall be sworn to impartially and to the best of their skill and judgment view the lands described in the petition, and ascertain and appraise the damages each of the defendants will sustain by reason of such lands being overflowed or otherwise injuriously affected by the dam or race, or the heightening or enlarging the same, and whether the dwelling-house, outhouse, orchard or garden of any defendant will be so affected, and if so, whether the same has been placed there for that purpose.

SEC. 1193. [**Hear witnesses and report finding.**]—The jury may, in addition to examining the premises, hear and examine witnesses. They shall report their findings in writing and attach the same to the order, which shall be returned by the sheriff to the clerk, and if it appears therefrom that the dwelling-house, outhouse, orchard or garden of any defendant will be injuriously affected, and that the same was placed on the premises for that purpose, such fact shall not be considered any bar or hindrance to the construction or building of the race or dam.

SEC. 1194. (*As amended by ch. 22, 15th g. a.*) [**Appeal.**]—Either party may appeal from such assessment of damages to the [court where the proceedings are pending] within thirty days after the assessment is made, in the manner, and the proceedings on such appeal shall be, as provided in chapter four of this title.

SEC. 1195. [**Cause shown.**]—When said report is filed, the clerk shall issue an order directed to the defendants, requiring them to appear at the next term of the court and show cause, if any they have, why a license should not be granted to construct the dam or race, which order shall be served in the same manner as hereinafter directed.

When a second writ issues, no further notice is necessary. It will be presumed that the defendant has been brought into court upon the order required in section 1195. *Burnham v. Thompson*, 35 Iowa, 426.

SEC. 1196. [**Objections filed: pleadings: amendment of: another jury.**]—On or before the day fixed in the order for the defendants to show cause, they may file any objections to the prior proceedings or to granting the license they seek proper. The petition and objections filed thereto shall constitute the pleadings, and the same may be amended upon such terms as the court deems just, and if the proceedings of the jury are found informal or defective in substance, the court may order a new jury to be impaneled upon such terms as to notice as it may direct. The return of the sheriff may be amended at any stage of the proceedings in accordance with the facts.

SEC. 1197. [**Written testimony.**]—Testimony may be taken to be introduced on final hearing before the court, in the same manner that testimony is taken in equitable actions triable on written testimony.

SEC. 1198. [**License granted.**]—If it shall appear to the court that neither the dwelling house, outhouse, garden or orchard of any defendant will be overflowed or injuriously affected, and the court shall judge it reasonable for the public benefit, license shall be granted to construct such dam or race, on the plaintiff paying to the proper parties the damages found by the jury and decreed by the court.

SEC. 1199. [**Forfeiture of.**]—If the plaintiff does not begin within one year thereafter to construct said dam or race, and finish and have in operation the mill and machinery in three years thereafter, and afterward keep it in good repair for the accommodation of the public, or in case said dam, race, mill or machinery be destroyed, he shall not begin to repair or rebuild it within one year, and finish it in three years, then said license shall be forfeited.

SEC. 1200. [**Continuance.**]—If the order shall not be executed by the sheriff on the day therein mentioned, he may, from time to time, appoint another day, notice thereof being given to the parties interested, as hereinbefore provided; and if inquest cannot be completed in one day, the sheriff shall adjourn the jury, from day to day, until its completion.

SEC. 1201. [**No bar to action.**]—No proceeding under this chapter shall bar an action which could have been maintained if this chapter had not been enacted, unless the prosecution or action was actually foreseen and estimated upon the inquest.

But a proceeding under this chapter may be pleaded in bar of an action brought to recover damages subsequently sustained by raising the dam, although the jury allowed no damages in the proceeding under which the license was obtained. *Watson v. Van Meter*, 43 Iowa, 76.

SEC. 1202. [**New party made.**]—Any owner of land affected by any proceedings under this chapter, who has not been made party by reason of want of notice, or from any other cause, may be made party thereto by proper proceedings at any time thereafter.

SEC. 1203. [**Costs.**]—Costs and fees under this chapter shall be the same as in other cases for like services, and shall be paid by the plaintiff.

SEC. 1204. [**Repair of injured banks or race by owner of machinery.**]—Where the water backed up by any dam belonging to any mill or machinery is about to break through or over the banks of the stream or race, or to wash a channel, so as to turn the water of such stream or race, or any part thereof, out of its ordinary channel, whereby such mills or machinery will be injured or affected, the owner or occupier of such mill or machinery, if he do not own such banks, or the lands lying contiguous thereto, may, if necessary, enter thereon, and erect and keep in repair such embankments and other works as shall be necessary to prevent such water from breaking through or over the banks of such stream or race, or washing a channel as aforesaid, such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay any damages which the owner of the lands may actually sustain by the erection and repair aforesaid.

SEC. 1205. [**Penalty for injuring embankment.**]—If any person shall injure, destroy or remove any such embankment, or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason of such injury, destruction or removal.

SEC. 1206. [**Utilizing fall below dam.**]—Any person owning and using a water-power for the purpose of propelling machinery, shall have the right to acquire, maintain and utilize the fall below such power for the purpose of improving the same, in like manner and to the same extent as provided in this chapter for the erection or heightening of mill dams. After such right has been acquired, the

fall shall be considered part and parcel of said water-power or privilege, and the deepening or excavating of the stream or tail race as herein contemplated shall in no way affect any rights relating to such water-power acquired by the owner thereof prior thereto.

CHAPTER 2.

OF DRAINS, DITCHES AND WATER-COURSES.

SECTION 1207. (*As amended by sec. 1, ch. 140, 16th g. a., and ch. 44, 19th g. a.*) [**Supervisors to locate.**]-The board of supervisors of any county having a population of (five) thousand inhabitants, as shown by the last preceding census, may locate and cause to be constructed (levees,) ditches or drains, or change the direction of any water-course in such county, whenever the same will be conducive to the public health, convenience or welfare.

The statute authorizing counties to construct ditches where they may be needed, and assess the cost upon adjacent lands benefited thereby, is not in conflict with the constitution. *Hatch et al. v. Pottawattamie County et al.*, 43 Iowa, 442.

This statute is based upon considerations of public good and not on private advantage, and the supervisors can order the work only after a petition is presented, signed by a majority of the persons residing in the county and owning land adjacent to the proposed improvement. *Patterson et al. v. Baumer*, Id., 477 (see section 1208, ante, p. 312).

SEC. 1208. (*As amended by ch. 44, 19th g. a.*) [**Proceedings: bond filed: survey made: notice given.**]-A petition signed by a majority of persons resident in the county, owning land adjacent to such improvement, shall be first filed in the office of the county auditor, setting forth the necessity of the same, the starting point, route and termini. A bond shall be filed in said office with sufficient sureties, to be approved by the auditor, and conditioned to pay all costs and expenses incurred in case the supervisors refuse to grant the prayer of the petition. The auditor shall thereupon place a copy of said petition in the hands of the county surveyor, or a competent engineer, who shall take with him the necessary assistants and proceed to make a survey of the proposed (levee,) ditch, drain or change in the direction of the water-course, and return a plat and profile of the same to the auditor; such return shall set forth a full and detailed description of the proposed improvement, its availability, necessity and probable cost, with a description of each tract of land owned by different persons through which the proposed improvement is to be located, how it will be affected thereby, and its situation and level as compared with that of adjoining lands, together with such other facts as he may deem material. The county auditor shall immediately thereafter cause notice in writing to be served on the owner of each tract of land along the route of the proposed (levee,) ditch, drain or change in the direction of such water-course, who is a resident of the county, of the pendency and prayer of said petition, and the session of the board of supervisors at which the same will be heard, which notice shall be served ten days prior to said session, in the same manner that original notices are required to be served. In case any such owner is a non-resident of the county, such notice shall be published for two consecutive weeks in some newspaper published in the county.

The petition of the character, and signed by the residents interested in the improvements, as prescribed in section 1208 of the code, is a jurisdictional matter and unless the requirements of this and the following section are complied with the supervisors can gain no jurisdiction to act in the premises. *Richman et al. v. The Board of Supervisors, etc.*, 70 Iowa, 627.

Unless the petition for the establishment of a ditch be signed by a majority of persons residing in the county, and owning lands adjacent to the proposed improvement as provided by section 1208 of the code, the board of supervisors acquire no jurisdiction in the matter, and any special tax levied by them to pay the cost of constructing the ditch is illegal. *Shaw et al. v. Board of Supervisors of Johnson Co.*, 34 N. W. R., 206; *Sheppard v. Board of Supervisors*, 33 Id., 770.

SEC. 1209. (*As amended by ch. 44, 19th g. a.*) [**Supervisors to view premises.**]-The supervisors, at the session set for the hearing of said petition, shall, if they find the preceding section to have been complied with, proceed to hear and determine said petition; and if they deem it necessary shall view the premises, and, if they find such (levee,) ditch, drain or change in the direction of the water-course to be necessary, and that the same will be conducive to the public health, convenience, or welfare, and no application shall have been made for compensation as provided in the next section, shall proceed to locate and establish such (levee,) ditch, drain or water-course, on the route specified in the plat and return of said county surveyor or engineer. But, if any application for compensation has been made, further proceedings shall be adjourned to the next regular session; and the county auditor shall forthwith proceed to appoint appraisers to assess and determine the damages and compensation of such claimant, who shall proceed in the manner as provided by law for the assessment of damages in the opening of highways; and the compensation so found and assessed in favor of said claimant shall be paid, in the first instance, by the parties benefited by such improvement, or secured to be paid upon such terms and conditions as the county auditor may deem just and proper; and the said supervisors shall, at the next regular session after such compensation shall have been assessed and paid, or secured as aforesaid, proceed to locate and establish such (levee,) ditch, drain or water-course, as hereinbefore provided.

SEC. 1210. (*As amended by section 2, ch. 140, 16th g. a., and ch. 44, 19th g. a.*) [**When and how claimed.**]-Any person claiming compensation for land required for the purpose of constructing any such (levee,) ditch, drain, or water-course (or for damages sustained by the change of direction of any such water-course) shall make his application in writing therefor to the county supervisors on or before the first day of the session at which the petition has been set for hearing, and on failure to make such application, shall be deemed and held to have waived his, her, or their right to such compensation.

SEC. 1211. (*As amended by ch. 44, 19th g. a.*) [**Supervisors to divide the work.**]-Said supervisors, whenever they shall have established any such (levee,) ditch, drain, or water-course, shall divide the same into suitable sections, not less in number than the number of owners of land through which the same may be located, and shall also prescribe the time within which work upon each section shall be completed.

SEC. 1212. [**Auditor to let the work, etc.**]-The county auditor shall cause notice to be given of the time and place of letting, and of the kind and amount of work to be done upon each section, and the time fixed for its completion, by publication for thirty days in some newspaper printed and of general circulation in said county, and shall let the work upon the sections respectively to the lowest bidder therefor; and the person or persons taking such work at such letting (shall be paid in the following manner: that the engineer in charge of the construction of the (levee,) ditch or drain, shall furnish the contractors monthly estimates of the amount of work done on each section; that upon the filing of such estimates with the county auditor, the auditor shall draw a warrant in favor of the contractor for eighty per cent of the value of the work done according to the estimate; and when such (levee,) ditch or drain is completed to the satisfaction of the engineer in charge, and when he so certifies the same to the county auditor, then the auditor shall draw a warrant in favor of said contractor upon the (levee or) drainage fund for the balance due the contractor) as provided in the following section. If any person to whom any portion of said work shall be let as aforesaid, shall fail to perform said work, the same shall be re-let by the county auditor, in the manner hereinbefore provided.

SEC. 1213. (*As amended by sec. 3, ch. 140, 16th g. a.*) [**Costs and fees: how paid.**]-The auditor and surveyor, or engineers shall be allowed such fees for services under the preceding sections of this chapter as the supervisors shall in each case deem reasonable and allow; and all other fees and costs accruing under the preceding sections shall be the same as provided by law for like services in other cases; and all costs, expenses, and cost of construction, fees and compensation for property appropriated (or damages sustained by the change of direction of such water-course,) which shall accrue and be assessed and determined, shall be paid out of the county treasury, from the fund collected for that purpose, on the order of the county auditor.

The payment for the ditching in the first instance out of the general fund is not such a violation of law as will enable persons assessed with taxes therefor to evade its payment. *Patterson v. Baumer*, 43 Iowa, 477.

SEC. 1214. (*As amended by ch. 139, 21st g. a.*) [**Equitable apportionment made of expenses, costs and fees.**]-Whenever any such ditch, drain or change in the direction of any water course, shall have been located and established, as provided in the preceding section, or when it shall be necessary to cause any such ditches, drains or water courses to be reopened and repaired, the auditor shall commission and appoint six disinterested freeholders of the county, not interested in a like question, who shall, within twenty days after such appointment, personally inspect and classify as "dry," "low," "wet" or "swamp," all the land benefited by the location and construction of such ditch, drain or water course, or the repairing or reopening of the same and shall make an equitable apportionment of the cost, expenses, costs of construction, fees and compensation for property appropriated or damages sustained by the construction of any such ditch, drain, change of direction of such water course or of repairing and reopening the same, and make report thereof in writing to the board of supervisors, which apportionment shall accrue and be assessed among the owners of the land benefited by the location, construction or the reopening and repairing of such ditch, drain or water course, in proportion to the benefit of each of them through along the line, or in the vicinity of whose lands the same may be located, constructed or reopened and repaired respectively, and the same may be levied upon the lands of the owner so benefited, in said proportions and collected in the same manner that other taxes are levied and collected for county purposes, and the amounts so assessed and collected shall be paid out of the county treasury, from the funds collected for that purpose on the order of the county auditor, and said commissioners shall receive for each day's service, when so engaged, two dollars, to be paid out of the funds so collected. Any such ditch, drain or water course, which is now or may hereafter be constructed, so as to prevent the surplus and overflow waters from the adjacent land from entering the same, is hereby declared a nuisance and the same may be abated as provided in title 20, chapter 5, of the code of Iowa, and diverting, obstructing, impeding or filling up of such drains, ditches, or water courses in any manner by any persons, without legal authority, is hereby declared a nuisance, and any person convicted of such crime shall be punished as provided in title 24, chapter 15 of the code, for the punishment of nuisances. Nothing in this chapter contained shall be construed so as to prohibit any land owner from appealing from the order of the board in assessing his land, for any of the purposes mentioned in this section, to the circuit court of the county, in the same manner that appeals are taken in the location of highways, nor shall the same be construed so as to prohibit the maintenance of an action for the recovery of any taxes erroneously or wrongfully assessed, for any of the purposes mentioned in this section, and in order to show that such assessment was erroneous or wrongful, it shall be necessary to prove that such lands so assessed were not benefited by the location, construction or maintenance of such ditch, drain or water course.)

Where a ditch was constructed by the county under chapter 2, title 10 of the code, and warrants had been drawn on the ditch fund, and payment thereof was refused, when presented to the county treasurer, because the board of supervisors had not raised a fund by the levy of a tax as contemplated by section 1214 of the code as it was prior to its amendments by chapter 139, laws of 1886, the holder of the warrants was held entitled to a judgment against the county for the amount thereof, and to the enforcement of payment by the levy of a tax in obedience to the provisions of the statutes. And it is not necessary to the recovery of such judgment that a request be made of the supervisors to raise a fund by the levy of the proper tax, and that such request be denied. *Mills County National Bank v. Mills County*, 67 Iowa, 697.

In a proceeding under this section to assess the cost of constructing a ditch on the lands along the line, and in the vicinity of the ditch, the board of supervisors has the power to determine what lands are in the vicinity of the ditch and subject to assessment; and from their determination in the matter there is no appeal. *Lambert v. Mills County*, 58 Id., 666.

SEC. 1215. [**Record kept.**]—The auditor shall keep a full and complete record of all proceedings had in each case.

SEC. 1216. (*As amended by ch. 44, 19th g. a.*) [**Appeal.**]—[The petitioners, or any of them, or the applicant for compensation for land taken, or for damages sustained by reason of the change of the direction of any water-course, may appeal from the order locating and establishing such (levee,) ditch or drain, or changing the directions of such water-course, or refusing so to do, and from the amount allowed as damages by pursuing the same method provided for appeals from assessment of damages in the location of highways, and the auditor shall make out transcripts as provided in appeals taken from the assessment of damages in case of highways].

DRAINAGE OF SWAMP OR MARSH LAND.

SEC. 1217. [**Application for, made by petition to township trustees.**]—Any person owning any swamp, marsh or wet land, desiring to drain the same by cutting a ditch through the land of others, and who is unable to agree upon the terms thereof with such other persons, may make application in writing to the township trustees of the township where such swamp or marsh land is situated, with a description of such land, the commencement and termini of the proposed ditch; and a description of the land belonging to others, with their names, through which it will pass. Such petition shall be filed by the township clerk,

SEC. 1218. [**Meeting of trustees: notice thereof given: land owners.**]—When the application is filed the clerk shall notify the trustees, who shall immediately determine upon the time and place they will meet to consider the application, and shall cause the applicant and all persons owning land through which said ditch is to pass, who are residents of the county, to be notified of the time and place of said meeting, which notice shall be served ten days previous to such day in the same manner as original notices, and if any of such owners of land are non-residents of the county, said notice shall be served on them by posting up copies thereof in three public places in the township; satisfactory proof by affidavit of such posting, and places where posted, shall be furnished said trustees and filed with the clerk.

SEC. 1219. [**Hearing: adjournment of.**]—Upon the day fixed for the hearing, the trustees, if satisfied that the requirements of the preceding section have been complied with, may proceed to hear and determine the matter of the application, or they may adjourn the same to a future day, and, if necessary, may cause another notice to be served in the manner above required. But such adjournment shall not be for a longer period than twenty days.

SEC. 1220. [**Trustees determine course, width, and depth of ditch: record of made.**]—If the trustees are satisfied from a personal examination of the premises, or from evidence of witnesses, that such swamp or marsh lands are a source of disease, that the public health will be promoted by draining the same,

that such ditch is necessary for the proper cultivation of such lands, that the permanent value thereof will be increased thereby, and that it is necessary, in order to drain said lands, that such ditch should pass through the lands of others, they shall determine the direction, depth, and width of such ditch, as near as may be, and, if necessary, may employ the county surveyor to assist them, and after such examination, or hearing such evidence, said trustees may order or refuse the construction of said ditch. All the findings and doings of the trustees shall be reduced to writing, and entered of record by the clerk.

A ditch can only be legally established under section 1220 of the code, by a written record showing the action of the trustees, and that the ditch was necessary for the public health. *Hull v. Baird*, 35 N. W. R., 613.

SEC. 1221. [Costs: by whom paid: bond required.]—The applicant shall pay all costs of the proceedings before the trustees, and they may require, before fixing the day of meeting as above provided, such applicant to give bond with sureties to be approved by the township clerk, conditioned to pay all such costs and expenses.

SEC. 1222. [Trustees to assess damages to land owner.]—If the trustees are satisfied the ditch will damage the land of any person, other than the applicant for the ditch, through which it has been located, they shall assess the amount to be paid the owner, and after payment, or tender of the same, to the person entitled thereto within thirty days after the same is assessed or ascertained on appeal in the circuit court, or, in case no damages are assessed, the applicant may enter upon the land through which the ditch passes, with the necessary implements to accomplish the work.

SEC. 1223. [Appeal: how taken.]—The applicant, or any person through whose land the ditch is located, may appeal from so much only of the order or action of the trustees as relates to the assessment of damages to the circuit court, in the same manner as to bond, the conditions thereof, notice of appeal, and the time within which it is to be taken, as is provided by law in cases of appeals from the assessment of damages on the location of highways. The township clerk shall approve the bond and make out a transcript of the proceedings before the trustees within ten days after the bond is filed and approved, and file the same with the clerk.

SEC. 1224. [Trial of: in district court.]—On the trial of such appeal, the person claiming damages shall be plaintiff and the applicant defendant, and if the appeal is taken by any person other than the applicant, judgment shall be rendered by the court for the amount found due such person as damages, which may be enforced as are other judgments; and if the appeal is taken by the applicant, no judgment shall be rendered for the amount found due any person as damages, but the amount thereof shall be certified to the township clerk, and the same shall thereafter be regarded as if the same had been assessed by the trustees at the time so certified. The court shall make such disposition of the costs as is required in similar cases in appeals from the assessment of damages on the location of highways. But the payment or acceptance of the damages assessed by the trustees shall bar the right to appeal.

Where an appeal from proceedings condemning the right of way for a railway was brought to the notice of the sheriff, and he directed his deputy to accept service of the notice of appeal for him, and it was accepted in due form in writing, to which the deputy signed the sheriff's name, held that there was a sufficient service of the notice upon the sheriff to sustain the appeal. *Waltmeyer v. The Wis., Iowa & Neb. R'y Co.*, 64 Iowa, 688.

SEC. 1225. If said drain shall cross a highway, it shall be bridged or covered at the expense of the applicant.

SEC. 1226. [Ditch repaired.]—If the ditch becomes out of repair the applicant, or any one interested therein, may make application in writing to the township trustees for leave to repair the same, whereupon such trustees shall make

such orders in relation thereto as they deem proper, and may empower such applicant or other interested person to enter upon the land of another for the purpose of repairing such ditch.

SEC. 1227. [**Penalty for obstructing.**]—Any person who shall dam up, obstruct, or in any way injure any ditch or ditches so opened, shall be liable to the person owning or possessing the swamp, marsh, or other low lands for the draining of which such ditch or ditches shall have been opened, double the damages that shall be assessed by the jury for such injury, and in case of a second or other subsequent offense by the same person, treble such damages.

DRAINAGE OF COAL LANDS.

SEC. 1228. [**How done: damages assessed.**]—Any person, or corporation, owning or possessing any land underlaid with coal, who is unable to mine such coal by reason of the accumulation of water in such mine, may drain the same through, over, or under the surface of land belonging to another person, and if such person or corporation and the owner of the land cannot agree as to the amount of damages that will be sustained by such owner, the parties may proceed to have the necessary right of way condemned and the damages assessed under the provisions of chapter four of this title.

DRAINAGE OF LEAD MINES.

SEC. 1229. [**Compensation for.**]—Any person, or corporation, who by machinery, such as engines or pumps, or by making drains or adit levels, or in any other way, shall rid any lead-bearing mineral lands or lead mines of water, thereby enabling the miners and the owners of mineral interest in said lands to make them productive and available for mining purposes, shall be entitled to receive one-tenth of all the lead mineral taken from said lands as compensation for said drainage.

This section of the code is not in conflict with the state constitution. It is identical in principle with statutes regulating party walls and partition fences, and provides only that one should compensate another for outlays lawfully made by which he himself is benefited. The act of building the adit is lawful, because it tends to promote the public interest, and is productive of public good. *Ahern v. The Dubuque Lead and Level Mining Co. et al.*, 43 Iowa, 140.

SEC. 1230. [**To be set apart: miners to allow examination of mines.**]—The owners of the mineral interest in said lands, and persons mining upon and taking lead mineral from said lands, shall jointly and severally set apart and deliver from time to time, when demanded, the said one-tenth part of said mineral taken from said lands to the person or corporation entitled thereto as compensation for drainage. The owners of the mineral interest in said lands shall allow the party entitled to such compensation, and his agents, at any and all times to descend into and examine said mines, and to enter any building occupied for mining purposes upon any of said lands and examine and weigh the mineral taken therefrom.

SEC. 1231. [**Penalty.**]—Upon the failure or refusal of any owner of the mineral interest in said lands, or of any person taking the mineral therefrom, to comply with the provisions of the preceding section, the person or corporation entitled to said compensation for drainage may sue for and recover the value of said mineral in any court of competent jurisdiction. And upon the hearing of any such case, if it shall appear that the defendant obstructed the plaintiff in the exercise of the right to examine the said mines, and to weigh said mineral, or concealed or secretly carried away any mineral taken from said lands, the court shall render judgment for double the amount proved to be due from such defendant.

SEC. 1232. [**Notice to smelters: effect of.**]—The person or corporation entitled to said drainage compensation, may, at any time, leave with any smelter of lead mineral in this state, a written notice stating that said person, or corporation,

claim of the persons named in said notice the amount to which said person or corporation may be entitled, which notice shall have the effect of notices in garnishment, and also authorize the said smelter to retain, for the use of the persons entitled thereto, the one-tenth part of the mineral taken from said land and received from the person named in said notice; the payment or delivery of the one-tenth part of the mineral taken from any of said lands by any one of the persons whose duty it is made hereby to pay or deliver the same, shall discharge the parties liable jointly with him except their liability to contribute among themselves.

SEC. 1233. [**Right of way.**].—Any person, or corporation, engaged as aforesaid, in draining such mines and lead bearing mineral lands, whenever he or they shall deem it necessary for the prosecution of their work, shall have the right of way upon, over, or under the surface of such mineral lands and the contiguous and neighboring lands, for the purpose of conveying the water from said mineral lands by troughs, pipes, ditches, water races, or tunnels, and the right to construct and use shafts and air holes in and upon the same, doing as little injury as possible in making said improvements.

SEC. 1234. [**Damages for.**].—If the said person, or corporation, engaged in draining as aforesaid, and the owner of any land upon which said right of way may be deemed necessary, cannot agree as to the amount of damages which will be sustained by the owner by reason thereof, the parties may proceed to have the same assessed under the provisions of chapter four of this title.

SEC. 1235. [**Consent of owners required.**].—The foregoing provisions shall not be construed to require the owners of the mineral interest in any of said lands to take mineral therefrom, or to authorize any other person to take the mineral from said lands without the consent of the said owners.

(CHAPTER 121, LAWS OF 1878.)

CONSTRUCTION OF DRAINS THROUGH TWO OR MORE COUNTIES.

An Act to provide for opening drains to be constructed through two or more adjoining counties, amendatory of chapter 2, title X, of the code.

SECTION 1. (*As amended by ch. 44, 19th g. a. Code, ch. 2, title 10, amended.*) [**Board of supervisors shall appoint commissioners to locate.**].—*Be it enacted by the general assembly of the state of Iowa:* That chapter 2, of title 10, of the code, be amended as follows: In all cases when it becomes necessary to construct a [levee or] drain through two or more contiguous counties or parts of counties, and a petition for such [levee or] drain has been presented to the board of supervisors of the counties through which such [levee or] drain is to be constructed, it shall be the duty of the board of supervisors of each of such counties to appoint a commissioner to act with the commissioner or commissioners of such other counties in locating such [levee or] drain.

SEC. 2. (*As amended by ch. 44, 19th g. a.*) [**Duty of commissioners.**].—It shall be the duty of the commissioners appointed under section 1 of this act, to meet within twenty days after the appointment of the last commissioner by such board of supervisors, and at once locate such [levee or] drain through their respective counties.

Approved March 25, 1878.

The first section of this act does not dispense with the necessity of a petition signed by a majority of the persons in interest, in order to give the supervisors jurisdiction to construct a levee where it extends into two counties. *Richman et al. v. Board of Supervisors*, 70 Iowa, 627.

(CHAPTER 85, LAWS OF 1880.)

CONSTRUCTION OF DRAINS THROUGH TWO OR MORE COUNTIES.

An Act to amend chapter 121, acts of seventeenth general assembly, section 1212, code of 1873, relating to drains of two or more counties.

SECTION 1. [**Amendment to ch. 121, 17th g. a.**]*—Be it enacted by the general assembly of the state of Iowa:* That chapter 121 of the acts of the seventeenth general assembly be amended by adding thereto the following sections:

SEC. 2. [**Engineer appointed.**]*—*That said commissioners shall appoint a competent engineer, who shall have charge of the construction of said (levee,) ditch, drain, or change in said water-course.

SEC. 3. (*As amended by ch. 44, 19th g. a.*) [**Duration of commission.**]*—*That said commission shall continue until the drain, (levee) or ditch are fully completed. They shall, in connection with the engineer in charge, proceed to make a survey of the proposed (levee,) ditch, drain, or change of water-course, and return a plat and profile of the same to the county auditor of each county through which the same may pass. Such return shall set forth a full and detailed description of the proposed improvement, its availability, necessity, and probable cost, with a description of each tract of land owned by different persons through which the proposed improvement is to be located, or which may be benefited by reason of its construction, how it will be affected thereby, and its situation and level as compared with that of adjoining lands, together with such facts as they may deem material. The county auditor and the board of supervisors of each county shall then proceed in the same manner as though the (levee,) ditch, or drain was all located in one county, as provided by sections 1208, 1209, code of 1873.

SEC. 4. [**Party aggrieved may appeal to district court.**]*—*That any person aggrieved by the action of the board of supervisors of any county in locating said (levee,) ditch or drain, or in fixing the number of acres of land benefited by reason of the construction of such (levee,) ditch or drain, shall have the right of appeal to the circuit court of the county in which such person's land may be situated, by serving notice thereof to the first four petitioners within twenty days after such action of the board of supervisors.

SEC. 5. (*As amended by ch. 44, 19th g. a.*) [**Ditches and drains in two or more counties.**]*—*That when a (levee,) ditch or drain has been located in two or more counties the land benefited by the (levee,) ditch or drain shall be proportionally taxed, as provided in section 1214, code of 1873, the same as though the (levee or) drain and land were all in one county.

SEC. 6. [**Transfer of funds.**]*—*That when a greater amount of money is collected by the county treasurer of a county through which such (levee,) ditch or drain may pass than is needed for the work actually done in that county, and if in any county there should be more work done than the equitable tax in that county will pay for, then the boards of supervisors of the several counties shall confer together and ascertain where the excess and deficiency exists, and the county where the excess exists shall transfer the excess to the county or counties where the deficit exists.

SEC. 7. (*As amended by ch. 44, 19th g. a.*) [**Additional levies.**]*—*That if the levy first made by the several boards of supervisors should be insufficient to pay for the construction of the (levee,) ditch or drain, then the several boards may make an additional levy in the same ratio as the first was made.

SEC. 8. [**Amendment of.**]*—*That section 1212, code of 1873, be amended by striking out the following words, commencing after the word "letting" in seventh

line: "shall, on completion thereof to the satisfaction of the county supervisors, be paid for such work out of the county treasury, upon the order of the county auditor," and that the following be inserted in lieu thereof: "shall be paid in the following manner: That the engineer in charge of the construction of the ditch or drain shall furnish the contractors monthly estimates of the amount of work done on each section; that upon the filing of such estimates with the county auditor, the auditor shall draw a warrant in favor of the contractor for eighty per cent of the value of the work done, according to the estimate; and when said ditch or drain is completed to the satisfaction of the engineer in charge, and when he so certifies the same to the county auditor, then the auditor shall draw a warrant in favor of said contractor upon the 'drainage fund' for the balance due to the contractor."

Approved March 22, 1876.

(Took effect by publication in newspapers, March 26, 1880).

(CHAPTER 186, LAWS OF 1884.)

DRAINS, LEVEES, AND CHANGES IN WATER COURSES.

An Act in relation to ditches, drains, levees, embankments, and changes in water courses, and amendatory to chapter 2, title X, of the code.

SECTION 1. [Ditches or drains in public highway.]—*Be it enacted by the general assembly of the state of Iowa:* Ditches or drains may be located and constructed within the limits of any public highway, and on either or both sides thereof, and levees or embankments upon and along the same; *provided*, they are so constructed as not to prevent public travel thereon. The engineer or commissioner appointed to locate ditches, drains, levees, or embankments, may recommend the establishment of a public highway upon and along the route of the same, and the board of supervisors may establish the same on such recommendations in the same manner as on the report of the highway commissioner. All levees built by taxation under the drainage laws shall be under the control of the board of supervisors of the county in which they are situated, and the board shall have the power to grant the right of way thereon to any railway company that will maintain the same while used for railway purposes: *provided*, the steps for condemnation and payment therefor, contained in chapter 4, title 10, of the code, shall first be taken by said company; *provided further*, that nothing in this section shall be construed so as to require such ditches or levees to be kept up at the expense of the county.

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

SEC. 3. Board of supervisors to determine levy.]—If the board of supervisors shall be of the opinion that the estimated cost of reclamation of such district of lands is greater than should be levied and collected in a single year from

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

SEC. 4. [Tax to pay bond, etc.]—It shall be the duty of the board of supervisors to levy each year on the lands benefited, a tax sufficient to pay the interest on such bonds and so much of the principal as falls due in the succeeding year, and such tax shall be collected in the same manner as other county taxes, and shall be carried to the credit of the drainage district on account of which the bonds are issued, and shall be used to pay the principal and interest of said bonds as the same falls due; *provided*, that any surplus may be devoted to payment of works of reclamation in said districts or repairs thereof.

(Took effect by publication in newspapers.)

(CHAPTER 96, LAWS OF 1888.)

DRAINAGE.

An Act to repeal chapter 188, laws of the twentieth (20th) general assembly and to enact a substitute therefor relating to drainage.

SECTION 1. [Repeal.]—*Be it enacted by the general assembly of the state of Iowa:* That chapter 188, laws of the twentieth general assembly, be repealed and the following enacted in lieu thereof: that whenever any person who is the owner of any swamp, wet or marsh land, which on account of its condition may endanger the public health, or is not for that reason in a proper condition for cultivation, shall desire to construct any tile or other underground drain through the land of another, and shall be unable to agree with the owner or owners of such land as to the same, he may file with the clerk of the township where said land is situated an application therefor, giving a description of the land or lands through which he may desire to construct the same, and the township clerk shall forthwith notify the township trustees of said township of said application, who shall fix a time and place for the hearing of same, which time shall not be more than twenty days distant, and they shall cause said clerk to notify the applicant and land owner of the time and place of said hearing at least ten days before the time fixed for the hearing of same, which notice shall be in writing, signed by said clerk, and shall be served on said applicant and land owner, if within the county, and, if not, then upon his agent for said land, if within the county, in the same manner as is now provided by law for the service of original notices; and in case that neither said party nor his agent are residents within said county, then the same shall be served by post-

ing written notices in three public places in said township, one of which shall be upon said land at least fifteen days before said hearing.

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

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

SEC. 4. [**Disagreement of owners.**].—Wherever any water course or natural drainage line crosses the boundary line between two adjoining land owners, and both parties desire to drain the land along such water course or natural drainage line, but are unable to agree upon the conditions as to the junction or connection of the lines of tile or other drainage at the boundary line aforesaid, then and in such case the township trustees shall have full authority to hear and determine all questions arising relative thereto between such land owners and to render such judgment thereupon as shall to them seem just.

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

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

SEC. 7. [**Appeal to district court.**].—Either party may appeal to the district court of the county from all of the findings of the township trustees, within ten days after the findings have been filed with the clerk, and the party appealing shall cause a notice in writing of the taking of said appeal to be served upon the opposite party for the same time and in the same manner as now provided by law for service of original notice in the district court; and if the appellant is the party petitioning for the drain, he must furnish a bond conditioned to pay all the costs of appeal assessed against him, said bond to be approved by the township clerk; and the matter shall be tried *de novo* in said court; *provided*, that if the appellant does not recover a more favorable finding or judgment, in the district court than he did before the trustees, he shall pay all the costs of the appeal.

SEC. 8. [**Township clerk.**].—In case of appeal the township clerk shall certify to the district court a transcript of the proceeding before said trustees, which shall be filed in said court with the appeal bond, the party appealing pay-

ing for said transcript and the docketing of appeal as in other cases, and upon appeal the party claiming damages shall be plaintiff and the applicant defendant.

SEC. 9. [**Costs.**—The applicant shall pay the costs of the trustees' clerk and services of notices on the hearing before the trustees, and shall pay all damages awarded before entering on the construction of said tile or other drain through the lands of the other.

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

Approved April 9, 1888.

CHAPTER 3.

OF WATER-POWER IMPROVEMENTS.

SECTION 1236. [**Powers of corporations organized for.**—There is granted to any corporation hereafter organized in accordance with law, for the purpose of utilizing and improving any water-power within this state, or in the stream lying upon the borders thereof, the right to take and hold so much real estate as may be necessary for the location, construction, and convenient use of its canals, conduits, mains and water-ways, or other means employed in the utilization of such water-power, and for the construction of such buildings and their appurtenances as may be required for the purpose aforesaid. Such corporation may also take, remove and use for the construction and repair of its said canals, water-ways, buildings and appurtenances, any earth, gravel, stone, timber, or other materials, on or from the land so taken. Compensation shall be made for the land and materials so taken and used such by corporation, to the owner, in compliance with and in the manner provided in chapter four of this title.

SEC. 1237. [**Same: consent of cities required.**—Such corporations may use, raise, or lower any highway for the purpose of having their said canals, water-ways, mains and pipes pass over, along or under the same; and in such case shall put such highway, as soon as may be, in good repair and condition, for the safe and convenient use of the public. And such corporation may construct and carry their canals, conduits, water-ways, mains, or water-pipes across, over, or under any railway, canal, stream, or water course, when it shall be necessary for the construction or operation of the same, but shall do so in such manner as not to impede the travel, transportation, or navigation upon, or other proper use of, such railway, canal or stream. But the powers conferred in this section can only be exercised in cities and towns with the consent and under the control of the city council or trustees of said municipal corporation.

SEC. 1238. [**Right of way over lands belonging to public granted.**—Such corporations are authorized to pass over, occupy, and enjoy, any of the school, university, and saline, or other lands of this state, whereof the fee, or any use, easement, or servitude therein is in the public, making compensation therefor. But no more of such land shall be taken than is required for the necessary use and convenience of such corporations.

SEC. 1239. [**Powers enumerated.**—Such corporations, in addition to other powers, shall have the following: To borrow money for the purpose of constructing, renewing, or repairing their works, and to make, execute and deliver contracts, bonds, notes, bills, mortgages, deeds of trust, and other conveyance, charging or incumbering their property, including all and singular their franchises, or any part or parcel thereof; to erect, maintain, and operate canals, conduits, mains, water-

ways, mills, factories, and other buildings and machinery, including waterways, sluices, and conduits, for the purpose of carrying waste water off from said premises to the stream from which the same was taken, or other convenient place; to let, lease, or sell, and convey any portion of their water supply, and any of the buildings, mills, or factories, or machinery aforesaid, for such sums, rents, tolls and rates, as shall be agreed upon between the parties; and to lay down, maintain, and operate, such water mains, conduits, leads and service pipes as shall be necessary to supply any building, village, town, or city, with water; and the grantee of any such corporations, or purchaser of the said property franchise, rights, and privileges, under and by virtue of any judicial sale, shall take and hold the same as fully and effectually, to all intents and purposes, as the same were held and enjoyed by such corporations.

SEC. 1240. [**Must commence in two and complete in five years: legislative control of corporations retained.**—Such corporation shall take, hold, and enjoy the privilege of utilizing and improving the water power, and the rights, powers, and privileges aforesaid, which shall be specifically mentioned and described in its articles of incorporation; *provided*, it shall proceed in good faith to make the improvements and employ the powers in its said articles of incorporation mentioned, and shall, within two years from the date of its organization, provide the necessary capital, complete the preliminary surveys, and actually commence the work of improving and utilizing the water power and furnishing the supply of water so mentioned in its articles of incorporation; and said water works and canals shall be completed within five years from the time when said corporation has been organized; and, *provided further*, that the rights, powers, and privileges conferred by this chapter shall be at all times subject to legislative control.

CHAPTER 4.

TAKING PRIVATE PROPERTY FOR WORKS OF INTERNAL IMPROVEMENT.

SECTION 1241. (*As amended by ch. 126, 17th g. a.*) [**By railway: limit of.**—Any railway corporation organized in this state [or chartered by or organized under the laws of the United States or any state or territory,] may take and hold, under the provisions of this chapter, so much real estate as may be necessary for the location, construction and convenient use of its railway, and may also take and remove, and use for the construction and repair of said railway and its appurtenances, any earth, gravel, stone, timber, or other materials, on or from the land so taken; the land so taken otherwise than by the consent of the owners, shall not exceed one hundred feet in width, except for wood and water stations, unless where greater width is necessary for excavation, embankment, or depositing waste earth.

Under the statute a railroad company may take and hold so much land for their right of way, not exceeding one hundred feet in width, as shall be necessary for the location, construction and convenient use of its road, irrespective of whether such location be near a public highway or not, by paying the damages when private property is taken. Per MILLER, CH. J., in *The C. R. & St. P. R. Co. v. Spafford*, 41 Iowa, 292, 296.

A foreign corporation has no power to acquire or possess land for a railroad right of way in this state, and cannot therefore be made a party to a proceeding for the assessment of damages appropriated for that purpose. *Holbert v. The St. L., K. C. & N. R. Co.*, 45 Id., 23.

Where a foreign corporation is using, by sufferance, the line of a domestic corporation, a land owner is entitled to an injunction restraining it from the use of that portion of the line running through his land until he shall have been compensated for the appropriation of the same for right of way. *Id.*

In procuring the right of way, railroad companies do not thereby acquire the right to divert a stream of water from its natural channel to the injury of the land owner. *Stodghill v. The C., B. & Q. R. Co.*, 43 Id., 26.

While a railroad company cannot condemn more than one hundred feet in width for right of way, it is not necessary that it should locate its track in the middle of the land condemned. *Stark v. The S. C. & P. R. Co.*, 43 Id., 501.

The fact that the company owns land adjacent to that which it seeks to condemn will not restrict its right of condemnation. *Id.*

Where lands belonging to one party were enclosed in common with those of another at the time the railroad was constructed through it, and subsequently a division fence was constructed and the company notified to construct a cattle guard thereat, which it failed to do, *held*, 1, that the company was liable for injury done to the crops upon the land of the plaintiff by cattle entering from the railway; and, 2, that the measure of damages was the actual value of the crops destroyed. *Donald v. The St. L., K. C. & N. R'y Co.*, 44 Id., 158.

In an action against a railway company for damages for killing stock, wherein it is alleged that a gate was not provided with proper fastenings, it was *held* that the jury should have been allowed to consider whether or not the company was negligent in the construction of the gate. *Hammond v. The C. & N. W. R'y Co.*, 43 Id., 168.

The company would not be released from liability by ignorance of the defect in the gate, if in the exercise of reasonable care it would have acquired knowledge of it. *Id.*

A defect in the original construction of the gate would be presumed to be known by the defendant, and plaintiff would not be required to give notice to the defendant of its existence, nor to repair it, even though it could be done at small expense. *Id.*

Where a lane leading from the highway to plaintiff's residence crossed the track of the railroad, and at each end of the lane were gates, which, with the inclosing fences, were maintained by him, his cow having been killed by the cars on a private crossing, it was *held* that the company was justified in assuming that he preferred the open crossing, and that he could not recover for the killing of the cow. *Tyson v. The K. & D. M. R. Co.*, 43 Id., 207.

The restriction as to what is "necessary" in this section, applies to the quantity of land to be taken for right of way, and not to the quantity of earth, gravel, stone, timber, etc., which may be removed from the land condemned. But the railroad company may not wantonly destroy timber, or use earth, etc., for other purposes than those provided in the statute. *Winklemans v. The Des Moines & N. W. R'y Co.*, 62 Id., 12.

The interest acquired by a railroad company taken as a right of way over real property under this section, is to occupy and use the surface of the land taken for the purpose of its railway, and to appropriate and use so much of the earth or other material upon the land as may be necessary for the construction and repair of its road. The owner of the land is not divested of the title. *Hollingsworth v. The Des Moines & St. Louis R'y Co.*, 63 Id., 444.

Where the owner of real property granted to a railroad corporation "the right of way over and through the land for all purposes connected with the construction, use and occupation of its railway," it was *held* that the grantee had the legal right to dig a well on such right of way, and to use the water supplied by percolation for railway purposes, although such use may materially diminish the supply of water in a spring upon the grantor's land. *Hogson v. The M. & St. Paul Railway Co.*, 35 Id., 556.

The provisions of the statute in respect to the appropriation of the right of way for railroad companies, applies as well to railways operated by animal power as those operated by steam. *The City of Clinton v. The C. & L. Horse Railway Co.*, 37 Id., 61.

The title to timber standing on land taken by a railway company for a right of way, remains in the owner of the soil; and the company have the right to take and remove only so much thereof as may be necessary for the construction and repair of the road and its appurtenances. *Preston v. The D. & P. Railway Co.*, 11 Id., 15.

The statute limits the amount of land which may be taken by a railway company under condemnation proceedings, to 100 feet in width, except: *First*, on account of wood and water stations; *second*, where a greater width is necessary for excavation, embankment, or depositing waste earth. *Johnson v. C., M. & St. P. R. Co. et al.*, 53 Id., 537, 542.

Plaintiff conveyed by quit claim deed a "right of way" over certain land, "for all purposes connected with the construction, use and occupation of said railway." *Held* that the deed did not confer upon the defendant the right to take sand from the right of way to construct a round house, because such use of the land was not included in the purpose for which the land was granted, as shown by the terms of the deed. On the other hand, it was *held*, that as the deed granted an easement only, for certain well defined purposes, the plaintiff might take sand from the right of way, so long as he did not interfere with the uses of the land by the defendant as were contemplated in the deed. *Vermillia v. The C., M. & St. Paul R'y Co.*, 66 Iowa, 606.

SEC. 1242. [Dams constructed to obtain water: limitation on right.]— It may, also, take and hold additional real estate at its water station, for the purpose of constructing dams and forming reservoirs of water to supply its engines. Such real estate shall, if the owner requests it, be set apart in a square or rectangular shape, including all the overflowed land, by the commissioners as

hereafter provided; but the owner of the land shall not be deprived of access to the water or the use thereof in common with the company on his own land. And the dwelling-house, out-house, orchards, and gardens of any person shall not be overflowed or otherwise injuriously affected by any proceeding under this section.

SEC. 1243. [**Pipes laid down and kept in repair; damages caused recovered by suit.**]—Any such railway corporation may lay down pipes through any land adjoining the track of the railway, not to a greater distance than three-fourths of a mile therefrom, unless by consent of the owners of the land through which the pipes may pass beyond that distance, and maintain and repair such pipes, and thereby conduct water for the supply of its engines from any running stream; and shall, without unnecessary delay, after laying down or repairing such pipes, cover the same so as to restore the surface of the land through which they may pass to its natural grade; and shall, as soon as practicable, replace any fence that it may be necessary to open in laying down or repairing such pipes; and the owner of the land through which the same may be laid shall have a right to use the land through which such pipes pass in any manner so as not to interfere therewith; said pipes shall not be laid to any spring, nor be used so as to injuriously withdraw the water from any farm; *provided*, that such corporation shall be liable to the owner of any such lands for any damages occasioned by laying down, regulating, keeping open, or repairing such pipes, such damages to be recoverable from time to time as they may accrue in any ordinary action in any court of competent jurisdiction.

MANNER OF CONDEMNATION.

SEC. 1244. [**Sheriff to summon jury on demand of either party.**]—If the owner of any real estate, necessary to be taken for either of the purposes mentioned in the three preceding sections, refuse to grant the right of way, or other necessary interest in said real estate required for such purposes, or, if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which said real estate may be situated shall, upon the application of either party, appoint six disinterested freeholders of said county, not interested in a like question, who shall inspect said real estate and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county, and if said corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway, pay to said sheriff for the use of said owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises.

The proceedings under the statute for the condemnation of lands to the use of railroads, simply fix the price at which, upon actual payment, the company may take the right of way. A judgment assessing the amount of damages passes no title to the company before payment, and does not bind it to accept the lands and pay the amount assessed. *Gear v. The Dubuque & S. C. R. R. Co.*, 20 Iowa, 523.

And where, in such a proceeding, a judgment is entered in the usual form of a judgment in an action for debt, it will be construed to have no greater force or effect than it would have if entered conformably to the statute authorizing the proceeding. *Id.*

In a proceeding to appropriate land for the right of way of a railroad already constructed, evidence of damages resulting from defective construction, or the like, is not admissible. While such damages may furnish a cause of action to recover the same in a suit therefor, they are not to be considered in assessing the compensation to be allowed the owner for the right of way. *King v. The Iowa Midland R. R. Co.*, 34 *Id.*, 458.

Nor, for the same reason, could the failure of the company for a time to erect cattle-guards be considered in estimating damages in such a proceeding. *Id.*

In a proceeding of this kind on appeal, the propriety of sending the jury to view the real estate in controversy rests in the sound discretion of the court, and where it refuses to do so, its action will not be disturbed where no abuse of discretion appears. *Id.*

An agreement in writing, executed by a land owner, to give a right of way to a railroad com-

pany upon its compliance with a certain condition, the agreement being placed in the hands of a third party, not an agent of the company, who returned it to the land owner after the company had failed of compliance, did not entitle it to the right of way without compensation. *Hibbs v. The C. & S. W. R. R. Co.*, 39 Id., 340; see, also, *Conger v. The B. & S. W. R. R. Co.*, 41 Id., 419.

A railroad company which enters upon land and appropriates a right of way without proceedings to condemn, or contract with the owner, or tendering him compensation therefor, is a mere trespasser, and acquires no right to hold the land. *Id.*

An injunction will be granted to restrain the company and its lessees from operating the road, after an award of damages under the statute, until they are paid. *Id.*

Where a railroad company entered upon and appropriated land for right of way, without proceedings to condemn, and assess damages or grant from the owner, it was held in a proceeding subsequently instituted under the statute by the company to assess the damages, that the measure thereof was the value of the land at the time of its appropriation, with interest from that time. *Daniels v. The C. I. & N. R. R. Co.*, 41 Id., 52.

A railway company appropriated a right of way without compensating the owner thereof, although damages were assessed: held, that ejectment would lie, but that execution for possession should not issue until the company had been granted a reasonable time, fixed by the court, in which to pay the assessed damages and interest thereon from the date of assessment, at the rate of six per centum. *Conger v. The B. & S. W. R. R. Co.*, 41 Id., 419.

In such a proceeding, evidence of the price at which the right of way was purchased through adjoining lands is not admissible, unless it be first shown that there is a uniformity of character of the lands thus brought in question. *Id.*

While the remedy provided by the statute for the assessment of damages sustained by a land owner in the taking of land for railroad right of way is exclusive of all other remedies for that purpose, it is not exclusive of an action of ejectment if his property has been taken by the railroad company without payment or tender of compensation. *Daniels v. The C. & N. W. R. R. Co.*, 35 Id., 129.

A dedication of land for a railroad right of way cannot be established by mere occupancy alone. It must be shown that the occupancy or use was with the knowledge and acquiescence of the land owner for the full period fixed by the statute for the limitation of real actions. *Id.*; see, also, *Onstott v. Murray*, 22 Id., 457; *Manderschid v. The City of Dubuque*, 29 Id., 73.

Knowledge of such use by an agent of the land owner, having merely a general oversight of the land, without any authority to sell or convey, would not be sufficient. *Id.*

A railroad company may abandon land condemned as a right of way under the statute, and such abandonment causes the land to revert to the original owner, but gives the company no claim to the damages that may have been awarded and paid into the hands of the sheriff. *Hastings v. The B. & M. R. R. Co.*, 33 Id., 316.

When a railroad company abandons land condemned to its use for a right of way, all of its interest in the land disappears, and the abandonment is a good defense to any claim for additional damages upon appeal from the award of the sheriff's jury. *Id.*

Where certain lots in a town, owned and used with other lots for purposes connected with the same business, but separated therefrom by streets and alleys, are appropriated for the right of way of a railroad, the jury, in estimating damages therefor to the owner, should not consider all the lots thus used and separated as an entirety in respect to the business for which they were used, and allow damages accordingly. They should, in such case, estimate the value of the lots taken before the appropriation, then their value afterward, and the difference would be the measure of damages. *Fleming v. The C. D. & M. R. R. Co.*, 34 Id., 353.

In ascertaining the depreciation in value of the premises, the immediate, and not the remote or contingent, consequences of the appropriation must alone be considered. *Id.* So, also, injuries that may result from unauthorized or unlawful acts, for which the company is liable in an action, are not to be considered. *Id.*

By the terms "just compensation," in the eighteenth section of the first article of the constitution of 1846, are meant that the persons whose property is taken shall receive a fair equivalent, and be made whole. *Sater v. The B. & M. P. Plank Road Co.*, 1 Id., 386; *Henry v. The Dubuque & P. R. R. Co.*, 2 Id., 288.

In ascertaining what that compensation shall be, the fair market value of the premises over which the proposed improvement is to pass, should be first ascertained, and then the like value of the premises in the condition in which they will be after the land for the improvement has been taken, irrespective of the benefit which may result from the improvement, and the difference will be the measure of compensation. *Henry v. The D. & P. R. R. Co.*, 2 Id., 288.

A sheriff's jury has no jurisdiction in proceedings to condemn right of way for a railroad, unless the owner refuses to grant the right of way, or the parties are unable to agree upon the compensation therefor; therefore, where the owner had conveyed the right of way to the railway company, though by a deed which he was seeking to have set aside in equity, since the deed until set aside vested the title *prima facie* in the railway company, the proceedings of the sheriff's jury

called out on motion of the owner, were without authority, and were properly set aside on *certiorari*. *The C. B. & St. Louis R'y Co. v. Bently et al.*, 62 Id., 446.

Plaintiff's grantor had executed a deed to the defendant for the right of way in question and had agreed to accept in payment thereof a sum to be fixed by G. Defendant took possession of the land but failed to have G. fix the compensation. *Held* that the case was within the provisions of section 1244 of the code, and that plaintiff was entitled to have the compensation assessed by commissioners as therein provided. *Corbin v. The Wis., Iowa & Neb. R'y Co.*, 66 Id., 269.

Where the land was fenced, and by taking the right of way it is thrown open, and left in a manner unfenced, this fact should be taken into consideration in arriving at the depreciated value of the remaining premises. *Id.*

The term "damages," in the statute, has relation to the provision of the constitution under which the property is taken, and is precisely synonymous with the phrase "just compensation" there used. *Fleming v. The C. D. & M. R. R. Co.*, 34 Id., 353.

The right of way conferred by the statute upon a railroad company is the right of way peculiar to a railroad, and contemplates all that is necessary for the construction and maintenance of a railroad over the premises. *Id.*

The title to the timber standing on land taken for the right of way of a railroad, remains in the owner of the soil, and the company may take and remove only so much thereof as may be necessary for the construction and repair of the road and its appurtenances. *Preston v. The Dubuque & P. R. R. Co.*, 11 Id., 15.

The word "construction," as used in the statute, implies not only the making of the road-bed, but also its preparation and readiness for use in a safe and convenient manner. *Id.*

In *Kucheman et al. v. The C. C. & D. R'y Co.*, 45 Iowa, 363, Justices ADAMS and ROTHROCK concurred in holding that where the fee of a street or highway is in the adjacent proprietor, he is entitled to recover damages from a railway company for its occupation of the street, and such damages are to be assessed like damages for the appropriation of the right of way. Justice BECK went farther than this, holding that the owner of adjacent property is entitled to recover damages from a railway company for its occupancy of the street with its track, without reference to whether the fee of the street be in the lot owner or not. Chief Justice SWEVERS and Justice DAY held that when a railway is constructed on a street of a city in a careful and proper manner, the owner of abutting property cannot recover consequential damages for the appropriation of the right of way, whether he owns the fee or not to the center of the street.

As to the measure of damages, Justices ADAMS, ROTHROCK and BECK held that the adjacent proprietor is not limited in his recovery to the actual value of the land taken, but may recover all such damages as result proximately from the use for which it is taken. Justices ADAMS and ROTHROCK, however, hold that he is limited to the recovery of damages for the use of his own land, which extends only to the middle of the street, and cannot recover for the entire depreciation in the value of his property, caused by the location of a railway half upon his land and half upon the land of the opposite owner, while Justice BECK held that the abutting owner may recover for all the injury he has suffered by the construction of the railroad in the street, although only one-half of it be upon his land.

A right of way for a railroad is an incumbrance for which a grantee may recover under a covenant against incumbrance, though he had full knowledge of the incumbrance at the time he accepted the deed. *Van Wagner v. Van Nostrand*, 19 Id., 422; followed in *Barlow v. McKinley*, 24 Id., 69.

Prior to the amendment of this section by chapter 126, laws of 1873, a foreign corporation could not acquire or possess land for a right of way in this state. *Holbert v. St. L., K. C. & N. R'y Co.*, 45 Id., 23.

In actions to recover damages for injuries by reason of the improper construction of a railroad on a street adjacent thereto, the measure of damages is the difference between the rental value of the property with the road *as constructed*, and the rental value if the road had been properly constructed.

The following question was held not erroneous: "How much less in value was the farm immediately after taking the land for the right of way, and in consequence thereof, than it was immediately before, not taking into account any supposed benefits to result from the building of defendant's railroad." *Harrison v. The Iowa Midland R. Co.*, 36 Id., 323.

SEC. 1245. [Jury to assess all damages in county: notice of meeting.]

—The application to the sheriff shall be in writing, and the freeholders appointed shall be the commissioners to assess all damages to the owners of real estate in said county, and said corporation, or the owner of any land therein, may, at any time after their appointment, have the damages assessed in the manner herein prescribed by giving the other party five days notice thereof in writing, specifying therein the day and hour when such commissioners will view the premises, which shall be served in the same manner as original notices.

The statute expressly provides that either party may institute this proceeding. *Hibbs v. The C. & S. W. R. Co.*, 39 Iowa, 340.

A land owner may institute proceedings to recover compensation for the right of way after the railroad is completed. *Id.*

The mortgagee of real property is an owner in such a sense that he is entitled to notice of the assessment of damages for railroad right of way over the property mortgaged. The proceeding to condemn the right of way, with notice to the mortgagor alone, will not defeat the paramount title of the mortgagee. *Severn v. The B., C. R. & M. R'y Co.*, 38 Iowa, 463.

In such case, the decree of foreclosure of the mortgage should direct the sale of the property, subject to the right of way, or, if that does not satisfy the debt, then the sale of the right of way, with the lot or independent of it, as shall be most advantageous. *Id.*

SEC. 1246. [**Minor or insane owner.**].—If the owner of any lands is a minor, insane or other person under guardianship, the guardian of such minor, insane or other person, may, under the direction of the circuit judge, agree and settle with said corporation for all damages by reason of the taking of such lands for any of the purposes aforesaid, and may give valid conveyances of such land.

SEC. 1247. [**Notice to non-resident owner.**].—If the owner of such lands is a non-resident of the county in which the same are situate, no demand of the right of way, or other purpose for which such lands are desired, shall be necessary, except the publication of a notice which may be in the following form:

NOTICE.—For the appropriation of lands for railway purposes. To (here name each person whose land is to be taken or affected) and all other persons having any interest in, or owning any of the following real estate (here describe the land by its congressional numbers in tracts not exceeding one-sixteenth of a section, or, if the land consist of lots in a town or city, by the numbers of the lot and block). You are hereby notified that the has located its railway over the above described real estate, and desires the right of way over the same, to consist of a strip or belt of land feet in width, through the center of which the center line of said railway will run, together with such other land as may be necessary for berms, waste banks and borrowing pits, and for wood and water stations (or desires the same for the purposes mentioned in sections twelve hundred and forty-two and twelve hundred and forty-three, of this chapter, as the case may be), and unless you proceed to have the damages to the same appraised on or before day of, A. D., 18.., (which time must be at least four weeks after the first publication of the notice), said company will proceed to have the same appraised on the day of (which must be at least eight weeks after the first publication of the notice), at which time you can appear before the appraisers that may be selected.

.....Railway Company.

By.....attorney, or agent.

This section requires that a notice of publication for the condemnation of the right of way for a railway must be addressed *by name* to the person whose land is taken or affected, and an owner not so named will not be bound by a notice addressed to "all other persons having any interest in or owning any portion" of the land. *Birge v. The C., M. & St. P. R'y Co.*, 65 Id., 440.

SEC. 1248. [**Notice published.**].—Said notice shall be published in some newspaper in the county, if there be one; if there be none, then in the newspaper published in the nearest county through which the proposed railway is to run, for at least eight successive weeks prior to the day fixed for the appraisement at the instance of the corporation.

SEC. 1249. [**Appraisal: how made and returned.**].—At the time fixed in either aforesaid notices, the appraisement may be made and returned in tracts larger than forty acres, and all the lands appearing of record to belong to one person and lying in one tract, may be included in one appraisement and return, unless the agent or attorney of the corporation, or the commissioner, has actual knowledge that the tract does not belong wholly to the person in whose name it

appears of record; and in case of such knowledge, the appraisement shall be made of the different parcels, as they are known to be owned.

Where two contiguous lots are improved together as one property, and it is sought to appropriate one of them for railroad right of way, the owner is entitled to have his damages assessed for the injury to the property as a whole and not only for the lot actually appropriated; and in such case although notice of condemnation named the one lot only, it was competent for the commissioners, under this section, to find that the two lots constituted but one property, and to assess the damages accordingly. *Cummins v. The Des Moines & St. Louis R'y Co.*, 63 Id., 397.

Payment by a railway company to the sheriff of the damages awarded by the commissioners under the statute for the right of way over another's land, is not payment to the land-owner, and, where the sheriff fails to pay the amount to the land-owner, the failure must be imputed to the company whose agent he is rather than the agent of the land-owner, and in such case the land-owner may recover the possession of the land for non-payment. *White v. The Wabash, St. Louis & Pacific R'y Co.*, 64 Id., 281.

SEC. 1250. [Where dwelling house, garden, or orchard is affected.]—If it appears from the finding of the commissioners that the dwelling-house, out-house, orchard or garden, of the owner of any land taken will be overflowed or otherwise injuriously affected by any dam or reservoir to be constructed under section twelve hundred and forty-two of this chapter, such dam shall not be erected until the question of such overflowing or other injury has been determined upon appeal in favor of the corporation.

SEC. 1251. [Talesmen.]—In case of the death, absence, neglect or refusal, of any of said freeholders to act as commissioners as aforesaid, the sheriff shall summon other freeholders to complete the panel.

SEC. 1252. [Costs: how paid.]—The corporation shall pay all the costs of the assessment made by the commissioners and those occasioned by the appeal, unless on the trial thereof a less amount of damages is awarded than was allowed by the commissioners.

Where the corporation seeking to condemn land, under chapter 4 of title X of the code, appeals from the assessment of the commissioners and the amount allowed to the land owners, on appeal, is less than that awarded by the commissioners, the court may, under the general rules of law, direct a part of the costs to be taxed to the corporation, notwithstanding the provisions of this section. *Jones et al. v. The M. County Coal Co.*, 47 Id., 35.

SEC. 1253. [Commissioner's report may be recorded.]—The report of the commissioners, where the same has not been appealed from, and the amount of damages assessed and costs have been deposited with the sheriff, or, if an appeal is taken and the amount of damages assessed on the trial thereof has been paid to the sheriff, may be recorded in the record of deeds in the county where the land is situate, and such record shall be presumptive evidence of title in the corporation to the property so taken, and shall constitute constructive notice of the rights of such corporation therein.

APPEALS.

SEC. 1254. [How taken.]—Either party may appeal from such assessment of damages to the circuit court within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff, notice in writing that such appeal has been taken; the sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall thereupon take jurisdiction thereof and try and dispose of the same as in actions by ordinary proceedings. The land owner shall be plaintiff and the corporation defendant.

See *Hibbs v. The C. & S. W. R. Co.*, 39 Iowa, 340.

The failure of the officer to file the papers until the first day of the next term after an appeal is taken affords no sufficient ground for dismissing the appeal. *Id.*

Where a party appeals from the assessment of damages in a right of way case, he is in court for all substantial purposes; and if he does not appear and urge his right to a new assessment, and the verdict of the jury is affirmed, he cannot object to the proceedings in the appellate court

on the ground of a want of notice. In such cases the appeal brings the cause to the circuit court upon its merits, and it is immaterial whether the appellant had notice. *Bosland v. The M. & M. R. Co.*, 8 Id., 148.

Where an appeal from proceedings condemning right of way for a railway was brought to the notice of the sheriff, and he directed his deputy to accept service of the notice of appeal for him, and it was accepted in due form in writing, to which the deputy signed the sheriff's name, *held* that there was a sufficient service of the notice upon the sheriff to sustain the appeal. *Waltmeyer v. The Wisconsin, Iowa & Nebraska R'y Co.*, 64 Id., 688.

From an assessment of damages made by a sheriff's jury for right of way purposes, either party may appeal. *The Cedar Rapids, Iowa Falls & N. W. R'y Co. v. Whelan et al.*, Id., 695.

An appeal from an award of damages for right of way by the sheriff's jury may be taken by serving the opposite party or his attorney with a notice of appeal, and it is not essential that service be also made on the sheriff, nor is it requisite that the report of the jury be filed in the appellate court. The notice of appeal constitutes presumptive evidence that an assessment has been made. *Hahn v. The C., O. & St. J. R. Co.*, 43 Id., 333.

In a proceeding to obtain the right of way for a railroad when the owner appeals to the circuit court from the award of damages made by the sheriff's jury, the company may abandon the proposed route, and upon the payment of full costs, for this or any other reason, dismiss the proceedings. *Burlington & M. R. R. Co. v. Sater*, 1 Id., 421; *Hunting & Waterman v. Curtis*, 10 Id., 132; *Harris v. Laird*, 25 Id., 143.

In the absence of statutory direction as to the manner of taking an appeal from the assessment of damages for a right of way, it seems that any act usually required in cases of appeal from one tribunal to another is sufficient. It was accordingly *held* that notice of appeal to the opposite party is sufficient. And it seems that in case of appeal by the land owner no bond is necessary. But if one should be held necessary, the omission to file it would not operate to dismiss the appeal, as in such case the court could require one to be filed. *Robertson v. The E. R'y and Coal Co.*, 27 Id., 245.

The time for taking an appeal from an award of damages for a railroad right of way begins to run not from the day when the premises are viewed by the jury, but from the time the assessment is actually made, reduced to writing and made public, or in some legitimate manner brought to the knowledge of the parties interested. *Jamison v. The B. & M. R'y Co.*, 68 Id., 670.

SEC. 1255. [Not to delay work if amount assessed is deposited with sheriff.]—An appeal shall not delay the prosecution of the work upon said railway, if said corporation pays or deposits with the sheriff the amount assessed by the commissioners; said sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of appeal, but shall retain the same until the determination thereof.

An injunction will be granted to restrain a railroad company from operating its road, after an award of damages under the statute until the damages are paid. *Henry v. The D. & P. R. Co.*, 10 Iowa, 540; *Richards v. The D. M. V. R. Co.*, 18 Id., 209; *Hibbs v. The C. & S. W. R. Co.*, 39 Id., 340; *Conger v. The B. & S. W. R. Co.*, 41 Id., 419; *Holbert v. St. L., K. C. & N. R. Co.*, 45 Id., 23, 27.

Where the damages for a railroad right of way are assessed jointly to two persons as owners of the land, an appeal cannot be taken and prosecuted by one of them without uniting the other therein, or making him a party thereto, by notice or otherwise. *The C., R. I. & P. R. Co. v. Hurst*, 30 Id., 73.

Upon appeal from assessment of damages by the sheriff's jury, the cause is to be heard upon its merits and not upon exceptions taken to the sheriff's jury as to their competency. *The M. & M. R. Co. v. Rosseau*, 8 Id., 374; *The B. & M. R. R. Co. v. Sinnamon*, 9 Id., 293.

Where damages for a right of way for a railway have been assessed by a sheriff's jury, and the amount so assessed deposited with the sheriff, and the railroad company appeals from the assessments, the right of the land owner to receive the amount so assessed and deposited is suspended until the appeal is heard. *Peterson v. Ferreby, Sheriff*, 30 Id., 327.

Where the land owner, after his damages have been assessed and deposited with the sheriff, accepts or receives the amount thus assessed and deposited, he cannot appeal from the assessment. A party cannot accept the benefits of an adjudication and afterwards appeal therefrom. *The M. & M. R. Co. v. Byington*, 14 Id., 572.

SEC. 1256. [When barred.]—An acceptance by the land owner of the damages awarded by the commissioners shall bar his right to appeal.

SEC. 1257. [Trial of judgment.]—On the trial of the appeal, no judgment shall be rendered except for costs; the amount of damages shall be ascertained and entered of record, and, if no money has been paid or deposited with the sheriff, the

corporation shall pay the amount so ascertained, or deposit the same with the sheriff before entering upon the premises.

A judgment, entered in the usual form of a judgment in an action of debt, in a proceeding to assess the damages to lands for the right of way of a railroad, will be construed to have no greater effect than it would have if entered conformably to the statute authorizing it. *Gear v. The D. & S. C. R. Co.*, 20 Iowa, 523.

The proceedings for the condemnation of lands for the right of way of a railroad, in effect simply fix the price at which, upon actual payment, the railroad company may take the right of way. The judgment assessing the amount of damages passes no title to the company before payment, and does not bind it to accept the lands and pay the amount assessed. *Id.*

SEC. 1258. [Same.]—If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before entering on, or, in any manner whatever, using or controlling the premises. And said sheriff, upon being furnished with a certified copy of such assessment, may remove said corporation, its agents, servants or contractors, from said premises unless the amount of the assessment is forthwith paid or deposited with him.

Where defendant had procured the condemnation of a right of way and had deposited the award with the sheriff and taken an appeal to the circuit court, where the amount of damages was increased, *held* that on an appeal to the supreme court it was necessary for the defendant, in order to hold possession of the right of way pending such appeal, to deposit the additional damages also with the sheriff, and that the filing of a *supersedeas* bond did not relieve it of that duty. Such deposit not being made, plaintiff had the right to remove the defendant from the land as provided in this section. *Downing v. The Des Moines & N. W. R'y Co.*, 63 Iowa, 177.

SEC. 1259. [Same.]—If the amount of the damages awarded by the commissioners is decreased on the trial of the appeal, the amount assessed on the trial of such appeal only shall be paid the land owners.

NON-USER.

SEC. 1260. (*As substituted by ch. 15, 18th g. a.*) [By railway corporations of right of way.]—(In any case where a railway, constructed in whole or in part, has ceased to be operated or used for more than five years, or in any case where the construction of a railway has been commenced by any corporation or person, and work on the same has ceased, and has not been in good faith resumed for more than five years, and the same remains unfinished, or where any portion of such railway has not been operated for four years last past, and the rails and rolling stock have been wholly removed therefrom, it shall be deemed or taken that the corporation or person thus in default has abandoned all right and privilege over so much as remains unfinished, or from which the rails and rolling stock have been wholly removed, as aforesaid, in favor of any other corporation or person which may enter on such abandoned work, as provided in section 1261 of the code: *provided, however*, that if said road-bed or right of way, or any part thereof, shall not be used or operated for a period of eight years, or in any case where the construction of a railway has been commenced by any corporation or person, and work on the same has ceased and has not been in good faith resumed by any corporation or person for a period of eight years, the land and the title thereto shall revert to the owner of the section, subdivision, tract or lot from which it was taken: *and provided further*, that the provisions of this act shall not apply to any railroad having a portion of its track laid with a wooden rail).

Where a railroad corporation proceeds under the statute to condemn and pay for a right of way, it acquires an easement in the land condemned. In theory of law the assessment thus acquired is so acquired to the public use, and it is, therefore, competent for the legislature to provide for its transfer to another corporation upon the failure of the one for which it was first condemned to construct its road for a prescribed period, and compensation being made to the latter. *Noll v. The Dubuque B. & M. R. Co.*, 32 Iowa, 66.

An easement acquired by express grant instead of by prescription is not lost by mere non-user,

where the owner of the servient estate does no act which prevents the use. *Id.* See, also, *Barlow v. The C., R. I. & P. R. Co.*, 29 Id., 276.

This section, prior to its amendment by chapter 15 of the laws of 1880, was held not in conflict with the state constitution. *The C. I. R. Co. v. M. & A. R. Co.*, 57 Id., 249. It was also held in the same case that it clearly contemplated that there might be an abandonment of a *part* of a constructed railway. Beck, J., *dissenting*.

Where a right of way for a railroad has been regularly condemned as against the owner of the land, and the award has been paid to the sheriff, and the owner neither appeals nor accepts the award, and the company fails to use the right of way for so long a time as to incur a forfeiture under sections 1260 and 1261 of the code, as amended, but afterwards builds its road thereon, the owner cannot maintain proceedings under the statutes for a second award of damages; for the first award is still in the hands of the sheriff for the benefit of the owner, and the statute plainly provides that notwithstanding an abandonment, he shall not be entitled to be paid twice for the right of way. *The C., M. & St. P. R'y Co. v. Bean*, 69 Id., 257.

SEC. 1261. [How right of way may be condemned.]—In every such case of abandonment, any other corporation may enter upon such abandoned work, or any part thereof, and acquire the right of way over the same and the right to any unfinished work or grading found thereon and the title thereto, by proceeding in the manner provided, and conforming in all particulars as near as may be to the provisions of this chapter; but parties who have previously received compensation in any form for the right of way on the line of such abandoned railway, which has not been refunded by them, shall not be permitted to recover the second time, but the value of such road-bed and right of way, excluding the work done thereon, when taken for a new company, shall be assessed to the former company or its legal representative.

Where a railroad company has acquired and paid for right of way, but has abandoned it, a second company may acquire it by condemnation, but, unless the land owner has refunded the compensation received by him from the first company, he is not entitled to the compensation awarded upon the condemnation by the second company, but such compensation is to be awarded to the first company, or its legal representatives. *The Dubuque & Dakota R'y Co. v. Diehl, Sheriff, et al.*, 64 Iowa, 635.

A right of way for a railway is only an easement, though it be conveyed by deed, and the existence of such easement is not a breach of covenant as to title in a warranty deed, subsequently made, conveying the land. *Brown v. Young*, 69 Id., 625.

CROSSING HIGHWAYS.

SEC. 1262. (As amended by ch. 122, 19th g. a.) [By railways: rights and duties of.]—Any such corporation may raise or lower any turnpike, plank road, or other highway, for the purpose of having its railway (cross) over or under the same; and in such cases said corporation shall put such highway, as soon as may be, in as good repair and condition as before such alteration.

Under the right of way act of 1853 it was held that the legislature had conferred upon railroad companies the right to construct their roads over and upon the common highways and upon the streets of cities and towns, the consent of the council of the city or town through which the road passes being obtained, and that railroads constructed upon streets under such authority cannot be considered public nuisances. *Milburn v. The City of Cedar Rapids et al.*, 12 Iowa, 246.

In *The City of Clinton v. The C. R. & M. R. R. Co.*, 24 Id., 455, it was held that where the fee of the streets in a city is vested in the corporation in trust for the public, the legislature may authorize them to be used by a railroad company without the consent of the city.

It was fully settled prior to the code of 1873 that a railroad company had a right under section 1321 of the revision, subject to equitable and police regulations, to pass over a street in a city without consent of the city authorities, and without previous payment to the city of damages occasioned by such occupation. *The Chicago N. & S. W. R. Co. v. The Mayor and Trustees, etc., of Newton*, 36 Id., 299; *Hine v. The K. & D. M. R. Co.*, 42 Id., 636; *City of Clinton v. The C. R. & M. R. R. Co.*, 24 Id., 455; *The City of Council Bluffs v. The Kansas C., St. J. & C. B. R. Co.*, 45 Id., 338; *Ingraham, Kennedy & Day v. The C. D. & M. R. Co.*, 38 Id., 669; *Milburn v. The City of Cedar Rapids et al.*, 12 Id., 246; *The City of Clinton v. The C. & L. H. R'y Co.*, 37 Id., 61.

Where it was provided in an ordinance of the city of Des Moines "that the right to build and operate a railroad bridge on Market street over and across the Des Moines river in the city of Des Moines, is hereby granted to the D. V. R. R. Co, provided said company build or cause to be

built a railroad bridge across said river within five years," it was held, that the right to build and operate the bridge being certain, it carried with it all the incidental rights and powers necessary to the efficacious enjoyment thereof, including the right to construct necessary and suitable approaches to the bridge, and that the construction of the bridge and approaches being thus authorized, the railroad company was not liable for consequential damages resulting therefrom to the lot owner in front of whose property an embankment had been thrown up in the proper construction of the bridge and approaches. *Slattern v. The D. V. R. R. Co.*, 29 Id., 148.

In a case arising in Muscatine, where the city had granted the right of way for the construction of a railroad upon one of its streets, it was held that the owner of adjacent property has an interest in the street, entitling him to maintain an action against a railroad company for such a careless or unlawful appropriation thereof, or the location of its track thereon, as shall be injurious to his property. *Cadle v. The M. W. R. Co.*, 44 Id., 11; see also, *The State v. The D. & St. P. R. Co.*, 47 Id., 507.

The same doctrine is held in *Park v. The C. & S. W. R. Co. et al.*, 43 Id., 636; and is followed in *Frith v. The City of Dubuque* and *The C. D. & M. R. Co.*, 45 Id., 406. The last case, however, holds that the city which granted the railway company the right to use its streets does not thereby become liable for its obstruction to an adjacent owner.

Where a railroad company duly authorized by a city ordinance, and also by virtue of this section (1321 of Revision), constructed its track along a certain street, it was held that the successor in interest of said company had no right after section 464 of the code took effect, to construct switches or side tracks on said street without making compensation to the abutting lot owners for injuries resulting therefrom. *Drady v. The D. M. & Ft. D. R. Co.*, 57 Id., 393.

What is to be considered as a part of a highway crossing of a railroad track, under certain circumstances, determined in *Beatty v. The Central Iowa R. Co.*, 58 Id., 242.

An incorporated street railway has the same rights in respect to right of way as steam railways. *Ingram, Kennedy & Day v. The C., D. & M. R. Co.*, 38 Id., 669; *The City of Clinton v. The Clinton & Lyons Horse R'y Co.*, 37 Id., 61.

A railway has the right, under section 1262 of the code, subject to proper equitable control and police regulation, to pass over a street of a city without the consent of the city authorities. *The State v. The D. & St. Paul R'y Co.*, 47 Id., 507. (Is this decision not inconsistent with section 464 of the code, which authorizes cities "to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places.")

The word "over" as used in the statute, is synonymous with the word "upon," and has the same meaning and effect. *Id.*

The power conferred upon railroad companies by section 1262 of the code, to occupy the streets of cities with their tracks, as heretofore construed by the supreme court in the cases above cited, is now by implication withdrawn by chapter 47, laws of 1874, amending that section. *Stanley v. The City of Davenport*, 54 Id., 463.

An indictment cannot be aided by intendment, nor omissions therein supplied by construction; and where the acts charged may, under certain circumstances, be lawful, and these circumstances are not negatived, the indictment is insufficient, even though it be alleged that the acts charged were willfully and unlawfully done. So held in a case where the indictment charged defendant with the obstruction of a highway without alleging that the acts charged were not done in the construction of a railway, or, if so, that it did not put the highway in repair within the time required by statute. *The State v. The C., B. & Q. R'y Co.*, 63 Id., 508.

SEC. 1263. [Further repairs required by supervisors or council of cities: R., § § 1322, 1323.]—If the supervisor, trustees, city council, or other person having jurisdiction over such highway require further or different repairs or alterations made thereon, or, if the same, in their opinion, is unsafe, they shall give notice thereof in writing to any agent or officer of the corporation, and if the parties are unable to agree respecting the same, either may apply by petition, setting out the facts, to the circuit court, or judge thereof, and such court or judge shall cause reasonable notice to be given the adverse party of the application; the petition shall be filed in the clerk's office, and may be answered as in other cases. The court shall determine the matter in a summary way and make the necessary orders in relation thereto, giving such corporation a reasonable time to comply therewith, and upon failure to do so, said court may enjoin the corporation from using so much of its road as interferes with any such highways, and the court may award costs in favor of the prevailing party.

Where a railway crosses a city street below grade, and a bridge and approaches are erected by the railroad company to carry the travel upon the street above the track of the railway, it is the duty of the company to keep both the bridge and the approaches in a safe condition. *The City of Newton v. The C., R. I. & P. R'y Co.*, 66 Id., 422, following *Farley v. The Same*, 42 Id., 237.

SEC. 1264. [Temporary ways.]—Every such corporation, when employed in raising or lowering any highway, or in making any other alteration by means of which the same may be obstructed, shall provide and keep in good order suitable temporary ways to enable travelers to avoid or pass such obstructions.

SEC. 1265. [Crossings so constructed as not to impede travel.]—Any such corporation may construct and carry its railway across, over, or under any railway, canal, or water-course, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct its crossings as not unnecessarily to impede the travel, transportation, or navigation upon the railway, canal, or stream so crossed; said corporation shall be liable for the damages occasioned by any corporation or party injured by reason of said crossing.

Although a railroad company is authorized by law to construct its road over and across a public highway, yet it is not authorized to obstruct the same, but must, where the railroad crosses the highway, put it in good condition, and the company is liable in damages for neglecting to do so. *Fleming v. The C., D. & M. R. Co.*, 34 Iowa, 353, 359.

SEC. 1266. [Bridges.]—Every such corporation shall maintain and keep in good repair all bridges, with their abutments, which it may construct for the purpose of enabling its railway to pass over or under any turnpike, highway, canal, water-course, or other way.

SEC. 1267. [Damages.]—Every such corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of this chapter.

The provisions of this section do not extend the liability of railroad companies to acts of those not their servants or agents. *Callahan v. The B. & M. R. R. Co.*, 23 Iowa, 562.

SEC. 1268. [Cattle guards.] When any person owns land on both sides of any railway, the corporation owning the same shall, when requested so to do, make and keep in good repair one cattle guard and one causeway or other adequate means of crossing the same, at such reasonable place as may be designated by the owner.

Where a railroad company has provided a private crossing, and supplied the necessary gates and bars, it is held only to the reasonable exercise of reasonable diligence and care to keep them closed; and it is not responsible for any injury sustained by a third party, which is caused by the negligence of the person for whose benefit the crossing is made. *Henderson v. The C., R. I. & P. R. Co.*, 39 Iowa, 220.

Where a railroad intervenes between one's residence and the highway, he is entitled to an adequate means of crossing the same. *Gray v. The B. & M. R. R. Co.*, 37 Id., 119.

Where a railroad track crosses a farm between the farm-house and the common highway, the owner of the farm is entitled to an open crossing under this section of the code, and the railroad company may be required to make it under its provisions when it is the only "adequate means" of crossing which can be afforded the land owner. The duty to construct such a crossing is imposed by the statute and its performance may be enforced by *mandamus*. And the place designated by the land owner is *prima facie* the most convenient for him, and will be deemed a reasonable place unless rendered unreasonable by difficulty of construction, or some other fact. *Boggs v. The C., B. & Q. R. Co.*, 54 Id., 435.

As to what constitutes an adequate crossing within the meaning of this section is a question of fact, largely depending on the nature and position of the crossing and other circumstances of the case. *Id.*

The conduct of a land owner through whose land a railway passes, in forcibly opening the gates at a crossing which have been closed by the company, sufficiently indicates to the company his requirement that it should comply with the provisions of this section. *Henderson v. The C., R. I. & P. R. R. Co.*, 43 Id., 620.

When the company has provided a private crossing and supplied the necessary gates, it is held only to the exercise of reasonable care to keep them closed, and it is not responsible for any injury to a third party, caused by the negligence of the person for whose benefit the crossing is provided. *Id.*

A railroad company whose road runs through the land of a person owning land on both sides of the road is only required to provide a crossing for such owner when he shall require it for his accommodation. *Henderson v. The C., R. I. & P. R. R. Co.*, 43 Id., 216, 220.

As to third persons it is the duty of railroad companies not only to fence their roads, but to keep the gates at private crossings in repair and closed; but where a railroad is properly fenced and the company uses the necessary care and caution in keeping it in good condition, and it is thrown and left down or open by the act of a third person, without the fault of the company, the

liability for the injury is upon the party thus throwing down or leaving open the fence, and not upon the railroad company. *Russell v. Hanley*, 20 Id., 219. To the same effect is *Perry v. The Dubuque Southwestern R'y Co.*, 36 Id., 102.

While a railway company is not obliged to construct farm crossings, and the necessary gates, fences and cattle guards pertaining thereto, unless requested so to do by the owner of the farm, yet, where it does construct them, whether by request or not, it is bound to keep them in sufficient repair to accomplish the purpose for which they were intended. *Miller v. The C., R. I. & P. R'y Co.*, 66 Id., 546.

This section gives the owner of land on both sides of a railway the right to designate the place where the company shall make the crossing provided in the statute; the only limitation being that the place selected by him shall be a reasonable one. *Van Vrankin v. The W., I. & Neb. R'y Co.*, 68 Id., 576.

SEC. 1269. [**Right of way granted other works of internal improvement.**]—When any corporation or person desires to construct a canal, turnpike, graded, macadamized, or plank road, or a bridge, as a work of public utility, although for private profit, such corporation or person may take such private property as may be deemed necessary for the right of way, not exceeding one hundred feet in width, by pursuing the course prescribed in this chapter, all the provisions of which are made applicable in similar cases.

SEC. 1270. [**Cities and towns.**]—Cities and incorporated towns may exercise the powers herein conferred for the purpose of taking private property for streets, alleys, and market house sites.

STATE MAY CONDEMN.

SEC. 1271. (*Repealed and substituted by ch. 75, 16th g. a.*) [**How done and for what purpose.**]—Whenever, in the opinion of the governor, the public interest requires the taking of any real estate for the making or construction of any drains, sewers, yards, walls, buildings, or other improvements or conveniences for the use or benefit of the penitentiary, hospitals for the insane, or any other institutions of the state, upon or across lands being private property, the same proceedings may be had in the name of the state as provided in this chapter, and for that purpose the state shall be considered a person, and the proceedings shall be conducted by the district attorney of the district in which the land is situated, whenever directed by the governor, or the governor may appoint some other person for that purpose.]

SEC. 1272. [**Damages: how certified and paid.**]—Whenever the amount of the damages contemplated in the preceding section is finally determined, the sheriff or clerk, as the case may be, shall certify the amount thereof to the governor, who shall, by an order indorsed thereon, direct the payment of the same, and the auditor of state shall issue a warrant on the treasury for the amount, which shall be paid with any money not otherwise appropriated. When the money is paid to the sheriff or person entitled thereto, the state, through its proper agent or officer, may enter on the premises and construct the desired work.

(CHAPTER 34, LAWS OF 1874.)

ESTABLISHMENT OF PUBLIC WAYS TO MINES AND STONE QUARRIES.

An Act authorizing the establishment of public ways to lands having stone and mineral thereon. [Additional to code, title IX, chapter 4, relating to "taking private property for works of internal improvement."]

SECTION 1. [**Quarry or mine owners may have public way established.**—*Be it enacted by the general assembly of the state of Iowa:* That any person, copartnership, joint stock association, or corporation, owning, leasing, or possessing

any lands having thereon or thereunder any coal, stone, lead, or other mineral, may have established over the land of another a public way from any stone quarry, coal, lead, or other mine, to any railway or highway, not exceeding (except by the consent of the owner of the land to be taken) fifty feet in width. When said road shall be constructed it shall, when passing through inclosed lands, be fenced on both sides by the person or corporation causing said road to be established.

SEC. 2. [**Proceedings to condemn right of way.**].—If the owner of any real estate necessary to be taken for the purposes mentioned in this act, refuse to grant the right of way, or if such owner and the person, partnership, joint stock association, or corporation seeking to have such way established, cannot agree upon the compensation to be paid for the same, the sheriff of the county in which said real estate may be situated shall, upon the application of either party, appoint six disinterested freeholders of the county, not interested in a like question, who shall inspect said real estate, and assess the damage which said owner will sustain by the appropriation of said land for such public way, and make *and* report in writing to the sheriff of said county, and if the applicant for such public way shall at any time before entering upon said real estate, for the purpose of constructing such way, pay to said sheriff, for the use of said owner, the sum so assessed and returned to him, as aforesaid, said highway may be at once constru[ct]ed and maintained over and across said premises.

SEC. 3. [**Payment of awarded.**].—In proceeding under this act, the application to the sheriff, the duty of commissioners, the time and manner of assessing the damages, the giving of notice thereof to residents and non-residents, the power of guardians to settle and convey, the making and returning of appraisement, the selection of talesmen, the payment of the costs of assessment, the report of the commissioners, the recording thereof, the right of appeal, the proceedings relating thereto, the result of non-user, the rights and duties as to other highways, are and shall be the same as provided in the sections of the code numbered twelve hundred and forty-five to and including twelve hundred and sixty-eight, and the provisions of all of said sections, so far as applicable, are declared to be a part of this act, except that the report of the commissioners, and record thereof, shall confer no title to the applicant for the land taken for the highway, but shall be presumptive evidence of the establishment of such way.

SEC. 4. [**Persons condemning may establish railway.**].—Any owner, lessee, or possessor of lands having coal, stone, lead, or other mineral thereon, who has paid the damages assessed for highways established under this act, may construct, use, and maintain a railway on such way, for the purpose of reaching and operating any quarry or mine on such land and of transporting the products thereof to market. In the giving of the notices required by this act, the applicant shall state whether a railway is to be constructed and maintained on the way sought to be established; and if it be so stated the jury shall consider the fact in the assessment of damages.

(Took effect by publication in newspapers, March 29, 1874.)

While any individual or corporation owning coal lands or stone quarries may condemn a right of way thereto over the lands of another under this chapter of the statute, yet the way so condemned must be a public one, and if a road be constructed thereon its use must be open to the owners of other mines and quarries upon the payment of proper compensation therefor. *Jones et al. v. The Mahaska County Coal Co.*, 47 Iowa, 35.

Where the corporation seeking to condemn the right of way appeals from the assessment of the commissioner, and the amount allowed to the land owners on appeal is less than that awarded by the commissioners, the court may, under the general rules of law, direct a part of the costs of the appeal to be taxed to the corporation, notwithstanding the provisions of section 1252 of the code. *Id.*

A road or way established under this chapter over the land of another to connect a mine or quarry with a railroad or highway is a *public* way, and not the *private* way of the mine owner,

and therefore the act is not in conflict with the constitution of the United States or of this state, which prohibits the taking of private property for private use. *Phillips v. Watson*, 63 Id., 28.

The owner of land over which a public way is established, under chapter 34, acts of 1874, from a mine to a railroad or highway, must be presumed to be compensated for his damages by an award of the commissioners, from which he does not appeal, and thereafter his right to use the way thus established is no greater than that of any other citizen; and the fact that he is thus cut off from utilizing mineral lands of his own, is no ground for the interference of equity by injunction to restrain the use of the way for the purpose for which it was established. *Id.*

(CHAPTER 35, LAWS OF 1874.)

RELATING TO RIPARIAN OWNERS.

An Act in relation to riparian owners on the Mississippi and Missouri rivers.

SECTION 1. [Land owners upon the Mississippi and Missouri may erect piers, cribs, booms, etc., when.]—*Be it enacted by the general assembly of the state of Iowa:* That all owners and lessees of lands, or lots, situate upon the Iowa banks of the Mississippi and Missouri rivers, upon which property there is now, or may hereafter be carried on any business which is in any way connected with the navigation of said rivers, or to which the said navigation is a proper or convenient adjunct, are hereby authorized to construct and maintain, in front of their said property, piers, cribs, booms and other proper and convenient erections and devices for the use of their respective pursuits and the protection and harbor of rafts, logs, floats, and other water crafts: *provided*, that the same present no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property.

SEC. 2. [Owners to receive compensation for railroad right of way.]—It shall not be lawful for any person or corporation to construct or operate any railroad or other obstruction between such lots or lands and either of said rivers, or upon the shore or margin thereof, unless the injury and damage to such owner occasioned thereby shall be first ascertained and compensated in the manner provided by chapter 4, title X, of the code.

Approved March 18, 1874.

Prior to this act the owners of lands lying along the Mississippi river was held to have no private right in the waters thereof, or in the shore between high and low water mark, and could not recover damages for being deprived of access to the stream by reason of the construction of a railroad along the banks between such marks. *Tomlin v. The Dubuque & Miss. R. Co.*, 32 Iowa, 106. See, also, *McManus v. Carmichael*, 3 Id., 1, Beck, J., dissenting.

To entitle riparian owner to damages for the appropriation by a railway company of land upon the banks of the Mississippi and Missouri rivers under this chapter, it is not necessary that he should have erected a crib or pier in front of his property. *Renwick et al. v. The D. & N. W. R. Co.*, 49 Id., 664.

It was competent for the state to provide, as it did in the above act, that a railway company should not appropriate land for its own uses, between high and low water mark without making compensation to riparian owner. *Id.*

The fact that the railroad company appropriated a right of way over an embankment, between the mainland and a crib which the plaintiff had no right to erect, would not deprive him of the right to damages for the right of way appropriated. *Id.*

The grant of authority to the railroad corporation, by the city of Davenport, to construct its road over the premises in question, held, not to impair the right of the riparian owner to damages. *Id.*

(CHAPTER 181, LAWS OF 1880.)

An Act defining the rights and liabilities of hotel, inn and eating-house keepers.

SECTION 1. [Hotel and inn-keepers keeping safes may require guests to deposit valuables therein.]—*Be it enacted by the general assembly of the*

state of Iowa: That all keepers of hotels, inns and eating-houses who shall keep therein a good and sufficient vault or iron safe for the deposit of moneys, jewels and other valuables, and also provide a safe and commodious place therein for the baggage, clothing and other property belonging to their guests and patrons, and shall keep posted up in a conspicuous place in the office or other public room, and in the guests' apartments therein, printed notices stating that such places for safe deposit are so provided for the use and accommodation of the inmates thereof, shall not be held liable for the loss of any money, jewels, valuables, baggage or other property not deposited with them for safe keeping, unless such loss shall occur through the fault or negligence of such landlord, keeper or their agents, servants or employes. *Provided,* that nothing herein contained shall apply to such reasonable amount of money nor to such jewels, baggage, valuables or other property as is usual, fit and proper for any such guests to have and retain in their apartments or about their persons.

SEC. 2. [**Inn-keepers' lien on baggage, etc., of guests.**—That all hotel, inn or eating-house keepers shall have a lien upon, and may take and retain possession of, all baggage and other property belonging to or under control of their guests which may be in such hotel, inn or eating-house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished such guest, and such property so retained shall not be exempt from attachment or execution to the amount of the proper and reasonable charges of such hotel, inn or eating-house keeper against such guest and the cost of enforcing the lien thereon.

Approved March 26, 1880.

CHAPTER 5.

OF RAILROADS.

ORGANIZATION.

SECTION 1273. [**Change of corporate name: how made and effect of.**—Any corporation organized under the laws of this state for the purpose of constructing and operating a railway, may, with the assent of two-thirds of all the stockholders in interest, change the corporate name thereof. But no change in the name of any such corporation shall be deemed complete until the president and secretary thereof shall file in the office of the secretary of state a statement under oath, showing the assent of the stockholders to such change, and the new name adopted, and a certified copy of the proceedings had by the corporation and stockholders in relation thereto as the same appears in the records thereof; from the time of such filing, the corporation by its new name shall be entitled to all the rights, powers, and franchises that it possessed under the old name, and by the new name shall be liable upon all contracts and obligations of every kind and description entered into by or binding upon such corporation by or under its old name to the same extent and manner as if no change in the name of such corporation had been made.

SEC. 1274. [**Record made by secretary of state.**—The secretary of state shall immediately record in the proper book in his office the matters filed in the preceding section, and make intelligible references to the record of the articles of incorporation as originally recorded.

SEC. 1275. [**May intersect, join, merge and consolidate.**—Any such corporation may join, intersect, and unite its railway with the railway of any other

corporation at such point on the boundary line of this state as may be agreed upon by such corporations. And with the assent of three-fourths in interest of all the stockholders, may, by purchase or sale, or otherwise, merge and consolidate the stock, property, franchises, and liabilities of such corporations, making the same one joint stock corporation upon such terms as may be agreed upon not in conflict with the laws of this state.

SEC. 1276. [**May connect and make contracts with reference thereto.**]—Any such corporation which has or may construct its railway so as to meet or connect with any other railway in an adjoining state at the boundary line of this state, shall have power to make such contracts and agreements with the corporations controlling such railways in an adjoining state, for the transportation of freight and passengers, or for the use of its railway by such foreign corporation, as the board of directors may see proper.

SEC. 1277. [**Extension of into other states.**]—Any such corporation organized for the purpose of constructing a railway from a point within the state, may construct or extend the same into or through any other state under such regulations as may be prescribed by the laws of such state; and the rights and privileges of such corporation over said extension in the construction and use thereof, and in controlling and applying the assets, shall be the same as if its railway was constructed wholly within this state.

SEC. 1278. [**Duties and liabilities apply to lessees.**]—All the duties and liabilities imposed upon corporations owning or operating railways by this chapter, shall apply to all lessees or other persons owning or operating such railways as fully as if they were expressly named herein, and any action which might be brought, or penalty enforced, against any such corporation by virtue of any provision of this chapter, may be brought or enforced against such lessees or other persons.

A railroad company cannot escape liability for an accident occurring while its road is being operated in the corporate name, even though in fact it may have been leased and was at the time controlled by another party. Sections 1278 and 1307, making lessees liable to the same extent as the corporations themselves, provide merely a cumulative remedy and do not release the lessors. *Bower v. The B. & S. W. R. Co.*, 42 Iowa, 546.

The requirement of the statute that every railroad shall construct cattle-guards wherever its track enters or leaves any improved land, applies equally to the lessee of the corporation owning the road. *Downing v. The C., R. I. & P. R. Co.*, 43 Id., 96.

Where two different railroad companies operate trains on the same road, one being the owner and the other the lessee of the road, each is liable only for stock injured or killed by its own trains by reason of the road being non-fenced, and not for that injured or killed by the trains of the other. *Stephens v. The D. & St. P. R. Co.*, 36 Id., 327; *Cary v. The Iowa Midland R'y Co.*, 37 Id., 344.

That in such case, by the terms of the lease, the lessor had the right to fix the time table, and that the lessee's trains were operated in subordination thereto, and that the lessor was obliged to keep up repairs and fences, would not change the above rule or liability for injuring or killing stock. *Id.*

A receiver who is operating a railroad under the appointment and direction of a court is included in the terms "persons owning or operating railways," in the contemplation of sections 1278 and 1307, and such receiver, or rather the property in his hands, is liable for the claims of employes for injuries received through the negligence of co-employes. *Sloan v. The Central Iowa R'y Co.*, 62 Id., 723.

SEC. 1279. [**Officers of, to reside in the state.**]—The offices of secretary and treasurer, or assistant treasurer and general superintendent, of every railway corporation organized under the laws of this state, shall be kept where the principal place of business of such corporation is to be, in which offices the original record, stock, and transfer books, and all the original papers and vouchers of such corporation shall be kept; and such treasurer or assistant treasurer shall keep a record of the financial condition of the corporation, which may be inspected at all reasonable hours by any stockholder, or any committee appointed by the general assembly. Such corporation may keep in any other state a transfer office, in

which may be kept a duplicate transfer book; but no transfer of shares of stock shall be legal or binding until the same is entered in the transfer book kept in this state. The secretary and treasurer, or assistant treasurer and general superintendent aforesaid, shall reside in this state.

SEC. 1280. [**Annual report to be laid before general assembly.**]—Every such corporation shall, annually, under the oath of the president, in the month of January, make a full report of the condition of its affairs to the secretary of state, and shall have the same published in some newspaper printed in the place of its general business office, showing the amount of the capital stock of such corporation, and the amount paid thereon, the amount of bonds issued, and how secured, and all other indebtedness; the length of such railway when completed, and how much is built and in use; the number of acres of land donated or granted to them, by whom, and what disposition has been made of said grants or donations; the gross amount of receipts and how disbursed; the net amount of profit and the dividends made, with such other facts as may be necessary to a full statement of the affairs and condition of such corporation, and the secretary of state shall present the said report to the general assembly.

SEC. 1281. [**Courts may compel report to be filed.**]—In case any such corporation shall neglect to make such report as required in the preceding section, any stockholder may file his petition in the district or circuit court in the county where the principal business office is kept, stating that said report has not been made, and praying that an order may issue against the corporation commanding it to make said report; said petition shall be under oath and filed at least ten days before the next term of the district or circuit court in said county, and notice thereof shall be given such corporation for the same length of time, and in the same manner as is now required to be given in other suits in the district or circuit court, and upon the filing of such petition, the clerk shall issue such order and make the same returnable at the next term of the district or circuit court in said county, and costs shall be recoverable by either party as in ordinary actions.

SEC. 1282. [**Same: examination ordered.**]—If it appears such report has not been filed, the court shall, during the term, appoint three disinterested and competent persons near the place of the general business office of the corporation as an investigating committee, who shall examine into its affairs and report at as early a day as practicable its condition in manner and form, as prescribed in section twelve hundred and eighty of this chapter; one copy of said report to be filed in the office of the clerk of the district court of the county where the proceedings are had, and one copy to be filed in the office of the secretary of state. The compensation for the services of such committee shall be paid by the corporation thus investigated, but it shall not exceed three dollars per day and mileage at the rate of ten cents per mile, counting one way.

ON STOCK AND DEBTS.

SEC. 1283. [**May issue bonds, borrow money, and execute mortgages.**]—Any such corporation shall have power to issue its bonds for the construction and equipment of its railway, in sums not less than fifty dollars, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per cent per annum, and make the same convertible into stock, and may sell the same at such rates or prices as is deemed proper; if such bonds are sold below the par value thereof they shall, nevertheless, be valid and binding, and no plea of usury shall be allowed such corporation in any action or proceeding brought to enforce the collection of said bonds; such corporation may also secure the payment of said bonds by executing mortgages or deeds of trust of the whole or any part of its property and franchises.

SEC. 1284. [**Mortgages may cover after acquired property.**—Said mortgages or deeds of trust may, by their terms, include and cover, not only the property of the corporation making them at the time of their date, but property both real and personal which may thereafter be acquired, and shall be as valid and effectual for that purpose as if the property were in possession at the time of the execution thereof.

SEC. 1285. [**How executed, recorded, and effect of.**—Said mortgages or deeds of trust shall be executed in such manner as the articles of incorporation or by-laws of the corporation may provide, and shall be recorded in the office of the recorder of each county through which the railway of the corporation may run, or in which any property mortgaged or conveyed by such deeds of trust may be situated, and shall be notice to all the world of the rights of all parties under the same, and for this purpose, and to secure the rights of mortgagees or parties interested under deeds of trust so executed and recorded, the rolling stock and personal property of the company properly belonging to the road and appertaining thereto, shall be deemed a part of the road, and said mortgages and deeds so recorded shall have the same effect both as to notice and otherwise, as to the personal, as to the real estate covered by them.

SEC. 1286. [**May issue preferred stock.**—Any such corporation, with the assent of two-thirds of all the stockholders in interest, may issue, in payment of debts, preferred stock, not exceeding ten thousand dollars for each mile of railway constructed, which stock shall be entitled to such dividends as the directors of the corporation may determine, not exceeding eight per cent per annum, if the same is earned in any one year after the payment of all interest on the bonds of the corporation before any dividend is made to the common stock.

SEC. 1287. [**Mortgages and preferred stock convertible into common stock.**—Such preferred stock, and any income or mortgage bond of the corporation, shall, at the option of the holder, be convertible into common stock in such manner and on such terms as the board of directors thereof may prescribe; but the aggregate amount of the common and preferred stock shall not exceed the total amount of stock which the corporation may be by law, or the articles of incorporation thereof, authorized to issue.

(CHAPTER 20, LAWS OF 1874.)

PREFERRED STOCK IN RAILWAYS.

An Act authorizing railway corporations to issue preferred stock for its bonded indebtedness. [Amendatory of code, title X, chapter 5 "of railways."]

SECTION 1. [**Railway corporations may issue preferred stock to pay bonded debt.**—*Be it enacted by the general assembly of the state of Iowa:* That any railway corporation which has no surplus, after paying its running expenses, with which to pay the interest on its bonded indebtedness, with the assent of its bondholders, in addition to the right conferred by section 1286 of the code, may, with the assent of two-thirds of its stockholders, issue its preferred [stock], at par, to an amount equal to and not exceeding its bonded indebtedness, in exchange for its said bonded indebtedness. The said stock shall be entitled to such dividends from its net profits as the directors of the corporation may determine, not exceeding eight per cent per annum, if the same is earned in any one year, after the payment of all interest on the indebtedness of the corporation, before any dividend is made to the common stock.

Approved March 14, 1874.

(Took effect by publication in newspapers, March 22, 1874.)

OF THE TRACK.

SEC. 1288. [**Cattle guards: crossings: signs at: penalty.**].—Every corporation constructing or operating a railway, shall make proper cattle guards where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public highway, good, sufficient and safe crossings and cattle guards, and erect at such points at a sufficient elevation from such highway to admit of free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railway and warn persons of the necessity of looking out for the cars; and any railway company neglecting or refusing to comply with the provisions of this section, shall be liable for all damages sustained by reason of such neglect and refusal, and in order for the injured party to recover it shall only be necessary for him to prove such neglect or refusal.

Under the revision the omission of a railroad company to erect a sign-board at a highway crossing to warn persons approaching as required in this section, does not render the company *absolutely* liable for injuries to persons or property while attempting to cross the track at such point. Evidence of omission merely establishes the negligence of the company, and, if it appears that the plaintiff's negligence contributed to the injury, he cannot recover. *Dodge v. C. R. & M. R. Co.*, 34 Iowa, 276. But under this section of the code it has been held that the failure or refusal of the company to erect the required sign-board renders it absolutely liable for an injury occurring at a highway crossing. *Payne v. The C., R. I. & P. R. R. Co.*, 44 Id., 236.

It has since been held that the failure to erect a sign at a crossing renders a railroad company liable only for damages sustained by the neglect or refusal to erect the sign, and does not release a party seeking to recover from the necessity of due care on his part. *Lang v. The Holiday Creek R. and Coal Mining Co.*, 49 Id., 469.

Every corporation, owning or operating a railway is required to construct crossings at all points where its road intersects a public highway, and it is liable for all injuries resulting from a neglect of this duty. *Farley v. The C., R. I. & P. R. Co.*, 42 Id., 234.

So, also, railways are required to repair and keep in safe condition for travel, the crossings which the statute requires them to construct, although this requirement does not relieve the road districts of the duty of maintaining the highway in good condition. *Id.*

The embankment which is constructed as a necessary approach to the railway track is, in legal contemplation, a part of the crossing. *Id.*

Any railway company claiming to be exempt from the provisions of the statute imposing this duty, has the burden to establish by affirmative proof the facts upon which such exemption is based. *Id.*

In an action against a railroad company for injuries resulting from a defective cattle-guard, evidence that another cattle-guard, constructed like the one in controversy, had proved sufficient, was properly rejected. *Downing v. The C., R. I. & P. R. Co.*, 43 Id., 96.

While it is the duty of the injured party to use all reasonable care to protect his property, he would not be allowed to go upon the railway to repair the cattle-guard, or be required to fence the road. *Id.*

The statute requires railroad companies to construct cattle-guards wherever their tracks enter or leave any improved land, and they are liable for injuries resulting from a failure to do so. *Id.*

And this is so where the railroad passes through fences dividing the lands of the same owner, as well as those constituting the boundaries between different owners. *Smith v. C. C. & D. R. Co.*, 38 Id., 518.

The rights of a party injured at a railway crossing of a public highway were determined by the statute in force at the time of the injury, and he can derive no advantage from a subsequent statute enlarging the liability of a railroad company, though enacted prior to the commencement of this action. *Payne v. The C., R. I. & P. R. Co.*, 44 Id., 236.

The rights of a traveler upon the highway and a railroad company are equal at a crossing, but a traveler approaching a crossing must yield the right of way to the train drawing near. *Black v. B., C. R. & Min. R. Co.*, 38 Id., 515.

A statute will not be so construed as to create or authorize the recovery of a penalty, unless the intention to do so be clear. Consequently the latter clause of this section, making the operation of railroad trains upon depot grounds at a greater rate of speed than eight miles per hour negligence, being susceptible of a different construction, will not be construed to authorize the recovery of double damages for injuries to stock caused by a violation of the statute. *Miller v. The C. & N. W. R. Co.*, 59 Id., 767.

This section, which requires railway corporations to make proper cattle-guards where their roads

enter or leave any improved or fenced lands, applies to lands which are improved or enclosed after the construction of the railroad as well as those improved or enclosed before. *Hesbutt v. The Wabash, St. Louis & Pacific R'y Co.*, 61 Id., 467.

A cattle-guard is not an essential portion of a fence, within the meaning of the statute providing for the recovery of double damages for injuries to stock in cases where railroad companies neglect to maintain fences; but, under section 1288 of the code, a company is liable for single damages only where stock is injured by reason of negligence in keeping a cattle-guard in repair. *Moriarty v. The Central Iowa R'y Co.*, 64 Id., 697.

Under the provisions of this section a railroad company must maintain a cattle-guard wherever its road enters or leaves "fenced land," whether the fenced land be the land of another or its own right of way. *Robinson v. The C., R. I. & P. R'y Co.*, 67 Id., 292.

SEC. 1289. [**Liability for stock killed where road is not fenced.**].—Any corporation operating a railway, that fails to fence the same against live stock running at large at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the willful act of the owner or his agent. And, in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglects to pay the value of or damages done to any such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officer, station or ticket-agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto; *provided*, that no law of this state, nor any local or police regulations of any county, township, city, or town, regulating the restraint of domestic animals, or, in relation to the fences of farmers or land owners, shall be applicable to railway tracks, unless so specifically stated in the law or regulation. The operating of trains upon depot grounds necessarily used by the company and public, where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence and render the company liable under this section.

[**Liability for fires set out.**].—*And provided further*, that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damage may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except to double damages.

This section is not inconsistent with section 6, article 1, of the state constitution. The legislature has the power to fix the consequences attending the failure of a railroad company to pay the simple or actual value of property destroyed or injured as contemplated in the statute. *Jones v. The G. & C. U. R. Co.*, 16 Iowa, 6.

Under this section of the statute if a railroad company fails to fence its road, where it has the right to do so, it is liable for stock injured or killed by reason of the want of such fence, unless the injury is occasioned by the willful act of the owner. *Russell v. Hanley*, 20 Id., 219; *Jones v. The G. & C. U. R. Co.*, 16 Id., 6; *McCool v. The Same*, 17 Id., 461; *Koons v. The C. & N. W. R'y Co.*, 23 Id., 493; *Spence v. The Same*, 25 Id., 139; *Stewart v. The Same*, 27 Id., 282; *Helphrey v. The C. & R. I. R. Co.*, 29 Id., 430; *Andre v. The C. & N. W. R'y Co.*, 30 Id., 197; *Soward v. The Same*, Id., 551; *Stewart v. The B. & M. R. R. Co.*, 32 Id., 561; *Davis v. The C., R. I. & P. R. Co.*, 40 Id., 292; *McCormick v. The Same*, 41 Id., 193; *Davis v. The B. & M. R. R. Co.*, 26 Id., 549; *Brandt v. The C., R. I. & P. R. Co.*, Id., 114; *Treadway v. The S. C. & St. P. R. Co.*, 43 Id., 527.

As to third persons, it is the duty of railroad companies not only to fence their roads but to keep gates at private crossings in repair and closed; but where a road is properly fenced and the company uses the necessary care and caution in keeping it up or in good condition, and it is thrown and left down or open by the act of a third person, without the fault of the company, the liability for the injury is upon the party thus throwing down or leaving open the fence, and not upon the railroad company. *Russell v. Hanley*, 20 Id., 219.

The company will be liable for stock killed or injured on its track by reason of its failure to keep the fences in repair which it has erected along the line of its road, but before such liability will attach, the company must have knowledge, either actual or implied, that the fence was out of repair, and a reasonable time thereafter to put it in proper condition. This rule applies where gates or bars have been left open by third person. *Aylesworth v. The C., R. I. & P. R.*

Co., 30 Id., 459; *Davis v. Same*, 40 Id., 292; *Perry v. The D. S. W. R. Co.*, 36 Id., 102; *McCormick v. The C., R. I. & P. R. Co.*, 41 Id., 193; *Lemon v. The C. & N. W. R'y Co.*, 32 Id., 151; *Bartlett v. The D. & S. C. R. Co.*, 20 Id., 188; *Hammond v. The C. & N. W. R'y Co.*, 43 Id., 168.

This section is not a penal statute, nor is the double damages therein provided for a statute penalty within the meaning of the statute of limitations (code, sec. 2529, sub. 1), and the action is, therefore, not barred in two years, but may be brought at any time within five years from the time of the injury. *Koons v. The C. & N. W. R'y Co.*, 23 Id., 493.

Under this section, a railroad company is liable for swine killed upon its track, while running at large, at a point where it has the right to fence its road and neglects to do so, although swine may be prohibited from running at large by vote of the electors of the county where the injury occurs, unless the injury was caused by the willful act of the owner or his agent. *Spence v. The C. & N. W. R'y Co.*, 25 Id., 139; *Stewart v. Same*, 27 Id., 282.

So also, the company will be liable under similar circumstances for the killing of a bull while running at large. The permitting a bull to run at large by the owner does not constitute a willful act within the meaning of the statute, relieving the company from liability. *Stewart v. The B. & M. R. R. Co.*, 32 Id., 561. But, see, *Pearson v. The M. & St. P. R. Co.*, 45 Id., 497.

This section, in so far as it provides that if a railroad company fails to fence its road against live stock running at large at all points where it has the right to fence, it shall be absolutely liable for stock killed or injured, does not extend or apply to depot grounds; and, in the absence of negligence, the company will not be liable for injuries to stock thereon. *Davis v. The B. & M. R. R. Co.*, 26 Id., 549.

The absolute liability of the company does not attach at all places where it has the abstract right to fence, but only where, in the particular case, it is fit, proper and suitable that a fence should be built. *Id.* To the same effect are *Packard v. The Illinois Central R. Co.*, 30 Id., 474; *Durand v. The C. & N. W. R'y Co.*, 26 Id., 559; *Comstock v. The D. V. R. Co.*, 32 Id., 376; *Smith v. The C., R. I. & P. R. Co.*, 34 Id., 506; *Latta v. The B., C. R. & M. R. Co.*, 38 Id., 250.

The company is not absolutely liable for stock injured or killed upon street or highway crossings, but only where it fails to exercise ordinary and reasonable care. *Davis v. The B. & M. R. R. Co.*, 26 Id., 549; *Rogers v. The C. & N. W. R'y Co.*, Id., 558.

In order for a railroad company to protect itself from absolute liability for injuries to stock on highway crossings, its fences should be built to, and its cattle guards erected at, the crossing. *Andre v. The C. & N. W. R'y Co.*, 30 Id., 107.

Where the outer line of a railroad and that of a highway running parallel with each other, intersected several hundred feet before the highway crossed the track of the railroad, the company were held liable for stock killed on the track between cattle guards which were erected at the points where the right of way of the railroad and the highway intersected and where the highway crossed the track and to which the company had erected fences. *Id.*

A railroad company has the same right to fence its track over land which lies within the corporate limits of a city or town, but outside of or beyond streets or alleys, or other public highways, as if the corporation did not exist, unless, possibly, such right may be controlled by municipal ordinance; and where a railway company fails to fence its track at such place, it becomes liable to the owner of any stock injured or killed by reason of the want of such fence. *Coyle v. The C., M. & St. P. R'y Co.*, 62 Id., 518; *Gilman v. The Sioux City & P. R'y Co.*, Id., 300.

Under the last clause of this section the fact of an injury resulting from fire caused by sparks escaping from an engine, is *prima facie* evidence of negligence, which the defendant must rebut. *Id.*, following, *Small v. The C., R. I. & P. R'y Co.*, 50 Id., 338. *Id.*

A team of horses which are harnessed to a wagon, and which have escaped from the control of their owner, is included under the term "live stock running at large," as used in this section, and a railway company whose train ran upon and injured a team so running at large, at a place where it had the right to fence its track, is liable to the owner for damages. *Suman v. C., M. & St. P. R'y Co.*, 60 Id., 459.

Where the plaintiff's horse was at large in the night time on the premises of another, in violation of the night herd law, which was then in force in the county, and was killed by the defendant's train, without fault or negligence of defendant, at a point where it had the right to fence, but did not, held that defendant was liable, under section 1289 of the code, for the value of the horse, in the absence of any showing that the plaintiff, by any willful act, contributed to the injury. Compare *Spence v. C. & N. W. R'y Co.*, 25 Id., 139. *Krebs v. The Minn. & St. Louis R'y Co.*, 64 Id., 670.

A railroad company is not liable for injury to domestic animals which get upon its track by breaking through a fence which is reasonably sufficient to turn live stock. *Shallenbarger v. The C., R. I. & P. R'y Co.*, 66 Id., 18.

A steer, with eighty other cattle, were being herded by a boy. He left them for an indefinite period, went home, and another boy returned, and without noticing the steer in question, which had separated from the rest, drove the cattle hurriedly across the defendant's railroad track to avoid an approaching train, leaving the steer behind. Held that the steer was "running at large" within the meaning of section 1289 of the code, providing for the liability of railroad

companies for killing stock running at large. *Vallean v. The Chicago, M. & St. P. R'y Co.*, 36 N. W. R., 760.

Section 1289 of the code, raises a *prima facie* presumption of negligence, upon proof of an injury by a railroad company in the operation of its road, and this presumption is one of liability which cannot be overcome except by proof that the company was not guilty of negligence in the matters which were the immediate cause of the injury. *Engle v. Chicago, M. & St. P. R'y Co.*, 37 N. W. R., 6.

In an action under this section for killing a horse, it was shown that the horse, which fell from off a bridge on defendant's railroad, was seen lying dead in the evening of August 1st, had not been seen by a passer-by at three o'clock p. m. of the same day; that on the evening of August 1st a train stopped near the bridge, and that the horse was exceedingly timid about a railroad track; held insufficient to show that the horse was driven onto the bridge by a train as an act of the defendant which, in connection with the want of a fence, was the cause of the injury. *Asback v. C., B. & Q. R'y Co.*, 37 N. W. R., 182.

A railroad company is not absolutely liable under this section for stock killed at the crossing of a road, used and traveled by the public as a highway, though the route thus traveled was in fact outside of the survey or line of the highway as legally established. *Soward v. The C. & N. W. R'y Co.*, 33 Iowa, 386.

Where stock has been injured through the negligence of a railroad company it is the duty of the company to take proper care of the injured animals, and, failing to do so, the owner is justified in taking proper care of them, for which he may recover a reasonable compensation from the company. *Finch v. The Central R. Co.*, 42 Id., 303.

That the owner of stock permits it to run at large in the vicinity of a railway crossing which he knows to be dangerous, does not constitute negligence which will defeat his recovery for injuries to his stock caused by the negligence of the railway company. *Kuhn v. The C., R. I. & P. R. Co.*, 42 Id., 420.

The owner of stock has the right to expect that the railway company will exercise ordinary care to prevent injury to his property, both in the construction of its crossings and in the operation of its trains; and it is proper for the jury to be instructed that if a crossing is more than ordinarily dangerous they should consider that circumstance in determining whether the company used reasonable care in the operation of its train when the injury occurred. *Id.*

In an action to recover damages for killing stock, the objection that the petition fails to set out the notice served upon the railroad company should be raised by demurrer, and if not so raised, will be regarded as waived. *McKinley v. The C., R. I. & P. R. Co.*, 47 Id., 76.

Under section 1239 above, railway companies are liable for all stock killed or injured on depot grounds by trains running at a greater rate of speed than eight miles an hour. *Monahan v. The Keokuk & Des M. Ry Co.*, 45 Id., 523.

This provision, however, imposes no restriction upon the rate of speed of trains outside of the limits of depot grounds, and the liability of a railway company for stock killed just beyond such limits is not affected by the fact that the train was running faster than eight miles an hour. *Id.*

In the absence of statutory limitation upon the rate or speed of railway trains, no conceivable rate is evidence of negligence *per se*. *McKonkey v. The C., B. & Q. R. Co.*, 40 Id., 205.

The provision of this section limiting the speed of trains on depot grounds is a new provision in the law, enacted as part of the code, and has no application to cases arising prior to the taking effect of the code. *Id.*

A railroad company is not liable under this section for cattle killed on its track unless they are running at large at the time of the injury. *Smith v. the C., R. I. & P. R'y Co.*, 34 Id., 96.

They are "running at large" within the meaning of the statute when they have escaped from the inclosure of their owner, through which the road runs, by reason of the company failing to maintain a sufficient fence along its road at that point. *Hiiman v. The C., R. I. & P. R. Co.*, 28 Id., 491; *Fernow v. Dubuque & S. W. R'y Co.*, 22 Id., 523; *Swift v. The N. Mo. R. Co.*, 29 Id., 243; *Hammond v. C. & N. W. R'y Co.*, 43 Id., 163.

But if cattle, while being driven, in charge of the owner or his servant, escape or run on the track and are injured, the company is not liable. They are not "running at large" within the meaning of this provision of the statute. *Smith v. The C., R. I. & P. R. Co.*, 34 Id., 96.

In an action for damages against a railway company for injuries to growing crops in consequence of a failure to construct cattle guards, the measure of recovery is the market value of the crops when matured, less the expense of fitting them for market, and diminished by whatever the value of the portion saved, if any, may be. *Smith v. The C. C. & D. R. Co.*, 38 Id., 518.

And in such case the owner will be entitled to recover a reasonable compensation for time and labor necessarily expended in efforts to save his crops from destruction; and he is not bound to exercise extraordinary diligence to save his crops, even though that might be successful; whether he is negligent or not in this respect is a question of fact for the jury. *Id.*

The owner of land adjacent to a railroad, who has agreed with the railroad company to erect

and maintain fences between his property and the railroad, cannot recover for injuries to stock caused by the want of fence or defects therein. *Semble*, that his tenants would likewise be estopped to claim indemnity for losses thus resulting. *Warren v. The R. & D. M. R. Co.*, 41 Id., 484.

Such a contract between the land owner and the company does not release the latter from its liability to other persons than such owner, although it may look to him for indemnity for losses caused by his failure to construct or repair the fence. *Id.*

But a railroad company is not authorized to diminish the speed of a train for the sake of avoiding injury to stock, if by so doing it augments the danger to passengers. There is no such thing as a "reasonable" increase of damage to passengers. *Sandham v. The C., R. I. & P. R. Co.*, 38 Id., 88.

To render a railroad company liable for double the value of stock killed on its track under this section, it must be served with a written notice of the killing or injury, accompanied by the original affidavit therein provided for. The leaving of a copy of the affidavit with the notice is not a compliance with the statute. *McNaught v. The C. & N. W. R'y Co.*, 30 Id., 336; *Cole v. The Same*, 38 Id., 311; *Campbell v. The C., R. I. & P. R. Co.*, 35 Id., 334.

It is not essential to the recovery of double damages that the affidavit be made by the owner of the stock injured. It may be made by any one cognizant of the fact. *Henderson v. The St. L. R. C. & N. R. Co.*, 35 Id., 387.

Prior to the code of 1873, to render a railroad company liable for damages on account of fire resulting from sparks emitted from one of its engines, the negligence of the company in the premises must be shown either directly or by circumstances tending to establish it, such as the absence of a spark arrester, the use of an excessive amount of steam, and unlawful rate of speed, or the like. The mere fact that the fire was caused by the sparks does not make a *prima facie* case against the company. *Gandy v. The C. & N. W. R. Co.*, 30 Id., 420; *Garrett v. The Same*, 36 Id., 121.

But, as in the nature of the case, the plaintiff must labor under difficulties in making proof of negligence, it may be established by circumstances bearing more or less directly on the case, which might not be satisfactory in other cases free from difficulty and open to clearer proofs. *Id.*

The decision in *Kesee v. The C. & N. W. R. Co.*, 30 Id., is not applicable to the subject, since the enactment of the code.

The proviso of section 1289, rendering railway companies absolutely liable for all damages by fire, caused by the operation of their roads, is not in conflict with the state constitution. *Rodemacker v. The Mil. & St. Paul R'y Co.*, 41 Id., 297.

It will not, in an action for such damages, be presumed that injuries by fire to fences and timber a mile from the railway were considered in estimating the damages for the right of way. *Id.*

The service of a written notice is not necessary to the validity of a claim for damages for losses by fire; such notice is only necessary when double damages are sought to be recovered. *Id.*

This section providing that railway companies "shall be liable for all damage that is set out or caused by the operation" of their roads, does not create any absolute liability, but makes the fact of an injury so occurring only *prima facie* evidence of negligence, which may be rebutted by proof of freedom from negligence. *Small v. The C., R. I. & P. R. Co.*, 50 Iowa, 338. BUCK, CH. J., and DAX, J., dissenting. Approved and followed in *Slosson v. The C., R. I. & P. R. Co.*, 51 Id., 294.

See, also, *Welsh v. The C., B. & Q. R. Co.*, 53 Id., 632.

Proof of service of notice on the station agent of the railroad company is, under this section, sufficient service. *Id.*

Where a horse was struck by an engine and his leg broken, thus rendering him valueless and useless, and was afterwards killed by the employes of the company; *held*, evidence of such fact were competent. *Id.*

The double damages authorized by this section are not in the nature of a fine or penalty, but are simply the measure of damages fixed by the statute for a private wrong, and as such do not render the provisions unconstitutional. *Mackie v. Central R'y of Iowa*, 54 Id., 540.

A statute will not be so construed as to create or authorize the recovery of a penalty, unless the intention to do so be clear; consequently the latter clause of this section, making the operation of railroad trains upon depot grounds at a greater rate of speed than eight miles per hour negligence, being susceptible of a different construction, will not be construed to authorize the recovery of double damages for injuries to stock caused by violation of the statute. *Miller v. The C. & N. W. R'y Co.*, 59 Id., 707.

Where an occupant of land traversed by a railway allows his swine to run at large on the land, and they go upon the railroad at a point where the company has the right to fence, but does not, and are killed by a passing train, he may recover of the company under this section, without proving that they were killed by the negligence of servants of the company. *Lee v. The Minneapolis & St. Louis R'y Co.*, 66 Id., 131.

If a railway company desires to protect itself from the liability for injury to stock running at large, it must fence its track against *live stock*, which includes swine. *Id.*

The moving of trains over a railway for whatever purpose is "operating a railway" within the meaning of this section of the code, and renders the company liable for stock killed or injured on account of a failure to fence the track. It is not essential to such liability that the road be completed and open to traffic; nor can the company claim exemption for any time, after it begins the movement of trains, on the ground that it should have a reasonable time after the construction of the road within which to build fences. *Glandon v. The C., M. & St. P. R'y Co.*, 68 Id., 457.

The notice and affidavit of the killing of stock by a railway company, required by this section in order to the recovery of double damages, may be served by simply delivering them to the proper officer or agent of the company without reading them. *Brester v. The C., M. & St. P. R'y Co.*, Id., 530.

Although a horse may be "crazy," if he gets upon the track of a railroad on account of the want of a fence, where the right to fence exists, and, for want of intelligence, runs ahead of the engine on the track, when he might escape on either side, and so runs into a bridge and is killed, without being struck by the engine, the company is liable, notwithstanding the horse's want of intelligence and manner of death. *Liston v. The Central Iowa R'y Co.*, 70 Id., 714.

In an action under this section, when the injury is claimed to have been caused by the improper and insecure fastening of a gate in defendant's fence, the question of the sufficiency of such fastening is for the jury, and their verdict in favor of the plaintiff cannot be held unsupported by evidence when it appears that the gate swung towards the right of way, and the hook that held it closed was bent at an angle that, by a slight pressure against the gate it would be thrown out of the staple. *Payne v. Kansas City, St. Joe & C. B. R'y Co.*, 72 Id., 214.

This section applies to cases where the fence is insufficient as well as where there is no fence at all, and the rule was applied to a case where the stock got upon the track through a defective gate in defendant's fence. *Id.*

A right of action against a railway company for killing stock may be assigned, and the assignee, by serving the notice required by this section of the code for the purpose of recovering double damages, will be entitled to recover such damages upon the same showing as the original owner of the stock. *Everett v. Central Iowa R'y Co.*, 35 N. W. R., 609.

A majority of the supreme court held, in *Blanford v. The Minn. & St. Louis R'y Co.*, 71 Iowa, 310, that a railroad corporation does not have the right to fence its track in cities and towns where it is intersected by streets and alleys; and that it is immaterial whether the track crosses a lot or block for a greater or less distance, or whether the lot or block is owned by one or many persons. *Beck and Reed, JJ.*, dissenting.

When damage is done by fire from a railroad locomotive, negligence is presumed under this section of the code, and in an action to recover for such damage it is not necessary to allege that the company was negligent. *Rose v. The C. & N. W. R'y Co.*, 72 Id., 625.

SEC. 1290. [Railway crossings near shore of Mississippi river.]—Whenever it becomes necessary in the construction of any railway to cross any other railway near the shore of the Mississippi river, each shall be so constructed and maintained at the point of crossing that the respective road-beds thereof shall be above high water in such river. But where such crossings occur within the limits of cities containing six thousand inhabitants, as shown by the last preceding census, the city council of such cities may establish the grade at such crossings.

SEC. 1291. [Terms and conditions on which change may be made.]—In all cases where taxes have been voted under chapter forty-eight, of twelfth general assembly, or chapter one hundred and two, of thirteenth general assembly, to aid in the construction of any railway, or where said tax has been transferred under chapter eighty-one, of the fourteenth general assembly, and said tax has been voted or transferred under any condition or contract with the railway company, which the township may desire to have changed or modified, said township is hereby authorized upon agreement of its trustees with the railway company constructing said proposed railway, to submit to a vote of the electors of the township, the question whether the conditions or contract under which said tax was voted or transferred shall be changed or modified, and said trustees, upon petition of one-third of the legal voters of the township, as shown by the vote cast at the last general election, asking such change or modification, shall order an election, submitting the agreement to the electors, at a special election called therefor, said election to be conducted in all respects as to notice and manner of holding as the election at which the tax was originally voted.

OF THE OPERATION.

SEC. 1292. (*As substituted by ch. 18, 15th g. a.*) [**Cars of other roads drawn over.**]—(Any railway corporation operating a railway in this state, intersecting or crossing any other line of railway, of the same gauge, operated by any other company, shall, by means of a Y, or other suitable or proper means, be made to connect with such other railway so intersected or crossed, and railway companies where railroads shall be so connected shall draw over their respective roads the cars of such connecting railway; and also those of any other railway or railways connected with said roads made to connect as aforesaid, and also the cars of all transportation companies or persons, at reasonable terms, and for a compensation not exceeding their ordinary rates.)

SEC. 1293. (*As substituted by ch. 18, 15th g. a.*) [**Commissioners appointed to fix rates: how done.**]—(When such corporations are unable to agree upon terms of connection and rates of transportation, either, or any person interested in having such construction made, may make application to the district or circuit court in any county in which said connection may be desired or located, or to the judge of said courts, if in vacation, after ten days' notice in writing to the companies. After hearing the parties, or on default, the said judge shall appoint three disinterested persons, being presidents or superintendents of railways, or experts in railway business, without regard to their place of residence, as commissioners, to determine the terms of connection, and rules and regulations necessary thereto. *Provided*, that the rates so fixed by the said commission for freights offered or transported in the cars of the company offering the same, shall in no case exceed the local rates per mile fixed by law or set forth in the carrying company's freight tariff, prepared and made public in accordance with the laws of the state.)

(See chapter 77, laws of 1878, *post*: "Establishing a board of railroad commissioners.")

SEC. 1294. [**Testimony taken by: report of: confirmation.**]—Said commissioners shall meet at such time and place as may be ordered by said court or judge, and shall hear the parties and any testimony brought before them, and make and sign their report, prescribing the things to be done. Such report made by them, or a majority of them, shall, within such time as ordered by said court or judge, be returned to and filed in said court, to be confirmed thereby; and, when so confirmed, shall be binding upon the parties until another report shall be made upon a new application, which cannot be made within two years after such confirmation.

SEC. 1295. [**Duty, power, and compensation of commissioners.**]—Said commissioners shall have such compensation as shall be deemed reasonable by the court, and shall be governed by the same rules and have the same power in compelling the attendance of witnesses, and shall themselves be sworn, as is now provided in cases of referees in civil actions at law in the district court, and exceptions may be taken to their report in the same manner; and such exceptions shall have the same effect, and the proceedings upon their report shall be the same as on reports of referees in cases referred from said court, and the costs shall be paid by the parties in such proportion as to the court may seem equitable and just.

SEC. 1296. [**Penalty.**]—If the officers of, or any person in the employ of said corporation, refuse to comply with the terms of such confirmed report, they may be punished as for a contempt of said court.

SEC. 1297. [**Parallel railways cannot pool earnings: penalty.**]—It shall be unlawful for any railway company to make any contract, or enter into any stipulation with any other railway company running in the same general direction, by which either company shall, directly or indirectly, agree to divide in any manner or proportion the joint earnings upon the whole or any part of the freight

transported over such roads, and any violation of this provision shall render the railway company violating the same liable to a penalty of five thousand dollars for each month for which such earnings are divided, to be recovered for the use of the permanent school fund in the name of the state.

SEC. 1298. [**Drawback.**—Contracts between any such corporations operating a railway, allowing a drawback of not exceeding fifteen per cent on the gross earnings of the railway on business coming from or going to any other railway, shall be legal and binding.

SEC. 1299. [**Same: on roads partially constructed.**—Any such corporation owning and operating a railway partially constructed, may, for the purpose of inducing the investment of capital in the extension or completion of its railway, contract with the party furnishing such means, or the trustees who may represent them, allowing a drawback not exceeding twenty per cent of the gross earnings of all business coming from and going to any part of the extension or portion to be aided or completed with the money or means thus obtained; or such railway company may lease of the trustees or said parties, the portion to be built with means thus furnished, subject to the same rights and liabilities as are provided in the next section.

SEC. 1300. [**Sale, lease or joint running arrangements.**—Any such corporation may sell or lease its railway property and franchises to, or may make joint running arrangements with, any corporation owning or operating any connecting railway, and the corporation operating the railway of another shall, in all respects, be liable in the same manner and extent as though such railway belonged to it, subject to the laws of this state.

A railroad company which, as the lessee of another company owning the road, has the exclusive right to run, operate and control the road as its own during a term of fifty years, and exercise the right of maintaining a fence along the line, was held liable under section 6, of chapter 169, of the laws of 1862, for stock killed by reason of its failure to fence the road operated by it. *Stewart v. The C. & N. W. R'y Co.*, 27 Iowa, 282.

So where two railroad companies operate trains on the same track, one being the owner and the other a lessee, each is liable for stock killed or injured by its own trains. *Clary v. The Iowa M. R. Co.*, 37 Id., 344; *Stevens v. The D. & St. P. R'y Co.*, 36 Id., 327.

That by the terms of the lease the lessor had the right to fix the time table, and that the trains of the lessee were operated in subordination thereto, and the lessor was obliged to keep up repairs and fences, would not change the rule. *Id.*

But a railroad company cannot escape liability for injuries occurring while its road is being operated in the corporate name, even though in fact it may have been leased, and was at the time of the injury controlled by the lessee. *Bower v. The B. & S. W. R. Co.*, 42 Id., 546.

Where a railroad company in the operation of its trains set out fire, destroying property, it cannot escape liability therefor by showing that the fire originated on the right of way, by reason of combustible matter thereon, and that the road and right of way belonged to another corporation, and that defendant simply had a right by contract to run trains over the road. *Slossen v. B., C. R. & N. R'y Co.*, 60 Id., 215.

The liability of railway corporations for double damages for stock killed or injured on their roads is not limited to the failure to fence the road, but extends also to a failure to maintain a sufficient fence. *Bennett v. The Wabash, St. L. & P. R'y Co.*, 61 Id., 355.

SEC. 1301. [**Mortgaged.**—Any contract, lease or benefit derived therefrom, contemplated in either of the three preceding sections, may be mortgaged for the purpose of securing construction bonds in the same manner as other property of the corporation.

SEC. 1302. [**Change of ownership or name: rights and remedies.**—Where any railway company shall be organized under a corporate name, and shall have made contracts for payments to it upon delivery of stock in such company, and shall, subsequent to such contracts, have changed their corporate name, or when the real ownership in the property, rights, powers and franchises has passed legally or equitably into any other company, no such contracts shall be enforced in law or equity until tender or delivery of stock in such last named corporation or company.

SEC. 1303. [Report to general assembly made.]—When any railway has been completed and opened for use, the corporation constructing the same shall report to the next general assembly, under oath, the total cost thereof, specifying the amount expended for construction, engines, cars, depots and other buildings, and the amount of all other expenses, together with the length of the railway, the number of planes, with their inclination to the mile, the greatest curvature, the average width of grade, and the number of ties per mile.

SEC. 1304. [Maximum rates to be annually fixed and posted up: penalty.]—In the month of June in each year, every corporation operating a railway in this state shall fix its maximum rates of fare for passengers and freight, for transportation of timber, wood and coal, per ton, cord or thousand feet per mile; also its fare and freight per mile for transporting merchandise and articles of the first, second, third and fourth classes of freight; and, on the first day of July following, shall put up at all the stations and depots on its railway, a printed copy of of such fare and freight, and cause a copy to remain posted during the year. For willfully neglecting so to do, or for willfully receiving higher rates of fare or freight than those posted, the company shall forfeit and pay to the state of Iowa, for the use of the school fund, not less than one hundred dollars nor more than two hundred dollars, to be recovered in any civil action in the name of the state; and it is hereby made the duty of the several district attorneys within their respective districts to sue for and recover all sums forfeited as aforesaid; and such corporation shall also forfeit and pay to the person injured double the amount of compensation or charge illegally taken, to be recovered by such person in a civil action.

SEC. 1305. [Maximum passenger fare.]—For the transportation of passengers, no railway company shall charge to exceed three and one-half cents per mile per passenger.

SEC. 1306. [Rights reserved.]—All contracts, stipulations and conditions regarding the right of controlling and regulating the charges for freight and passengers upon railways, heretofore made in granting land or other property or voting taxes to aid in the construction of, or franchises to, railway corporations, are expressly reserved, continued and perpetuated in full force and effect, to be exercised by the general assembly, whenever the public good or the public necessity requires such exercise thereof.

SEC. 1307. [Liable for injuries done employes: contracts restricting void.]—Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.

Under the statute prior to the passage of chapter 169, laws of 1862, it was held, in harmony with the current of common law authority, that the principal is not liable for damages sustained by an employe from the negligence of a co-employe in the same general service; and that the 14th section of the act entitled "an act to grant to railroad companies the right of way," approved January 13, 1853, did not change the general rule on the subject. *Sullivan v. The M. & M. R. Co.*, 11 Iowa, 421.

After the act of 1862 took effect it was held, that while the seventh section thereof gave an employe of a railroad company a right to recover for injuries caused by the negligence of a co-employe, the liability was nevertheless measured by a different standard and rule as to negligence from what it is in case of injuries to passengers. While extraordinary care and caution are required with respect to passengers, ordinary care only is due to the employe. *Hunt v. The C. & N. W. R'y Co.*, 26 Id., 363, WRIGHT, J., dissenting, and holding that under the statute the same rule applied to both.

A person employed by a railroad company as a private detective, and who, while walking upon the railroad track in the discharge of his duty, and without fault on his part, is injured by the negligence of an engineer of a passing train, may maintain an action against the company under this section. *Pyne v. The C., B. & Q. R. Co.*, 54 Id., 223.

A paper shown to be similar to an affidavit of the killing of stock served on a railroad company, but not a copy, is not admissible to prove the contents of the affidavit. *Kyser v. K. C., St. J. & C. B. R. Co.*, 56 Id., 207.

To entitle an employe of a railroad company to recover of the company for personal injuries inflicted through the negligence of a co-employe, it must be shown that his employment was connected with the operation of the railway. *Smith v. The B., C. R. & N. R'y Co.*, 59 Id., 73, citing the following: *Schroeder v. The C., R. I. & P. R. Co.*, 41 Id., 344; *Same Case*, 47 Id., 375; *Deppe v. The C., R. I. & P. R. Co.*, 36 Id., 52. See also *Frandsen v. The Same*, Id., 272.

An employe of a railroad company cannot recover from the company for injuries sustained through the negligence of a co-employe, where he has also been guilty of contributory negligence producing the injury. *Hoben v. The B. & M. R. R. Co.*, 20 Id., 562; *McAunich v. The M. & M. R. Co.*, Id., 338; *Kroy v. The C., R. I. & P. R. Co.*, 32 Id., 357; *Nelson v. The C., R. I. & P. R. Co.*, 38 Id., 564.

The rule is settled in this state that in an action for injuries resulting from negligence, the burden of proof is on the plaintiff to show that the injury happened without contributory negligence on his part; yet this may be inferred from circumstances, without direct proof. *Nelson v. The C., R. I. & P. R. Co.*, 38 Id., 564.

As to the scope of the term employe used in the statute it must be limited to those employes engaged in the hazardous business of operating a railroad. *Deppe v. The C., R. I. & P. R. Co.*, 36 Id., 52; *Frandsen v. The Same*, Id., 372; *Schroeder v. The Same*, 41 Id., 344; *McAunich v. The M. & M. R. Co.*, 20 Id., 338.

Nevertheless, one who is employed in connection with a dirt train, and who was injured while loading a car by the falling of an impending bank is within the term. *Frandsen v. The C., R. I. & P. R. Co.*, *supra*.

A person employed as a section hand whose duty it is, with others, to keep a certain distance of the railroad track in repair, and to go with them on the track in a hand car for that purpose, is an employe within this section of the statute. *Frandsen v. The C., R. I. & P. R. Co.*, 36 Id., 272. See also *Ney v. The D. & S. C. R. Co.*, 20 Id., 347.

This provision of the statute was held to be not in conflict with the constitution in *McAunich v. The M. & M. R. Co.*, 20 Id., 338.

Where the deceased was the conductor and superior officer of the train, and directed the line of conduct by which resulted his death, his personal representatives will be estopped from recovering against the company on the ground of negligence on the part of its employes. *Dewey v. The C. & N. W. R'y Co.*, 31 Id., 373.

Where an employe of a railway company is killed through the negligence of a co-employe, a right of action accrues under this section to the representatives of the deceased. *Philo v. The Ill. Cen. R. Co.*, 33 Id., 47.

The bare fact that an employe is directed by his superior in charge to perform an act at a time and under such circumstances as that a person would reasonably apprehend danger therefrom, would not justify his disobedience of such order; hence to assume such position of danger in obedience to such direction, is not, of itself, negligence. *Frandsen v. The C., R. I. & P. R. Co.*, 36 Id., 372.

The giving of signals of an approaching train at a crossing, by blowing the whistle or ringing the bell is not required under the statute or any rule of law. *Spencer v. The Ill. Cent. R. Co.*, 29 Id., 55; *Artz v. The C., R. I. & P. R. Co.*, 34 Id., 153.

But see chapter 104, laws of 1884, making it the duty of the company to do so at least 60 rods before reaching a highway crossing, *post*, p.

And where such signals are required by statute, the omission to give them will not render the company absolutely liable, unless injury results from such omission alone, without the negligence of the party injured. *Id.*

Nor on the other hand will the absence of such statutory requirement excuse the company from giving such signals under all circumstances. *Id.*

While it is the duty of a person in crossing the track of a railway to use all reasonable precautions to ascertain whether a train is approaching, he is not, as a matter of law, bound to stop his team and look and listen before attempting to cross. He may have satisfactory and sufficient evidence to justify him in attempting to cross, without this. *Spencer v. The Ill. Cent. R. Co.*, 29 Id., 55.

A person going upon the track of a railroad for the purpose of walking thereon, is bound to exercise ordinary precaution in looking out for the approach of the cars, and to use his senses to that end. His failure to do so constitutes negligence on his part as matter of law. *Carlin v. C., R. I. & P. R. Co.*, 37 Id., 316.

While an employe would have no right of action for injuries received in such case, since he was

employed and paid for assuming such a position of danger, yet if the danger was created by reason of the prior negligence of co-employees, or if, by reason of their negligence, the injury was caused to him, he may recover. *Id.*

It is the duty of railroad companies to provide their cars with such appliances as are calculated and reasonably necessary to insure the safety of their employees. *Greenlief v. The Ill. Cen. R. Co.*, 29 Id., 14; *Cooper v. The Cen. R. Co.*, 44 Id., 134.

If the car in question was wanting in the appliances reasonably necessary for the safety of employes at the time of its construction, and so continued when put and used on the road, it would not be necessary to show any further knowledge thereof on the part of defendant in order to fix its liability. *Id.*

If the defect was known to the employe, or might have been known by the use of ordinary care, and there was no inducement used for him to remain, by promises to remove the danger by remedying the defect, it would seem that he thereby assumes the risk and would not be entitled to recover for injuries resulting therefrom. *Id.*

If at one time the car was supplied with these appliances and they were afterwards removed by accident or otherwise, an employe cannot recover on account of the defects without showing that the company or its agents had notice thereof, or might have known it by the use of ordinary diligence. *Id.*

Though an employe knew of the defects in the appliances of a car, his right to recover for injuries resulting therefrom would not be defeated if he was at the time acting under the immediate order of a superior. *Id.*

The rule is now recognized in this state, that if the employe knows that another employe is habitually negligent, or that the materials with which he works are defective, and he continues his work without objection and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk and cannot recover for an injury resulting therefrom. *Kroy v. The C., R. I. & P. R. Co.*, 32 Id., 357.

The doctrine of contributory, and not that of comparative negligence, prevails in this state, and it has been uniformly held that the plaintiff cannot recover if his own negligence contributed to the injury, although the railroad company was also guilty of negligence. *Haley v. The C. & N. W. R'y Co.*, 22 Id., 15; *Donaldson v. The M. & M. R. Co.*, 18 Id., 280; *Hunt v. The C. & N. W. R. Co.*, 26 Id., 363; *Hoben v. The B. & M. R. Co.*, 50 Id., 562; *O'Keefe v. The C., R. I. & P. R. Co.*, 32 Id., 467; *Sherman v. The Western Stage Co.*, 24 Id., 515; *Haley v. The C. & N. W. R'y Co.*, 21 Id., 15; *McAunsch v. The M. & M. R. Co.*, 20 Id., 338; *Spencer v. The Ill. Cen. R. Co.*, 29 Id., 55; *Kesee v. The C. & N. W. R. Co.*, 30 Id., 79; *Dewey v. The Same*, 31 Id., 373; *Artz v. The C., R. I. & P. R. Co.*, 34 Id., 153; *Dodge v. The B. C. & M. R. Co.*, 34 Id., 276; *Doggett v. The Ill. Cen. R. Co.*, Id., 284; *Carlin v. The C., R. I. & P. R. Co.*, 37 Id., 316; *Reynolds v. Hindman*, 32 Id., 146; *Artz v. The C., R. I. & P. R. Co.*, 33 Id., 293; *Patterson v. The B. & M. R. Co.*, Id., 219; *Murphy v. The C., R. I. & P. R. Co.*, Id., 539; *Kuhn v. The Same*, 42 Id., 420; *Steel v. The Central R. Co.*, 43 Id., 109; *Belair v. The C. & N. W. R. Co.*, Id., 662; *Williams v. The Central R. Co.*, Id., 397; *Cooper v. The Same*, 44 Id., 134; *O'Neil v. The K. & D. M. R. Co.*, 45 Id., 546; *Murphy v. The C., R. I. & P. R. Co.*, Id., 661.

The plaintiff's negligence will not enable the defendant to escape liability if the act which caused the injury was done by defendant after it discovered the plaintiff's negligence, and if the defendant could have avoided the injury by the exercise of reasonable care. *Morris v. The C., B. & Q. R. R. Co.*, 45 Id., 29.

When a person knowingly about to cross a railroad track approaches it from a point where he may have an unobstructed view of the railroad, and know of the approach of a train a sufficient time to clearly avoid any injury from it, he cannot, as a matter of law, recover, although the railroad may also have been negligent in omitting to perform a statutory requirement or otherwise. *Artz v. The C., R. I. & P. Co.*, 34 Id., 153.

If, however, the view of the railroad as the crossing is approached, is by any means so obstructed at the time as to render it impossible or difficult to learn of the approach of the train; or there are circumstances connected with the incident calculated to deceive or throw a person off his guard, then whether it was negligence on the part of the person injured in undertaking to cross, is a question of fact for the jury. *Id.*

In an action for damages against a railroad company for injuries received at a crossing, the following instruction was given: "If you believe from the evidence that the plaintiff neither stopped his team, nor made any effort to see or hear the train before he drove on the railroad track; and you farther believe that if he had stopped and looked he could have seen the train, or if he had listened he could have heard it, then he cannot recover." *Held* to embody the correct rule of law. *Benton v. The C. R. of Iowa*, 42 Id., 192.

To entitle the plaintiff to recover in such an action, he must affirmatively establish reasonable care on his own part while proving negligence on the part of the company. *Id.* See, also, to the same effect, *O'Keefe v. The C., R. I. & P. R. Co.*, 32 Id., 467; *Carlin v. Same*, 37 Id., 316; *Donaldson v. The M. & M. R. Co.*, 18 Id., 280; *Balcom v. The D. & S. C. R. Co.*, 21 Id., 102;

Greenleaf v. The Ill. C. R. Co., 29 Id., 14; *Spencer v. Same*, Id., 55; *Reese v. The C. & N. W. R. Co.*, 30 Id., 78; *Dewey v. Same*, 31 Id., 373; *Reynolds v. Hindman*, 32 Id., 146.

An employe of a railroad company, who is foreman of a crew, with power to direct the men under him in their work, and to hire and discharge them at will, is a co-employe with the men under him, in contemplation of this section, and may recover of the company for injuries received in the course of his employment by reason of the negligence of the men in his crew. *Houser v. The C., R. I. & P. R. Co.*, 61 Id., 230.

It was held that one whose duty it was to wipe the defendant's engines, and do other work about the round-house, and to open the doors of the round-house so as to allow the engines to pass in and out, and while endeavoring to shut the doors, was injured by the carelessness of his co-employes, who were at the time engaged with him in the same effort, cannot recover of the company for such injury under this section, because the injury was not in any manner connected with the use and operation of the railway, as contemplated in this section. *Malone v. The B., C. R. & N. R'y Co.*, 61 Id., 326.

To entitle an employe of a railroad company to recover for injuries inflicted through the negligence of a co-employe, it must be shown that his employment was connected with the operation of the railway. *Smith v. The B., C. R. & N. R'y Co.*, 59 Id., 73; citing and following *Schrøder v. The C., R. I. & P. R'y Co.*, 41 Id., 344; *Same Case*, 47 Id., 375; *Deppe v. The Same*, 36 Id., 52; see, also, *Fransden v. The Same*, Id., 372.

Where a railroad company undertook to transport a lot of cattle for the owner, who was to take care of them, in a car which proved to be defective, by reason of which the cattle had to be changed to another car, which the owner of the cattle had no opportunity to provide with bedding, whereby some of the cattle got down and were injured, it was held, that the company was liable for the loss thus sustained. *McDaniel v. C. & N. W. R. Co.*, 24 Id., 412.

If the employes of a railway company, engaged in the operation of the road or in the running of the trains, commit an assault upon a citizen who is not a passenger upon the train or in any manner connected with the company, it is not liable for such assault. *Porter v. The C., R. I. & P. R. Co.*, 41 Id., 358.

Prior to the act of April 18, 1872, being chapter 65 of the laws of that year, which is embodied in section 1307 of the code, it was held, that a railroad company was not liable for stock killed or injured on its track in consequence of the willful act of the engineer. *DeCamp v. The M. & M. R. Co.*, 12 Id., 348. Followed in *Cooke v. The Ill. Cen. R. Co.*, 30 Id., 202.

It is now, however, held, that a railway company is liable for the malicious and criminal acts of its agents toward passengers while they are executing what they suppose to be the orders of the company, even though the orders do not in fact contemplate such acts. *McKinley v. The C. & N. W. R. Co.*, 44 Id., 310.

The decision in the above case does not seem to be based upon the provisions of section 1307 of the code, as no reference is made thereto in the opinion, but it clearly overrules the prior cases on the same question.

A railroad company is chargeable with negligence if any of its employes whose duty it was to observe the condition of a bridge, or keep it in repair, had actual or implied notice of the defects therein, or in the exercise of reasonable diligence would have known them, and failed to make the necessary repairs. *Locke v. The S. C. & P. R. Co.*, 46 Id., 109.

A railroad company is held only to the exercise of ordinary diligence to prevent injury to its employes. *Id.*

In an action against a railway company for negligence, in killing plaintiff's intestate, when the evidence shows contributory negligence on the part of the deceased, the court may direct a verdict for defendant. *Starry v. The D. S. W. R. Co.*, 51 Id., 419.

Under this section a railroad company is liable for the tort of a brakeman committed in removing a trespasser from a train whether the wrongful act be merely one of negligence, or a willful and criminal wrong. *Marion v. The C., R. I. & P. R'y Co.*, 64 Id., 568.

This section is not in conflict with the fourteenth amendment to the constitution of the United States, because it subjects railroad corporations to liabilities and penalties to which other corporations and persons are not subjected. *Bucklew v. The Central R'y of Iowa*, 64 Id., 604; following *McAunich v. The M. & M. R'y Co.*, 20 Id., 338.

A car repairer, whose duties were to repair cars on the track, but had nothing to do with the cars in motion, except to ride on a passenger or freight train to and from his work, held not engaged in the operation of a railway within the meaning of this section, and cannot recover for an injury received in the discharge of his duty through the negligence of a co-employe. *Foley v. The C., R. I. & P. Co.*, 64 Id., 644; *Deppe v. The Same*, 36 Id., 52, distinguished.

An employe of a railway company whose duty it was to wipe engines, open and shut the doors of an engine house, and remove snow from the turn-table and connecting tracks, is not, by reason of such duties, in any proper sense employed in the operation of the railroad, within the meaning of this section of the code, and for an injury received while performing such duties, through the negligence of a co-employe, he cannot recover against the company, under this

section of the code, notwithstanding he may have other duties to perform which do pertain to the operation of the road. *Malone v. The B., C. R. & N. R'y Co.*, 65 Id., 417.

Where the plaintiff was a member of a construction gang on the defendant's railway, and his duties required him to ride upon, and work upon and about, defendant's cars and tracks, but he was injured by the negligence of a co-employee, in throwing a heavy stone upon his hand while engaged in placing stones under the ends of ties, *held* that such injury was not in any manner connected with the use or operation of the railway as contemplated in section 1307 of the code, and that the defendant was not liable therefor. *Matson v. The C., R. I. & P. R'y Co.*, 68 Id., 22.

Railroad companies are liable to employes for injuries received through the negligence of co-employes only when "it is in any manner connected with the use and operation of any railway on or about which they shall be employed." But one whose sole duty it is to elevate coal to a platform convenient for delivering it to the tenders of engines, is not employed in the use and operation of a railroad—not being in any way concerned with the moving and operation of trains. *Struble v. The C., M. & St. P. Ry Co.*, 70 Id., 555.

Where the plaintiff, a section hand in the employment of the defendant, a railroad company, was directed to get upon a loaded moving tram by the conductor and others in charge of the train, to go to another place and unload it, and in attempting to do so was thrown down and received personal injuries, *held*, that such injuries occurred in the "use and operation" of the train, within the meaning of this section of the statute. *Rayburn v. The Central Iowa R'y Co.*, 35 N. W. R., 606.

An employe of a railroad whose duty it is to assist in loading and unloading gravel cars, and to perform any other service, as required in and about the work in hand, and to ride back and forth on the cars between the gravel pit and the places where the gravel is placed on the track, is a person employed in the operation of a railroad within the meaning of this section of the code, which gives to such employes a remedy for injuries caused by the negligence of co-employes. *Handeluo v. The B. C. R. & N. R'y Co.*, 72 Iowa, 709.

SEC. 1308. [Liability cannot be lessened, etc.]—No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier of passengers, which would exist had no contract, receipt, rule or regulation, been made or entered into.

When a railroad company undertook to transport cattle from Clinton, Iowa, to Chicago, Illinois, under a contract containing a stipulation restricting the common law liability of the company as a common carrier, this stipulation was *held* void under chapter 113, laws of the tenth general assembly, and that the company was liable as a common carrier, the same as if no such stipulation had been inserted in the contract. *McDaniel v. The C. & N. W. R'y Co.*, 24 Iowa, 412.

Under sections 1307 and 1308 of the code, railroad companies are liable for all damages caused by the negligence of their agents or employes, and no special contract will exempt them from such liability. The provisions of the statute are general, applying equally to passengers and servants of the company. *Rose v. The D. V. R. Co.*, 39 Id., 246.

The rule is the same where the passenger is riding on a free pass as upon a purchased ticket. The payment of fare is not necessary to create the relation of common carrier and passenger. *Id.*

The measure of damages, in an action against the company, where the injury has resulted in the death of a passenger through the negligence of the company, is the sum which will compensate the estate for the pecuniary loss sustained by the death. *Id.*

Where it appeared that the deceased was twenty-four years of age, without family, of temperate and industrious habits, and whose annual net earnings were found to be \$263, a verdict of ten thousand dollars was *held* to be excessive; judgment affirmed upon a *remittitur* of five thousand dollars being entered. *Beck, J.*, dissenting.

Where a contract for transportation of freight limited the carrier's liability at common law, in consideration of which the shipper received special rates and a pass over the road, it was *held* that not contract was void within this section of the code. *Brush v. The S. A. & D. R. Co.*, 43 Id., 554. To the same effect is *McCoy v. The K. & D. M. R. Co.*, 44 Id., 424.

The acceptance by a railroad company of goods consigned to a point beyond the *terminus* of its road creates a *prima facie* liability to transport to and deliver the goods at that point, which, however, may be modified by proof of a different usage known to the shipper at the time of making the consignment. *Mullen v. The Ill. Cen. R'y Co.*, 36 Id., 181.

A regulation of a railway company to the effect that no valuable live stock shall be received for shipment until a contract is signed by the owner releasing the company from all liability for injury to such stock in shipment above the value of ordinary stock, is void under this section of the code. *McCune v. The B., C. R. & N. R. Co.*, 52 Id., 600.

It is immaterial in case of the carriage of goods by a common carrier, who is deemed an insurer of the goods, that the owner's agent accompanies the goods under a provision in a contract exempting the carrier from liability, and which is void under this section of the code. *Hart v. The C. & N. W. R'y Co.*, 69 Id., 485.

A contract between a railway company and a shipper of horses, limiting the liability of the company for the horses to an amount less than their actual value, is invalid. *Id.*

This section, 1308 of the code, whereby all contracts by which carriers seek to limit their liability as such are declared to be invalid, is not repugnant to the constitution of the United States as being a regulation of commerce between the states, when the contract relates to the shipment of goods from this to another state. *Id.*

SEC. 1309. [Judgment against: when a lien.]—A judgment against any railway corporation for any injury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, A. D. 1862.

Under the provisions of this section a judgment for a personal injury sustained after the recording of a mortgage upon a railroad will be a lien prior and superior to the lien of the mortgage, and of this the purchaser of railroad bonds must take notice, but this section cannot be extended to embrace claims for personal injuries, not reduced to judgment, though actions therefor be pending on such claims, and the purchaser of a railroad takes the same free from such claims. *The B., C. R. & N. R. Co. v. Verry*, 48 Iowa, 458.

This case followed in *White v. K. & D. M. R'y Co.*, 52 Id., 97.

Section 1309 of the code, which provides that a judgment against any railway corporation for any injury to any person or property shall be a lien on the company's property, prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, 1862, held not repugnant to section 6, article 1, or section 12, article 8 of the constitution of Iowa, nor to the fourteenth amendment to the constitution of the United States, as being special legislation. *The Cent. Trust Co. et al. v. Sloan et al.*, 65 Id., 655.

SEC. 1310. [Provisions in relation to railways terminating at or near Council Bluffs.]—All railway corporations that have been or may hereafter be organized, under the laws of this state, that operate or may hereafter operate a line of railway in this state terminating at or near the city of Council Bluffs, and making a connection with any railway, which either by its charter or otherwise, extends to a point on the boundary or within the limits of this state, be, and they are hereby prohibited from making any transfer of freights, passengers, or express matters to or with any other railway corporation at or near such terminus—either by delivering or receiving the same—at any other place than in this state, at or near the said point at which the said railway extending to the boundary of this state terminates.

Sections 1310-1316, inclusive, of the code, wherein they require railroad companies connecting with the Union Pacific Railway to transfer their freight, passengers and express matter at Council Bluffs, is in conflict with the acts of congress, approved, respectively, July 1, 1862, and June 15, 1866, and cannot, therefore, be enforced. *The City of Council Bluffs v. The K. C. St. J. & C. B. R. Co.*, 45 Iowa, 338.

The term "transfer," as employed in section 1310, refers to the act of removing freight, passengers and express matter, and is intended to cover the removal of cars, with their burdens, from one railroad to another, as well as the change of their burdens from the cars of one company into those of another. *Id.*

Any regulation of the transportation of goods in transit from one state to another, upon railroads, operates as a regulation of commerce, and a state statute prescribing such regulation is unconstitutional and void. *Id.*

While the legislature of the state may regulate the time and manner of making transfers of the subjects of commerce transported by railway carriage, between points within its own limits, it cannot impose any burden upon transportation between points lying in different states. *Id.* BECK, J., *dissenting*.

SEC. 1311. [Transfer of freights and passengers prohibited at any place out of the state.]—Every railway corporation which, by its charter or otherwise, has its terminus at any point on the boundary or within the limits of this state, or which has authority to bridge or ferry the Missouri river for the purpose of having a continuous line of its railway and for connecting with other railways in this state, is hereby prohibited from making any transfer of freights, passengers, or express matters to or with any other railroad corporation, either by delivering or receiving the same at any other place than in this state, at or near its legal terminus; and every such corporation extending to the boundary

or within this state, or having authority to bridge or ferry said Missouri river, shall erect and maintain at or near its legal terminus within the limits of this state, all its depots, stations, and other buildings necessary for such transfer.

SEC. 1312. [**Contracts with municipal corporations enforced.**].—Every railway corporation which has heretofore made, or which shall hereafter make, any contract with any municipal corporation in this state, is hereby prohibited from, in any manner, violating any of the provisions of such contract; and every railway corporation which has heretofore made, or which shall hereafter make, any contract with any municipal corporation in this state, is hereby required to perform each and all of the provisions of any and every such contract, specifically as agreed therein. In every case in which any such municipal corporation has complied with its obligations relating to such contract at any stage of the progress of its fulfillment, so far as it has agreed to do, such municipal corporation shall not be required to furnish any further tender or guarantee of compliance on its part in order to secure its rights in the courts; but in case anything remains to be done by such municipal corporation under such contract, after the completion of the same on the part of the railway corporation contracting therewith, then it shall, after the enforced compliance on the part of such corporation as hereinafter provided, be required to fully comply on its part.

SEC. 1313. [**Penalty for failure to comply.**].—In case of a refusal of any railway corporation to comply with the provisions of section thirteen hundred and ten of this chapter, or its failure to perform the duties required in the preceding section, or their doing or having done any act at variance with such performance or duties, then the municipal corporation affected thereby, or with which the contract in that particular case was made, may, in an action by mandamus, in any court of record in the county in which such municipal corporation is situate, proceed against such corporation so failing or refusing, and such corporation shall, on proper proof, be required by such court to perform all the duties required by this and the three preceding sections, and said law pertaining to mandamus shall apply in such a case with the same force that it does in all other cases, except as it is herein enlarged.

SEC. 1314. [**Proceedings to enforce contracts.**].—In case any municipal corporation affected as before stated, or with which any such contract has been made, should not desire to seek the remedy given in the last preceding section, it may proceed in equity by the action of specific performance, in any court in the county in which such municipal corporation is situate, and in case such court should find that a contract had been made, it shall, by decree, require such company so violating or offering to violate its contract, or failing or refusing to perform the provisions thereof, to specifically perform the same.

SEC. 1315. [**Injunction.**].—Any court or judge in this state to whom application shall be made, shall, at the suit of any municipal corporation as aforesaid, restrain by injunction the violation of any provisions of the five preceding sections of this chapter, or of the provisions of any contract as aforesaid; and in such proceeding it shall not be necessary for such municipal corporation to give bond.

SEC. 1316. [**Remedies not exclusive.**].—The remedies provided for in the two preceding sections shall not be construed to be exclusive, and any order, judgment, or decree made by any court in pursuance of any provisions of the six preceding sections, shall be enforced in the usual manner.

See notes to section 1310, *ante*.

(CHAPTER 68, LAWS OF 1874.)

RATES OF FARE AND FREIGHT.

An Act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this state. (Amendatory of code, title X, chapter 5: "Of railways.")

SECTION 1. [Classification of railroads.]—*Be it enacted by the general assembly of the state of Iowa:* That all railroad corporations organized or doing business in this state, their trustees, receivers or lessees, under the laws or authority thereof, shall be limited in their maximum charges to the rates of compensation for the transportation of passengers and freight, which are herein prescribed. All railroads in this state shall be classified according to the gross amount of their respective annual earnings within the state, per mile, for the preceding year as follows: Class "A" shall include all railroads whose gross annual earnings, per mile, shall be four thousand (\$4,000) or more. Class "B" shall include all railroads whose gross annual earnings, per mile, shall be three thousand dollars (\$3,000) or any sum in excess thereof less than four thousand (\$4,000). Class "C" shall include all railroads whose gross annual earnings, per mile, shall be less than three thousand dollars (\$3,000).

SEC. 2. [Maximum rates of fare.]—All railroad corporations, according to their classifications as herein prescribed, shall be limited to compensation per mile for the transportation of any person, with ordinary baggage, not exceeding one hundred pounds in weight as follows: Class "A" three cents; class "B" three and one-half cents; class "C" four cents: *Provided*, that no such corporation shall charge, demand or receive any greater compensation per mile for the transportation of children twelve years of age or under, than half the rates above prescribed: *And provided, also*, a charge of ten cents may be added to the fare of any passenger, when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train.

(All of the sections of this chapter except one, two and seven are repealed by chapter 77, laws of 1878).

SEC. 7. [To make annual statement of receipts to governor.]—It shall be the duty of each railroad corporation operating a railroad in this state during the month of January, 1875, and each and every year thereafter, to make and return to the governor a statement of its gross receipts on its entire road within this state for the year preceding and ending with the 31st day of December. Said statement shall be sworn to by the president and superintendent of the road in this state, and shall contain a detailed statement of the entire receipts for transporting freight and passengers, and all other sources of income of the road. A failure to comply with the provisions of this section shall subject the corporation so failing to a penalty of one hundred dollars per day, for each and every day after such report is due until it is made; to be recovered in an action in the name of the state of Iowa, for the benefit of the school fund. If the executive council shall, on examination, be satisfied of the correctness of said return, it shall be their duty to classify the different railroads in this state as hereinbefore provided, and the governor, when there shall be any change in classification, shall issue a certificate to any corporation or corporations affected by such change, certifying to them the class to which they are respectively assigned. And any change of rates made by any railroad corporation pursuant to any change of classification, shall take effect and be in force from and after the 4th day of July following such changes. The reports from the railroad corporations of this state for the year

1873, made pursuant to the provisions of section 1280 of the code, shall determine the classification of each road for the year ending July 3, 1875.

It was held erroneous to charge that if the conductor received and retained the fare tendered by the passenger he was not justified in expelling such passenger for a refusal to pay the additional sum demanded. *Hoffbauer v. The D. & N. W. R'y Co.*, 59 Iowa, 342

After the train had been stopped for the expulsion of a passenger who had thus refused to pay the fare demanded under the regulations of the company, he could not, by a tender of the amount demanded, reimpose upon the railroad company the obligation of the contract he had violated by his refusal to pay in the first instance, and he was rightfully ejected, notwithstanding such tender. *Id.*

Where the agent of a railway company, in violation of this chapter, collected for himself, as a shipper of goods, a rate of freight in excess of that provided by law, and paid the same over to the company, he was, equally with the company, a violator of the law, and, therefore, held not entitled to receive from the company the penalty provided in this act for such illegal charges. To be "equally guilty" in such case does not imply the same degree of guilt, nor guilt subjecting the wrong doers to the same punishment, but only that both should be in fact partakers of the guilt. *Steever v. The Ill. Cent. R'y Co.*, 62 Id., 371.

Where a passenger, having sufficient opportunity, neglected to purchase a ticket, it was held erroneous to instruct the jury that the reasonableness of the regulation of the company making an additional charge in such cases was a question of fact for their determination. *Hoffbauer v. The D. & N. W. R'y Co.*, 52 Id., 342.

An action under this section to recover the penalty therein provided, is an action to recover a statute penalty, and the limitation for the recovery of statute penalties applies thereto. *Herriman v. The B., C. R. & N. R. Co.*, 57 Id., 187.

Where a statute imposes two distinct, not alternative, penalties for the same act, the enforcement of one will be no bar to the enforcement of the other. *Id.*

(CHAPTER 77, LAWS OF 1878.)

ESTABLISHING A BOARD OF RAILROAD COMMISSIONERS.

An Act to repeal chapter 68, acts of the fifteenth general assembly, and provide for the establishment of a board of railroad commissioners, and defining their duties and term of office.

SECTION 1. [Repealed.]—*Be it enacted by the general assembly of the state of Iowa:* That chapter 68, of the acts of the fifteenth general assembly, excepting sections one, two and seven thereof, be and the same is hereby repealed, and the following be enacted:

Section two of this act was repealed by chapter 29, laws of 1888.

SEC. 3. [Duties of commissioners.]—Said commissioners shall have the general supervision of all railroads in the state operated by steam, and shall inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein, or by the officers, agents or employes thereof, and shall also from time to time carefully examine and inspect the condition of each railroad in the state, and of its equipment, and the manner of its conduct and management, with reference to the public safety and convenience, and for the purpose of keeping the several railroad companies advised as to the safety of their bridges, shall make a semi-annual examination of the same, and report their condition to the said companies.

And if any bridge shall be deemed unsafe by the commissioners, they shall notify the railroad company immediately, and it shall be the duty of said railroad company to repair and put in good order within ten days after receiving said notice, said bridge, and in default thereof, said commissioners are hereby authorized and empowered to stop and prevent said railroad company from running or passing its trains over said bridge, while in its unsafe condition.

[Shall notify railroad company of any repairs or changes deemed expedient.]—Whenever, in the judgment of the railroad commissioners, it shall

appear that any railroad corporation fails, in any respect or particular, to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station houses, or any change in its rates of fare for transporting freight or passengers, or any change in the mode of operating its road and conducting its business is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said railroad commissioners shall inform such railroad corporation of the improvements and changes which they adjudge to be proper, by a notice thereof in writing to be served by leaving a copy thereof, certified by the commissioners' clerk, with any station agent, clerk, treasurer or any director of said corporation, and a report of the proceedings shall be included in the annual report of the commissioners to the legislature.

[Railroads not relieved of liability.]—Nothing in this section shall be construed as relieving any railroad company from their present responsibility or liability for damage to person or property.

SEC. 4. [Report of commissioners.]—The said railroad commissioners shall, on or before the first Monday in December in each year, make a report to the governor of their doings for the preceding year, containing such facts, statements and explanations as will disclose the working of the system of railroad transportation in this state, and its relation to the general business and prosperity of the citizens of the state, and such suggestions and recommendations in respect thereto as may to them seem appropriate. Said report shall also contain as to every railroad corporation doing business in this state:

First. The amount of its capital stock.

Second. The amount of its preferred stock, if any, and the condition of its preferment.

Third. The amount of its funded debt and the rate of interest.

Fourth. The amount of its floating debt.

Fifth. The cost and actual present cash value of its road and equipment, including permanent way, buildings and rolling stock, all real estate used exclusively in operating the road, and all fixtures and conveniences for transacting its business.

Sixth. The estimated value of all other property owned by such corporation, with a schedule of the same, not including lands granted in aid of its construction.

Seventh. The number of acres originally granted in aid of construction of its road by the United States or by this state.

Eighth. Number of acres of such land remaining unsold.

Ninth. A list of its officers and directors, with their respective places of residence.

Tenth. Such statistics of the road and of its transportation business for the year as may, in the judgment of the commissioners, be necessary and proper for the information of the general assembly, or as may be required by the governor. Such report shall exhibit and refer to the condition of such corporation on the first day of July of each year, and the details of its transportation business transacted during the year ending June 30th.

Eleventh. The average amount of tonnage that can be carried over each road in the state with an engine of given power.

SEC. 5. [Report of railroad companies.]—To enable said commissioners to make such a report, the president or managing officer of each railroad corporation doing business in this state, shall annually make to the said commissioners, on the 15th day of the month of September, such returns, in the form which they may prescribe, as will afford the information required for their said official report; such returns shall be verified by the oath of the officer making them; and any railroad

corporation whose return shall not be made as herein prescribed by the 15th day of September, shall be liable to a penalty of one hundred dollars for each and every day after the 16th day of September that such return shall be willfully delayed or refused.

SEC. 6. [**Salary of commissioners.**].—The said commissioners shall hold their office in the capitol, or at some other suitable place in the city of Des Moines. They shall each receive a salary of three thousand dollars per annum, to be paid as the salaries of other state officers are paid, and shall be provided at the expense of the state with necessary office furniture and stationery, and they shall have authority to appoint a secretary, who shall receive a salary of fifteen hundred dollars per annum.

SEC. 7. [**Shall be sworn and give bond.**].—Said commissioners and secretary shall be sworn to the due and faithful performance of the duties of their respective offices before entering upon the discharge of the same, as prescribed in section 676 of the code, and no person in the employ of any railroad corporation, or holding stock in any railroad corporation, shall be employed as secretary.

[**Bonds.**].—Each of said commissioners shall enter into bonds, with security to be approved by the executive council, in the sum of ten thousand dollars, conditioned for the faithful performance of his duties.

SEC. 8. [**Repealed by chapter 29, laws of 1888.**].

SEC. 9. [**Powers in examining records of railroad companies.**].—The said commissioners shall have power, in the discharge of the duties of their office, to examine any of the books, papers, or documents of any such corporation, or to examine under oath or otherwise any officer, director, agent, or employe of any such corporation; they are empowered to issue subpoenas and administer oaths in the same manner and with the same power to enforce obedience thereto in the performance of their said duties as belong and pertain to courts of law in this state; and any person who may willfully obstruct said commissioners in the performance of their duties, or who may refuse to give any information within his possession that may be required by said commissioners within the line of their duty, shall be deemed guilty of a misdemeanor, and shall be liable, on conviction thereof, to a fine not exceeding one thousand dollars, in the discretion of the court, the cost of such subpoenas and investigation to be first paid by the state on the certificate of said commissioners.

SEC. 10. [**Duties of railroads in certain cases.**].—It shall be the duty of any railroad corporation, when within their power to do so, and upon reasonable notice, to furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and to receive and transport such freight with all reasonable dispatch, and to provide and keep suitable facilities for the receiving and handling the same at any depot on the line of its road; and also to receive and transport in like manner, the empty or loaded cars furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged, or re-loaded and returned to the road so connecting; and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad for a similar service.

SEC. 11. [**Roads shall not discriminate in rates.**].—No railroad corporation shall charge, demand, or receive from any person, company, or corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall at the same time charge, demand, or receive from any other person, company, or corporation for a like service from the same place, or upon like condition and under similar circumstances, and all concession of rates, drawbacks, and contracts for special rates, shall be open to and allowed all persons, companies and corporations alike, at the same rate per ton per mile by car load upon like condi-

tion and under similar circumstances, unless by reason of the extra cost of transportation per car load from a different point the same would be unreasonable and inequitable, and shall charge no more for transporting freight from any point on its line than a fair and just proportion of the price it charges for the same kind of freight transported from any other point.

SEC. 12. [No railroad company shall charge unreasonable rates.]—No railroad company shall charge, demand, or receive from any person, company, or corporation any unreasonable price for the transportation of persons or property, or for the handling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation.

SEC. 13. [Penalty for violation of provisions of this act.]—Any railroad corporation which shall violate any of the provisions of this act, as to the extortion or unjust discrimination, shall forfeit for every such offense to the person, company or corporation aggrieved thereby, three times the actual damages sustained or overcharges paid by the said party aggrieved, together with the cost of suit, and a reasonable attorney's fee to be fixed by the court, and if an appeal be taken from the judgment or any part thereof, it shall be the duty of the appellate court to include in the judgment an additional reasonable attorney's fee for services in the appellate court or courts, to be recovered in a civil action therefor. And in all cases where complaint shall be made, in accordance with the provisions of section 15, hereinafter provided, that an unreasonable charge is made, the commissioners shall require a modified charge for the service rendered, such as they shall deem to be reasonable, and all cases of a failure to comply with the recommendation of the commissioners shall be embodied in the report of the commissioners to the legislature; and the same shall apply to any unjust discrimination, extortion, or overcharge by said company, or other violation of law.

This section providing a penalty for the violation of any of the provisions of the act "as to extortion or unjust discrimination" is, like all other penal statutes, to be strictly construed, and must be limited to extortion and discrimination in making charges; and the penalty of treble damages cannot be recovered for a failure or refusal to furnish cars or transportation as required by section 10 of the act. *Bond v. The Wabash, St. L. & P. Ry Co.*, 67 Iowa, 712.

SEC. 14. [Investigation in case of accident.]—Upon the occurrence of any serious accident upon a railroad which shall result in personal injury, or loss of life, the corporation operating the road upon which the accident occurred shall give immediate notice thereof to the commissioners whose duty it shall be, if they deem it necessary, to investigate the same, and promptly report to the governor the extent of the personal injuries, or loss of life, and whether the same was the result of the mismanagement or neglect of the corporation on whose line the injury or loss of life occurred.

Provided, That such report shall not be evidence or referred to in any case in any court.

SEC. 15. [Examination of rates by commissioners on complaint of mayor, etc.]—It shall be the duty of said commissioners upon the complaint and application of the mayor and aldermen of any city or the mayor and council of any incorporated town, or the trustees of any township, to make an examination of the rate of passenger fare or freight tariff charged by any railroad company, and of the condition or operation of any railroad, any part of whose location lies within the limits of such city, town or township, and if twenty-five or more legal voters in any city or township shall, by petition in writing, request the mayor and aldermen of such city or the trustees of such township to make the said complaint and application, and the mayor and aldermen, or the trustees, refuse or decline to comply with the prayer of the petition, they shall state the reason for such non-compliance in writing upon the petition, and return the same to the petitioners; and the petitioners may thereupon, within ten days from the date of such refusal

and return, present such petition to said commissioners, and said commissioners shall, if upon due inquiry and hearing of the petitioners they think the public good demands the examination, proceed to make it in the same manner as if called upon by the mayor and aldermen of any city, or the trustees of any township. Before proceeding to make such examination, in accordance with such application or petition, said commissioners shall give to the petitioners and the corporation reasonable notice, in writing, of the time and place of entering upon the same. If, upon such an examination, it shall appear to said commissioners that the complaint alleged by the applicants or petitioners is well founded, they shall so adjudge, and shall inform the corporation operating such railroad of their adjudication within ten days, and shall also report their doings to the governor, as provided in the fourth section of this act.

SEC. 16. [Phrases "railroad" and "railroad corporation."]—In the construction of this act, the phrase railroad shall be construed to include all railroads and railways operated by steam, and whether operated by the corporation owning them, or by other corporations, or otherwise. The phrase railroad corporation shall be construed to mean the corporation which constructs, maintains or operates a railroad operated by steam power.

SEC. 17. [Not to hinder any suit against railroad company.]—Nothing in this act shall be construed to estop or hinder any persons or corporations from bringing suit against any railroad company for any violation of any of the laws of this state for the government of railroads.

SEC. 18. [Repealing clause.]—All acts or parts of acts inconsistent with this act are hereby repealed.

(Took effect by publication in newspapers March 26, 1878.)

(CHAPTER 133, LAWS OF 1884.)

GIVING RAILROAD COMMISSIONERS INCREASED POWER.

An Act authorizing actions against railroad companies, to be brought in the name of the state, upon recommendation of the board of railroad commissioners. [Additional to code, chapter 10, title V.]

SECTION 1. [Circuit and district court to enforce decrees of railroad commissioners.]—*Be it enacted by the general assembly of the state of Iowa:* The circuit and district courts of this state shall have power to enforce, by proper decrees, injunctions and orders, the rulings, and orders and regulations affecting public right, made or to be made by the board of railroad commissioners, such as are now, or may hereafter be, authorized to be made by them for the future direction and observance of the railroads in this state. The proceedings therefor shall be by equitable action in the name of the state of Iowa, and shall be instituted by the attorney-general, whenever advised by the board of railroad commissioners that any railway corporation, or person operating a line of road in this state, is violating and refusing to comply with any rule, order or regulation made by such board of railroad commissioners and applicable to such railroad or person. It shall be the duty of the court in which any such cause shall be pending, to require the issue to be made up at the first term of the court to which such cause is brought, which shall be the trial term, and to give the same precedence over other civil business. If the court shall find that such rule, regulation, or order is reasonable and just, and that in refusing compliance therewith said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction compelling obedience to, and compliance with such rule, order, or regulation by said railroad company, or other person, its

officers, agents, servants and employes, and may grant such other relief as may be deemed just and proper. All violations of such decree shall render the company, persons, officers, agents, servants and employes who are in any manner instrumental in such violations, guilty of contempt of court, and the court may punish such contempt by fine not exceeding one thousand dollars for each offense, and may imprison the person guilty of contempt until he shall sufficiently purge himself therefrom. And such decree shall continue and remain in effect and be enforced until the rule, order or regulation shall be modified or vacated by the board of railroad commissioners.

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

Approved April 3, 1884.

A state has no authority to regulate the charges which a railway company may make for carrying goods from a point without the state to a point within, or *vice versa*; and an order of the railroad commissioners of this state designed to regulate such charges is void, as being in conflict with section 8, of article 1, of the constitution of the United States. *The State v. The Chicago & N. W. R'y Co.*, 70 Iowa, 162. See also, *Carton v. Ills. Central R'y Co.*, 59 Id., 148; and *Illinois v. Wabash, St. L. & P. R'y Co.*, 7 Sup. Ct. R., 4.

(CHAPTER 31, LAWS OF 1888.)

An Act providing for change in name of railway stations in certain cases and prescribing penalties for non-compliance therewith.

SECTION 1. [**Name may be changed.**]*—Be it enacted by the general assembly of the state of Iowa:* That in all cases where any railway company shall fail or refuse to make the name of a railway station conform to the name of the incorporated town within the limits of which it is situated, the railway commissioners of the state upon hearing and after notice thereof may order a change in the name of the said station to effect such uniformity in name. Said notice may be served upon the same persons and in the same manner as provided for service upon said railway company of original notice, at least ten days before the date named for hearing.

SEC. 2. [**Notice to be given.**]*—When the railway commissioners shall order a change in the name of a railway station in pursuance of the provisions of section one of this act, said commission shall give the company upon whose line the said station is located notice of such order, and if the said order be not complied with within thirty days from the date of service of such notice it shall be the duty of the said commissioners to notify the attorney-general of the facts in the case, who, upon such notice, shall proceed in the courts of the state to compel the enforcement of said order.*

SEC. 3. [**Failure to comply.**]*—A failure to comply with the order of the railway commissioners within thirty days from service of such notice, shall constitute a misdemeanor for which said railway company shall be subject to a fine of one thousand dollars and non-compliance for each thirty days thereafter shall constitute a separate and distinct offense, subject to a fine of one thousand dollars.*

Approved March 24, 1888.

(Took effect by publication in newspapers March 27, 1888.)

OF ASSESSMENT AND TAXATION.

SEC. 1317. [**Executive council to assess.**]*—On the first Monday in March in each year the executive council shall assess all the property of each railway*

corporation in this state, excepting the lands, lots and other real estate belonging thereto not used in the operation of any railway.

The bridge across the Mississippi river at Davenport being owned exclusively by the United States, and although used by the C., R. I. & P. R. Co., which company paid half the cost thereof, is not taxable either wholly or in part to the company, and the city of Davenport has no power to levy any tax thereon. *The C., R. I. & P. R. Co. v. The City of Davenport*, 51 Iowa, 451.

This section, providing for the assessment of railway property every year, while real estate is assessed only every alternate year, is not repugnant to section 6 of article 1 of the constitution of the U. S., as a discrimination against railways. *The Central Iowa R'y v. The Board of Supervisors et al.*, 67 Id., 199.

SEC. 1318. [Officers to furnish statement: what it shall contain.]—The president, vice-president, or general superintendent, and such other officers as such council may designate of any corporation operating any railway in this state, shall furnish said council on or before the fifteenth day of February in each year, a statement signed and sworn to by one of such officers, showing in detail for the year ending on January the first preceding:

1. The whole number of miles owned, operated or leased in the state by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind, and the value, located in each county in the state;

2. Also a detailed statement of the number and the value thereof of engines, passenger, mail, express, baggage, freight and other cars, or property used in operating or repairing such railway in this state; and on railways which are part of lines extending beyond the limits of this state, the return shall show the actual amount of rolling stock in use on the corporation's line in the state during the year for which return is made.

The return shall show the amount of rolling stock, the gross earnings of the entire railway, and the gross earnings of the same in this state, and all property designated in the next section, and such other facts as such council may, in writing, require. If such officers fail to make such statement, said council shall proceed to assess the property of the corporation so failing, adding thirty per cent to the assessable value thereof.

SEC. 1319. [How assessment made and value ascertained.]—The said property shall be valued at its true cash value, and such assessment shall be made upon the entire railway within the state, and shall include the right of way, road-bed, bridges, culverts, rolling-stock, depots, station-grounds, shops, buildings, gravel beds, and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January the first, preceding, and any and all other matters necessary to enable said council to make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling-stock and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without the state; such valuation shall be in the same ratio as that of the property of individuals.

SEC. 1320. (As amended by ch. 153, 16th g. a.)—[Statement sent auditor of each county.]—On or before the (twenty-fifth day of March) in each year, said council shall transmit to the county auditor of each county through which any railway may run, a statement showing the length of the main track of such railway within the county, and the assessed value per mile of the same as fixed by a pro rata distribution per mile of the assessed value of the whole property named in the preceding section. Said statement shall be entered on the proper record of the county.

SEC. 1321. [**Duty of auditor, board of supervisors, and county treasurer.**]*—*At the first meeting of the board of supervisors held after said statement is received by the county auditor, they shall make, and cause the same to be entered in proper record, an order, stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township or lesser taxing district in their county through which said railway runs, as fixed by the executive council, which shall constitute the taxable value of said property for taxable purposes, and the taxes on said property when collected by the county treasurer shall be paid over to the person or corporations entitled thereto as other taxes, and the county auditor shall transmit a copy of said order to the city council or trustees of such city, incorporated town or township.

SEC. 1322. [**Taxes levied.**]*—*All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships and lesser taxing districts.

SEC. 1323. [**Shall not apply.**]*—*The provisions of this chapter in relation to transporting of passengers, shall not apply to any railway in this state until the gross earnings of the preceding year, reckoning from the first day of January of each year, shall equal or exceed the sum of four thousand dollars per mile average for all the miles of road operated during the whole of that preceding year.

(CHAPTER 114, LAWS OF 1878.)

TAXATION OF SLEEPING AND DINING CARS.

An Act to tax sleeping and dining cars, amending section 1318, chapter five, title ten of the code.

SECTION 1. [**Company shall return number of cars used.**]*—Be it enacted by the general assembly of the state of Iowa:* That in addition to the matters required to be contained in the statement provided for in section 1318 of the code, such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, and also the number of miles each month that said cars have been run or operated on such railway within the state, and the total number of miles that said cars have been run or operated each month within and without the state.

SEC. 2. [**Executive council shall assess the same.**]*—*The executive council shall, at the time of the assessment of other railway property for taxation, assess for taxation the average number of cars so used by such corporation each month, and the assessed value of said cars shall bear the same proportion to the entire value thereof, that the monthly average number of miles that such cars have been run or operated with the state shall bear to the monthly average number of miles that such cars have been used or operated within and without the state; such valuation shall be in the same ratio as that of the property of individuals.

SEC. 3. [**Manner of assessment.**]*—*The executive council shall, as provided by sections 1318 and 1319 of the code, first assess the value of the property of the corporation using sleeping and dining cars not owned by such corporation, and shall then add to such valuation, the amount of the assessed valuation of said sleeping and dining cars, made as hereinbefore provided, and such aggregate amount shall constitute and be considered the assessed value of the property of such corporation for the purposes of taxation.

Approved March 25, 1878.

(CHAPTER 68, LAWS OF 1876.)

RAILROADS, EXPRESS AND TELEGRAPH COMPANIES.

An Act to facilitate business with railroads, express and telegraph companies. (Additional to code, chapter five, title X: "Of railways.")

SECTION 1. [Shall keep office at convenient point.]—*Be it enacted by the general assembly of the state of Iowa:* That all railroads terminating in Iowa shall establish and maintain at such terminus, general freight and passenger offices (and express and telegraph offices, when operating an independent express or telegraph company), at localities accessible and convenient to the public, and there keep for sale tickets over their respective roads, and in advertising, correctly set forth their true connections, starting or terminal points, time tables and freight tariffs, affording correct information to the business and traveling public.

SEC. 2. [Not complying with section 1, to be punished.]—If any officer, agent, employe or lessee engaged in operating any railroad, express company or telegraph line, terminating in or operated within the state of Iowa, shall refuse or neglect to comply with any of the provisions or requirements of section one (1) of this act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not exceeding five hundred dollars, and may be imprisoned not more than six months.

(Took effect by publication in newspapers March 15, 1876.)

(CHAPTER 163, LAWS OF 1884.)

TO PREVENT ACCIDENTS AT RAILWAY CROSSINGS.

An Act to prevent accidents at railway crossings.

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

SEC. 2. [Penalty: \$100 for school fund.]—Every engineer violating the provisions of the preceding section shall for each offense forfeit one hundred dollars, to be recovered in an action in the name of the state of Iowa, for the benefit of the school fund, and the corporation on whose road such offense is committed shall forfeit for each offense so committed the sum of two hundred dollars, to be recovered in like manner.

Approved April 5, 1884.

(CHAPTER 104, LAWS OF 1884.)

BELLS AND STEAM WHISTLES ON LOCOMOTIVES.

An Act concerning bells and steam whistles on locomotives. (Additional to chapter five, title X of the code.)

SECTION 1. [Bells and whistles.]—*Be it enacted by the general assembly of the state of Iowa:* That a bell and a steam whistle shall be placed on each locomotive

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

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

Approved March 29, 1884.

(CHAPTER 118, LAWS OF 1876.)

RELATING TO THE RELOCATION OF RAILROADS.

An Act to authorize the relocation of railroads.

SECTION 1. [**Railroad company shall file petition, etc.**].—*Be it enacted by the general assembly of the state of Iowa:* Any railroad company desiring to change or remove the line of its road, after the same has been permanently located and constructed, may for that purpose file a petition in the district or circuit court in any one of the counties wherein the change or removal is proposed to be made, describing with convenient accuracy that portion of its line of road which said company seeks to have changed or removed, and asking the court to grant the right or authority to make such change or removal. To this suit, all trustees, mortgagees, or other lien holders, and all townships, cities, and counties which have aided by taxation to build the road, must be made defendants by service of original notice, in the time and manner as provided by law for the service of original notices.

SEC. 2. [**Notice given.**].—In addition to the foregoing notice, a public notice to all whom it may concern, of the time of filing such petition, and of the object thereof and of the term of court at which the application for authority to make the change will be made, and requiring all persons desiring the repayment of money or the return of property, as in this act contemplated, to appear at such court and make good their claim therefor, must be published in a newspaper printed in each county wherein the change is to be made for a period of ten successive weeks before the term of court at which the application is to be made. The court may order any additional notice or publication that it may deem proper.

SEC. 3. [**Before change can be made company must repay moneys, etc.**].—But no railroad company shall be allowed to change or remove the line of its road after its permanent location and construction, without repaying to the proper parties all moneys, and restoring all property, or its value, which were given or donated to the company building the same, exclusively in consideration of the said railroads being located and constructed on such line, nor without first procuring the proper consent of all parties having liens upon said railroad; and also of any township, city, or county that has by taxation or by the issuing of bonds contributed money to aid in the construction thereof; *provided*, that the consent of such township, city, or county shall be necessary with reference only to the change to be made within its own territorial limits.

SEC. 4. [**Court shall make order.**].—If the court is satisfied that due and proper notice has been given, and that the consent of the proper parties, as herein contemplated, has been duly obtained, it shall order and adjudge in favor of all persons who have appeared and established their claims thereto, the repayment of

all moneys, the return of all property, or its value, which were given or donated to the company exclusively in consideration of the roads being located on the line from which it is proposed to make the removal, and shall declare and adjudge all persons not so appearing and establishing their claims as aforesaid, forever thereafter debarred and estopped from setting up or asserting the same. The court may, if the public interest demand it, make an order authorizing the railroad company to change or remove the location of its road, as asked for in the petition, but such order must be on the condition that all claims for the repayment of money, or the return of property, which may be allowed by the court, as herein provided, shall be first paid or satisfied.

SEC. 5. [**Effect of removal on liens, etc.**].—All mortgage liens or other incumbrances on the line of road which the company is authorized by the court to change, shall be and remain valid liens and incumbrances on the line of road to which the change is made, and shall take priority of all other liens and incumbrances upon such new line of road.

SEC. 6. [**Trustees to appear for their respective townships.**].—For the purpose of this act, the trustees of each township shall be served with notice, and shall be authorized to represent and act for their respective townships; *provided*, that no vested right of any person or persons, living on and along the line of any railroad removed under the provisions of this act, shall be defeated or affected by this act; *and provided, further*, that the provisions of this act shall apply only to such railroads as were constructed prior to the year one thousand eight hundred and sixty-six.

SEC. 7. [**Cuts to be filled and banks leveled upon removal.**].—That when any railroad company shall take up their track and relocate the same under the provisions of this act, shall fill up the cuts and level down the banks, or cause the same to be done, within two years from the time of taking up such track.

Approved March 15, 1876.

(CHAPTER 152, LAWS OF 1878.)

RE-LOCATION OF RAILROADS.

An Act to exempt certain railroads from the operation of section 7, of chapter 118, of the laws of the sixteenth general assembly.

SECTION 1. [**Section 7, chapter 118, 16th g. a., not to apply to certain railroads.**].—*Be it enacted by the general assembly of the state of Iowa*: That the provisions of section seven (7), of chapter 118, of the laws of the sixteenth general assembly, shall not apply to any railroad which has its initial point at any town upon the Mississippi river, and which had, in the year 1859, sixty-three miles and no more of completed track from such initial point, and provided that the exemption from the provisions of this section shall only apply a distance of sixty-three miles from the initial point of any such railroad.

Approved March 25, 1878.

(Took effect by publication in newspapers, April 5, 1878.)

(CHAPTER 191, LAWS OF 1880.)

RELATIVE TO CONDEMNATION OF REAL ESTATE.

An act to provide for the condemnation of real estate for channels and ditches, for the drainage and better protection of the right of way and road bed of railroads.

SECTION 1. [**Railroad companies may straighten streams.**]—*Be it enacted by the general assembly of the state of Iowa:* That in all cases where any railroad corporation, organized under the laws of this state or any other state, owning or operating a line of railroad within this state would have the right at this time, by procuring the right of way from the land owner to dig a channel or cut a ditch in such a manner as to change and straighten the course of a stream too frequently crossed by its road, or to protect the right of way and road bed, or promote the safety and convenience of the operation of the road, such railroad company may condemn the right of way as provided in the next section.

SEC. 2. [**How compensation ascertained.**]—Any such railroad corporation desiring the right of way for any of the purposes contemplated in the preceding section, where its officers and the land owner cannot agree upon the compensation to be paid him, or when he refuses to grant the right of way, may cause to be condemned of land belonging to such person a strip or belt of such reasonable width as may be necessary for the channel or ditch so desired, by pursuing in all respects, as near as may be, and so far as applicable, the provisions of law for the condemnation of real estate for right of way for said railroads, as provided in sections 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252 and 1253, of the code of 1873.

SEC. 3. [**Either party may appeal.**]—Either party may appeal from such assessment in the manner provided for appeals from the assessment of the sheriff's jury in the condemnation of real estate for right of way for railroads, and sections 1254, 1255, 1256, 1257, 1258 and 1259 of the code shall be applicable to such appeals.

SEC. 4. [**Intent of act.**]—The true intent of this act is, not to create in favor of a railroad corporation any additional right to divert a water course from its natural channel, but simply to give the right to condemn the land necessary for the right of way in all cases where by conveyance to the railroad corporation it would have the right to dig such channels or ditches.

[**Proviso.**]—*Provided,* That nothing herein shall permit any railroad company to turn the channel of any stream off of any cultivated, or pasture or meadow lands, where said stream only touches said lands at one point, unless it be by the consent of the owner of said land.

(Took effect by publication in newspapers, April 6, 1880.)

A railroad corporation may, under this chapter, condemn land for a right of way for a channel and change the course of a stream, where the safety of the traveling public will be promoted thereby. For such object the land would be taken for a public use, authorizing the exercise of the power of eminent domain, and for that purpose the statute is not in conflict with the constitution. *Reusch v. The C., B. & Q. R. Co.*; *Long v. Same*, 57 Iowa, 637.

(CHAPTER 159, LAWS OF 1884.)

RELATING TO TAXES IN AID OF RAILROADS.

An Act to repeal chapter 123 of the laws of the sixteenth general assembly, and chapters 87 and 173, of the laws of the seventeenth general assembly, and chapter 192 of the laws of the eighteenth general assembly, and chapter 102 of the laws of the nineteenth general assembly, in relation to taxes in aid of railroads, and to enact a substitute therefor.

SECTION 1. [Chapter 102, 19th g. a., amended.]—*Be it enacted by the general assembly of the state of Iowa:* That chapter 123 of the laws of the sixteenth general assembly, and chapters 87 and 173 of the laws of the seventeenth general assembly, and chapter 192 of the laws of the eighteenth general assembly, and chapter 102 of the laws of the nineteenth general assembly, be and the same are hereby repealed, and the following is enacted instead thereof.

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

SEC. 3. [Duties of trustees or council.]—Whenever a petition shall be presented to the council or trustees of any incorporated town or city, or the trustees of any township, signed by a majority of the resident freehold taxpayers of such township, incorporated city or town, asking that the question of aiding any railroad company incorporated under the laws of the state of Iowa in the construction of a projected railroad within this state be submitted to the voters thereof, it shall be the duty of the trustees or council of such incorporated town or city, or trustees of such township, to immediately give notice of a special election by publication in some newspaper published in said incorporated town, city or township, if any be published therein, and if not then in some newspaper published in the county, if any such there be, and also by posting copies of said notice in five public places in such township, incorporated city or town at least ten days before said election, which notice shall specify the time and place of holding said election, the name of the company and the line of the road proposed to be aided, the rate per centum of the tax to be levied, whether one-half of said tax shall be collected the first year and one-half the following year, or the whole thereof be collected in one year, the amount of work required to be done and when and where the same shall be done, to what point said railroad shall be fully completed, and any other conditions which shall be performed before such tax or any part thereof shall become due, collectible and payable, and in no case shall such tax become due, collectible or payable until such railroad is fully completed according to the conditions in said notice; at such election the question of taxation shall be submitted; the form of the ballots shall be "for taxation" and "against taxation," and if a majority of the votes polled be "for taxation" then the recorder of the incorporated town, city or township clerk or clerk of election shall forthwith certify to the county auditor the result of said election, the rate per centum of tax thus voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms and conditions upon which the same when collected is to be paid to the railroad company under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds of the county, and the expense thereof and of publishing said notices and

all the expenses of said election shall be paid by the railroad company to which it is proposed to vote said tax. When such certificates shall have been made and recorded the board of supervisors of the county shall, at the time of levying the ordinary taxes next following, levy such taxes as are voted under the provisions of this act as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, incorporated city or town, indicating in their order thereupon when and in what proportion the same are to be collected and upon what conditions the same are to be paid to the railroad company, a certified copy of which order shall accompany the tax list. Said taxes shall be collected at the time or times specified in said order in the same manner and subject to the same laws after they are collectible as other taxes or as may be stated in the petition and notices for the election.

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

SEC. 5. [**Money to be paid out: how and when.**].—The moneys collected under the provisions of this act shall be paid out by the county treasurer to the treasurer of the railroad company for whom the same was voted upon the orders of the president or managing director thereof at any time after the trustees of such township or trustees or council of such incorporated town or city voting said tax, or a majority of them, shall have certified to the county treasurer that the conditions required of the railroad company and set forth in the notice for the special election at which the tax was voted [**Duties of trustees and council.**] have been complied with, and said township trustees, or trustees or council of such incorporated town or city shall make said certificate, when the said conditions have been complied with sufficiently to entitle the said railroad company to the amount of such orders, or when the said conditions are fully complied with and performed on the part of the railroad company, but if the costs and expenses of holding said election and of recording said certificates shall not have been paid by the railroad company, then the county treasurer shall first deduct from the moneys so collected the amount of said costs and expenses and pay the same over to the parties entitled thereto.

SEC. 6. [**Treasurer to issue certificate to taxpayer.**].—It shall be the duty of the county treasurer, when required in addition to a tax receipt, to issue to each tax-payer, on the payment of any taxes voted under the provisions of this act, a certificate showing the amount of tax so paid, the name of the railroad company entitled thereto and when the same was paid, and the treasurer shall be entitled to charge and receive the sum of twenty-five cents for each certificate so issued. Said certificates are hereby made assignable, and when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid as shown by such certificate in amount showing the sum of one hundred dollars or more of taxes to have been paid for said railroad company, said railroad company shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of said stock, then the holder of said certificates shall be entitled to receive the full number of shares of stock covered by said certificates and may make up and tender in money the balance of any share of said stock when the certificates held by him are not equal in amount to one full share of such stock, the stock for such purpose to be estimated at its par value. Whenever it shall be proposed in the petition and notice calling said election to issue first mortgages,

bonds not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, and not exceeding the sum of sixteen thousand dollars per mile for the ordinary four feet eight and one-half inch gauge, in lieu of stock as herein provided, it shall be lawful to issue said bonds of the denomination of one hundred dollars in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal of said bonds.

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

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

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

Approved April 5, 1884.

Took effect by publication in newspapers.

Chapter 123, laws of 1876, as amended by chapter 173, laws of 1878, providing for the taxation of cities, towns and townships in aid of the construction of railways, held to be constitutional upon the authority of *Stewart v. The Board of Supervisors*, 30 Id., 9, and other late cases. *The Chicago, M. & St. P. R'y Co. v. Shea, County Treasurer, et al.*, 67 Id., 728.

The aggregate amount of tax that can be lawfully voted by a township or incorporated city or town in aid of railroads, under this chapter, is five per centum of the assessed value of the property therein, and when that amount has been once voted, levied and collected, the power conferred by this act is exhausted. *Dumphy v. Supervisors of Humboldt County*, 53 Id., 273.

After township trustees have passed upon the sufficiency of a petition presented to them calling for an election to decide the question of levying a tax in aid of the construction of a railroad, and the election has been ordered, and the tax voted and levied, the validity of such tax cannot be assailed on the ground that the petition was not signed by one-third of the resident tax-payers. *Ryan v. Varga et al.*, 37 Iowa, 78.

The trustees having jurisdiction to decide that question, their decision cannot be collaterally assailed, but like any other judicial determination remains conclusive until reversed or set aside by writ or error, *certiorari* or other direct proceedings provided for that purpose by law. *Id.*

Under chapter 48, laws of 1863, it was held that while it was the duty of the county treasurer to collect and pay into the treasury a tax voted in aid of a railroad, yet the company cannot enforce this duty by *mandamus* until it shows itself fully entitled to the tax by presenting to the treasurer an order of the president or managing director, accompanied by certified estimates of the engineer showing that an amount equal to the tax has been expended by the company within the county. *Harwood et al. v. Case*, 37 Id., 692.

Nor can the treasurer be compelled to pay over a *portion* of the tax upon the presentation of an order, accompanied by a certificate of the engineer that an amount has been expended by the company equal to the amount of the order. *Id.* But see *Cassady v. Levey et al.*, 49 Id., 523.

Where on the question of voting a tax in aid of a railroad, the form of ballots prescribed by the trustees was, "For Taxation" or "Against Taxation," and certain electors cast ballots bearing the words "Against taxation for benefit of railroad companies or any other monopolies to the indebtedness of the poor man"; held, that such ballots should be counted the same as if they had been in the form prescribed by the trustees. *Cattell v. Lowry et al.*, 45 Id., 478.

A tax to aid in the construction of a railroad was voted in the township of K, to be expended in that and two other townships specified. Double the amount of the tax was expended by the company in constructing the road through the township of K, but nothing was expended in either of the other townships; held, that the three townships should be regarded as a unit, and that the tax was not forfeited by the failure to expend any part of it in either of the other townships specified. *Merrill v. Welscher et al.*, 50 Id., 61.

See also *Bonnielfeld v. Bidwell*, 32 Id., 149.

A county acquires a beneficial interest in taxes voted in aid of a railroad and paid to the county treasurer, and cannot be held responsible for their repayment when forfeited by the railroad company. The claim of the tax-payer for the recovery of such taxes is against the fund in the hands of the treasurer, and not against the county, and no order of the board of supervisors is necessary to authorize their repayment. *Barnes v. The County of Marshall*, 56 Id., 20.

The aggregate amount of tax that can be lawfully voted by a township, city or incorporated town in aid of railroads, under chapter 123, laws of 1876, held to be five per centum of the assessed

value of the property therein, and when that amount has been once voted, levied and collected, the power conferred by the statute is exhausted. *Dumphy v. The Board of Supervisors of Humboldt Co.*, 58 Id., 273.

Where a tax was voted in aid of a proposed railroad, but the statute under which it was voted was repealed by the above chapter before the levy was made, and the company in whose favor the tax was voted had not, prior to the repeal, expended any money in reliance upon the tax in constructing the road, and never did construct it, but transferred it by a perpetual lease to another company which did construct it, but there was no assignment or transfer of the tax to such other company, and it did not appear that such company constructed the road relying upon the tax, held that the collection of the tax was properly enjoined. *Barthel v. Meader et al.*, 72 Id., 125.

(CHAPTER 190, LAWS OF 1884.)

DEPOT GROUNDS.

An Act to authorize railway corporations to condemn lands for additional depot grounds. [Additional to code, chapter 5, title X, of railways.]

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

(Took effect by publication in newspapers.)

(CHAPTER 139, LAWS OF 1884.)

UNION RAILWAY DEPOTS.

An Act for union railway depots. [Additional to code, chapter 10, title V.]

SECTION 1. [Union Depots.]—*Be it enacted by the general assembly of the state of Iowa:* In order to facilitate the public convenience and safety in the transmission of freight and passengers from one railway to another and to prevent unnecessary expense and inconvenience attending the accumulation of a number of stations in one place, authority is hereby given to any number of persons or any number of railroad corporations or both persons and railway corporations to form themselves into a body corporate under the general incorporation laws of this state relating to corporations for pecuniary profit, for the purpose of acquiring, establishing, constructing and maintaining at any place in this state, union station houses or depots for freight or passengers, or both, with necessary offices for express, baggage, and postal rooms in the same or separate buildings, railroad tracks and other appurtenances of such depots, and for that purpose may make and file for record articles of association in the manner provided for such corporations in this state, and any railroad company operating a road in this state or interested in the operation of a road in this state, whether organized under the laws of this state or elsewhere, may become stockholder in such corporation in the

same manner an individual might. Such articles may provide for the business of the corporation being conducted under by-laws to be adopted by the stockholders, in which case a copy of such by-laws shall be posted in the passenger or waiting rooms of the depot and in the office of the company.

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

SEC. 3. [**With consent of city council may make necessary connections.**]—Such corporation, with consent of the city council of any city or town in this state in which said depot is located, shall have the right to lay its tracks to make necessary connection with all railways desiring to use such depot upon the streets or alleys of said city, and by and with the consent of such city council may erect such depot upon or across any such street or alley, but no railroad track can thus be located, nor can such depot be so erected, until after due injury to property abutting upon the streets or alleys upon which such railway track is proposed to be located, or such depot is proposed to be erected, has been ascertained and compensation made in the manner provided for taking private property for works of internal improvement in chapter four of title ten of the code, subject to the provisions of section 464 of the code.

SEC. 4. [**Railroads not released from liability for damages.**]—Nothing in this act contained, or in the articles of incorporation or by-laws of the corporation herein provided for, shall in any manner release the railroad companies using such union depots, tracks or appurtenances from the same liability for all damages by injuries to persons, stock, baggage or freight, or for the loss of baggage or freight, in or about said union depot grounds, as if said depot, tracks and appurtenances wholly belonged to and were operated by said railroad companies using the same.

Approved April 3, 1884.

(CHAPTER 169, LAWS OF 1880.)

SLEEPING CARS.

An Act to facilitate business with railroad and sleeping car companies running or operating sleeping cars on lines terminating in this state.

SECTION 1. [**Railroad and sleeping car companies must establish and keep open ticket offices.**]—*Be it enacted by the general assembly of the state of Iowa:* That all railroad and sleeping car companies, running or operating sleepers or sleeping cars within this state, upon railroads terminating therein, shall establish, maintain, and keep open to the public at such termini, ticket offices, at accessible and convenient places, in which they shall keep a diagram of the berths and state-rooms in such sleepers or sleeping cars, and shall at all times, during the daytime, keep such offices open for the sale of tickets for such berths and state-rooms.

SEC. 2. [**Punishment for refusal or neglect.**]—If any officer, agent, employe, or lessee, engaged in operating any sleeper or sleeping car line, terminating or operated within the state of Iowa, shall refuse or neglect to comply with any of the provisions or requirements of this act, he shall be deemed guilty

of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding five hundred dollars, and may be imprisoned not more than six months.

(Took effect by publication in newspapers April 3, 1880.)

(CHAPTER 186, LAWS OF 1880.)

RAILROAD COMPANIES TO RECORD EVIDENCE OF TITLE TO LANDS.

An Act to require railroad companies holding lands by grant, to place evidence of their title to such lands on record.

SECTION 1. [**Title must be recorded.**]*—Be it enacted by the general assembly of the state of Iowa:* That each and every railroad company which owns or claims to own lands in the state of Iowa, granted by the government of the United States or the state of Iowa, to aid in the construction of its railroad, where it has not already done so, shall place on file and cause the same to be recorded within three months after the taking effect of this act, in each county wherein the lands so granted are situated, evidence of its title, or claim of title, whether the same shall consist of patents from the United States or certificates from the secretary of the interior or governor of the state of Iowa, or the proper land office of the United States or the state of Iowa. Where no patent was issued, reference shall be made in said certificate to the act or acts of congress and the acts of the legislature of the state of Iowa, granting such lands, giving the date of said acts, and date of their approval under which claim of title is made: *Provided*, that where the certificate of the secretary of the interior, or the patents, as the case may be, contain lands situated in more than one county, that the register of the state land office shall, upon application of any railroad company, or grantee, prepare and furnish to be recorded as aforesaid, a list of all the lands situated in any one county so granted, patented or certified; and when so recorded, said records, or a duly authenticated copy thereof, may be introduced in any court as evidence, as provided in section 3702 of the code.

SEC. 2. Such evidence of title shall be filed with the recorder of deeds of the county in which the lands are situated, and it shall be the duty of the recorder to record the same, and shall place an abstract thereof upon the index of deeds, so as to show the evidence of title, and the evidence thereof shall be constructive notice to all persons, as provided in other cases of entries upon said index, and the recorder shall receive the same fees as for recording other instruments.

Approved March 27, 1880.

(CHAPTER 32, LAWS OF 1880.)

STREET RAILWAY COMPANIES.

An Act granting street railway companies, organized under the laws of this state, the right of way over certain public highways.

SECTION 1. [**Company shall put highway in good repair.**]*—Be it enacted by the general assembly of the state of Iowa:* That any street railway company now or hereafter organized under the laws of this state to operate a street railway in any city or incorporated town in this state, for the purpose of extending its railway beyond the limits of such city or town, may locate, build and operate, either by animal or motive power, its road over and along any portion of a highway which is of width of one hundred feet or more. In such cases said company, as soon as practicable, shall put said highway in as good repair and condition as the

same was before its use for the purpose herein contemplated; and boards of supervisors are hereby authorized to accept for highway purposes, under this act, conveyances of land adjoining any highway or part thereof, sufficient to increase said highway to the width of one hundred feet.

SEC. 2. [Company shall pay all damages.]—Unless the owners of the land abutting each *site* [side] of said highway shall consent to its use as contemplated in section one (1), said railway company shall pay all damages sustained by such land owners by reason of building said road, which damages shall be ascertained and paid in the same manner as provided for taking private property for works of internal improvement. Said company shall also be liable for all damages sustained by any one resulting from the carelessness of its officers, agents, or servants, in the construction or operation of its railway.

(Took effect by publication in newspapers, March 16, 1880.)

Section 1 of chapter 32, laws of 1880, granting the right to construct street railways upon any highway of the width of one hundred feet or more, legalizes a boulevard as a highway of one hundred and twenty feet in width, and also legalizes a street railway to be built thereon. *Linn County v. Hewitt et al.*, 55 Iowa, 505.

(CHAPTER 128, LAWS OF 1880.)

RELATIVE TO FOREIGN RAILROAD COMPANIES.

An Act to authorize railroad companies organized in other states to extend their railroads into this state.

SECTION 1. [Railroads organized in other states become possessed of rights of Iowa companies.]—*Be it enacted by the general assembly of the state of Iowa:* That any railroad company organized or created by or under the laws of any other state, and owning or operating a line or lines of railroad in such state, is hereby authorized to extend and build its road, or any branches thereof, into the state of Iowa; and such railroad company shall have and possess all the powers, franchises, rights and privileges, and be subject to the same liabilities, of railroad companies organized and incorporated under the laws of this state, including the right to sue, and the liability to be sued, the same as railroads organized under the laws of this state; *provided*, such railroad corporation shall file with the secretary of the state of Iowa a copy of its articles of incorporation, if incorporated under a general law of such state, or a certified copy of statute laws of such state incorporating such company, where the charter of such railroad corporation was granted by statute of such state.

Approved March 25, 1880.

(CHAPTER 24, LAWS OF 1884.)

STATION HOUSES AT RAILROAD INTERSECTIONS.

An Act to provide for the erection and maintaining of station houses and connections at the points of intersections or crossing of two or more railroads.

SECTION 1. [Erection.]—*Be it enacted by the general assembly of the state of Iowa:* All railroad corporations shall at all points of connection crossing, or intersection with the roads of other corporations, unite with such corporations in establishing and maintaining suitable platforms and station houses for the convenience of passengers desiring to transfer from one road to the other, and for the transfer of passengers, baggage, or freight, whenever the same shall be ordered by

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

SEC. 2. [**Penalty.**].—Any railroad corporation or company which, after having received ninety days' notice by the railroad commissioners, shall neglect or refuse to comply with the provisions of section one of this act shall for every day such corporations or company fails, neglects or refuses to comply therewith, forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the state of Iowa, for the use of the school fund of the county wherein such crossing or intersection is situated, and it shall be the duty of the prosecuting attorney of the proper judicial district to prosecute for and recover the same.

(CHAPTER 28, LAWS OF 1884.)

TAXATION OF CERTAIN RAILROAD LANDS.

An Act to provide for the assessment and taxation of lands within the state of Iowa, granted to railroad companies or corporations which have become earned but not patented.

SECTION 1. [**Land earned but not patented, taxed.**].—*Be it enacted by the general assembly of the state of Iowa:* That all lands lying within the state of Iowa, which have been heretofore granted or may be hereafter granted to any railroad company or corporation by the general government, or by the general government to the state of Iowa, and by the state granted to any such railroad company or corporation, shall be subject to assessment and taxation within the counties wherein situated from and after the year the same may be earned, to the same extent as though patents had been issued to, and the title of record was in such railroad companies or corporations. The fact that such lands are claimed by more than one such company or corporation shall in no way affect the liability of such lands to assessment and levy, *provided*, nothing herein contained is intended to subject any lands to taxation for the past that were not taxable prior to the passage of this act.

SEC. 3. (Sec. 2.) [**Evidence.**].—Parol evidence shall be admissible to prove when said lands were earned.

SEC. 4. (Sec. 3.) [**Repealing clause.**].—All acts or parts of acts inconsistent with this act are hereby repealed.

Approved March 20, 1884.

(CHAPTER 165, LAWS OF 1886.)

RELATING TO SALE AND TRANSFER OF GRAIN.

An Act regulating the sale and transfer of grain in elevators and other places of storage.

SECTION 1. [Grain dealers required to file declaration.]—*Be it enacted by the general assembly of the state of Iowa:* That all persons owning and dealing in corn, wheat, oats, rye, barley, and other grain, who may desire to sell, transfer, assign, pledge or hypothecate the same, or any part thereof, by issuing elevator or warehouse receipts, or certificates, are hereby required to file with the recorder of deeds, in the county where any such grain is stored, a written declaration, setting forth the name and residence of such person; that such person designs to own, keep or control a warehouse, elevator, crib, or other place for the storage and keeping of grain, an accurate description of the place and locality where the same is to be kept, owned or controlled, and of the elevator, warehouse, crib, or other place, the dimensions and quality thereof, and the names of any other persons than the one making the declaration, having any interest in the land or structure; such declaration shall be duly acknowledged and filed for record in the same manner as instruments for the conveyance of personal property.

SEC. 2. [License given to deal in grain.]—Any person owning, keeping or controlling any such elevator, warehouse, crib, or other place for the storage of grain, and who has filed the declaration as provided in section 1 hereof, may execute and issue bills, certificates, or warehouse receipts, for any grain that may actually be in said elevator, warehouse, crib, or other place described in his said declaration, or for any part or quantity thereof, and may hereby sell, convey, assign, transfer, pledge, or encumber said grain, or any part or quantity thereof. But such bill, certificate, or warehouse receipt, shall have written or printed on it a statement that the one issuing it has complied with section 1 hereof, with the book and page in the recorder's office where the same is recorded, the name and address of the party issuing it, and to whom issued, the location and description of the premises and elevator, warehouse, crib, or other place where the grain is stored, the date of issuance, and the quantity of grain and its kind, and shall be signed by the person issuing it; and bills, certificates and receipts issued in the manner and form aforesaid, shall operate and have the effect to transfer the title to the grain described in them, and vest the same in the holders thereof, and the holders thereof may sell, assign, transfer or otherwise dispose of the same in like manner, without the purchaser, assignee, or holder being required to have the same recorded, or give notice to protect himself against existing creditors or subsequent purchasers, as required in other cases where property is left to the possession of the vendor.

SEC. 3. [Record of sales and transfers to be kept.]—Every person making the declaration and issuing receipts and certificates for grain as herein contemplated, shall keep a regular well bound book, wherein shall be kept and entered, at the date of issuance thereof, a full account of each and every receipt or certificate, with the date of issuance, number, name of person to whom issued, the quantity and kind of grain covered by such; and such book shall be subject to the inspection and examination of each and every person holding any such receipt or certificate, his agent or attorney. Any person wrongfully altering, changing, or willfully destroying any such book, shall, upon conviction, be fined not exceeding one thousand dollars, or imprisonment in the county jail not exceeding one year; and any person issuing any receipt or certificate, without entering and preserving in such book the required memorandum, shall be fined, upon conviction, not to exceed

one hundred dollars for each certificate so issued, and be liable for all damages sustained in consequence of such omission.

SEC. 4. [**For issuing receipt on grain fraudulently.**—Any person who shall knowingly issue any such receipt or certificate for grain, when the grain described is not actually in the elevator, warehouse, crib, or other place mentioned therein, or shall knowingly, with intent to defraud, issue a second receipt or certificate for grain, for which, or part of which, any former receipt or receipts, certificate or certificates, are outstanding, uncanceled and valid and subsisting, shall, besides being liable for all damages caused by such second such issue, be guilty of felony, and for each offense be fined not to exceed one thousand dollars, and imprisonment in the penitentiary not exceeding five years.

SEC. 5. [**Removal of grain on which receipt is outstanding.**—Any person owning, possessing or controlling any elevator, warehouse, crib or other place for storing grain, as provided in this act, who shall sell or remove, or knowingly permit to be removed therefrom, any grain for which any receipt or certificate has been issued and is outstanding, held by any other person than the person issuing the same, and any person knowingly receiving, or helping to remove the same, shall be guilty of grand larceny, and punished as provided by statute, and such grain so removed shall be deemed and regarded as stolen property, and may be pursued and recovered, or its value recovered by the owner and holder of said receipt or certificate.

(Took effect without the approval of the governor, April 13, 1886.)

(CHAPTER 28, LAWS OF 1888.)

TO REGULATE RAILROADS AND OTHER COMMON CARRIERS.

An Act to regulate railroad corporations and other common carriers in this state, and to increase the powers and further define the duties of the board of railroad commissioners, in relation to the same, and to prevent and punish extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this state, and to prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal section 11 of chapter 77 of the acts of the seventeenth general assembly in relation to the board of railroad commissioners and all laws in force in direct conflict with the provisions of this act.

SECTION 1. [**Application of the provisions of this act.**—*Be it enacted by the general assembly of the state of Iowa:* The provisions of this act shall apply to the transportation of passengers and property, and to receiving, delivering, storage and handling of property wholly within this state, and shall apply to all railroad corporations and railway companies, express companies, car companies, sleeping-car companies, freight or freight line companies and to any common carrier or carriers engaged in this state in the transportation of passengers or property by railroad therein, and shall also be held to apply to shipments of property made from any point within the state to any point within the state, whether the transportation of the same shall be wholly within this state or partly within this and an adjoining state or states. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any corporation, receiver, trustee or other person operating a railroad whether owned or operated under contract, agreement, lease or otherwise, and the term "transportation" shall include all instrumentalities of shipment or carriage, and the term "railroad corporation" contained in this act shall be deemed and taken to mean all corporations, companies or individuals now

owning or operating, or which may hereafter own or operate any railroad in whole or in part in this state; and the provisions of this act shall apply to all persons, firms and companies and to all associations of persons whether incorporated or otherwise, that shall do business as common carriers upon any of the lines of railway in this state (street railways excepted) the same as to railroad corporations herein mentioned.

SEC. 2. [**Unjust discrimination defined.**].—All charges made for any service rendered or to be rendered in the transportation of passengers or property in this state, as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

SEC. 3. [**Penalty.**].—That if any common carrier subject to the provisions of of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful; this section, however, is not to be construed as prohibiting a less rate per 100 pounds in a car-load lot than is charged, collected or received for the same kind of freight in less than a car-load lot.

SEC. 4. [**Preference or advantage not to be given.**].—That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever; *provided, however*, that nothing herein shall be construed to prevent any common carrier from giving preference as to time of shipment of live stock, uncurd meats or other perishable property. All common carriers subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and switching of cars, and the receiving, forwarding and delivering of passengers and property to and from their several lines, and to and from other lines and places connected therewith; and shall not discriminate in their accommodations, rates and charges between such connecting lines. And any common carrier may be required to switch and transfer cars for another for the purpose of being loaded or unloaded, upon such terms and conditions as may be prescribed by the board of railroad commissioners.

SEC. 5. [**No greater charge to be made for a short than a long haul.**].—That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property for a shorter than for a longer distance over its railroad, all or any portion of the shorter haul being included within the longer. And said common carrier shall charge no more for transporting freight to or from any point on its railroad than a fair and just rate as compared with the price it charges for the same kind of freight transportation to or from any other point.

SEC. 6. [**Freight pooling forbidden.**].—That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freight of different and competing railroads, or divide between them the aggre-

gate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

SEC. 7. [**Schedules of rates and fare kept for inspection.**—That every common carrier, subject to the provisions of this act, shall print and keep for public inspection, schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and which are in force at the time upon its railroad as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier, shall plainly state the places upon its railroads between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately any terminal charges and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type of at least the size of ordinary pica, and a copy for the use of the public shall be kept in every freight office and passenger station, on such railroad, where it can be conveniently inspected, and such common carrier shall keep a printed notice posted in every such freight office and passenger station, indicating where therein such schedules can be found. No advance shall be made in the rates, fares and charges which have been established as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedules then in force, and the time when the increased rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reduction in such published rates, fares or charges may be made without previous public notice, but whenever any such reduction is made, notice of the same shall immediately be publicly posted, and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection. And when any such common carrier shall have established and published its rates, fares and charges, in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith than is specified in such published schedule of rates, fares and charges as may at the time be in force. Every common carrier subject to the provisions of this act shall file with the board of railroad commissioners of this state, copies of its schedules of rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commissioners of all changes made in the same. Every such common carrier shall also file with said commissioners copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes in this state operated by more than one common carrier, and the several common carriers operating such lines or routes have established joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commissioners. Such joint rates, fares and charges on such continuous lines so filed as aforesaid, shall be made public by such common carriers, when directed by said commissioners, in so far as may in the judgment of the commissioners be deemed practicable; and said commissioners shall from time to time prescribe the measures of publicity which shall be given to such rates, fares and charges, or to such part of them as they may deem it practicable for such com-

mon carriers to publish, and the places in which they shall be published; but no common carrier, party to any such joint tariff, shall be liable for the failure of any other common carrier party thereto, to observe and adhere to the rates, fares or charges thus made and published. If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares and charges as provided in this section, or any part of the same, such common carriers shall, in addition to other penalties herein prescribed, be subjected to a writ of mandamus to be issued by any district court of this state in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed. And if such common carrier be a foreign corporation, then such writ may be issued by any district court in the judicial district where such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section, and such writ shall issue in the name of the state of Iowa, at the relation or upon the petition of the said board of railroad commissioners of this state; and failure to comply with its requirements shall be punishable as and for a contempt; and shall make said corporation liable to a penalty of five hundred dollars (\$500.00) for each day's failure to comply, and when any such writ of mandamus shall be so applied for by said commissioners, no bond shall be required of them by any court or judge, in which or before whom any such application may be made.

SEC. 8. [**Combinations against continuous transit.**—That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract or agreement, expressed or implied, to prevent by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination in this state; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

SEC. 9. [**Penalty for violation or omission.**—That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing, in this act required to be done, such common carrier shall be liable to the person or persons injured thereby, for three times the amount of damages sustained in consequence of any such violation of the provisions of this act, together with costs of suit and a reasonable counsel or attorney's fee, to be fixed by the court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case; *provided*, that in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section, and that no suit shall be brought until the expiration of fifteen days after such demand.

SEC. 10. [**Complaint to railroad commissioners, etc.**—That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act, may either make complaint to the board of railroad commissioners of this state or may bring suit in his or their own behalf for the recovery of damages for which any such common carrier may be liable under the provisions of this act, in any court of this state of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies at the same time.

[**Attendance of witnesses and evidence.**—In any such action brought for the recovery of damages, the court before whom the same shall be pending may

compel any director, officer, receiver, trustee or agent of the corporation or company, defendant in such suit, to attend, appear and testify in such case, and may compel the production of books and papers of such corporation or company party to any such suit; the claims that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person or witness from testifying or producing said books and papers; but such evidence or testimony shall not be used against such person in any way on the trial of any criminal proceedings.

SEC. 11. [**Violation by individual or agent, and penalty.**]-That except as otherwise specially provided for in sections twenty-three to twenty-eight inclusive, of this act, and unless relieved from the consequences of a violation of the law as provided in section fifteen of this act, any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for, or employed by such corporation, who, alone or with any other corporation, company, person or party, shall willfully do, or cause to be done, or shall willingly suffer or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this act required to be done, or shall cause or willingly suffer, or permit any act, matter or thing so directed or required by this act to be done, not to be so done, or shall aid or abet any such omission, or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof in any district court of this state of competent jurisdiction, be subject to a fine of not to exceed five thousand dollars (\$5,000) and not less than five hundred dollars (\$500) for each offense.

SEC. 12. [**Commissioners may inquire into business of common carriers.**]-That it shall be the duty of, and the board of railroad commissioners of this state shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the said commissioners to perform the duties and carry out the object for which said board was created, and which are contemplated by this act; and for the purposes of this act the said commissioners shall have power to require the attendance and testimony of witnesses, and the production of all books, papers, tariffs, schedules, contracts, agreements and documents relating to any matter under investigation, and to that end may invoke the aid of any court of this state in requiring the attendance and testimony of witnesses and the production of books, papers and document under the provisions of this section. And any court of this state, within the jurisdiction of which such inquiry is carried on, shall, in case of contumacy, or refusal to obey a subpoena, or other process issued to any common carrier or person subject to the provisions of this act, or other person, issue an order requiring such common carrier, or other person, to appear before said commissioners (and produce books and papers if so ordered) and give evidence touching or in relation to the matter in question; and any failure to obey such order of the court shall be punished by such court as a contempt thereof; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person or witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. 13. [**Complaint: mode of entering and making.**]-That any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, complaining of anything

done or omitted to be done, by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said commissioners by petition, which shall briefly state the facts whereupon a statement of the complaint thus made, with the damages, if any are alleged, shall be forwarded by the said commissioners to such common carrier who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time to be specified by the commissioners. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, or shall correct the wrong complained of, said carrier shall be relieved of liability to the complainant only for the particular violation of the law thus complained of. If such common carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the said commissioners to investigate the matters complained of in such manner and by such means as said commissioners shall deem proper, and said commissioners, whenever they have sufficient reason to believe that any common carrier is violating any of the provisions of this act, shall at once institute an inquiry in the same manner, and to the same effect, as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant or complainants or petitioners.

SEC. 14. [**Investigations: report of findings.**].—That whenever an investigation shall be made by said commissioners after notice as provided by section 13 of this act, it shall be their duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commissioners are based, together with its or their recommendation or orders as to what reparation, if any, should be made by the common carrier to any party, or parties, who may be found to have been injured; and such finding, so made, shall thereafter in all judicial proceedings be deemed and taken as *prima facie* evidence as to each and every fact found. All reports of investigation made by said commissioners shall be entered of record, and a copy thereof shall be furnished to the party who may have complained and any other person or persons directly interested, and to any common carrier that may have been complained of.

SEC. 15. [**Findings of the commissioners.**].—That if in any case in which an investigation shall be made by said commissioners it shall be made to appear to the satisfaction of the commissioners, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act or of any law cognizable by said commissioners by any common carrier, or that any injury or damages has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation, it shall be the duty of said commissioners forthwith to cause a copy of their report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time to be specified by the commissioners; and if within the time specified it shall be made to appear to the commissioners that such common carrier has ceased from such violation of law and has made reparation for the injury found to have been done in compliance with the report and notice of the commissioners, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commissioners and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

SEC. 16. [**Refusal or neglect to obey board of commissioners' requirements.**].—That whenever any common carrier as defined in and subject to the provisions of this act shall violate or refuse or neglect to obey any lawful order or requirement of the said board of railroad commissioners, it shall be the duty of said commissioners, and lawful for any company or person interested in such order or

requirement to apply in a summary way, by petition to the district or superior court in any county of this state in which the common carrier complained of has its principal office, or in any county through which its line or road passes or is operated, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said commissioners shall be *prima facie* evidence of the matter therein, or in any order made by them stated; and if it be made to appear to such court on such hearing or on the report of any such person or persons, that the order or requirement of said commissioners drawn in question, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commissioners and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such courts to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of one thousand (\$1,000.00) dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such monies (moneys) shall, upon the order of the court, be paid into the treasury of the county in which the action was commenced and one-half thereof shall be transferred by the county treasurer to the state treasury; and the payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order, in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court, saving to the commissioners and any other party or person interested the right of appeal to the supreme court of the state under the same regulations now provided by law in relation to appeals to said court as to security for such appeal, except that in no case shall security for such appeal be required when the same is taken by said commissioners; but no appeal to said supreme court shall operate to stay or supersede the order of the court, or the execution of any writ or process thereon; and such court may in every such matter order the payment of such costs and attorney and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented, or be prosecuted by the said commissioners, or by their direction it shall be the duty of the attorney general of the state to prosecute the same, and in such prosecution he shall have the right to have the assistance of any county attorney of the county in which any such proceedings are instituted, and it is hereby made the duty of any such county attorney to render

such assistance; and the costs and expenses on the part of said commissioners of any such prosecution shall be paid out of the appropriations for the expenses of said board of commissioners.

SEC. 17. [Commissioners empowered to make schedules.]—The board of railroad commissioners of this state are hereby empowered and directed to make for each of the railroad corporations, doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads, and said power to make schedules shall include the power of classification of all such freights, and it shall be the duty of said commissioners to make such classification; *provided*, that the said rates of charges to be so fixed by said commissioners shall not in any case exceed the rates which are or may hereafter be established by law; and said schedules so made by said commissioners, shall in all suits brought against any such railroad corporations, wherein is in any way involved the charges of any such railroad corporation for the transportation of any freight or cars or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as *prima facie* evidence that the rates therein fixed are reasonable and just maximum rates of charges for the transportation of freight and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedules, subject to the same provision that the rates fixed are not to be higher than now or hereafter established by law. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause notice thereof to be published for two successive weeks in some public newspaper published in the city of Des Moines in this state, which notice shall state the date of the taking effect of said schedule, and said schedule shall take effect at the time so stated in such notice and a printed copy of said revised schedule shall be conspicuously posted by such common carrier in each freight office and passenger depot upon its line or lines. All such schedules, so made, shall be received and held in all such suits as *prima facie* the schedule of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of said railroad commissioners that the same is a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that notice of making the same has been published as required by law; *provided*, that before finally fixing and deciding what the original maximum rates and classification shall be, it shall be the duty of the railroad commissioners to publish ten days notice in two daily papers published in Des Moines, setting forth in such notice that at a certain time and place they will proceed to fix and determine such maximum rates and classification; and they shall at such time and place and as soon as practicable afford to any person, firm, corporation or common carrier who may desire it an opportunity to make an explanation or showing or to furnish information to said commissioners on the subject of determining and fixing such maximum rates and classification; and in any event the original schedule of rates and classification of freights on all lines of railroads in Iowa shall be fixed and shall go into effect within sixty days from the taking effect of this act.

SEC. 18. [Investigation of violation of schedule.]—Whenever any person upon his own behalf, or class of persons similarly situated, or any firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, shall make complaint to said board of railroad commissioners that the rate charged or published by any railroad company, or the maximum rates fixed by said commissioners in the schedules of rates made by them under the provisions of section 17 of this act, or the maximum rate that now or hereafter may be fixed by law is unreasonably high or discriminating, it shall be the duty of said commissioners to immediately investigate the matter of such com-

plaint. If such complaint appears to be well founded and not trivial in character the board shall fix a day for hearing the same and shall notify the railroad company of the time and place of such hearing by mailing a notice, properly directed, to any division superintendent, general or assistant superintendent, general manager, president or secretary of such company, which notice shall contain the substance of the complaint so made, and the board shall also notify the person or persons complaining of such time and place.

SEC. 19. [**Hearing of case as to violation.**—Upon such hearing so provided for, the said commissioners shall receive whatever evidence, statements or arguments either party may offer or make pertinent to the matter under investigation; and the burden of proof shall not be held to be upon the person or persons making the complaint, but the commissioners shall add to the showing made at such hearing whatever information they may then have, or can secure from any source whatsoever, and the person or persons complaining shall be entitled to introduce any published schedules of rates of any railroad company, or evidence of rates actually charged by any railroad company for substantially the same kind of service, whether in this or any other state; and the lowest rates published or charged by any railroad company for substantially the same kind of service, whether in this or any other state, shall, at the instance of the person or persons complaining, be accepted as *prima facie* evidence of a reasonable rate for the services under investigation, and if the railroad company complained of is operating a line of railroad beyond the state of Iowa, or if it appears that it has a traffic arrangement with any such railroad company, then the commissioners, in determining what is a reasonable rate, shall take into consideration the charge made or rate established by such railroad company or the company with which it has traffic arrangements for carrying freight from beyond the state to points within the state and from within the state to points beyond (the) state; and if such company be operating a line of railway beyond the state they shall also take into consideration the rate charged or established for a substantially similar or greater service by such company in any other state in which said railroad company operates a line of railway.

SEC. 20. [**Decision of the commissioners in the matter.**—After such hearing and investigation the said commissioners shall fix and determine the maximum charge to be thereafter made by the railroad company or common carriers complained of, which charge shall in no event exceed the one now or hereafter fixed by law, and the said commissioners shall render their decision in writing, and shall spread the same at length in the record to be kept for that purpose; such decision shall specifically set out the sums or rate which the railroad company or common carrier, so complained of, may thereafter charge or receive for the service therein named and including a classification of such freight, and the said commissioners shall not be limited in their said decision and the schedule to be contained therein to the specific case or cases complained of, but it shall be extended to all such rates between points in this state and whatever part of the line of railway of such company or common carrier within this state as may have been fairly within the scope of such investigation, and any such decisions so made and entered on record of said commissioners, including any such schedules and classifications, shall, when duly authenticated, be received and held in all suits brought against any such railroad corporation or common carrier wherein is in any way involved the charges of any such corporation or carrier mentioned in said decisions, in any of the courts of this state, as *prima facie* evidence that the rates therein fixed are reasonable maximum rates, the same as the schedules made by said commissioners as provided in section 17 hereof; and the rates and classifications so established after such hearing and investigation shall from time to time thereafter, upon complaint duly made, be subject to revision by said commissioners the same as any other rates and classifications.

SEC. 21. [**Conduct of proceedings.**]—That the said board of railroad commissioners may in all cases conduct its proceedings, when not otherwise particularly prescribed by law, in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the commissioners shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said commissioners may from time to time make or amend such general rules, or orders, as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform as nearly as may be to those in use in courts of this state. Any party may appear before said board of commissioners and be heard in person or by attorney. Every vote and official action of said board of commissioners shall be entered of record and its proceedings shall be public upon the request of either party or any person interested. Said board of railroad commissioners shall have an official seal, which shall be judicially noticed, and every commissioner shall have the right to administer oaths and affirmations in any proceeding pending before said board.

SEC. 22. [**Annual report required.**]—The said board of railroad commissioners is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such report shall be made and to require from such carriers specific answers to all questions upon which said commissioners may need information. Such annual reports shall show in detail the amount of the capital stock issued, the amounts paid therefor and the manner of the payment of the same; the dividends paid, the surplus fund if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the costs and value of the carrier's property, franchises and equipment; the number of employes and the salaries paid each class; the amounts expended for improvements each year, how and where expended and the character of such improvements; the earnings and receipts from each branch of business, and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year including an annual balance sheet. Such report shall also contain such information in relation to rates or regulations, concerning fares or freights, or agreements, arrangements, or contracts, with other common carriers as the commissioners may require; and the said board of commissioners may within its discretion for the purpose of enabling it the better to carry out the purpose of this act, (if in the opinion of the commissioners it is practicable to prescribe such uniformity and methods of keeping accounts) prescribe a period of time within which all common carriers subject to the provisions of this act shall have as near as may be a uniform system of accounts and the manner in which such accounts shall be kept.

SEC. 23. [**Extortion and penalty.**]—If any railroad corporation or common carrier subject to the provisions of this act shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description or for the use and transportation of any railroad car upon its track, or any of the branches thereof, or upon any railroad within this state which it has the right, license or permission to use, operate or control, or shall make any unjust and unreasonable charge prohibited in section two (2) of this act, the same shall be deemed guilty of extortion, and shall be dealt with as hereinafter provided, and if any such railroad corporation, (or common carrier) shall be found guilty of any unjust discrimination as defined in section three (3) of this act, upon conviction thereof, shall be dealt with as hereinafter provided.

SEC. 24. [**Discrimination defined and punished.**]—If any such railroad corporation shall charge, collect or receive for the transportation of any passenger or freight of any description upon its railroad for any distance within this state, a greater amount of toll or compensation than is at the same time charged, collected or

received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same railroad, or if it shall charge, collect or receive at any point upon its railroad a higher rate of toll or compensation for receiving, handling or delivering freight of the same class and quantity, than it shall at the same time charge, collect or receive at any other point upon the same railroad; or if it shall charge, collect or receive for the transportation of any passenger or freight of any description over its railroad a greater amount as toll or compensation than shall at the same time be charged, collected or received by it for the transportation of any passenger or like quantity of freight of the same class being transported in the same direction over any portion of the same railroad of equal distance; or if it shall charge, collect or receive from any person or persons a higher or greater amount of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for receiving, handling or delivering freight of the same class and like quantity, at the same point upon its railroad; or if it shall charge, collect or receive from any person or persons, for the transportation of any freight upon its railroad, a higher or greater rate of toll or compensation than it shall, at the same time, charge, collect or receive from any other person or persons, for the transportation of the like quantity of freight of the same class, being transported from the same point in the same direction, over equal distance of the same railroad, or if it shall charge, collect or receive, from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, for any distance, a greater amount of toll or compensation than is at the same time charged, collected or received from any other person or persons, for the use and transportation of any railroad car of the same class or number, for a like purpose, being transported in the same direction, over a greater distance of the same railroad; or if it shall charge, collect or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, a higher or greater compensation in the aggregate, than it shall, at the same time, charge, collect or receive from any other person or persons, for the use and transportation of any railroad car or cars of the same class for a like purpose, being transported from the same original point, in the same direction, over an equal distance of the same railroad; all such discriminating rates, charges, collection or receipts, whether made directly, or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken, against such railroad corporation, as *prime facie* evidence of the unjust discrimination prohibited by the provisions of this act; and it shall not be deemed a sufficient excuse or justification of such discrimination on the part of said railroad corporation, that the railway station or point at which it shall charge, collect or receive less compensation in the aggregate for the transportation of such passenger or freight, or for the use and transportation of such railroad car the greater distance than for the shorter distance, is a railway station or point at which then exists competition with any other railroad or means of transportation. This section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight and passenger rates. The provisions of this section shall extend and apply to any railroad, the branches thereof, and any road or roads which any railroad corporation has the right, license or permission to use, operate or control wholly or in part, within this state; *provided, however*, that nothing herein contained shall be construed as to prevent railroad corporations from issuing commutation, excursion or thousand mile tickets: provided the same are issued alike to all applying therefor.

SEC. 25. [Discrimination as to cars.]—It shall be unlawful for any such common carrier to charge, collect, demand or receive more for transporting a car of freight than it at the same time charges, collects, demands or receives per car for several cars of a like class of freight over the same railroad, for the same distance, in the

same direction, or to charge, collect, demand or receive more for transporting a ton of freight than it charges, collects, demands or receives per ton for several tons of freight under a carload, of a like class of freight over the same railroad for the same distance, in the same direction, or to charge, collect, demand or receive more for transporting a hundred pounds of freight than it charges, collects, demands or receives per hundred for several hundred pounds of freight, under a ton, of a like class of freight over the same railroad, for the same distance, in the same direction; all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad company as *prima facie* evidence of the unjust discrimination prohibited by this act; *provided, however*, that for the protection and development of any new industry within this state, such railroad company may grant concession or special rates for any agreed number of car loads, but such special rates aforesaid shall first be approved by the board of railroad commissioners, and a copy thereof filed in the office thereof.

SEC. 26. [**Discrimination as to passengers, etc.**].—Any such railroad corporation guilty of extortion or making any unjust discrimination as to passengers or freight rates or the rates for the use and transportation of railroad cars or in receiving, handling or delivering freights, shall upon conviction thereof be fined in any sum not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) for the first offense; and for every subsequent offense ten thousand dollars (\$10,000), such fine to be imposed in a criminal prosecution by indictment, or shall be subject to the liability prescribed in the next succeeding section, to be recovered as therein provided.

SEC. 27. [**Penalty for discrimination.**].—Any such railroad corporation guilty of extortion or of making any unjust discrimination as to passenger or freight rates or the rates for the use and transportation of railroad cars, or in receiving, handling or delivering freights, shall forfeit and pay to the state of Iowa not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) for the first offense, and not less than five thousand dollars (\$5,000) nor more than ten thousand dollars (\$10,000) for every subsequent offense, to be recovered in a civil action by ordinary proceedings instituted in the name of the state of Iowa. And the release from liability or penalty provided for in section 15 of this act shall not apply to either a criminal prosecution under the last preceding section or a civil action brought under this section.

SEC. 28. Whenever said railroad commissioners have good reason to believe that any railroad corporation or common carrier subject to the provisions of this act has been guilty of extortion or unjust discrimination, and thereby become liable to the penalties prescribed in sections 26 and 27 hereof, it shall be their duty to immediately cause suits to be commenced and prosecuted against any such railroad corporation or common carrier. Such suits and prosecutions may be instituted in any county of this state through or into which the line of the railroad corporation sued for violation of this act may extend. And such railroad commissioners are hereby authorized, when in their judgment it is necessary so to do, to employ counsel to assist the attorney-general in conducting such suit on behalf of the state. No such suit commenced by said commissioners shall be dismissed unless the said commissioners and the attorney-general shall consent thereto. And the court may, in its discretion, give preference to such suits over all other business except criminal cases.

SEC. 29. [**Handling of property for United States or the state.**].—That nothing in this act shall apply to the carriage, storage or handling of property free or at reduced rates for the United States or this state or municipal governments or for charitable purposes, or to and from fairs and expositions for exhibition thereat, or for the employes of such common carriers or their families, or pri-

vate property or goods for the family use of the employes of such common carriers, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to prevent railroads from giving free carriage to their own officers and employes and their families dependent upon said officer or employe for support, and to persons in charge of live stock being shipped from the point of shipment to destination and return, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies; *provided*, that no pending litigation shall in any way be affected by this act.

SEC. 30. [Railroad commissioners and secretary to be transported free.]—The said railroad commissioners and their secretary shall have the right of free transportation in the performance of their duties concerning railroads, on all railroads and railroad trains in this state; and they may take with them experts or other agents whose services they may require, and who shall, in like manner, be transported free of charge.

SEC. 31. [Expenses of commissioners' investigation: how met.]—To defray the necessary expenses of the said railroad commissioners in making investigations and prosecuting suits and to pay all necessary costs attending the same under the provision of this act, there is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of ten thousand dollars (\$10,000) or so much thereof as may be necessary, to be drawn upon warrants of the state auditor issued upon the requisition of said commissioners, approved by the governor, which requisition shall be accompanied by an itemized statement of the cost and expenses to be paid.

SEC. 32. [Conflicting law repealed.]—Section 11 of chapter 77 of the acts of the seventeenth general assembly, in relation to the board of railroad commissioners, and all laws now in force in direct conflict with any of the provisions of this act, are hereby repealed.

Approved April 5, 1888.

(CHAPTER 29, LAWS OF 1888.)

An Act to change the manner of selecting railroad commissioners, and to repeal sections 2 and 8, chapter 77, acts of the seventeenth general assembly, and to provide for the election of and to prescribe the qualification of railroad commissioners, and for the appointment of a secretary.

SECTION 1. [Repeals sections 2 and 8 of ch. 77, laws of 17th g. a.]—*Be it enacted by the general assembly of the state of Iowa:* That sections 2 and 8, of chapter 77, acts of the seventeenth general assembly, and all acts and parts of acts inconsistent with this act are hereby repealed.

SEC. 2. [Election of commissioners.]—That at the regular election in the year 1888, there shall be three persons having the qualifications of electors, in the places where they shall respectively reside in the state of Iowa, chosen by the electors of the state, from the body of the electors of said state, who, when they shall have taken the oath of office and given such bond as may be required of them by the governor of the state, shall be known and styled the board of railroad commissioners of the state of Iowa. They shall hold office, beginning on the second Monday in January, 1889, for the period of one, two and three years respectively, as shall be decided between them by lot at their first meeting as a board in such manner as may be designated by the secretary of state. At the reg-

ular election in the year 1889, and every year thereafter at each such election, there shall be chosen one person as commissioner, having the qualification hereinbefore and hereinafter described, who shall hold his office for three years from the second Monday in January after his election, and until his successor is elected and qualified. Said person shall fill the vacancy caused by the expiration of the term of the commissioner whose term expires on the second Monday in January following his said election. It shall organize on each second Monday in every year immediately after the new member has been qualified, and if for any cause this is not done, it may be done at a subsequent meeting. The organization shall be by the selection of one member as chairman and a person having the qualifications hereinbefore and hereinafter described for a commissioner as secretary. The board shall have power to employ such additional clerical help as it may deem necessary and for the good of the service. No person in the employ of any common carrier or owning any bonds, stock, or property in any railroad company, or who is in any way or manner pecuniarily interested in any railroad corporation, shall be eligible to the office of railroad commissioner, and the entering into the employ of any common carrier, or the acquiring of any stock or other interest in any common carrier, or the acquiring of any stock or other interest in any common carrier by any officer under this act after his election nor appointment, shall disqualify him to hold the office, and to perform the duties thereof.

Sec. 3. [Vacancies: how filled.]—All vacancies in the office of railroad commissioners shall be filled by appointment of the governor. The person appointed to serve until his successor is elected and qualified. The board of commissioners as constituted by chapter 77, acts seventeenth general assembly, shall hold office and have all powers conferred upon them by chapter 77, acts of the seventeenth general assembly, and acts amendatory thereto, and such other powers and authority as are now or may hereafter be conferred upon them by law, until commissioners shall be chosen and enter upon their duties as contemplated by this act.

Sec. 4. [Canvass of votes.]—The canvass of votes cast for the election of commissioners provided for in this act shall be made and returns and abstracts thereof and relating thereto be made, certified and forwarded and results of said election declared (by the executive council) in all respects in the same manner and by the same officers and boards as now provided by law for canvassing, making, certifying, forwarding and declaring the same as to other state officers.

Sec. 5. [Powers of commissioners.]—The commissioners chosen under this act shall have all the powers that are conferred upon the railway commission by chapter 77, acts of the seventeenth general assembly, and such other powers and authority as may now or shall hereafter be imposed by law.

Approved April 6, 1888.

(CHAPTER 30, LAWS OF 1888.)

An Act requiring railroad companies to fence their tracks within the state of Iowa, and to keep the fences in good repair.

SECTION 1. [All railway corporations required to fence track.]—*Be it enacted by the general assembly of the state of Iowa:* That all railroad corporations organized under the laws of this state, or any other state, owning or operating a line of railroad within this state, which have not already erected a lawful fence, shall construct, maintain and keep in good repair a suitable fence of posts and barb wire, or posts and boards, on each side of the tracks of said railroad within the state of Iowa, and so connected with cattle-guards at all public highway crossings as to prevent cattle, horses, and other live stock from getting on the railroad tracks. Said railroad tracks to be fenced by said railroad companies, on or before January 1, 1890,

where the railroads are now built, and within six months after the completion of any new railroads, or any part thereof; the said fences to be constructed either of five barbed wires, securely fastened by posts, said posts to be not more than twenty feet apart, and not less than fifty-four inches in height, or of five boards, securely nailed to posts, said posts to be not further than eight feet apart, and said fence to be not less than fifty-four inches in height; *provided*, when said railroad corporations, who have now their fences built, shall, when they rebuild or repair their fences, the same shall be built as provided in this act; *provided further*, that any other fences which, in the judgment of the fence viewers, is equivalent to the fence herein provided, shall be a lawful fence; *provided, however*, that this act shall not be so construed as to compel a railway company operating a third class railway to fence its road through the land of any farmer or other person who, by written agreement with said company, has waived, or may waive, the fencing of said road through such land; *provided further, however*, that at any points where third class roads are not released by written agreement from building fence as herein provided for, and fences are built on both sides of railway track at such points, cattle-guards shall be so constructed at such points as to prevent stock from going upon said track so fenced.

SEC. 2. [**Penalty for refusal to fence.**—If any corporation, or officer thereof, or lessee, owning or engaged in the operation of any railroad in this state, neglect or refuse to comply with any provision of section one of this act, such corporation, officer or lessee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding five hundred dollars for each and every offense; and every thirty days continuance of such refusal or neglect shall constitute a separate and distinct offense within and for the purposes of this act.

SEC. 3. [**Killing stock.**—Nothing herein contained shall relieve said railroad corporation from pecuniary liability arising from the killing or maiming of live stock on said track, or right of way, by said corporation, that may occur through the negligence of said corporation or through its employes; and *provided further*, that nothing in this act shall be construed so as to interfere with the right to open or private crossings, as now maintained, or with the right of persons to such crossings; *provided further*, that nothing in this act contained shall in any way limit or qualify the liability of any corporation or person owning or operating a railway that fails to fence the same against live stock running at large, for any stock injured or killed by reason of the want of such fence as now provided for in section 1289 of the code of 1873.

Approved April 6, 1888.

CHAPTER 6.

OF TELEGRAPHS.

SECTION 1324. (*As amended by ch. 104, 19th g. a.*) [**Who may construct: right of way granted.**—Any person or company may construct a telegraph [or telephone] line along the public highways of this state, or across the rivers or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor; *provided*, that when any highway along which said line has been constructed shall be changed, said person or company shall, upon ninety days notice in writing, remove said line to said highway as established. Said notice contemplated herein may be served on any agent or operator in the employ of said person or company.

SEC. 1325. [**How constructed.**]—Such fixtures must not be so constructed as to incommode the public in the use of any highway, or the navigation of any stream; nor shall they be set up on the private grounds of any individual without paying him a just equivalent for the damages he thereby sustains.

SEC. 1326. [**Damages assessed.**]—If the person over whose lands such telegraph line passes claims more damage therefor than the proprietor of the telegraph is willing to pay, the amount of damages may be determined in the same manner as is provided in chapter four of this title.

SEC. 1327. [**Liability of proprietor for refusing to transmit messages.**]—If the proprietor of any telegraph within this state, or the person having the control and management thereof, refuses to receive dispatches from any other telegraph line, or to transmit the same with fidelity and without unreasonable delay, all the laws of the state in relation to limited partnerships, to corporations, and to obtaining private property for the use of such telegraph shall cease to operate in favor of the proprietor thereof; and, if private property has been taken for the use of such telegraph without the consent of the owner, he may reclaim and recover the same.

SEC. 1328. [**For willful failure: guilty of misdemeanor.**]—Any person employed in transmitting messages by telegraph must do so without unreasonable delay, and any one who willfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor.

SEC. 1329. [**Liable for mistakes.**]—The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law.

It seems to be competent for a telegraph company, notwithstanding this section, to adopt reasonable rules, conditions and regulations governing the transmission of messages, restricting its liability in cases where the message is not repeated. *Sweatland v. The Miss. Tel. Co.*, 27 Iowa, 433.

Where it is competent for a telegraph company to restrict by printed stipulations and conditions annexed to the message sent, its liability in cases where the message is not repeated, it will, notwithstanding, be liable for mistakes in transmission resulting from its own fault or negligence. *Id.*; *Manville v. The W. U. Tel. Co.*, 37 Id., 214.

A telegraph company is also liable for injuries resulting from negligence in the delivery of a message. *Id.*

The parties to telegraphic messages have the right to their use to prove contracts made thereby and an operator having them in his possession may be required by a court to produce them as evidence. This section does not apply to the use of messages as evidence. *Woods & Bradley v. Miller & Co.*, 55 Id., 168.

(CHAPTER 59, LAWS OF 1878.)

TAXATION OF TELEGRAPHS.

An Act to provide for the assessment and taxation of telegraph lines within the state of Iowa. [Additional to code, title X, chapter 6: "Of telegraphs."]

SECTION 1. [**All telegraphs subject to taxation.**]—*Be it enacted by the general assembly of the state of Iowa:* That all telegraph lines built and operated within the state of Iowa shall be subject to taxation as hereinafter required.

SEC. 2. [**Every telegraph company shall report annually to the auditor of state.**]—It shall be the duty of the president, vice-president, general manager or superintendent of every telegraph company operating a line in this state, to furnish the auditor of state, on or before the first Monday in May of each year, a

statement under oath, and in such form as the auditor may prescribe, showing the following facts: *First*—The total number of miles owned, operated or leased, within the state, with a separate showing of the number leased. *Second*—The total number of miles in each separate line or division thereof, together with the number of separate wires thereon, and stating the counties through which the same is carried. *Third*—The total number of telegraph stations on each separate line, and the total number of telegraphic instruments in use therein, together with the total number of stations, other than railroad stations, maintained. *Fourth*—The average number of telegraph poles, per mile, used in the construction and maintenance of said lines.

SEC. 3. [Upon which report the state board of equalization shall assess.]—Upon the receipt of the said statement from the several companies, the auditor of state shall lay the same before the state board of equalization at its meeting on the first Monday in July in each year, which shall proceed to assess said telegraph lines at the true cash value thereof.

SEC. 4. [And shall determine the rate of tax to be levied.]—The said state board shall also, at said meeting, determine the rate of tax to be levied and collected upon said assessment, which shall not exceed the average rate of taxes, general, municipal and local, levied throughout the state during the previous year, which rate shall be ascertained from the records and files in the auditor's office, which tax shall be in lieu of all other taxes, state and local, and shall be payable into the state treasury.

SEC. 5. [When tax shall become due.]—The taxes levied as provided by this chapter shall become due and payable at the state treasury on the first day of February, following the levy thereof, and if said taxes are not paid as herein provided, it shall be the duty of the treasurer of state to collect the same by distress and sale of any property belonging to such company in the state, in the same manner as required of county treasurers, in like cases, by section 858 of the code; and the record of the state board in such case shall be sufficient warrant therefor.

SEC. 6. [Proviso: telegraph line used by, and taxed as property of railroad exempt from provisions of this act.]—*Provided, however,* that any telegraph line which may be owned and operated by any railroad company exclusively for the transaction of the business of such company, and which has been duly reported as such in the annual report of such company, and been duly taxed as part of the property thereof under the laws providing for the taxation of railway property, shall be exempt from the provisions of this act.

SEC. 7. [Penalty for not filing report as per section 2.]—If the officers of any company fail to make and file the report required by section two (2) of this act, such neglect shall not release its lines from taxation, but the state board shall proceed to assess the line notwithstanding, adding thereto thirty per centum on the assessable value thereof.

SEC. 8. [Repealing clause.]—All acts in conflict herewith are hereby repealed. (Took effect by publication in newspapers, March 21, 1878.)

TITLE XI. OF THE POLICE OF THE STATE.

CHAPTER 1.

OF THE SETTLEMENT AND SUPPORT OF THE POOR.

SECTION 1330. [Who liable to maintain.]—The father, mother, and children of any poor person who is unable to maintain himself by work, shall, jointly or severally, relieve or maintain such poor person in such manner as may be approved by the trustees of the township where such poor person may be; but these officers shall have no control unless the poor person has applied for aid.

Under sections 1330, 1333, the son of a poor person, unable to support himself by work, is liable to the county for money expended in his support upon the order of the township trustees, and may be compelled by order of court to support him. *Jasper County v. Osborn*, 59 Iowa, 208.

This section does not make a father legally liable for medical services rendered his adult daughter in her last illness, at her request, even though she be still living with her father as a member of his family and the services were rendered with the knowledge of the father, and without any objection on his part, where it does not appear that the daughter was a poor person. *Blachley v. Laba*, 63 Id., 22.

A father, who cares for and supports his insane daughter, committed to him by the direction of the board of supervisors, may recover of the county a reasonable compensation therefor, notwithstanding the provisions of this section. *Speeding v. Worth County*, 68 Id., 152.

SEC. 1331. In the absence or inability of nearer relatives, the same liability shall extend to grand-parents, if of ability without personal labor, and to the male grand-children who are of ability by personal labor or otherwise.

SEC. 1332. [Putative father: illegitimate child.]—The word “father” in this chapter includes the putative father of an illegitimate child, and the question of his being the father may be tried in any action or proceeding to recover for, or to compel the support of an illegitimate child. But there shall be no obligation to proceed against the putative father before proceedings against the mother.

SEC. 1333. [Proceeding to compel.]—Upon the failure of such relative so to relieve or maintain a poor person who has made application for relief, the township trustees may apply to the circuit court of the county where such poor person resides, for an order to compel the same, and all provisions of this chapter relating to trustees shall apply to any other officers of a county, township, or incorporated town or city, charged with the oversight of the poor.

Under this section a county has no lien, without judgment, upon the real estate of an insane person for expense incurred on account of such person in the hospital. *Thode, Guard., v. Spoford et al.*, (two cases), 65 Iowa, 294.

SEC. 1334. [Notice given.]—At least ten days’ notice of the application shall be given in writing, which shall be served as original notice in an action. In such proceedings the county is plaintiff, and the person to be charged is defendant.

SEC. 1335. [Same.]—The court shall make no order affecting a person not served, but may notify him at any stage of the proceedings.

SEC. 1336. [Hearing: order of court.]—The court may proceed in a summary manner to hear the allegations and proofs of the parties, and order any one or more of the relatives of such poor person who appear to be able, to relieve and

maintain him, charging them, as far as practicable, in the order above named, and for that purpose making new parties to the proceedings when necessary.

SEC. 1337. [**Same.**].—Such order may be for the entire or partial support of the poor person, and it may be for the support either by money or by taking the poor person to a relative's house, or the order may assign the poor person for a certain time to one, and for another period to another relative, as may be adjudged just and convenient, taking into view the means of the several relatives; but no person shall be sent to the house of any relative who shall be willing to pay the amount necessary for his support.

SEC. 1338. If the court order the relief in any other manner than in money, it shall fix a just weekly value upon it.

SEC. 1339. The order may be specific in point of time, or it may be indefinite until the further order of the court, and may be varied from time to time when the circumstances require it, on the application of the trustees of the poor person, or of any relative affected by it, upon ten days' notice being given.

SEC. 1340. When money is ordered to be paid it shall be paid to such officers as the court may direct.

SEC. 1341. [**Failure to comply.**].—If any person fails to render the support ordered, on the affidavit of one of the proper trustees showing the fact, the court may order execution for the amount due, rating any support ordered in kind as before assessed.

SEC. 1342. [**Appeal.**].—Any appeal may be taken from such judgment as from other judgments of the circuit court.

SEC. 1343. [**Abandonment: property ordered seized.**].—Whenever a father, or mother, abandon children, or husband abandons his wife, or wife her husband, leaving them chargeable, or likely to become chargeable, upon the public for their support, the trustees of the township where such abandoned person may be, upon application being made to them, may apply to the clerk or the circuit court or judge of any county in which the parties reside, or in which any estate of such absconding father, mother, husband or wife, may be, for an order to seize the same, and upon due proof of the above facts, the clerk of the court or judge may issue an order authorizing the trustees or the sheriff of the county to take into their possession the goods, chattels, things in action, and lands of the person absconding.

SEC. 1344. [**Seizure of.**].—By virtue of such order, the trustees or sheriff may take the property wherever the same may be found, and shall be vested with all the right and title to the personal property, and to the rent of the real property which the person absconding had at the time of his departure.

SEC. 1345. [**When affecting real estate.**].—Such order, when affecting any real estate, may be entered in the incumbrance book, and all sales, leases and transfers of any such property, real and personal, made by the person after the issuing and entry of the order, shall be void.

SEC. 1346. [**Inventory of.**].—The trustees or sheriff shall immediately make an inventory of the property so seized by them, and return the same, together with the proceedings, to the court, there to be filed.

SEC. 1347. [**Discharge of: sale ordered.**].—The court, upon inquiry into the facts and circumstances of the case, may discharge the order of seizure; but if it be not discharged, the court shall have power to direct from time to time what part of the personal property shall be sold and how, and how much of the proceeds of such sale, and of the rents and profits of the real estate shall be applied to the maintenance of the children, wife or husband, of the person so absconding.

SEC. 1348. [**Security given: property restored.**].—If the party against whom such order is issued, return and support the person so abandoned, or give security to the county satisfactory to the clerk of the circuit court that such person

shall not become chargeable to the county, the order shall be discharged by another order from such clerk, and the property taken and remaining restored.

SEC. 1349. [**Trial by jury.**].—The defendant may demand a jury in the trial contemplated, on the question of his ability and of his obligation to support a poor relative; and also on the question of abandonment and liability to become a public charge as provided above, which demand may be made upon the inquiry contemplated above, and such inquiry shall take place on the request of the defendant unless it be ordered on the motion of the court itself with notice to the defendant.

SEC. 1350. [**Action by county.**].—Any county having expended any money for the relief of a poor person under the provisions of this chapter, may recover the same from any of his kindred mentioned in sections one thousand three hundred and thirty and one thousand three hundred and thirty-one of this chapter, by an action brought in any court having jurisdiction, within two years from the payment of such expenses.

SEC. 1351. [**By a relative.**].—A more distant relative who may have been compelled to aid a poor person, may recover from any one or more of the nearer relatives, and one so compelled to aid may recover contribution from others of the same degree.

SEC. 1352. [**How acquired.**].—Legal settlements may be acquired in the counties as follows:

1. Any person having attained majority, and residing in this state one year without being warned as hereinafter provided, gains a settlement in the county of his residence;

2. A married woman follows and has the settlement of her husband, if he have any within the state, and if she had a settlement at the time of marriage it is not lost by the marriage;

3. A married woman abandoned by her husband, may acquire a settlement as if she were unmarried;

4. Legitimate minor children follow and have the settlement of their father, if he have one, but if he have none, then that of their mother;

5. Illegitimate minor children follow, and have the settlement of their mother, or if she have none, then that of the putative father;

6. A minor whose parent has no settlement in this state, and a married woman living apart from her husband and having no settlement, and whose husband has no settlement in this state, residing one year in any county, gains a settlement in such county;

7. A minor bound as an apprentice or servant, immediately upon such binding, if done in in good faith, gains a settlement where his master has one.

Where a person removes to a county with the intent to reside there, the domicile thus acquired is not affected if he afterward, and before he acquires a legal settlement, becomes insane, and his insanity and removal to the insane hospital will not prevent his acquiring a legal settlement. *Washington County v. Mahaska County*, 47 Iowa, 57.

Although this section is found in the chapter on the settlement and support of the poor, it is sufficiently general in its application to embrace the case of an insane person who has become a county charge. *Scott County v. Polk County*, 61 Id., 616.

The residence in a county necessary to establish a settlement therein must be personal presence in a fixed and permanent abode, or of a character indicating permanency of occupation as distinct from lodging, boarding or temporary occupation. *Cerro Gordo County v. Wright County*, 50 Id., 439.

Where a person having a legal settlement in one county becomes sick and disabled in another, a notice by the auditor of the latter to the auditor of the former that relief is being furnished, is sufficient to charge the county in which the pauper has a settlement. *Id.*

SEC. 1353. [**Lost.**].—A settlement once acquired continues until it is lost by acquiring a new one.

An insane and helpless pauper, who was removed from the county of her residence to another county that she might be continued in charge of the person who had previously cared for her, and

was supported by the former county for a year after her removal, it was *held* did not acquire a settlement in the county to which she removed, nor lose her residence in the former county. *Fayette County v. Bremer County*, 56 Id., 516.

SEC. 1354. [**Foreign paupers.**]-A person coming from another state, and not having become a citizen of, nor having a settlement in this state, falling into want and applying for relief, may be sent to the state whence he came, at the expense of the county, under an order of the circuit court, or judge, otherwise he is to be relieved in the county where he applies.

SEC. 1355. [**Warning to depart.**]-Persons coming from other states or counties who are, or of whom it is apprehended that they will become county charges, may be prevented from obtaining a settlement in a county by warning them to depart from the same or any township thereof, and thereafter they shall not acquire a settlement except by the requisite residence for one year uninterrupted by another warning.

SEC. 1356. [**How given and served.**]-Such warning shall be in writing, and may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors; and, if not made by a sworn officer, it must be verified by affidavit.

SEC. 1357. [**Removal when settlement is in another county.**]-When a poor person applying for relief in one county has a settlement in another, he may be removed to the county of his settlement, if he be able to be removed, upon the order of the trustees of the township or board of supervisors of the county where he applied for relief, and delivered to any officer charged with the oversight of the poor in the county where his settlement is, giving written notice of the fact to the county auditor; or the trustees of the township or board of supervisors of the county where he applied for relief, may, in their discretion, cause the auditor of the county where he has a settlement, to be notified of his being a county charge, and, thereupon, it will become the duty of the latter board to order the removal of the poor person, if he is able to be removed, and, if not able, then to provide for his relief and for all expenses incurred in his behalf.

SEC. 1358. [**County of settlement liable.**]-The county where the settlement is, shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person, if notice of relief being rendered is given to the county of the settlement within a reasonable time after the county of the settlement is ascertained, and for the charges of removal and expenses and support incurred after notice given, in all cases.

Where a person removed to a county with the intent to reside there, the domicile thus acquired is not affected if the party afterward, and before he acquires a legal settlement, becomes insane, and his insanity will not prevent him acquiring a settlement. *Washington County v. Mahaska County*, 47 Iowa, 57.

The cause of action for the support of a pauper, against the county of his settlement, arises when the support is furnished, and the operation of the statute of limitation is not suspended by the ignorance of the county furnishing it that the pauper is chargeable upon another county. *Id.*

SEC. 1359. [**Order binding unless notice of contest given.**]-Such order of removal shall be binding on the county to which the removal is to be made, unless, within thirty days after receipt of the notice provided by section thirteen hundred and fifty-seven, it gives notice to the auditor of the county making such order, of its intention to contest the same. In such case, the proper settlement of the pauper in such county may be tested and determined in an action brought to recover the amount already expended in his behalf. A notice of such action, signed by the county auditor, shall be served on the auditor of the other county, specifying the amount claimed and the facts out of which the claim arises, and no other proceeding shall be necessary to commence the action. The notice hereinbefore provided for, and a transcript of whatever other proceedings or papers there may be relative to the matter, shall be filed in the office of the clerk of the

circuit court, and the cause may be entitled as of the county issuing the order as plaintiff against the county contesting the same as defendant.

Under this section the circuit court had exclusive jurisdiction of proceedings by one county against another to recover for money expended in support of a pauper whose legal residence was in the latter county. *Cerro Gordo County v. Wright County*, 59 Iowa, 485.

The giving of notice by the plaintiff to the defendant county that certain paupers had applied for and were receiving aid from the plaintiff, and that defendant was required to provide for said paupers, and that plaintiff would hold defendant responsible for expenses incurred, followed by the neglect of the defendant to notify plaintiff that it denied the settlement and refused to be liable for the support of the paupers, did not estop the defendant from denying the settlement of the paupers, in an action to recover for aid rendered by the plaintiff county. The estoppel provided in this section is not created by these facts, but by others recited in said section. *Winneshiek County v. Allamakee County*, 62 Id., 558.

Where a county sought to be charged with the expenses of an insane person denies the settlement of such person, and gives notice of such denial, the circuit court has exclusive jurisdiction to try the issues, but where no notice of such denial is given, the action to recover for such expenses may be maintained in the district court. *Id.*

SEC. 1360. [Trial: manner.]—The cause may be tried as other actions at law, but no pleadings are necessary, the only issues being whether the pauper had a settlement in the county to which he was ordered to be removed at the time of such order, and whether the amount claimed, or any part thereof, was actually and properly expended by the plaintiff county in his behalf; and the burden of proof shall be on the county making the order of removal.

SEC. 1361. (*As substituted by ch. 133, 18th g. a.*) [Three trustees may afford relief.]—[The trustees of each township shall provide for the relief of such poor persons in their respective townships as should not in their judgment be sent to the county poor house. But where a city of the first or second class or acting under special charter is embraced within the limits of any township, the board of supervisors may appoint an overseer of the poor, who shall have within said city all the powers and duties conferred by this chapter on the township trustee. The relief thus furnished may be in the form of food, clothing, fuel, lights, rent, medical attendance or money; but exclusive or medical attendance the relief thus furnished shall not exceed the sum of two dollars per week for each person. And when in the opinion of the trustees or overseer, the person asking aid, or any member of his family, is able to work, and such a condition would not be oppressive, they may require the person or any member of his family who is able, as a condition on which relief shall be granted, to earn the relief by labor on the public highway at the rate of not to exceed sixty-five cents per day. The trustees of townships or overseers of the poor, are also authorized to grant relief by furnishing food to transient persons who appear needy, and who are able to work; but such relief shall not exceed the sum of forty cents per day; and they may require such able bodied persons to labor faithfully on the streets or highway at the rate of five cents an hour in payment for and as a condition of granting the relief. Said labor shall be performed under the direction of the officer having charge of working streets or highways.]

The board of supervisors has no right to prescribe the rule that a bill for medical services rendered a pauper shall only be allowed at a regular meeting of the township trustees. *Hunter v. Jasper County*, 40 Iowa, 568.

When no limit has been fixed for such services, the trustees must allow a reasonable compensation. *Id.*

The words "medical attendance," as used in this section are not restricted in their meaning to the professional attendance of a physician, but may include nursing and watching. Where the plaintiff and his family cared for a pauper who was sick and helpless and required constant attendance, it was held that the plaintiff's recovery from the county was not limited by this section to two dollars per week. *Scott v. Winneshiek County*, 52 Id., 579.

Where, under this section, the board of supervisors appointed an overseer of the poor for a city, such overseer was held to have exclusive jurisdiction of the poor within the city, and the township trustees to have exclusive control of the poor of the township outside of the city, so that where aid

was rendered to a city pauper by order of the township trustees, the county was held not liable therefor. *Hoyt v. Black Hawk County*, 59 Id., 184.

SEC. 1362. (As amended by ch. 37, 17th g. a.) [**Families of Iowa soldiers.**]—(In no case shall a soldier or the widows or families of soldiers, requiring public relief, be sent to the county poor-house, when they can and prefer to be relieved out of the poor-house. All other persons in families requiring such aid, may, at the discretion of the board of supervisors, or the overseer of the poor under the supervision of the board of supervisors of such county, be sent to the county poor-house, or receive aid out of poor-house, as the board may deem necessary, not to exceed the extent as above provided.)

SEC. 1363. [**Expense to be paid out of county treasury.**]—All moneys expended as contemplated in the two preceding sections, shall be paid out of the county treasury, after the proper account rendered thereof shall have been approved by the board of supervisors of the respective counties, and in all cases the necessary appropriations therefor shall be made by the respective counties. But the board of supervisors may limit the amount of relief to be thus furnished.

WHERE THERE IS NO POOR-HOUSE.

SEC. 1364. [**Township trustees have charge of.**]—The trustees in each township, in counties where there is no poor-house, have the oversight and care of all poor persons in their township, and shall see that they receive proper care, until provided for by the board of supervisors.

SEC. 1365. (As amended by ch. 101, 22d g. a.) [**Application: how made.**]—The poor must make application for relief to the trustees of the township where they may be, and, if the trustees are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may afford such relief (subject to the approval of the board of supervisors) as the necessities of the person require, and shall report the case forthwith to the board of supervisors, who may continue or deny relief as they find cause. (The board of supervisors may examine into all claims for medical attendance allowed by the township to be unreasonable, extortionate, or for any goods or services other than for the necessities of life, they may reject or diminish the claims as in their judgment would be right and just, and this act shall apply to all counties in the state, whether there are poor-houses established in the same or not; *provided*, that this act shall apply to acts of overseers of poor in cities as well as to township trustees.)

Where a physician rendered services to a pauper at the request of the township trustees, it was held to be competent for the board of supervisors to waive a certificate from the trustees that the services had been rendered, and that the physician was entitled to recover against the county. *Collins v. Lucas County*, 50 Iowa, 448.

The obligation of a county to support its poor is purely statutory, and, to render it liable, the case must fall within, and the liability be created pursuant to, and in the manner prescribed by the statute. *Coolidge v. Mahaska County*, 24 Id., 211.

Under sections 1364 and 1365, the township trustees' may bind the county for medical services rendered at their instance, during the vacation of the board of supervisors to poor sick persons in the township. *Id.*

The board of supervisors have power to employ a competent physician to attend all the poor in the county, where there is no poor-house, and the trustees of the township in which such physician resides has no right to disregard such appointment and employ another physician to render such services, within such township, and thereby make the county liable to pay for the same. *Mansfield v. Sac County*, 59 Id., 694.

Under the provisions of sections 1364 and 1368, application for aid for paupers must first be made and passed upon by the township trustees, whose duty it is to report the cases forthwith to the board of supervisors. Where the trustees have employed a physician for a poor person, and have failed to report to the board of supervisors, the medical aid may be continued in good faith until the board order otherwise, and the county will be liable therefor, but the township trustees will be liable to the county for damages arising from the continuance of aid furnished to persons not properly entitled thereto. *Mansfield v. Sac County*, 60 Id., 11.

Where a pauper resident of one township was temporarily in another township, and was there disabled by breaking his leg, the attending physician forbade his removal, *held*, that the trustees of the latter township might lawfully furnish him aid under section 365. *Mussel v. Tama County*, 34 N. W. R., 762.

SEC. 1366. [**Expenses paid by county.**—All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they are to be paid out of the county treasury. In no case shall a trustee, or either of the trustees, nor overseer of the poor, draw an order upon himself, or upon either of the board for supplies for the poor, except such trustees or overseer has a contract to furnish such supplies.

Under sections 1364 and 1365, the township trustees may bind the county for medical services rendered at their instance, during the vacation of the board of supervisors, to poor sick persons in the township. *Cooledge v. Mahaska County*, 24 Iowa, 211.

Whether a failure of the trustees to report to the board of supervisors, as required in section 1365, where medical services have been thus rendered, at their instance, will deprive the physician of the right to compensation for services rendered after the time when the trustees ought to have reported, although not notified of the omission, nor to discontinue his services, *quere. Id.*

Where a claim against a county is presented, and disallowed or reduced by the board of supervisors, the claimant is not limited to an appeal from the action of the board, but may bring and maintain an action against the county upon his claim. *Armstrong v. Tama County*, 34 Id., 309.

Under this and the two preceding sections, the township trustees, where there is no poor-house, are vested with the power of determining, in the first instance, the question whether the necessities of a poor person are such as to require aid at the public expense, as well as the nature of the relief required, and, if their determination is made in good faith, it is binding upon the board of supervisors, and not subject to review. *Id.*

The board of supervisors have no right to prescribe the rule that a bill for medical services rendered a pauper shall only be allowed at a regular meeting of the township trustees. *Hunter v. Jasper County*, 40 Id., 568.

Where a physician rendered services to a pauper at the request of the township trustees, it was *held* to be competent for the board of supervisors to waive a certificate from the trustees that the services had been rendered and that the physician was entitled to recover against the county. *Collins v. Lucas County*, 50 Id., 448.

The board of supervisors have power to employ a competent physician to attend all the poor in the county, where there is no poor-house, and the trustees of a township in which such physician resides have no right to disregard such appointment and employ another physician to render such services, within such township, and thereby make the county liable to pay for the same. *Mansfield v. Sac County*, 59 Id., 694.

The certificate of the township trustees to the correctness of a bill for aid or support furnished to the poor under this section, is conclusive on the county. Their determination partakes of a judicial character and settles the relations of the parties, in the absence of fraud. *Mussel v. Tama County*, 34 N. W. R., 762.

SEC. 1367. [**Allowance for.**—The board may, in its discretion, allow and pay to poor persons who may become chargeable as paupers and who are of mature years and sound mind, and who will probably be benefited thereby, such sums or such annual allowance as will not exceed the charge of their maintenance in the ordinary mode.

SEC. 1368. [**Appeal to board of supervisors.**—If any poor person on application to the trustees, is refused the required relief, he may apply to the board of supervisors, who, on examination into the matter, may direct the trustees to afford relief, or they may direct specific relief.

SUPERVISORS MAY CONTRACT.

SEC. 1369. [**Supervisors may contract.**—The board of supervisors may enter into contract with the lowest bidder, through proposals opened and examined at a regular session of the board, for the support of all the poor of the county for one year at a time, and may make all requisite orders to that effect; and shall require such contractor to give bonds in such sum as they deem sufficient to secure the faithful performance of the same.

SEC. 1370. [**Supervision of.**—When such a contract is made, the board shall, from time to time, appoint some person to examine and report upon the manner the poor are kept and treated, which shall be done without notice to the person contracting for their support; and, if upon due notice and inquiry, the board find that the poor are not reasonably and properly supported and cared for, they may, at a regular session, set aside the contract, making the proper allowances for the time it has been in force.

SEC. 1371. [**Employment of paupers.**—Any such contractor may employ a poor person in any work for which his age, health and strength is competent, subject to the control of the trustees, and in the last resort of the board of supervisors.

SUPERVISORS MAY ESTABLISH POOR-HOUSE.

SEC. 1372. [**People to vote.**—The board of supervisors of each county may order the establishment of a poor-house in such county whenever it is deemed advisable, and also the purchase of such land as may be deemed necessary for the use of the same, and may make the requisite contracts and carry such order into effect, provided the cost of said poor-house and land shall be first estimated by said board and approved by a vote of the people.

SEC. 1373. [**Contracts: government of.**—The board of supervisors, or any committee appointed by them for that purpose, may make all contracts and purchases requisite for the poor-house, and may prescribe rules or regulations for the management and government of the same, and for the sobriety, morality, and industry of its occupants.

SEC. 1374. [**Steward appointed.**—The board may appoint a steward of the poor-house, who shall be governed in all respects by the rules and regulations of the board and its committees, and may be removed by the board at pleasure, and who shall receive such compensation, perform such duties, and give such security for his faithful performance as the board may appoint.

SEC. 1375. [**Duty of.**—The steward shall receive into the poor-house any person producing an order as hereafter provided, and enter in a book to be kept for that purpose the name and age, and the date of the reception of such person.

SEC. 1376. [**Employment of paupers.**—He may require of persons so admitted, such reasonable and moderate labor as may be suited to their ages and bodily strength, the proceeds of which, together with the receipts of the poor-farm, if there be one, shall be appropriated to the use of the poor-house in such manner as the board may determine.

The poor-farm is appurtenant to the poor-house, and whoever is appointed steward of the poor-house becomes, *ipso facto*, steward of the poor-farm. *The State v. Platner*, 43 Iowa, 140.

The board of supervisors may remove the steward of the poor-house at their pleasure, and they cannot contract with one for a specified time in such a way as to deprive themselves or their successors of the power of removal. *Id.*

SEC. 1377. [**Admission to poor-house.**—No person shall be admitted to the poor-house, unless upon the written order of a township trustee or member of the board of supervisors, and relief is to be furnished in the poor-house only, when the person is able to be taken there, unless in the cases hereinbefore provided.

SEC. 1378. [**Binding out.**—The board may bind out such poor children of the poor-house as they believe are likely to remain a permanent charge on the public, males until eighteen and females until the age of sixteen, unless sooner married, on such terms and conditions as prescribed in the chapter concerning master and apprentices. And they may bind for shorter periods on such conditions as they may adopt.

SEC. 1379. [**Discharge of.**—When any inmate of the poor-house becomes able to support himself, the board may order his discharge.

SEC. 1380. [**Visitation of poor-house.**—The board shall cause the poor-house to be visited at least once a month by one of their body, who shall carefully examine the condition of the inmates and the manner in which they are fed and clothed and otherwise provided for and treated, ascertain what labor they are required to perform, inspect the books and accounts of the steward, and look into all matters pertaining to the poor-house and its inmates and report to the board.

SEC. 1381. (*As amended by ch. 10, 21st g. a.*) [**Expenses: how paid.**—The expenses of supporting the poor-house shall be paid out of the county treasury in the same manner with other disbursements for county purposes; and in case the ordinary revenue of the county prove insufficient for the support of the poor, the board may levy a poor tax not exceeding one (and one-half) mills on the dollar to be entered on the county list and collected as the ordinary county tax; (*provided*, that the provisions of this act shall not apply to counties in which the population is less than fourteen thousand [14,000] inhabitants.)

(The expense of the poor-house shall include such an amount of tuition for the instruction of the children as the whole number of days' attendance of such pauper children is to the total number of days' attendance in the school at which such pauper children attend, and such amount shall be paid into the treasury of the district where said children attend.)

Section 1381 of the code as amended by chapter 149, laws of 1876, empowered counties having a population of 33,000 inhabitants or more to levy a poor tax of one and a half mills on the dollar, in case the ordinary revenue of the county proved insufficient for the support of the poor, but it did not take away the power given by the section before that amendment to counties containing a less number of inhabitants, to levy a tax of one mill on the dollar for the same purpose. *Lucas County v. The C., B. & Q. R'y Co.*, 67 Id., 541.

SEC. 1382. [**Supervisors: power.**—The board is invested with authority to let out the support of the poor, with the use and occupancy of the poor-house and farm for a period not exceeding three years.

CHAPTER 2.

OF THE CARE OF THE INSANE.

SECTION 1383. [**Hospitals established: trustees: members of general assembly not eligible.**—The hospital for the insane, located at Mount Pleasant, in Henry county, shall be known by the name of the Iowa hospital for the insane at Mount Pleasant; and the hospital for the insane, located at Independence, in Buchanan county, shall be known by the name of the Iowa hospital for the insane at Independence. Each of said hospitals shall be under the charge of five trustees, two of whom may be women, three of whom shall constitute a quorum for the transaction of business; and in future no member of the general assembly shall be eligible to that office. When the term of a trustee expires, his successor shall be appointed by the general assembly for four years; but no vacancy shall be filled until the number of trustees is reduced to the number provided in this section. No trustees shall receive pay for more than thirty days in any year.

SEC. 1384. (*As amended by ch. 66, 20th g. a.*) [**Trustees: compensation: meetings of.**—The trustees shall be paid five cents per mile for each mile traveled, and five dollars per day during the time they are actually engaged in the discharge of their official duties, from the state treasury, out of any moneys not otherwise appropriated, by an order drawn by the secretary of the board and approved by the board. Each board of trustees shall hold an annual meeting upon the (second) Wednesday of (July) at the hospital, when they shall choose one of

their number president and another secretary, and shall also choose a treasurer for the year then ensuing and until their successors are elected and qualified. They shall also hold quarterly meetings on the second Wednesday in October, January and April.

SEC. 1385. [**Trustees to visit: keep record: report of.**—The board of trustees, or a majority thereof, shall inspect the hospital under their charge at each quarterly meeting; and a committee may visit the hospital monthly. The trustees shall make a record of their proceedings in books kept for the purpose; and at the annual meetings preceding the regular sessions of the general assembly, they shall make a report to the governor of the condition and wants of the hospital, which shall be accompanied by full and accurate reports of its superintendent and treasurer, and an account of all moneys received and disbursed.

SEC. 1386. (*As amended by ch. 53, 15th g. a.*) [**Trustees to control and manage hospitals.**—The trustees shall have the general control and management of the hospital under their charge; shall make all by-laws necessary for the government of the same, not inconsistent with the laws and constitution of the state, and conduct the affairs of the institution in accordance with the laws and by-laws regulating the same. They shall appoint a medical superintendent, (and upon the nomination of the superintendent shall appoint) an assistant physician or physicians, a steward, and a matron, who shall reside in the hospital and be styled resident officers of the same, and be governed and subject to all the laws and by-laws for government of the said institution. But the same person shall not hold the office of superintendent and steward. They may, also, in their discretion, and upon the nomination of the superintendent, appoint a chaplain and prescribe his duties. The board of trustees shall, from time to time, fix the salaries and wages of the officers and other employes of the hospital, and certify the same to the auditor of state; and they may remove any officer or other employe of such institution.

SEC. 1387. [**Trustees may take land in trust.**—The board of trustees may take, in the name of the state, and hold in trust for the hospital, any land conveyed or devised, and any money or other personal property given or bequeathed, to be applied for any purpose connected with the institution.

SEC. 1388. [**Officers cannot be interested in contracts.**—No trustee, or officer of the hospital, shall be, either directly or indirectly, interested in the purchase of building material, or any article for the use of the institution.

SEC. 1389. [**Trustee ineligible.**—No trustee shall be eligible to the office of steward or superintendent of the hospital during the term for which he was appointed, nor within one year after his term shall have expired.

SEC. 1390. (*As amended by ch. 100, 17th g. a.*) [**Trustees to give bond.**—The treasurer shall execute a bond to the state of Iowa, for the use of the hospital (naming which), in double the highest amount of money likely to come into his hands, and with such securities as the executive council shall require, conditioned that he will faithfully perform the duties of his office, and pay over and account for all money that shall come into his hands, and shall be filed with the secretary of state. He shall receive such compensation as the board shall fix, not exceeding one-half of one per cent on all moneys paid out by him. Upon authority granted by the board, he may draw from the state treasury, out of money not otherwise appropriated, upon his order, approved by the superintendent and not less than two of the trustees, and under seal of the hospital, a sufficient amount [quarterly] for the purpose of defraying any deficiencies that may arise in the current expenses of the hospital, but the amount of each requisition shall in no case exceed [sixteen] dollars per month for each public patient in the hospital, taking the number of such patients on the fifteenth day of each month as the average number on which the estimate shall be made, the number then in the hospital to be certified to the

auditor of state by the superintendent and steward, which certificate shall accompany the requisition. But no part of the money so drawn for current expenses shall be used in making improvements. Upon the presentation of such order to the auditor of state, he shall draw a warrant upon the treasurer of state for the amount therein specified, not exceeding the amount for each patient hereinbefore specified.

SEC. 1391. [**Superintendent of: chief executive officer.**]—The superintendent of the hospital shall be a physician of acknowledged skill and ability in his profession. He shall be the chief executive officer of the hospital, and shall hold his office for six years, unless sooner removed as above provided. He shall have the entire control of the medical, moral, and dietetic treatment of the patients, and he shall see that the several officers of the institution faithfully and diligently discharge their respective duties. He shall employ attendants, nurses, servants, and such other persons as he may deem necessary for the efficient and economical administration of the affairs of the hospital, assign them their respective places and duties, and may, at any time, discharge any of them from service.

SEC. 1392. [**Steward to make purchases: keep accounts: take and preserve vouchers.**]—The steward, under the direction of the trustees [and superintendent], shall make all purchases for the hospital where and in such manner as they can be made on the best terms, keep the accounts, pay all employes, and have a personal superintendence of the farm. He shall take duplicate vouchers for all purchases made, and for all wages paid by him, which he shall submit to the trustees at each of their quarterly meetings, for their examination and approval. Such settlement of accounts shall be made by the board of trustees in open session, and shall not be entrusted to a committee. The trustees shall, after examining and approving such vouchers, file one set of them with the auditor of state. The books and papers of the steward and treasurer shall be open at all times to the inspection of any one of the trustees, state officers, or members of the general assembly.

SEC. 1393. [**Seal.**]—The superintendent shall provide an official seal, upon which shall be inscribed the statute name of the hospital under his charge, and the name of the state.

SEC. 1394. [**Assistant physicians.**]—The assistant physicians shall be medical men of such character and qualifications as to be able to perform the ordinary duties of the superintendent during his necessary absence, or inability to act.

COMMISSIONERS OF INSANITY.

SEC. 1395. [**Who may be: judge of circuit court to appoint.**]—In each county there shall be a board of three commissioners of insanity. The clerk of the circuit court shall be a member of such board and clerk of the same. The other members shall be appointed by the judge of said court. One of them shall be a respectable practicing physician, and the other a respectable practicing lawyer; and the appointment shall be made of persons residing as convenient as may be to the county seat. Such appointment may be made during the session of the court or in vacation; and, if made in vacation, it shall be by written order, signed by the judge and recorded by the clerk of the court. The appointment shall be for two years, and so that the term of one commissioner shall expire every year. The appointment of successors may be made at any time within three months prior to the expiration of the term of the incumbent, who shall hold his office until his successor is appointed and qualified. In the temporary absence or inability to act of two commissioners, the judge of the circuit court, if present, may act in the room of one, or the commissioner present may call to his aid a respectable prac-

ting physician or lawyer, who, after qualifying as in other cases, may act in the same capacity. The record in such cases must show the facts.

SEC. 1396. [**Organization of.**—]—They shall organize by choosing one of their number president. They shall hold their meetings for business at the office of the clerk of said court, unless, for good reasons, they shall fix on some other place, and shall also meet on notice from the clerk.

SEC. 1397. [**Clerk of: duty.**—]—The clerk of said board of commissioners shall sign and issue all notices, appointments, warrants, subpoenas or other process required to be given or issued by the commissioners, affixing thereto his seal as clerk of the circuit court. He shall file and preserve in his office all papers connected with any inquest by the commissioners, and properly belonging to his office, with all notices, reports, and other communications. He shall keep separate books in which to minute the proceedings of the board, and his entries therein shall be sufficiently full to show, with the papers filed, a complete record of their findings, orders and transactions. The notices, reports and communications herein required to be given or made, may be sent by mail, unless otherwise expressed or implied; and the facts and date of such sending and their reception, must be noted on the proper record.

SEC. 1398. [**Jurisdiction and power.**—]—The said commissioners shall have cognizance of all applications for admission to the hospital, or for the safe keeping otherwise of insane persons within their respective counties, excepting in cases otherwise especially provided for. For the purpose of discharging the duties required of them, they shall have power to issue subpoenas and compel obedience thereto, to administer oaths, and to do any act of a court necessary and proper in the premises.

SEC. 1399. [**Applications for admission.**—]—Applications for admission to the hospital must be made in the form of an information, verified by affidavit, alleging that the person in whose behalf the application is made is believed by the informant to be insane, and a fit subject for custody and treatment in the hospital; that such a person is found in the county, and has a legal settlement therein, if such is known to be the fact; and, if such settlement is not in the county, where it is, if known; or where it is believed to be, if the informant is advised on the subject.

SEC. 1400. [**Investigation warrant: certificate of physician.**—]—On the filing of such information, the commissioners may examine the informant, under oath, and, if satisfied there is reasonable cause therefor, shall at once investigate the grounds thereof. For this purpose they may require that the person for whom such admission is sought be brought before them, and that the examination be had in his presence; and they may issue their warrant therefor, and provide for the suitable custody of such person until their investigation shall be concluded. Such warrant may be executed by the sheriff, or any constable of the county; or, if they shall be of opinion from such preliminary inquiries as they may make—and in making which they shall take the testimony of the informant, if they deem it necessary or desirable, and of other witnesses if offered—that such course would probably be injurious to such person, or attended with no advantage, they may dispense with such presence. In their examination they shall hear testimony for and against such application, if any is offered. Any citizen of the county, or any relative of the person alleged to be insane, may appear and resist the application, and the parties may appear by counsel, if they elect. The commissioners, whether they dispense with the presence before them of such person or not, shall appoint some regular practicing physician of the county to visit such person and make a personal examination touching the truth of the information, and the actual condition of such person, and forthwith report to them thereon. Such physician may, or may not, be of their own number; and the physician so appointed and

acting shall certify, under his hand, that he has, in pursuance of his appointment, made a careful personal examination as required; and that, on such examination, he finds the person in question insane, if such is the fact, and if otherwise, not insane; and in connection with his examination, the said physician shall endeavor to obtain from the relatives of the person in question, or from others who know the facts, correct answers, so far as may be, to the interrogatories hereinafter required to be propounded in such cases, which interrogatories and answers shall be attached to his certificate.

The physician's certificate prepared from the statement of relatives and friends of a patient in the insane asylum, is not competent evidence to show what has been the mental condition of the patient previous to his confinement in the asylum. *Butler v. The St. Louis Life Ins. Co.*, 45 Iowa, 93.

The opinion of a witness who is not an expert, respecting the sanity of a person, is competent where he states all the facts upon which his opinion is founded. *Id.*

In the trial of an issue of insanity, it is not competent for a medical witness to give his opinion as an expert respecting the testimony which has been introduced in the case, but the inquiry should be limited to his conclusion respecting the facts. *Id.*

SEC. 1401. (*As amended by ch. 152, 18th g. a., and ch. 63, 22d g. a.*) [**Finding of commissioners.**].—On the return of the physician's certificate, the commissioners shall, as soon as practicable, conclude their investigation, and shall find whether the person alleged to be insane, is insane; whether, if insane, a fit subject for treatment and custody in the hospital; whether the legal settlement of such person is in their county, and, if not in their county, where it is, if ascertained. If they find such person is not insane, they shall order his immediate discharge, if in custody. If they find such person insane, and a fit subject for custody and treatment in the hospital, [they shall order said person to be committed to the hospital, unless said person so found to be insane (or some one in his or her behalf), shall appeal from the finding of said commissioners.] They shall forthwith issue their warrant, and a duplicate thereof, stating such finding, with the settlement of the person, if found; and, if not found, their information, if any, in regard thereto, authorizing the superintendent of the hospital to receive and keep such person as a patient therein. Said warrant and duplicate, with the certificate and finding of the physician, shall be delivered to the sheriff of the county, who shall execute the same by conveying such person to the hospital, and delivering him, with such duplicate and physician's certificate, and finding, to the superintendent thereof. The superintendent, over his official signature, shall acknowledge such delivery on the original warrant, which the sheriff shall return to the clerk of the commissioners, with his costs and expenses indorsed thereon. If neither the sheriff nor his deputy is at hand, or if both are otherwise engaged, the commissioners may appoint some other suitable person to execute the warrant in his stead, who shall take and subscribe an oath faithfully to discharge his duty, and shall be entitled to the same fees as the sheriff. The sheriff, or any other person so appointed, may take to his aid such assistants as he may need to execute such warrant; but no female shall thus be taken to the hospital without the attendance of some other female, or some relative. The superintendent, in his acknowledgment of delivery, must state whether there was any person in attendance, and give the name or names, if any. But if any relative or immediate friend of the patient who is a suitable person, shall so request, he shall have the privilege of executing such warrant in preference to the sheriff, or any other person, and without taking such oath; and for so doing he shall be entitled to his necessary expenses, but to no fees. [And no person during such investigation or who shall be found to be insane, as above provided, shall, during investigation, or after such finding, and pending commitment to the hospital for the insane, or when *en route* to said hospital, be confined in any jail or prison or other place of solitary confinement except in case of extreme violence when it may be deemed absolutely necessary for the safety of such insane person,

or of the public; and if such violent insane person be so confined there shall be at all times during such confinement some suitable person or persons in attendance in charge of such insane person; but at no time shall any female be placed in such confinement without at least one female attendant remaining in charge of such insane person.] The requirements of this and preceding sections are modified by the provisions of the next section.

This section is not in conflict with section 9 and 10, of article 1, of the constitution, securing to every person a speedy and impartial trial by an impartial jury, in all cases involving life or liberty. Those sections apply only to accusations for criminal offenses, and not to inquests of lunacy or insanity. *The County of Black Hawk v. Springer*, 58 Iowa, 417.

SEC. 1402. [**When settlement is in another county: proceedings.**—If the commissioners find that the person so committed to the hospital has, or probably has, a legal settlement in some other county, they shall immediately notify the auditor of such county of such finding and commitment; and the auditor so notified shall thereupon inquire and ascertain, if possible, whether the person in question has a legal settlement in that county, and shall immediately notify the superintendent of the hospital and the commissioners of the county from which such person was committed, of the result of such inquiry. If the legal settlement of a person so committed cannot for a time be ascertained, and is afterwards found, the notices so required shall then be given.

A county from which an insane person has been committed to the hospital, and which has been charged with, and has paid the expenses of such person in the hospital, cannot recover such expenses from the county of such insane person's settlement, unless the commissioners of the plaintiff county, at the time of the commitment found that such person had, or probably had, a settlement in the defendant county, and immediately notified the auditor of the defendant county of such finding and commitment; and a petition which does not allege such notice is bad on demurrer. *Poweshiek County v. Cass County*, 63 Iowa, 244.

(CHAPTER 152, LAWS OF 1880.)

APPEALS FROM COMMISSIONERS OF INSANITY.

An Act providing for appeals from the findings of the commissioners of insanity, and to amend section 1401, of chapter 2, title XI, of the code.

SECTION 1. [**Any person found insane has right of appeal.**—*Be it enacted by the general assembly of the state of Iowa:* That any person found to be insane by the commissioners of insanity may appeal to the circuit court by giving the clerk of said court notice in writing that he or she appeals from said finding, which notice may be signed by the party, his or her attorney, agent, or guardian.

SEC. 2. [**To be taken in ten days.**—Such appeal may be taken at any time within ten (10) days after the filing of the finding of said commissioners.

SEC. 3. [**Docketed in circuit court.**—The cause, when thus appealed, shall be placed upon the docket by the clerk of said court, and stand for trial anew in the circuit court.

SEC. 4. [**Person appealing to be discharged or suitably provided for.**—If any person found to be insane by the commissioners of insanity takes an appeal from such finding, such person shall be discharged from custody pending such appeal, unless the commissioners, for any reason, find that such person cannot, with safety, be allowed to go at large, in which case they shall require that such patient shall be suitably provided for, as provided in section 1403 of the code, until such appeal can be tried and determined.

SEC. 5. [**Discharged.**—If, upon the trial, such person is found not insane, the court shall order his or her immediate discharge, if in custody. If such person is found to be insane, and a fit subject for custody and treatment in the hospital, the court shall order that such person be committed to the hospital, and the clerk of

the court shall issue a warrant to carry said finding and order into effect; which warrant and the proceedings on and under it, shall be substantially the same as are provided for in section 1401 of chapter 2, title 11, of the code.

SEC. 6. [Amendment.]—That section 1401 of chapter 2 of the title 11 of the code be amended by inserting, after the word “hospital,” in the tenth line thereof, the words: “They shall order said person to be committed to the hospital,” and “unless said person so found to be insane (or some one in his or her behalf) shall appeal from the finding of said commissioners.”

Approved March 26, 1880.

A person found by the commissioners of insanity to be insane may appeal to the district court within ten days after the finding is filed, under this statute, but the statute makes no provision for a rehearing before the commissioners; and from a refusal by them to grant a rehearing, an appeal will not lie. *Wilson v. The State*, 66 Iowa, 487.

SEC. 1403. [(As amended by ch. 68, 22d g. a.)] [When person cannot be sent to hospital: special custodian appointed.]—If any person found to be insane and a fit subject for custody and treatment in the hospital cannot at once be admitted therein for want of room, or for any other cause, and cannot with safety be allowed to go at liberty, the commissioners shall require that such patient shall be suitably provided for otherwise until such admission can be had, or until the occasion therefor no longer exists. Such patients may be cared for either as private or as public patients. Those shall be treated as private patients whose relations or friends will obligate themselves to take care of and provide for them without public charge. In such case the commissioners shall appoint some suitable person a special custodian, who shall have authority, and who shall, in all suitable ways, restrain, protect, and care for such patient, in such manner as to best secure his safety and comfort, and to best protect the person and property of others. In the case of public patients, the commissioners shall require that they be in like manner restrained, protected and cared for by the board of supervisors at the expense of the county, and they may, accordingly, issue their warrant to such board, who shall forthwith comply with the same. If there is no poor house for the reception of such patients, or if no more suitable place can be found, they may be confined in the jail of the county in charge of the sheriff. [Provided, however, that any female who may be so confined in such poor house or jail shall be at all times under the care of a suitable female attendant, who alone shall hold the key of the apartment in which said insane person is confined.]

SEC. 1404. [When admission to hospital is not desired.]—On application to the commissioners in behalf of persons alleged to be insane, and whose admission to the hospital is not sought, made substantially in the manner above prescribed, and asking that provisions be made for their care as insane—either public or private—within the county, and on proof of their insanity and need of care as above pointed out, the commissioners may provide for their restraint, protection and care, as in the case of other applications.

SEC. 1405. [When suffering from want of care.]—On information laid before the commissioners of any county that a certain insane person in the county is suffering for want of proper care, they shall forthwith inquire into the matter, and if they find the information well founded, they shall make all needful provisions for the care of such person, as provided in other cases.

SEC. 1406. [May be transferred to hospital.]—Insane persons who have been under care, either as public or private patients, outside of the hospital, by authority of the commissioners of any county, may, on application to that effect, be transferred to the hospital whenever they can be admitted thereto, on the warrant of such commissioners. Such admission may be had without another inquest, at any time within six months after the inquest already had, unless the commissioner shall deem further inquest advisable.

SEC. 1407. [**Interrogatories to be answered.**]—In each case of application for admission to the hospital, correct answers to the following interrogatories, so far as they can be obtained, shall accompany the physician's certificate; and if, on further examination, after the answers are stated, any of them are found to be erroneous, the commissioners shall cause them to be corrected:

1. What is the patient's name and age? Married or single? If any children, how many? Age of youngest child?
2. Where was the patient born?
3. Where is his (or her) place of residence?
4. What has been the patient's occupation?
5. Is this the first attack? If not, when did the others occur, and what was their duration?
6. When were the first symptoms of this attack manifested, and in what way?
7. Does the disease appear to be increasing, decreasing, or stationary?
8. Is the disease variable, and are there rational intervals? If so, do they occur at regular periods?
9. On what subjects, or in what way is derangement now manifested? State fully.
10. Has the patient shown any disposition to injure others?
11. Has suicide ever been attempted? If so, in what way? Is the propensity now active?
12. Is there a disposition to filthy habits, destruction of clothing, breaking of glass, etc.?
13. What relatives, including grandparents and cousins, have been insane?
14. Did the patient manifest any peculiarities of temper, habits, disposition, or pursuits, before the accession of the disease?—any predominant passion, religious impressions, etc.?
15. Was the patient ever addicted to intemperance in any form?
16. Has the patient been subject to any bodily disease; epilepsy, suppressed eruptions, discharges of sores, or ever had any injury of the head?
17. Has restraint or confinement been employed? If so, what kind, and how long?
18. What is supposed to be the cause of the disease?
19. What treatment has been pursued for the relief of the patient? Mention particulars and effects.
20. State any other supposed to have a bearing on the case.

SEC. 1408. [**Discharge on application of friends.**]—On the application of the relations or immediate friends of any patient in the hospital, who is not cured, and who cannot be safely allowed to go at liberty, the commissioners of the county where such patient belongs, on making provision for the care of such patient within the county as in other cases, may authorize his discharge therefrom; *provided*, no patient who may be under criminal charge or conviction, shall be discharged without the order of the district court or judge, and notice to the district attorney of the proper district as hereinbefore provided.

SEC. 1409. [**Discharge of care for in county.**]—Whenever it shall be shown to the satisfaction of the commissioners of insanity of any county, that cause no longer exists for the care within the county of any particular person as an insane patient, they shall order the immediate discharge of such person.

SEC. 1410. [**Expenses estimated and paid in advance from county treasury.**]—Whenever the commissioners issue their warrant for the admission of a person to the hospital, and funds to pay the expense thereof are needed in advance, they shall estimate the probable expense of conveying such person to the hospital, including the necessary assistance, and not including the compensation allowed the sheriff; and on such estimate, certified by the clerk, the auditor of the

county shall issue his order on the treasury of the county in favor of the sheriff or other person entrusted with the execution of such warrant; the sheriff, or other person executing such warrant, shall accompany his return with a statement of the expenses incurred; and the excess or deficiency may be deducted from or added to his compensation, as the case may be. If funds are not so advanced, such expenses shall be certified and paid in the manner above prescribed on the return of the warrant. When the commissioners order the return of a patient, compensation and expenses shall be in like manner allowed.

SEC. 1411. [**Warrant and certificate: superintendent not liable to prosecution.**]—The warrant of the commissioners of insanity, authorizing the admission of any person to the hospital as a patient, accompanied by a physician's certificate as herein provided, shall operate to shield the superintendent and other officers of the hospital against all liability to prosecution of any kind on account of the reception and detention of such person in the hospital; *provided*, such detention shall be otherwise in accordance with the laws and by-laws regulating its management.

INSANE PRISONERS.

SEC. 1412. [**Commissioners to make inquiry, etc.**]—If any person in prison charged with a crime, shall at any time before indictment is found against him, at the request of any citizen be brought before the commissioners in the manner provided by law, and if it shall be found by them that such person was insane when he committed the offense; or if any person in prison shall, after the commission of the offense, and before conviction, become insane, and if at the request of any citizen an inquest be instituted as provided for in this chapter, and if the commissioners shall find that such person became insane after the commission of the crime of which he stands charged or indicted, and is still insane, they shall issue their warrant authorizing and requiring the superintendent of either hospital to receive and keep the person as a patient therein. In such case the warrant can only be executed by the sheriff or his deputy; and no delivery of the insane prisoner to any other person than the superintendent of the hospital shall exonerate the sheriff from his liability for the custody of such prisoner, and any such lunatic may, when restored to reason, be prosecuted for any offense committed by him previous to such insanity.

SEC. 1413. [**Cannot be discharged until county attorney is notified.**]—When any lunatic shall be confined in either hospital under the preceding section, the superintendent in whose charge he may be, shall, as soon as such lunatic is restored to his reason, give notice thereof to the district attorney of the proper county, and retain such lunatic in custody for such reasonable time thereafter as may be necessary for said attorney to cause a warrant to issue and to be served, by virtue whereof the said person so restored to reason shall again be returned to the jail of the proper county to answer to the offense alleged against him.

SEC. 1414. [**Becoming insane after conviction: governor suspend, etc.**]—If any person, after being convicted of any crime or misdemeanor, and before the execution in whole or part of the sentence of the court, becomes insane, the governor shall inquire into the facts, and he may pardon such lunatic, or commute or suspend, for the time being, the execution in such manner and for such a period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of either penitentiary, order such lunatic to be conveyed to the hospital and there kept until restored to reason. If the sentence of any lunatic be suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor.

CUSTODIAN OF INSANE PERSONS.

SEC. 1415. [**Guilty of misdemeanor.**—Any person having care of an insane person, and restraining such person either with or without authority, who shall treat such person with wanton severity, harshness, or cruelty, or shall in any way abuse such person, shall be guilty of a misdemeanor, besides being liable in an action for damages.

SEC. 1416. [**Insane cannot be restrained except by authority.**—No person supposed to be insane shall be restrained of his liberty by any other person, otherwise than in pursuance of authority obtained as herein required, excepting to such extent and for such brief period as may be necessary for the safety of person and property until such authority can be obtained.

SUPERINTENDENT—TRUSTEES—REGULATIONS.

SEC. 1417. [**When sent from one county whose settlement is in another.**—When the superintendent of the hospital has been duly notified as herein required, that a patient sent to the hospital from one county has a legal settlement in another county, he shall thereafter hold and treat such patient as from the latter county; and such holding shall apply to expenses already incurred in behalf of such patient and remaining unadjusted.

SEC. 1418. [**Expenses may be recovered of the county of the settlement.**—Expenses incurred as hereinafter provided by one county on account of an insane person whose legal settlement is in another county, shall be refunded, with lawful interest thereon, by the county of such settlement, and shall be presented to the board of supervisors of the county sought to be charged, allowed, and paid the same as other claims. If the settlement is denied by the latter board, they may serve a notice similar to that provided for in section thirteen hundred and fifty-nine, of chapter one of this title, for cases of removal; and all the provisions of that chapter in regard to the determination of a disputed claim upon an order of removal shall apply to the change of settlement of an insane person.

SEC. 1419. (*As amended by ch. 47, 21st g. a.*) [**When no settlement, state to pay.**—Patients in the hospital having no legal settlement in the state, or whose legal settlement cannot be ascertained, shall be supported at the expense of the state, and the trustees may authorize the superintendent to remove any patient at the expense of the state if they see proper. [The cost of such removal to be paid directly from the state treasury upon the sworn statement of the superintendent approval of the trustees appended to each voucher, and counties from which such and patients are hereafter received shall be reimbursed for expenses incurred in sending such patients to the hospital, claim for such reimbursement to be certified to by the county auditor and be paid directly from the state treasury.]

SEC. 1420. [**Special care may be given when paid for by relatives.**—All patients in the hospital shall be regarded as standing upon an equal footing; and the several patients, according to their different conditions of mind and body, and their respective needs, shall be provided for and treated with equal care; but if the relatives or friends of any patient shall desire it, and shall pay the expense thereof, such patient may have special care, and may be provided with a special attendant, as may be agreed upon with the superintendent. In such cases, the charges for such special care and attendance shall be paid quarterly in advance.

SEC. 1421. [**Expenses paid by relatives.**—The relatives or friends of any patient in the hospital shall have the privilege of paying any portion or all of the expenses of such patients therein; and the superintendent shall cause the account of such patient to be credited with any sums so paid.

SEC. 1422. [**Discrimination between patients.**]—If at any time it may become necessary, for want of room or other cause, to discriminate in the general reception of patients into the hospital, a selection shall be made as follows:

1. Recent cases, *i. e.*, cases of less than one year's duration, shall have the preference over all others;

2. Chronic cases, *i. e.*, where the disease is of more than one year's duration, presenting the most favorable prospects of recovery shall be next preferred;

3. Those for whom application has been longer on file, other things being equal, shall be next preferred;

4. Where cases are equally meritorious in all other respects, the indigent shall have the preference.

SEC. 1423. [**Escape of.**]—If any patient shall escape from the hospital, the superintendent shall cause immediate search to be made for him; and, if he cannot soon be found, shall cause notice of such escape to be forthwith given to the commissioners of the county where the patient belongs; and if such patient is found in their county, the commissioners shall cause him to be returned, and shall issue their warrant therefor as in other cases, unless the patient shall be discharged, or unless, for good reasons, they shall provide for his care otherwise, of which they shall notify the superintendent.

SEC. 1424. [**Discharge of when cured.**]—Any patient who is cured shall be immediately discharged by the superintendent. Upon such discharge, the superintendent shall furnish the patient, unless otherwise supplied, with suitable clothing and a sum of money, not exceeding twenty dollars, which shall be charged with the other expenses in the hospital of such patient. The relatives of any patient not susceptible of cure by remedial treatment in the hospital, and not dangerous to be at large, shall have the right to take charge of and remove such patient on consent of the board of trustees. In the interim of the meetings of the board, the consent of two of the trustees shall be sufficient.

SEC. 1425. [**Incurable and harmless removed.**]—The board of trustees shall order the discharge or removal from the hospital of incurable and harmless patients, whenever it is necessary to make room for recent cases; in the interim between the meetings of the board, the superintendent, in connection with two trustees, shall possess and exercise the same power.

SEC. 1426. [**Notice of discharge sent commissioners.**]—When patients are discharged from the hospital by the authorities thereof without application therefor, notice of the order of discharge shall at once be sent to the commissioners of the county where they belong; and the commissioners shall forthwith cause them to be removed, and shall at once provide for their care in the county as in other cases, unless such patients are discharged as cured.

SEC. 1427. (*As amended by ch. 84, 17th g. a.*) [**Compensation for keeping fixed.**]—The trustees shall, from time to time, fix the sum to be paid per (month) for the board and care of the patients, which shall not exceed the sum of (sixteen dollars per month and the monthly sum so fixed,) shall be the sum the said hospital shall be entitled to demand for keeping any patient; and the certificate of the superintendent, attested by the seal of the hospital, shall be evidence in all places of the amount due as fixed.

SEC. 1428. (*As amended by ch. 28, 16th g. a.*) [**Superintendent to certify to auditor of state.**]—The superintendent shall certify to the auditor of state on the first day of January, April, July and October, the amount, not previously certified by him, due to said hospital, from the several counties having patients chargeable thereto; and said auditor shall pass the same to the credit of the hospital. The auditor shall, thereupon, notify the county auditor of each county so owing of the amount thereof, and charge the same to said county; and the board of super-

visors shall levy a tax in said county for said amount, and pay the amount due the state into the state treasury.

(*As amended by ch. 183, laws 17th g. a.*) [**On failure to levy insane tax.**]—(And should they within one year from the taking effect of this act fail to levy such tax sufficient to pay the amount now due the state, as shown by the books of the auditor of state, and shall fail at the time of levying other taxes thereafter to levy the tax aforesaid to an amount sufficient to pay the sum then due the state, it shall be the duty of the auditor of state to charge such delinquent county with a penalty three per centum per month upon the amount of indebtedness then six months due, for each month until payment thereof and penalty therein be made.)

(CHAPTER 183, LAWS OF 1878.)

RELATING TO SUPPORT OF THE INSANE.

An Act to amend section 1428, chapter 2, title XI, of the code, relating to insane expenses.

SECTION 1. [Code, § 1428, amended.]—*Be it enacted by the general assembly of the state of Iowa:* That section fourteen hundred and twenty-eight of the code be amended by adding thereto the following, that is to say—“and should they within one year from the taking effect of this act fail to levy such tax sufficient to pay the amount now due the state, as shown by the books of the auditor of state, and shall fail at the time of levying other taxes thereafter to levy the tax aforesaid to an amount sufficient to pay the sum then due the state, it shall be the duty of the auditor of state to charge such delinquent county with a penalty of three per centum per month upon the amount of indebtedness then six months due, for each month until payment thereof and penalty thereon be made.”

SEC. 2. [Duty of county treasurer.]—It shall be the duty of the county treasurer on collection of the taxes herein required to be levied, to pay into the state treasury the amount due and owing from his county at the times and in the manner required for the payment of state taxes collected.

SEC. 3. [Insane tax shall not be diverted to other fund.]—Taxes levied and collected in any county for the purpose named in this act, shall be used only to defray the expenses of the insane chargeable to such county and the costs incident thereto, and shall not be diverted to any other purpose, nor be transferred to any other fund.

SEC. 4. [Penalty for violation of these provisions.]—Any member of the board of supervisors, or any county treasurer who shall violate any of the provisions of this act, shall be liable to a fine of not less than one hundred nor more than five hundred dollars, to be recovered in an action brought against him in the district court of his county, in the name of the state, by the attorney-general.

SEC. 5. [Duty of state and county auditor.]—The auditor of state shall notify the several county auditors and county treasurers of the provisions of this act, and it shall be the duty of said officers to present said notice to the board of supervisors at their first meeting thereafter.

Approved March 26, 1878.

(CHAPTER 19, LAWS OF 1876.)

LEGALIZING THE LEVY OF TAXES FOR THE INSANE.

An Act to legalize the levy of certain taxes for the insane, and to provide for the collection thereof.

SECTION 1. [Levy made valid.]—*Be it enacted by the general assembly of the state of Iowa:* That wherever any of the boards of supervisors in any of the counties of this state have heretofore levied a tax known or called "insane tax," or "insane fund," upon the taxable property of such counties, that the said levy and said tax be, and are hereby declared to be, legal and valid in all respects, the same as though the said boards of supervisors of said counties had been authorized by law to levy the same, and had levied such taxes in the manner required or authorized by law.

SEC. 2. [Collection.]—That wherever any of said taxes now remain uncollected, the treasurers of said counties are hereby authorized to collect the same as other taxes are collected.

SEC. 1429. [Fees of superintendent when attending court.]—When the superintendent of the hospital, in obedience to a subpoena, attends any court of the county in which the hospital is situated as witness for either party in the case of a person on trial for a criminal offense, and the question of the sanity of such person is raised, he shall be allowed, on such account, his necessary and actual expenses, and such daily pay as is allowed to other witnesses, and such expenses and pay shall be paid by the state. When compelled so to attend in civil cases, he shall be entitled to the same compensation, to be paid by the party requiring his attendance.

SEC. 1430. [Seal of affixed.]—The superintendent shall affix the seal of the hospital to any notice, order of discharge, or other paper required to be given by him or issued.

SEC. 1431. [Blanks sent commissioners.]—The trustees of the hospital shall provide for furnishing the commissioners of the counties entitled to send patients to the hospital with such blanks for warrants, certificates, etc., as will enable them with regularity and facility to comply with the provisions of this chapter; and, also, with copies of the by-laws of the hospital when printed.

SEC. 1432. (As amended by ch. 76, 22d g. a.) [Rules adopted: who to form]—The superintendents of the hospitals and the governor of the state shall adopt such regulations as they may deem expedient in regard to what patients, or class of patients, shall be admitted to and provided for in the respective hospitals; or from what portion of the state patients, or certain classes of patients, may be sent to [any] hospital; and they may change such regulations from time to time as they may deem best; and they shall make such publication of these regulations as they may deem necessary for the information of those interested. The regulations so adopted shall be conformed to by the parties interested.

SEC. 1433. (As amended by ch. 26, 15th g. a.) [Estates of patients and relatives bound for support.]—The provisions herein made for the support of the insane at public charge shall not be construed to release the estates of such persons from liability for their support; and the auditors of the several counties, subject to the direction of the board of supervisors, are authorized and empowered to collect from the property of such patients, any sums paid by the county in their behalf, as herein provided; and the certificate from the superintendent, and the notice from the auditor of state, stating the sums charged in such cases, shall be

presumptive evidence of the correctness of the sums so stated. If the board of supervisors, in the case of any insane patient who has been supported at the expense of the county, shall deem it a hardship to [charge the estate] of [any] such patient [with such cost of supporting the patient] they may relieve such [estate or estates] from any part or all of such burden, as may seem to them reasonable and just.

Under this section as amended by chapter 26 of the laws of 1874, the husband is not liable for the expenses incurred in the treatment of his insane wife who has been ordered to be sent to the hospital for the insane, and the county cannot recover from him the amount it has expended therefor. *Delaware County v. McDonald*, 46 Iowa, 170.

SEC. 1434. [Meaning of term "insane": idiots not admitted.]—The term "insane," as used in this chapter, includes every species of insanity or mental derangement. The term "idiot," is restricted to persons foolish from birth, supposed to be naturally without mind. No idiot shall be admitted to the hospital.

VISITING COMMITTEE.

SEC. 1435. [Appointed by governor: power and duties.]—There shall be a visiting committee of three, one of whom at least shall be a woman, appointed by the governor, to visit the insane asylums of the state at their discretion, and without giving notice of their intended visit, who may, upon such visit, go through the wards unaccompanied by any officer of the institution, with power to send for persons and papers, and to examine witnesses on oath, to ascertain whether any of the inmates are improperly detained in the hospital, or unjustly placed there, and whether the inmates are humanely and kindly treated, with full power to correct any abuses found to exist; and any injury inflicted upon the insane shall be treated as an offense, misdemeanor, or crime, as the like offense would be regarded when inflicted upon any other citizen outside of the insane asylums. They shall have power to discharge any attendant or employe who is found to have been guilty of misdemeanor meriting such discharge; and in all these trials for misdemeanor, offense, or crime, the testimony of patients shall be taken and considered for what it is worth, and no employe at the asylum shall be allowed to sit upon any jury before whom these cases are tried. Said committee shall make an annual report to the governor.

SEC. 1436. (*As amended by section 2, ch. 53, 15th g. a.*) [Inmates of hospital allowed to write.]—The names of this visiting committee and their post-office address, shall be kept posted in every ward in the asylum, and every inmate in the asylum shall be allowed to write [once a week, what he or she pleases to this committee.] And any member of this committee who shall neglect to heed the calls of the patient to him for protection, when proved to have been needed, shall be deemed unfit for his office, and shall be discharged by the governor.

SEC. 1437. [Superintendent to furnish writing material.]—Every person confined in any insane asylum shall be furnished by the superintendent or party having charge of such person, at least once in each week, with suitable materials for writing, enclosing, sealing and mailing letters, if they request the same, unless otherwise ordered by the visiting committee, which order shall continue in force until countermanded by said committee.

SEC. 1438. (*As amended by section 2, ch. 53, 15th g. a.*) [Letters to be deposited in p. o.]—The superintendent or party having charge of any person under confinement, shall receive, if requested to do so by the person so confined, at least one letter in each week [addressed to one of the visiting committee and] without opening or reading the same, and without delay to deposit it in a post-office for transmittal by mail, with a proper postage stamp affixed thereto; [and to deliver to said person any letter without opening or reading the same, written to him or her by

one of the visiting committee. But all other letters written by, or to, the person so confined may be examined by the superintendent, and if, in his opinion, the delivery of such letter would be injurious to the person so confined, he may retain the same.]

SEC. 1439. [**Inquest held.**]—In the event of the sudden and mysterious death of any person so confined, a coroner's inquest shall be held as provided for by law in other cases.

SEC. 1440. [**Punishment for violation of law.**]—Any person neglecting to comply with, or willfully and knowingly violating any of the provisions of the five preceding sections, shall, upon conviction thereof, be punished by imprisonment for a term not exceeding three years, or by fine not exceeding one thousand dollars, or by both fine and imprisonment, in the discretion of the court, and by ineligibility for this office in the future, and upon trial had for such offense, the testimony of any person, whether insane or otherwise, shall be taken and considered for what it is worth.

SEC. 1441. [**Visits of.**]—At least one member of said committee shall visit the asylum for the insane every month.

WHEN ILLEGALLY CONFINED.

SEC. 1442. [**May be discharged by district judge.**]—On a statement in writing, verified by affidavit, addressed to a judge of the district or circuit court of the county in which the hospital is situated, or of the county in which any certain person confined in the hospital has his legal settlement, alleging that such person is not insane, and is unjustly deprived of his liberty, such judge shall appoint a commission of not more than three persons, in his discretion, to inquire into the merits of the case, one of whom shall be a physician, and if two or more are appointed, another shall be a lawyer. Without first summoning the party to meet them, they shall proceed to the hospital and have a personal interview with such person, so managed as to prevent him, if possible, from suspecting its object; and they shall make any inquiries and examinations they may deem necessary and proper of the officers and records of the hospital touching the merits of the case. If they shall judge it prudent and advisable, they may disclose to the party the object of their visit, and either in his presence or otherwise, make further investigation of the matter. They shall forthwith report to the judge making the appointment the result of their examination and inquiries. Such report shall be accompanied by a statement of the case, made and signed by the superintendent. If, on such report and statement, and the hearing of the testimony, if any is offered, the judge shall find the person not insane, he shall order his discharge. If the contrary, he shall so state, and authorize his continued detention. The finding and order of the judge, with the report and other papers, shall be filed in the office of the court over which such judge presides, who shall enter a memorandum thereof on his record, and forthwith notify the superintendent of the hospital of the finding and order of the judge, and the superintendent shall carry out the order. The commissioners appointed as provided in this section shall be entitled to their necessary expenses and a reasonable compensation, to be allowed by the judge, and paid by the state out of any funds not otherwise appropriated; *provided*, that the applicant shall pay the same if the judge shall find that the application was made without probable grounds, and shall so order.

SEC. 1443. [**Commission: when appointed.**]—The commission so provided for shall not be repeated oftener than once in six months in regard to the same party; nor shall such commission be appointed in the case of any patient within six months of the time of his admission.

SEC. 1444. [**Habeas corpus.**—All persons confined as insane shall be entitled to the benefits of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing, and if the judge shall decide that the person is insane, such decision shall be no bar to the issuing of the writ a second time, whenever it shall be alleged that such person has been restored to reason.

SEC. 1445. [**Failure of duty punished.**—Any officer required herein to perform any act, and any person accepting an appointment under the provisions of this chapter, and willfully refusing or neglecting to perform his duty as herein prescribed, shall be guilty of a misdemeanor, besides being liable to an action for damages.

(CHAPTER 40, LAWS OF 1882.)

ASYLUM FOR FEEBLE-MINDED CHILDREN REORGANIZED.

An Act to repeal chapter 152 of the acts of the sixteenth general assembly, and chapter 164 of the acts of the eighteenth general assembly, and to provide for the establishment and maintenance of the institution for feeble-minded children at Glenwood.

SECTION 1. [**Chapter 152 of 16th g. a. and 164 of 18th g. a. amended.**]—*Be it enacted by the general assembly of the state of Iowa:* That chapter 152 of the sixteenth general assembly, and chapter 164 of the eighteenth general assembly, be and the same are hereby repealed, and the following enacted in lieu thereof:

SEC. 2. [**Name changed to institution for.**—That the institution located at Glenwood, in Mills county, and heretofore known as the asylum for feeble-minded children, shall by this act be termed the institution for feeble-minded children. Said institution shall be under the management of a board of trustees, consisting of three persons, two of whom shall constitute a quorum for the transaction of business. Said trustees shall be elected by the general assembly, one of whom shall be elected for two years, one for four years, and one for six years; and at least one of them shall be a resident of Mills county, and each general assembly shall hereafter elect one trustee for six years.

SEC. 3. [**Purposes.**—The purposes of this institution are to train, instruct, support, and care for feeble-minded children.

SEC. 4. [**Duty of trustees and superintendent.**—The board of trustees shall appoint a superintendent, whose duty it shall be, under the direction of the board, to superintend the care, management, training, and instruction of the wards of the institution, and the management of its finances. He shall give a bond to the state of Iowa in such sum as the board shall require, to be approved by the board, conditioned for the faithful performance of his duties. He shall make quarterly settlements with the treasurer of the board.

SEC. 5. [**Trustees to supervise the institution.**—The board of trustees shall have the general supervision of the institution and all its affairs, and shall adopt such rules and regulations for the management of the same as will carry into effect the provisions and purpose of this act. The trustees shall elect one of their number president, and they shall elect a secretary and treasurer, who may or may not be members of the board. The treasurer shall give bonds as the board may require, conditioned for the faithful accounting of all moneys that come into his hands. The secretary and treasurer, if not a member of the board, shall receive three dollars per day for the time he is actually employed during the sessions of the board, or under their direction. Said board shall meet at the institution on the first Wednesday in October of each year, and every three months thereafter, and at such other times as two of their number may decide. The full compensa-

tion of the members of the board shall be four dollars per day for time actually employed, and mileage such as is allowed by law to members of the general assembly.

SEC. 6. [**Admission of pupils, and duty of county superintendents.**]—Every child and youth residing in the state between the ages of five and eighteen years of *age*, who, by reason of deficient intellect, is rendered unable to acquire an education in the common schools, shall be entitled to receive the physical and mental training and care of this institution at the expense of the state; and it shall be the duty of the county superintendent of common schools in each county to report to the superintendent of the institution, on the first day of October of each year, the name, age, and postoffice address of every person in his county between the ages of five and twenty-one, who, by reason of feeble mental and physical condition, is deprived of a reasonable degree of benefit from the common schools. He shall also state in said report whether or not such person has ever attended school, and how long, if at all; and he shall also give the postoffice address of the parent, guardian, or nearest friend of such person.

SEC. 7. [**Who can apply for admission.**]—There shall be received into the institution feeble-minded children between the ages of five and eighteen years, whose admission shall be applied for as follows:

First—By the father and mother, or either of them, if the other be adjudged insane.

Second—By the guardian duly appointed.

Third—In all other cases by the board of supervisors of the county in which the child resides. It shall be the duty of such board of supervisors to make such application for any such child that has no living sane parent or guardian in the state, unless such child is comfortably provided for already.

SEC. 8. [**Trustees to prescribe form of application.**]—The forms for applications for admission into the institution shall be such as the trustees shall prescribe, and each application shall be accompanied by answers to such interrogatories as the trustees shall require propounded.

SEC. 9. [**\$10 per month support fund.**]—For the support of said institution there is hereby appropriated out of any money in the treasury, not otherwise appropriated, the sum of ten (10) dollars per month for each inmate therein supported by the state, counting the actual time such person is an inmate and supported by the institution; and upon presentation to the auditor of state of a sworn statement of the average number of inmates supported in the institution by the state for the preceding month, the auditor of state shall draw his warrant upon the treasurer of state for such sum. For the ordinary expenses of the institution, including furniture, books, school apparatus, and compensation of officers and teachers, there is hereby appropriated the sum of eleven (11) thousand dollars annually, or so much thereof as may be necessary, which may be drawn quarterly upon the order of the trustees.

SEC. 10. [**Superintendent to furnish clothing: when.**]—When the pupils of the institution are not otherwise provided with clothing, the same shall be furnished by the superintendent, who shall make out an account of the cost thereof in each separate case, together with the cost of transmission of the pupil, when the latter is not otherwise provided for; and said account shall be made against the parent or guardian, if there be such, or otherwise against the inmate; and when said account shall have been certified by the superintendent it shall be presumed to be correct in all courts, and shall be transmitted by mail to the county auditor of the county from which said pupil was sent to the institution. The said auditor shall then proceed at once to collect the same, by suit if necessary, in the name of the county, and pay the same into the state treasury. The superintendent shall at the same time

transmit a duplicate of the same account to the auditor of state, who shall credit the same to the account of the institution and charge it to the proper county: *Provided*, (if) it shall appear by the affidavit of three disinterested citizens of the county, not kin to the inmate, that the parent or guardian would be unreasonably oppressed by such suit, then such auditor shall not institute such suit, but shall credit the same to the state on his books, and report the amount of such account to the board of supervisors of his county, and the said board shall draw from the county fund the amount claimed and cause the same to be paid into the state treasury. All accounts for clothing and transportation of pupils on the books of the superintendent of this institution, and not paid at the time of the enactment of this section, hereby are made subject to the same, and shall be collected accordingly.

SEC. 11. [**Inmates returned: when.**—Any inmate of the institution may be returned to the parents or guardian whenever the trustees may so direct.

SEC. 12. [**Feeble-minded include idiotic children.**—The term “feeble-minded,” as used in connection with this institution, shall be so construed as to include idiotic children, and the institution shall provide a custodian department for the care of such children as cannot be benefited by educational training.

SEC. 13. (*As amended by ch. 68, 22d g. a.*) [**Trustees to report to general assembly.**—The board of trustees shall make a full report of the disbursements of the institution, and its condition, financial and otherwise, (to the governor biennially.)

SEC. 14. [**Appointment of subordinate officers.**—The superintendent may, under the direction of the board of trustees, appoint such subordinate officers, teachers, attendants and other help as may be needed for the efficient working of the institution.

CHAPTER 3.

OF DOMESTIC AND OTHER ANIMALS.

SECTION 1446. (*As substituted by sec. 2, ch. 70, 15th g. a.*) [**Swine and sheep restrained.**—(Every owner of swine, sheep or goats, shall restrain the same from running at large.)

SEC. 1447. [**Male animals running at large taken up.**—Any person may take possession of any stallion, jack, bull, boar or buck, found at large in the county in which such person resides, and give notice thereof to any constable in the county, who shall sell the animals so taken at public auction to the best bidder for cash, having given ten days notice of the time and place of sale, by posting the same in writing in three public places in the township wherein such animals were found at large. Out of the proceeds of sale he may pay all costs and charges of keeping and any damage done by said animals, and shall pay the remainder of said proceeds into the county treasury, to be applied to the use of the county, unless legal proof be made to the county auditor by the owner of said animals of his right thereto; such proof may be made at any time within twelve months from the sale, and thereupon said auditor shall order the proper amount to be paid to the owner out of any money in the treasury not otherwise appropriated. But if the owner, or any person for him, shall, on or before the day of sale, pay the costs and charges thus far made, and all damages, and make satisfactory proof of his ownership, the constable shall release the animal to him without proceeding further.

The owner of a bull, who allows him to run at large, is liable for all damages he may cause, and where an unpedigreed bull thus running at large gets a thoroughbred cow with calf, the

measure of damages is the difference in value of plaintiff's cow for breeding purposes, before and after meeting defendant's bull. *Crawford v. Williams*, 48 Iowa, 247.

SEC. 1448. (*As substituted by sec. 3, ch. 70, 15th g. a.*) [**Domestic animals doing damage restrained.**]—(When any person is injured in his lands, inclosed by a lawful fence, by any kind of domestic animal, he may recover his damages by an action against the owner, or by distraining the animals doing the damage; but if they were lawfully on the adjoining land, and escaped therefrom in consequence of the neglect of the person suffering the damage to maintain his part of the division fence, the owner of the animals shall not be liable for such damage; *provided*, that if the party injured elects to recover by action against the owner of the stock, no appraisalment need be made by the trustees as in cases of distraint; and in counties where by police regulation stock is restrained from running at large, any person injured in his improved or cultivated lands by any domestic animal may recover his damages as provided in section six of this act and sections 1454, 1455 and 1456 of the code, whether the lands whereon the injury was done was inclosed by a lawful fence or not.)

The fact that stock is prohibited from running at large in a county does not relieve the land owner from the duty of maintaining partition fences, and if he suffers damage resulting from his own neglect to keep up his fences, he cannot recover therefor from the owner of the stock doing the damage. *Duffrees v. Judd*, 48 Iowa, 256.

The common law rule, that every man is required to keep his cattle within his own close, under the penalty of answering in damages for all injuries arising from their running at large, was held not in force in Iowa. *Wagner v. Bissell*, 3 Id., 396 (1856); *Heath v. Coltenback*, 5 Id., 490 (1857); *Alger v. The M. & M. R'y Co.*, 10 Id., 268 (1859); *Smith v. The C., R. I. P. R'y Co.*, 34 Id., 506.

In an action for trespass committed by cattle, under the law as it stood in 1856-57. the plaintiff, in order to recover, had to show that his fence was sufficient to turn ordinary stock. *Heath v. Coltenback*, *supra*; *Frazier v. Nortimus*, 34 Id., 82.

In an action for damages under this section, the plaintiff may prove the damages sustained by him by the ordinary character of evidence. The finding of the damages by the fence viewers is done only where the plaintiff elects to distrain the beasts. *Quinton v. Van Tuyle*, 30 Id., 554.

An agent or servant may distrain for, and at the direction of the master or owner of the premises or crops, trespassing animals doing damage thereon; and as such agent he may justify, in an action of replevin brought against him to recover the cattle while thus held by him. *Bearinger v. O'Hare*, 36 Id., 259.

The fact that stock is prohibited from running at large in a county does not relieve the land owner of the duty of maintaining partition fences, and if he suffers damage resulting from his neglect to keep up his fences, he cannot recover therefor from the owner of the stock causing the damage. *Duffrees v. Judd*, 48 Id., 256.

If cattle break over a good and sufficient fence into one field, and from thence into another field belonging to the same owner, separated from the first by an insufficient fence, such owner may maintain an action for damages to the second field. *Herold v. Meyers*, 20 Id., 378.

This section authorizes only persons whose lands are enclosed by lawful fence to distrain domestic animals injuring their premises, and where animals are distrained, the township trustees have not exclusive jurisdiction of the question whether the distrainer had a lawful fence, but that question may be determined in an action of replevin brought to recover the animals distrained. *Lufford v. Shriner*, 61 Id., 155.

SEC. 1449. [**Adjoining owner.**]—And if the animals are not lawfully upon the adjoining close and came thereupon, or if they escaped therefrom into the injured enclosure in consequence of the neglect of the adjoining owner to maintain any partition fence, or any part thereof, which it was his duty to maintain, then the owner of the adjoining land shall be liable as well as the owner of the animals.

SEC. 1450. (*As substituted by §§ 3, 4, ch. 70, 15th g. a.*) [Section 309 of the code is hereby amended by striking out the word "now" in the fifth line thereof; and the word "stock," as used therein and in this chapter, is hereby declared to mean cattle, horses, mules and asses; and, under said section, the board of supervisors of each county may—and on petition of one-fourth of the legal voters thereof, as shown by the returns of the last general election, must—submit, in the manner provided by section 310 of the code, except as herein modified, to the electors of the county at the next general election, or, if they deem it advisable, at a special

election called for that purpose, the following questions of police regulation, or either of them, and no others, to-wit:

First. Shall stock be restrained from running at large?

Second. Shall stock be restrained from running at large between sunset and sunrise?

Third. Shall stock be restrained from running at large between sunset and sunrise from the first day of (naming the month) in each year, until the first day of (naming the month) following?

Fourth. Shall stock be restrained from running at large between sunset and sunrise from the first day of (naming the month) in each year until the first day of (naming the month) following?

The provisions of the statute authorizing the people of the several counties of the state to decide by a majority vote to restrain swine and sheep from running at large, held, not inconsistent with article 1, of section 6, of the state constitution. *Dalby v. Wolf et al.*, 14 Iowa, 228. See, also, *Weir v. Cram*, 37 Id., 649; *Little v. McGuire*, 38 Id., 560.

It was held that, under chapter 26, laws of 1870, the owner of trespassing animals was liable for damages done by them without inquiry as to whether the lands were fenced or not. *Little v. McGuire*, 38 Id., 560; *Hallock v. Hughes*, 42 Id., 516.

SEC. 1451. (*As amended by sec. 5, ch. 70, 15th g. a.*) [Regulation in force when.]—If at such election a majority of the electors voting thereon shall vote in favor of either of such regulations, then the same shall take effect and be in force at the end of thirty days after said election, and shall continue in force until the end of ninety days after an election at which, on a resubmission of the same question, a majority of the electors of the county voting thereon shall vote against the same; *Provided*, that where any county prior to the taking effect of this act, shall have voted, on the submission of such question, “for restraining stock from running at large;” or “for restraining stock from running at large between the hours of sunset and sunrise,” as provided in chapter three, title eleven, of the code, or in the law or laws to which the same is amendatory, such vote is hereby declared to be legal and valid, and to amount to an adoption by the county of the police regulation so voted for, as the same is herein set out, as fully and effectually as if the same was submitted and voted for under this act, except that the same shall be and remain in force in such county until the end of thirty days after the next general election and no longer, unless re-adopted thereat.]

SEC. 1452. (*As amended by section 1, ch. 188, 18th g. a.*) [Owner of stock liable for damage where police regulation is adopted.]—[The owner of any stock or domestic animal, prohibited by law or police regulation of any county, from running at large at any of the times hereinbefore mentioned, shall be liable for all damages done thereby while wrongfully remaining at large upon the public highway or upon the improved or cultivated lands of another, which may be recovered by action at law, or the party injured may, at his option, distrain the trespassing animals, and retain the same in some safe place, at the expense of the owner, until the damages are paid as provided in section[s] 1454, 1455 and 1456 of the code. [Said damages to be assessed pro rata per head, and each owner, if more than one owner, shall be liable for the pro rata amount, and each owner shall have the right to discharge his stock from distraint by paying the said pro rata amount to the person damaged, together with his pro rata share of the costs of the distraint.] *Provided*, that no stock or domestic animal, except the male animals mentioned in section 1447 of the code, shall be considered as running at large, so long as the same is upon the unimproved or uncultivated lands, and under the immediate care and control of the owner, or upon the public highway under like care and control, for the purpose of travel or driving thereon.

The plowing of a single furrow around an 80 acre tract of wild and unimproved land, the cultivation of three acres for a garden, the breaking of eight acres and the cutting of some brush on a portion of the remainder do not constitute the whole tract improved as contemplated by this section; but such acts sufficiently indicate the owner's possession of the land and his pur-

pose to use the grass growing thereon, to enable him to maintain an action for damages against one who, without his consent, herds cattle upon the unbroken part of the land. *Otis v. Morgan*, 61 Iowa, 712.

SEC. 1453. (*As amended by ch. 70, 15th g. a.*) [**Who to be considered owner.**]—[The word owner, as used in the preceding and in the three succeeding sections of this chapter of the code, shall include the person entitled to the present possession of the animal, and also the person having the care or charge of the same, as well as the person having the legal title thereto.]

(CHAPTER 188, LAWS OF 1880.)

RELATIVE TO DAMAGE DONE BY DOMESTIC ANIMALS.

An Act amending section 6 of chapter 70 of the laws of the fifteenth general assembly, relating to the liability of owners of stock for damage done by domestic animals running at large; and for the punishment of persons unlawfully relieving stock from distraint.

SECTION 1. (*Amendment of section 6, ch. 70, 15th g. a.*) *Be it enacted by the general assembly of the state of Iowa:* That section 6 of chapter 70 of the [public] acts of the fifteenth general assembly be amended as follows: By adding, after the word "code" and before the word "provided," in the tenth line of the said section, the following: "Said damages to be assessed pro rata per head, and each owner, if more than one owner, be liable for the pro rata amount, and each owner shall have the right to discharge his stock from distraint by paying the said pro rata amount to the person damaged, together with his pro rata share of the costs and distraint."

SEC. 2. [**Relieving stock from distraint by force punished.**]—That if any person by force or otherwise without leave of the person having stock under distraint, relieve the stock from distraint, he shall be guilty of a misdemeanor, and shall pay a fine of not less than 10 dollars nor more than 100 dollars, or by imprisonment in the county jail not less than 10 days nor more than 30 days.

Approved March 27, 1880.

The word "stock" as used in section 2 of chapter 188 of the laws of 1880, making it a misdemeanor to release distrained stock, has its ordinary meaning as used in agriculture, and includes swine. *The State v. Clark*, 65 Iowa, 336.

SEC. 1454. [**Township trustees notified to assess damages: sale of stock.**]—Within twenty-four hours after the stock has been distrained, Sunday not being included, the party so injured, or his agent, shall notify the owner of said stock, when known, and if said owner shall fail to satisfy the owner of, or occupant cultivating said land, he shall, within twenty-four hours thereafter, notify the township trustees to be and appear upon the premises to view and assess the damages; such notices to be either verbal or in writing. When two or more trustees have assembled, they shall proceed to view and assess the damages and the amount to be paid for keeping said stock; and if the persons owning such distrained stock refuse to pay such damages so assessed, then the trustees shall post up notices in three conspicuous places in the township where such damages were done, that the said stock, or so much thereof as is necessary to pay said damages with costs of sale, will be sold to the highest bidder; any money or stock left after satisfying such claims, shall be returned to the owner of the stock so disposed of; said sale shall take place at the enclosure where such stock was distrained, between the hours of one and three p. m., on the tenth day after the posting of said notice; *provided*, that if any one or more of said trustees are interested in said damages, the trustee or trustees not so interested shall appoint some one or more, as the case may require, to act in the place of the person or persons so interested; the owner of the stock, or the person entitled to the possession thereof, when known, shall

also be notified of the time and place of the meeting of said trustees to assess said damages. When either trustee is absent so that notice cannot be served upon him, then any justice of the peace shall appoint a suitable person, having the qualifications of a juror, to supply the place of the absent trustee, and the person so appointed shall serve as such trustee for all the purposes of this and the following sections.

SEC. 1455. [Assessment filed with clerk: appeal from.]—The trustees shall make their assessment in writing and file the same with the township clerk, to be of record in his office. Any person aggrieved by the action of the trustees under this chapter, may appeal to the circuit court of the proper county. The bond shall be filed with the clerk of the township in a penalty double the value of the property distrained, or if the value of the property exceed the amount of the damage claimed, then double the amount of the damage. Notice of such appeal shall be given in the same time and manner as in appeals from a judgment of a justice of the peace, with good and sufficient securities, to be approved by the clerk; and from and after the filing of the appeal bond, the same shall operate as a supersedeas. In case the owner of such stock be a pellant the same shall be delivered to him. The clerk, after the appeal is taken, shall certify all the original papers to the clerk of the circuit court within the time prescribed for the appeal.

On an appeal from an assessment of damages by the township trustees under this section, not only the amount of the damages awarded by the trustees, but also the question as to whether the claimant is entitled to any damages at all, may be considered. *Duffees v. Judd*, 48 Iowa, 256.

When power is conferred upon three or more persons to do an act, and notice to such persons is required, all must be notified, if possible, although, when duly notified, a majority may act. Accordingly held that an appraisal by two of the township trustees, of the damage done by trespassing animals, under this section of the code, was void, where no attempt was made to notify the other trustee. *Barrett v. Dolan*, 71 Id., 94.

SEC. 1456. [Estrays.]—If the owners of such distrained stock are not known it shall be treated as estrays.

The fact that a horse found running at large has escaped from, or been turned loose by a thief, will not prevent one who distrains him, and complies with the provisions of the statute concerning estrays, from acquiring a good title to him in due time, under the estray laws; and another may purchase the title so acquired, and hold the horse against the person from whom he was taken, even though he has been notified by the latter that the horse was stolen from him, and that he would claim him. *Kinnie v. Roe*, 70 Id., 509.

(Sections 1457, 1458, 1459, 1460, 1461, 1462 and 1463, are repealed by section one (1), of chapter 70, laws of 1874.)

SEC. 1464. [Unbroken Animals.]—No person shall take up an unbroken animal as a stray, between the first day of May and the first day of November, unless the same be found within his lawful enclosure; nor shall any person take up any stray unless he be a householder.

An estray is an animal whose owner is unknown. And a person cannot, under the statute, lawfully take up an animal found upon his unfenced premises, whose owner is known to him; and the owner of the animal may, in such case, replevy the animal without first tendering to the person who has taken it up, the costs and expenses incurred in respect thereto. *Walters v. Glates*, 29 Iowa, 437.

Under this section a householder may take up as an estray a broken animal running in the highway; the restriction is upon the taking up of an unbroken animal unless found within the enclosure of the distrainer. *Knudson v. Geison*, 38 Id., 234.

SEC. 1455. [Who may take up strays.]—If any horse, mule, neat cattle, or other animal, liable to be taken up as a stray, come upon any person's premises, any other person may notify him of the fact, and if he fail to take up such stray for more than five days after such notice, any other person being a householder in the same township may take up such stray and proceed with it as if taken upon his own premises; provided, that he shall produce to the justice of the peace proof of the service of such notice, and all persons taking up stray animals shall state to the justice, under oath, where such stray was taken up.

SEC. 1466. [**Notice containing description of animal posted up.**]—Any person taking up a stray, shall, within five days thereafter, post up written notices in three of the most public places in the township, containing a full description of said animal, and unless such stray shall have been previously reclaimed by the owner, he shall, within ten days, go before a justice of the peace in the township, in which such stray was taken up, or, in case there is no justice in the township, he shall go before the nearest justice in the county, and make oath as to where said stray was taken up, and that the marks or brands have not been altered to his knowledge either before or after the same was taken up.

SEC. 1467. [**Appraisers: oath: duty of justice.**]—If necessary, the justice shall issue a notice to three disinterested householders in the township, to appear at the time and place mentioned in said notice to appraise the stray. The persons so notified, or any two of them attending, shall take an oath that they will fairly and impartially appraise said stray, and their appraisement, embracing a description of the size, age, color, sex, marks, and brands of the stray, shall be entered by the justice in a book to be kept by him for that purpose.

SEC. 1468. [**Justices to send copy of to county auditor: his duty.**]—The justice shall, within ten days thereafter, send a certified copy of said entry to the county auditor, who shall immediately enter the same in an estray book, to be kept by him for that purpose. If the appraised value of the stray is ten dollars, or more, the auditor shall cause a copy of said entry to be posted on the court house door, and a copy of said notice to be inserted three times in some newspaper in the county, if there be one, if not, he shall cause to be posted up written notices in three public places in the county, and he shall, within ten days after receiving the notice of appraisement, unless the animal shall have been previously reclaimed by the owner, forward a certified copy of the same to the public printer hereafter provided; together with the amount required to pay for two insertions of said notice in the paper published by such printer.

SEC. 1469. [**Secretary of state to contract for publishing notices: auditor notified.**]—The secretary of state shall select and contract with a printer to print such advertisements of strays, and shall immediately notify the auditor of each county of the name and residence of such printer, and the price of such advertisements. In making the contract the secretary shall select an agricultural paper, published at the capital, if there be one. Such contract shall be renewed on the first day of January, annually; and if a vacancy should from any cause occur, the secretary shall immediately fill it with a new contract.

SEC. 1470. [**Publication of notice: county auditor to subscribe for paper.**]—The printer thus selected shall, once in each week, issue a newspaper or printed sheet, in which he shall give two successive insertions of all estray notices sent to him, and shall send one copy of each paper issued to the auditor of each county, who shall receive, file, and preserve the same, to be examined by any person who may desire to see them. The auditor is hereby required to subscribe for one copy of the paper selected by the secretary of state for the publication of estray notices, and the amount of the subscription price shall be allowed and paid out of the treasury of the county.

SEC. 1471. [**When value is less than five dollars.**]—When the appraised value of any stray does not exceed five dollars, no further proceedings need be had than for the justice to enter a description of said stray on his estray book, and if no owner appear within six months, the right of the property shall vest in the finder, if he has complied with the law and paid all costs.

SEC. 1472. [**When title to property vests.**]—Where the appraised value of the stray exceeds five dollars and is less than ten, and the finder shall have complied with the provisions of this chapter, and paid all costs, the property shall vest in him after the expiration of nine months, if no owner appear.

SEC. 1473. [**Taker up may use and work animal.**]-Any person legally taking up a stray may use or work, if he does so with care and moderation, and does not abuse or injure it. But if any person unlawfully take up any stray, or take up any stray and fail to comply with the provisions of this chapter, or use or work it in a manner contrary to this chapter, or work it before having it appraised, or keep such stray out of the county for more than five days at any one time before he acquires a title to said stray, such offender shall forfeit to the county twenty dollars, to be sued for by any person in the county; and the owner of the stray may also recover of such offender double the amount of all injury sustained, with costs.

SEC. 1474. [**Owner may prove property: proceeding.**]-The owner of any stray may, within one year from the time of taking up, prove his ownership of the same before a justice of the peace (and if the title shall not have already vested in the finder by sections fourteen hundred and seventy-one or fourteen hundred and seventy-two of this chapter), and upon payment of all costs, the reward, and a reasonable allowance, he shall be entitled to recover the stray. If the owner and finder cannot agree upon the amount of such allowance, it shall be settled by some justice of the peace, who shall take into consideration the trouble and expense incurred by the finder, and whatever use he may have had of the stray.

SEC. 1475. [**Title to vest in finder: exceptions.**]-If the owner fail to claim his title to any stray for one year after the time of taking up, and the finder shall have complied with this law, a complete title to the stray shall vest in the finder; but if the owner shall appear within eighteen months from the time of taking up, and prove his ownership of such stray, and pay all costs and expenses as above provided, the finder shall pay him the appraised value of such stray, or may, at his option, deliver up the stray.

SEC. 1476. [**Finder not liable for accidents.**]-If any stray legally taken up escape from the finder, or die, without any fault on his part, he shall not be liable for the loss.

SEC. 1477. [**Penalty.**]-If any person shall sell, or trade, or take out of the state, any stray before the legal title shall have vested in him, he shall forfeit to the owner double the value of said stray, and shall be punished by fine not exceeding ninety dollars, or imprisonment in the county jail not exceeding thirty days.

SEC. 1478. If any printer, auditor or justice of the peace, fail to perform the duties enjoined upon him by this chapter in relation to strays, he shall forfeit to the county not less than five or more than fifty dollars, to be sued for by any person in the county.

SEC. 1479. [**Marks and brands, book for.**]-The board of supervisors of each county shall procure at the expense of the county, a book for each civil township, in which to record the marks and brands of horses, sheep, hogs and other animals.

SEC. 1480. [**Recorded.**]-Any person wishing to mark or brand his domestic animals with any distinguishing mark, may adopt his own mark and have a description thereof recorded by the clerk of the township in which the owner lives.

SEC. 1481. [**Mark of another.**]-No person shall adopt a mark or brand previously recorded to another person residing in the same township, nor shall the clerk record the same one to two persons unless on their joint application.

SEC. 1482. [**Abandoned animals taken care of at owner's expense.**]-Any person may take charge of any animal whose owner has abandoned it, or fails to properly take care and provide for it, and may furnish the same with proper shelter, nourishment, and care, at the owner's expense, and shall have a lien on such animal for the same; which lien at the expiration of three months, shall become a perfect title to the property as provided in the case of a stray.

SEC. 1483. [**Cruelty to animals: food and water to be supplied.**—In case any creature impounded or otherwise confined shall be without necessary food or water for more than twelve successive hours, it shall be lawful for any person, as often as necessary, to enter the pound, enclosure, or building, and supply it with food and water so long as it shall remain so confined; and the reasonable cost of such food and water may be collected by him of the owner of such creature.

SEC. 1484. [**Diseased animals killed.**—The sheriff, constable, police officer, officer of any society for the prevention of cruelty to animals, or any magistrate shall destroy any horse or any other animal having the disease called and known as the glanders, or any disabled creature unfit for further use.

SEC. 1485. [**Dogs may be killed.**—It shall be lawful for any person to kill any dog caught in the act of worrying, maiming or killing any sheep or lambs, or other domestic animal, or any dog attacking or attempting to bite any person, and the owner shall be liable to the party injured for all damages done by his dog, except when the party is doing an unlawful act.

The owner of domestic animals is justified in killing a dog which is harassing, maiming or worrying the animals, and the killing is justifiable even at the time the dog is not committing the act, providing his conduct is such as to excite a reasonable apprehension that he is about to do so. *Marshall v. Blackshire*, 44 Iowa, 475.

This section imposes liability upon the owners of dogs for all injuries done by them. *O'Harra v. Miller*, 64 Id., 462-3.

SEC. 1486. [**Animals seized released on execution of bond.**—Any animal, or other property; taken up, held, distrained or seized under this chapter, may be released at once by the owner, upon execution and filing of a bond in double the value of the property held, conditioned for the payment of all costs and damages for which the same is held, and to which the one taking up, holding, or distraining, may be legally entitled, within twenty days from the filing and approval of such bond; said bond shall be filed with and approved by any constable, sheriff, or other officer having custody of the property, or by the nearest acting justice of the peace, or by the justice before whom any legal proceedings relating to such property is pending. Said bond shall be for the use of any person having any right or interest in or to said property so released.

SEC. 1487. [**Bounty: paid from county treasury.**—A bounty of one dollar shall be allowed on each scalp of a wolf, lynx, swift, or wildcat, to be paid out of the treasury of the county in which the animal was taken, upon a verified statement of the facts showing the claimant to be entitled thereto.

SEC. 1488. [**Proceedings to obtain.**—The person claiming the bounty shall produce such statement, together with the scalp or scalps, with the ears thereon, to the county auditor, or a justice of the peace of the county wherein such wolf, lynx, swift, or wildcat may have been taken and killed; and the officer before whom such scalps are produced shall deface or destroy the scalps when so produced, so as to prevent the use of the same to obtain for a second time the bounty herein provided for.

CHAPTER 4.

OF FENCES.

SECTION 1489. [**Partition maintained.**—The respective owners of lands enclosed with fences, shall keep up and maintain partition fences between their own and next adjoining enclosure so long as they improve them in equal shares, unless otherwise agreed between them.

SEC. 1490. [Neglect to build or repair.]—If any party neglect to repair or rebuild a partition fence, or a portion thereof, which he ought to maintain, the aggrieved party may complain to the fence viewers, who, after due notice to each party, shall examine the same, and if they determine the fence is insufficient, shall signify it in writing to the delinquent occupant of the land, and direct him to repair or rebuild the same within such time as they judge reasonable.

Section 1490 does not, in terms, require a *written* notice, though, properly, it should be in writing and proceed from the fence viewers; but where it appears that a party, in fact, was notified verbally by the opposite party, and was present at the meeting of the fence viewers and made no objection, the statute is sufficiently complied with. *Talbot v. Blackledge*, 22 Iowa, 572. A verbal notice was held sufficient in *Gantz v. Clark*, 31 Id., 254.

The proceedings of the fence viewers should not be measured with technical nicety, but, like those before a justice of the peace, receive indulgent consideration. *Id.*

An adjacent proprietor cannot evade the law in relation to the erection and maintenance of partition fences, by purposely building his fence a few feet from, instead of on, the dividing line. *Id.*

An owner of land is not liable for a failure to comply with the requirement of the township trustees acting as fence viewers under section 1492 of the code, unless he has been served with written notice of their meeting to take action in the premises. *Lookhart v. Wessels*, 46 Id., 81. This case certainly overruled *Gantz v. Clark*, 31 Id., 254, in so far as that case holds that a verbal notice is sufficient.

The action of the fence viewers in locating and apportioning division lines of fence is not conclusive, and it is competent for a land owner to show, in a proper action, that the fence was located upon his land, and not upon the division line, and he may recover damages therefor. *Peschongs v. Meuller*, 50 Id., 237.

It is not necessary that a complainant to the fence viewers of the insufficiency of a partition fence should be in writing. *Stubbs v. Ogden*, 46 Id., 134.

The party whose fence is complained of should have reasonable notice of the meeting of the fence viewers, but no definite time is required. *Id.*

An adjudication respecting the sufficiency of the fence must be made by the trustees setting as a board, and must be based upon personal inspection, although that inspection need not be made jointly, nor is it necessary that such adjudication should be reduced to writing and certified by them. *Id.*

The certificate of the fence viewers as to the value of the fence built by the complainant, after a refusal of the other party to comply with the order of the fence viewers, need not be delivered to or served upon him to entitle the complainant to recover therefor. It is sufficient if it be filed with the clerk. *Id.*

The statute creates the fence viewers a special tribunal for the adjudication of the rights and settlement of controversies of adjoining owners respecting the erection and maintaining of partition fences, and no action will lie in the courts for that purpose until the fence viewers have been appealed to and acted in the premises as prescribed by statute. *Lease v. Vance*, 28 Id., 509.

SEC. 1491. [Penalty, if order of fence viewers is not complied with.]—If such fence be not repaired or rebuilt accordingly, the complainant may repair or rebuild it, and the same being adjudged sufficient by the fence viewers, and the value thereof, with their fees, being ascertained by them and certified under their hands, the complainant may demand of the owner of the land where the fence was deficient the sum so ascertained, and, in case of neglect to pay the same for one month after demand, may recover it with one per cent a month interest by action.

SEC. 1492. [Disputes: fence viewers to settle.]—When a controversy arises between the respective owners about the obligation to erect or maintain partition fences, either party may obtain apply to the fence viewers, who, after due notice to each party, may inquire into the matter and assign to each his share thereof and direct the time within which each shall erect or repair his share in the manner provided above.

An owner of land is not liable for a failure to comply with the requirements of the township trustees, acting as fence viewers under this section, unless he was served with written notice of their meeting to take action in the premises. *Lookhart v. Wessels*, 46 Iowa, 81.

A fence built on the line of a public alley, but used by the owner of the lot on the opposite side of the alley, by fencing across and enclosing the alley, does not become a partition fence by reason of such use, and the township trustees have no jurisdiction to apportion its cost between the parties. *Anderson v. Cox*, 54 Id., 578.

Sections 1490 and 1492 of the code, and section 2 of chapter 106, laws of 1876, confer jurisdiction upon the fence viewers to decide upon the sufficiency of a hedge and its value, and their decision upon the question within their jurisdiction is conclusive. *McKeever et al. v. Jenks et al.*, 59 Id., 300.

SEC. 1493. [Failure to comply.]—If a party neglect to erect or maintain the part of fence assigned him by the fence viewers, it may be erected and maintained by the aggrieved party in the manner before provided, and he shall be entitled to double the value thereof, to be recovered as directed above.

Under section 1493, it is not necessary that the fence viewers notify a party who neglects to erect the portion of fence assigned him under the preceding section, of their meeting to ascertain the value of the fence which has been erected by the aggrieved party. *Talbot v. Blackledge*, 22 Iowa, 573.

In an action to recover double the value of a partition fence which the defendant by the decision of the fence viewers had been required to erect, it was held proper for the jury, under the instructions of the court, to determine whether or not the land of plaintiff was used for pasturing swine and sheep, and whether a fence was required to turn these animals. *Huber et al. v. Wilkinson*, 46 Id., 458.

SEC. 1494. [Repair.]—All partition fences shall be kept in good repair throughout the year, unless the owners on both sides otherwise agree.

SEC. 1495. (As amended by ch. 95, 22d g. a.) Who required to maintain.]—No person not wishing his land enclosed and not occupying nor using it otherwise than in common, shall be compelled to contribute to erect or maintain any fence between him and an adjacent owner; but when he encloses (cultivates) or uses his land otherwise than in common, he shall contribute to the partition fences as in this chapter provided.

One who incloses land adjoining another's close, and does not own any part of the division fence, may throw any portion of such land open to common at pleasure. *Miner v. Bennett*, 45 Iowa, 635.

When one uses his land otherwise than in common, he can be compelled to contribute to the erection of partition fences. *Hewett v. Jewell*, 59 Id., 37.

Where two persons owning contiguous lands were not using their lands in common, it was held that either of them could be compelled to join in the erection of a partition fence on the line between their lands. *Id.*

Land may said to be used in common where its use does not require an inclosure. The term "in common" is used solely with reference to the obligation to contribute to a partition fence. *Says v. Peck et al.*, 53 Id., 256.

SEC. 1496. [Enclosed in common: proceedings where division is sought.]—When lands owned in severalty have been enclosed in common without a partition fence, and one of the owners is desirous to occupy his in severalty, and the other refuses or neglects to divide the line where the fence should be built or build a sufficient fence on his part of the line when divided, the party desiring it may have the same divided and assigned by the fence viewers, who may, in writing, assign a reasonable time, having regard for the season of the year for making the fence, and if either party neglect to comply with the decisions of the viewers, the other, after making his own part, may make the other part and recover as directed above.

Where adjoining owners agree to enclose lands in common, such agreement releases, for the time being, each party from the obligation to build a partition fence; and if one of them turns his cattle upon his own land from which they stray upon the land of the other, and do damage, he is liable therefor, the same as he would be if the lands were separated by a lawful partition fence; and the injured party may distrain the cattle while thus trespassing upon his land, regardless of the fact as to whether their owner turned them on his own land with the intention that they should go upon the land of the other. *Winters v. Jacobs*, 29 Iowa, 115.

While a lawful fence is not necessary between adjoining farms to constitute an occupation in severalty, still the partition fence must be such as will turn stock, and premises separated only by a hedge which is insufficient for that purpose must be considered as enclosed in common within the meaning of section 1496 of the code. *Miner v. Bennett*, 45 Id., 635.

SEC. 1497. [When it is desired not to enclose.]—In the case mentioned in the preceding section, when one of the owners desires to throw open any portion of his field not less than twenty feet in width, and leave it unenclosed to be used

in common by the public, he shall first give the other party six months notice thereof.

SEC. 1498. [**When owner encloses he must pay for partition fence.**—When land which has lain unenclosed is enclosed, the owner thereof shall pay for one-half of each partition fence between his lands and the adjoining lands, the value to be ascertained by the fence viewers, and if he neglect for thirty days after notice and demand to pay the same, the other party may recover as before provided; or he may, at his election, rebuild and make half of the fence, and if he neglect so to do for two months after making such election he shall be liable as above provided.

To confer jurisdiction upon fence viewers, the fence respecting which they determine must be in fact a partition fence, and they cannot conclude a party by determining that to be a partition fence which is not. *Bills v. Bellnap*, 38 Id., 225.

If parties use a fence as a partition between their farms, it is wholly immaterial whether it is on the exact boundary line or not, so far as the obligation to maintain the fence or contribute to its construction is concerned. *Card v. Dale*, 67 Id., 552.

SEC. 1499. [**Division of fence recorded.**—When a division of fence between the owners of improved lands may have been made, either by fence viewers, or by agreement in writing, recorded in the office of the clerk of the township where the lands are, the owners and their heirs and assigns shall be bound thereby, and shall support them accordingly, but if any desire to lay his lands in common and not improve them adjoining the fence divided as above, the proceeding shall be as directed in the case where lands owned in severalty have been enclosed in common without a partition fence.

A failure to have recorded with the township clerk the assignment of the respective shares of each party will not affect their rights in respect to building the share assigned to the other on his failure to do so, and the recovery of double damages therefor as provided in the statute, if he had actual notice of such assignment. *Gantz v. Clark*, 31 Iowa, 254.

SEC. 1500. [**Definition of "owner" and "fence viewers."**—In the provisions of this chapter, the term "owner" shall apply to the occupant or tenant when the owner does not reside in the county, but these proceedings will not bind the owner unless notified. The term "fence viewers" means the fence viewers of the township in which the division line in controversy is, and if that line is between two townships, and both parties live in the same, then it means the viewers of that township, but if the parties live in different townships, one viewer at least shall be taken from that of the party complained against.

SEC. 1501. [**Fence on another's land may be removed.**—When a person has made a fence or other improvement on an enclosure, which, on afterward making division lines is found to be on land of another, and the same has occurred through mistake, such first person may enter upon the land of the other and remove his fence or other improvement and material within six months after such line has been run, upon his first paying, or offering to pay, the other party for any damage to the soil which may be occasioned thereby, and when the parties cannot agree as to the damages the fence viewers may determine them as in other cases.

SEC. 1502. [**Same.**—But such fence or other improvement, except substantial buildings, shall not be removed if they were made or taken from the land on which they lie, until the party pays the owner the value of the timber, to be ascertained by the fence viewers, nor shall a fence be removed at a time when the removal will throw open or expose the crop of the other party, but it shall be removed in a reasonable time after the crop is secured, although the above six months have passed.

SEC. 1503. [**Disputes: fence viewers to determine.**—When any question arises between parties, other than those above stated, concerning their rights in fences, or their duties in relation to building or supporting or removing them, such question may be determined by the fence viewers upon the principles of this chapter.

Where the parties had agreed to erect a fence sufficient to turn swine and sheep, the trustees could properly determine whether or not the agreement had been performed, and if not, direct the time and manner of performance. *Huber v. Wilkinson*, 46 Iowa, 458.

In an action to recover double the value of a partition fence which the defendant by the decision of the township trustees had been required to erect, it was *held*, proper for the jury, under the instruction of the court, to determine whether or not the land of the plaintiff was used in pasturing swine and sheep, and whether a fence was required to turn these animals. *Id.*

SEC. 1504. [**Lines: fence on.**—A person building a fence, may lay the same upon the line between him and the adjacent owners, so that the fence may be partly on one side and partly on the other, and the owner shall have the same right to remove it as if it were wholly on his own land.

SEC. 1505. [**Same.**—The foregoing provisions concerning partition fences shall apply to a fence standing wholly upon one side of the division line.

SEC. 1506. [**Other proceedings.**—The foregoing provisions of this chapter do not bar any other legal proceedings for the determination of the title to land, or the dividing line between contending owners, nor do they preclude agreements by the parties.

SEC. 1507. (*As amended by ch. 101, 16th g. a., and ch. 47, 18th g. a.*) [**Lawful fence defined.**—A fence made of three rails of good, substantial material, or three boards, not less than six inches wide, and three-quarters of an inch thick, such rails or boards to be fastened in or to good, substantial posts, not more than ten feet apart where rails are used, and not more than eight feet apart where boards are used, wire either wholly or in part, substantially built and kept in good repair, or any other kind of fence, which in the opinion of the fence viewers, shall be equivalent thereto, shall be declared a lawful fence; *provided*, that the lowest or bottom rail, [wire] or board shall not be more than twenty nor less than sixteen inches from the ground, and that such fence shall be fifty-four inches in height; [except that a barbed wire fence may consist of three barbed wires, or of four wires, two of which shall be barbed, such fence in either case to have not less than [thirty-six] iron barbs to the rod [of two points each, twenty-six iron barbs of four points each on each wire;] the wires to be firmly fastened to posts not more than two rods apart, with two stays between the posts, or with posts not more than one rod apart without such stays, the top wire to be not more than [fifty-four] nor less than forty-eight inches in height, and the bottom wire not more than twenty nor less than sixteen inches from the ground;] *provided further*, that all partition fences may be made tight at the expense of the party desiring it, and such party may take from such fence the same material by him added thereto whenever he may elect; and *provided further*, that when the owner or occupants of adjoining land use the same for the purpose of pasturing swine or sheep, each of said owners or occupants shall keep their respective share of the partition fence sufficiently tight to restrain such swine or sheep.

It was *held*, that a fence of less height than four feet and six inches might, under section 1544 of the revision, be a lawful fence if it afforded equal strength and security to the enclosure. *Phillips v. Oystee*, 32 Iowa, 257.

A steep bluff, a hedge, a ditch, a wall, or the like, which furnishes as effectual security to the inclosure as the fence prescribed by the statute, may be regarded as a lawful fence. *Hilliard v. The C. & N. W. R'y Co.*, 37 *Id.*, 442.

This section does not determine the character of fence which a railway company is required to build under section 1289 of the code. *Lee v. The Minn. & St. Louis R'y Co.*, 66 *Id.*, 131.

SEC. 1508. (*As amended by ch. 95, 22d g. a.*) [**Where stock is restrained.**—That all the provisions of this chapter in relation to partition fences, shall be alike applicable to counties or townships having restrained, or which may restrain, stock from running at large, [and section 1495 of the code of 1873, and all parts thereof, shall be so construed in counties where stock is not so restrained; *provided*, that the provisions of this act shall not apply to counties having a population of less than twelve thousand inhabitants, according to the census of 1885.]

In a county where the herd law is in force, a party cultivating a farm and using it for raising

crops cannot be required to build and maintain one-half of the partition fence between his farm and that of an adjoining owner whose farm is inclosed, and this section is not inconsistent with this holding. *Says v. Peck*, 58 Iowa, 256.

(CHAPTER 106, LAWS OF 1876.)

IN RELATION TO DIVISION HEDGES.

An Act in relation to hedges on division lines between adjoining land owners.
[Additional to code, chapter 4, title XI: "Of fences."]

SECTION 1. [Fence may be built five feet beyond the division line.]—
Be it enacted by the general assembly of the state of Iowa: That if any person shall desire to plant or make a hedge fence on any line separating his lands, or enclosures from the lands, or enclosures of any other person, or persons, he shall be allowed to make or build a fence sufficient to protect the hedge and set the same five feet beyond the line on the adjoining lands and keep the same there, not more than five years, and free from weeds, and then he shall be allowed to remove the same, and during which time he shall be permitted to cultivate the land thus enclosed for the benefit of the hedge; *provided*, he shall enter upon the cultivation of said hedge within twelve months from the time said fence is removed on the adjoining land.

SEC. 2. [Builder of hedge on entire division line to receive pay for one-half.]—When any person builds a hedge on the entire line between his own and unenclosed lands, when said lands are enclosed the owner thereof shall pay for one-half of said hedge, the value to be ascertained by the fence viewers, and the manner of proceeding in this respect shall conform to the provisions of the law now in force in relation to the ascertainment of the value of partition fences with like remedies; the maker of said hedge to select his own half thereof; *provided*, this act shall not apply to town lots.

(Took effect by publication in newspapers, March 26, 1876.)

The language of this section is not to be construed so as to defeat recovery for the value of one-half of a hedge merely because at some points on the line, on account of the nature of the ground, a hedge could not be grown for short distances. *McKeever et al. v. Jenks et al.*, 59 Iowa, 300.

CHAPTER 5.

OF LOST GOODS.

SECTION 1509. [Rafts, logs and lumber: proceedings when taken up.]
If any person shall hereafter stop or take up any raft of logs, or part thereof, or any logs suitable for making lumber, or hewn timber or sawed lumber, found adrift on any water-course within the limits or upon the boundaries of this state, such person, within five days thereafter, provided the same shall not have been previously restored to the owner, shall go before some justice of the peace or notary public of the county in which the same was taken up, and make affidavit in writing, setting forth an exact description of the articles found, and stating when and where the same were found, the number of logs or other pieces, and the marks and brands thereon, and that the same have not been altered or defaced since the taking up by him, or by any other person to his knowledge. And such justice of the peace or notary public, within five days thereafter, shall transmit such affidavit to the county auditor of said county, and the said auditor shall thereupon file the

same in his office, and enter in his estray book the description of the said property, the time and place, when and where, and the name and residence of the person by whom the same was taken up, and the said auditor shall also publish a notice thereof for three weeks successively in some newspaper printed in the county.

SEC. 1510. [Disposition of property unclaimed.]—In all cases where the value of the articles so taken up shall not exceed five dollars, and no person shall appear to claim and prove the same within three months after the publication of such notice, then the property in the same shall vest in the person taking them up; but if the value thereof shall exceed five dollars, and the same be not claimed or proven within six months after such publication, then the finder shall deliver them to the sheriff of said county, and thereupon the same proceedings shall be had, and the same disposition be made of the proceeds arising from the sale thereof, as is provided for in section fifteen hundred and thirteen of this chapter, in relation to boats, vessels, etc., the value of which exceeds twenty dollars.

SEC. 1511. [Compensation for.]—As a reward for the taking up of any boards, timber, logs, rafts of logs or any part thereof, there shall be paid by the owner to the person taking up the same, for each log, not exceeding ten, twenty-five cents; for each log exceeding ten and not exceeding fifty, twenty cents; and for sawed lumber, fifty cents per thousand feet.

SEC. 1512. [Vessels and water crafts: value.]—If any person shall stop or take up any vessel or water craft found adrift within the limits or upon the boundaries of this state, of the value of five dollars or upwards, including her cargo, tackle, rigging and other appendages, such person, within five days thereafter, provided the same shall not have been previously proven, and restored to the owner, shall go before some justice of the peace in the township where the craft or vessel is found of the proper county, and make affidavit in writing, setting forth the exact description of such vessel or water craft; where and when the same was found; whether any, and if so, what cargo, tackle, rigging or other appendages, were found on board or attached thereto; and that the same has not been altered or defaced, either in the whole or in part, since the taking up, either by him, or by any other person, to his knowledge; and the said justice shall thereupon issue his warrant, directed to some constable of his township or district, commanding him to summon three respectable householders of the neighborhood, who shall proceed, without delay, to examine and appraise such boat or vessel, her cargo, or tackle, rigging and all other appendages as aforesaid, and to make report thereof, under their hands, to the justice issuing such warrant, who shall enter the same, together with the affidavit of the taker-up at large in his estray book; and, within five days, shall transmit a certified copy thereof to the county auditor of the proper county, to be by him recorded in his estray book and filed in his office.

SEC. 1513. [Value less than twenty dollars: advertisement.]—In all cases where the appraisement of any such boat or vessel, including her cargo, tackle, rigging or other appendages, shall not exceed the sum of twenty dollars, the taker-up shall advertise the same on the door of the court house and in three other of the most public places in the county within five days after the appraisement, and if no person shall appear to claim and prove such boat or vessel within six months from the time of taking up, the property in the same shall vest in the taker-up; but if the value thereof shall exceed the sum of twenty dollars, the county auditor, within five days from the time of reception of the justice's certificate at his office, shall cause an advertisement to be set up on the door of the court house, and at three other of the most public places of the county; and, also, a notice thereof to be published for three weeks successively in some public newspaper printed in this state, and if the said boat or vessel be not claimed or proven within ninety days after the advertisement of the same as aforesaid, the taker-up shall

deliver the same to the sheriff of the county wherein such boat or vessel may have been taken up, who shall thereupon proceed to sell the same at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of sale; and the proceeds of all such sales, after deducting the cost and other necessary expenses, shall be paid into the county treasury.

SEC. 1514. [**Money, bank notes, etc.: description of.**]-If any person shall find any lost goods, money, bank notes, or other things of any description whatever, of the value of five dollars and upwards, such person shall inform the owner thereof, if known, and make restitution of the same without any compensation whatever, except the same be voluntarily given; but if the owner be unknown, such person shall, within five days after such finding, take such goods, money, bank notes, or other things, before some justice of the peace of the proper county, and make affidavit of the description thereof, the time and place, when and where the same was found, and that no alteration had been made in the appearance thereof since the finding of the same; whereupon the justice shall enter a description of the property, and the value thereof, as near as he can ascertain in his estray book, together with the affidavit of the finder; and shall also, within five days, transmit to the county auditor a certified copy thereof to be by him recorded in his estray book and filed in his office.

The finder of lost goods which have no marks by which the owner could be identified, and who does not know to whom they belong, is not guilty of larceny, even if he does not exercise diligence to discover who the owner of the goods may be. *State v. Dean*, 49 Iowa, 73.

SEC. 1515. [**When value exceeds ten dollars: advertisement.**]-In all cases where such lost goods, money, bank notes, or other things, shall not exceed the sum of ten dollars in value, the finder shall advertise the same on the door of the court house, and three other of the most public places in the county; and if no person shall appear to claim and prove such money, goods, bank notes, or other things, within twelve months from the time of such advertisement, the right to such property, when the same shall consist in goods, money, or bank notes, shall be vested in the finder; but if the value thereof shall exceed the sum of ten dollars, the county auditor, within five days from the receipt of the justice's certificate, shall cause an advertisement to be set upon the court house door, and in three of the most public places in the county; and also a notice thereof to be published for three weeks successively in some public newspaper printed in this state; and if the said goods, money, bank notes, or other things, be not reclaimed within six months after the finding, the finder, if the same shall consist in money or bank notes, shall deliver the same to the county treasurer, after deducting the necessary expenses hereinafter provided for; if in bills, notes of hand, patents, deeds, mortgages, or other instruments of value, the same shall be delivered to the county auditor, to be preserved in his office for the benefit of the owner, whenever legal application shall be made therefor; if in goods or merchandise, the same shall be delivered to the sheriff of the county, who shall thereupon proceed to sell the same at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of such sale; and the proceeds of all such sales, after deducting the cost and other expenses, shall be paid into the county treasury.

SEC. 1516. [**When value is less than five dollars.**]-In all cases where any vessel or water craft shall be taken up, or any goods, money, or bank notes shall be found as aforesaid, which shall be of a value less than five dollars, the finder shall advertise the same by setting up three advertisements in the most public places in the neighborhood; but in such cases he shall keep and preserve the same in his possession, and shall make restitution thereof to the owner, without fee or reward, except the same be given voluntarily, whenever legal application be made for the same, provided it shall be done in three months from such taking up or

finding; but if no owner shall appear to claim such property within the time aforesaid, the exclusive right to the same shall be vested in the finder or taker up.

SEC. 1517. [**Ownership settled.**]—In any case where a claim is made to property found or taken up, and the ownership of the property cannot be agreed upon by the finder and claimant, they may make a case before any justice of the peace, who may hear and adjudicate it, and if either of them refuses to make such case, the other may make an affidavit of the facts which have previously occurred, and the claimant shall also verify his claim in his affidavit, and the justice may take cognizance of and try the matter on the other party having one day's notice, but there shall be no appeal from the decision. This section does not bar any other remedy given by law.

SEC. 1518. [**Compensation.**]—As a reward for the taking up of all boats and other vessels, and for finding of lost goods, money, bank notes, and other things, before restitution of the property or proceeds thereof shall be made, the finder shall be entitled to ten per cent upon the value thereof, in addition to which said allowance the owner shall also be required to pay to the taker up, or finder, all such costs and charges as may have been paid by him for services rendered as aforesaid, including the cost of publication, together with reasonable charges for keeping and taking care of such property, which last mentioned charge, in case the taker up or finder, and the owner cannot agree, shall be assessed by two disinterested householders of the neighborhood, to be appointed by some justice of the peace of the proper county, whose decision, when made, shall be binding and conclusive on all parties.

SEC. 1519. [**Proceeds paid into county treasury.**]—The net proceeds of all sales made by the sheriff, and all money or bank notes paid over to the county treasurer, as directed in this chapter, shall remain in the hands of the county treasurer in trust for the owner, if any such shall apply in one year from the time the same shall have been paid over; but if no owner shall appear within the time aforesaid, the said money shall be considered as forfeited, and the claim of the owner thereto forever barred, in which event the money shall remain in the county treasury for the use of common schools in said county.

SEC. 1520. [**Taker up not accountable for accidents.**]—If the taker up of any water craft, raft, logs, timber or boards, or finder of lost goods, bank notes, or other things, shall be faithful in taking care of the same, and if any unavoidable accident shall happen thereto, without the fault or neglect of the finder or taker up before the owner shall have an opportunity of reclaiming the same, such taker up or finder shall not be accountable therefor; *provided*, that in cases of accident as aforesaid, the taker up or finder, within ten days thereafter, shall certify the same under his hand to the county auditor, who shall make an entry thereof in his estray book.

SEC. 1521. [**Penalty for disposing of property.**]—If any person shall trade, sell, or loan, out of the limits of this state, any such property as may at any time be taken up or found as aforesaid before he shall be vested with the right to the same, agreeably to the foregoing provisions, he shall forfeit and pay double the value thereof, to be recovered by any person who shall sue for the same, in any court, or before any justice of the peace having jurisdiction thereof; one half shall go to the person suing, and the other half to the county aforesaid.

SEC. 1522. [**Penalty for failure to comply.**]—If any person shall take up any boat or vessel, or any raft, logs, timber or boards, or shall find any goods, money, bank notes, or other things, and shall fail to comply with the requisitions of this chapter, every such person so offending shall forfeit and pay the sum of twenty dollars, to be recovered before any justice of the peace by any person who will sue for the same, one half for the use of the person suing, and the other half to be deposited in the county treasury for the use of common schools; but noth-

ing herein contained shall prevent the owner from having and maintaining his action for the recovery of any damage he may sustain.

CHAPTER 6.

OF INTOXICATING LIQUORS.

SECTION 1523. [Sale of prohibited: declared a nuisance.]—No person shall manufacture or sell, by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors except as hereinafter provided. And the keeping of intoxicating liquor, with the intent on the part of the owner thereof, or any person acting under his authority, or by his permission, to sell the same within this state contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided.

The keeping of intoxicating liquors without an intention to sell the same contrary to law is not prohibited by the statute. *The State v. Harris*, 36 Iowa, 136.

The original prohibitory law of January 22, 1855, was held, to be constitutional in *Santo et al. v. The State of Iowa*, 2 Id., 165, and its constitutionality re-affirmed in *The State v. Donehey*, 8 Id., 396.

This law as found in the revision of 1860, held, constitutional in *The State v. Baughman*, 20 Id., 497; *The State v. Bartemeyer*, 31 Id., 601.

The owning of intoxicating liquors in this state, in a state of transportation, was not unlawful; nor were such liquors a nuisance which any one might abate by destroying them. *Bowen & King v. Hale*, 4 Id., 430.

Where A purchased of B intoxicating liquors, upon which an attachment was afterwards levied as the property of B, at the suit of C, whereupon A intervened, claiming the property under his purchase from B, averring in his petition that they were not purchased or kept by him with intent to sell the same in violation of the statute, it was held, that if the facts averred in his petition were true, A was entitled to recover the liquor. *Niles v. Fries*, 35 Id., 41.

So long as the liquors retain their character as intoxicating liquors, capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall under the ban of the law, but when they are so compounded with other substances as to lose their distinctive character of intoxicating liquors, and are no longer desirable for use as a stimulating beverage, and are in fact medicine, then their sale is not prohibited. *The State v. Laffer*, 33 Id., 422.

The prohibition of the manufacture and sale of intoxicating liquors as a beverage is not unconstitutional legislation. *Santo v. The State*, 2 Id., 165; *The State v. Donehey*, 8 Id., 396; *The State v. Baughman*, 20 Id., 497; *The State v. Bartemeyer*, 31 Id., 601; *The State v. Stucker*, 58 Id., 496; License Cases 5 How., (U. S.), 504 to 633; Slaughter House Cases, 16 Wal., (U. S.); 62; *Beer Co. v. Mass.*, 79 U. S., 26.

A license from the United States government is no protection for a violation of the state law against the manufacture and sale of intoxicating liquors as a beverage. *State v. McClary*, 17 Id., 44; *State v. Carney*, 20 Id., 82; *State v. Baughman*, Id., 497; *State v. Stutz*, Id., 488; *Pervear v. The Government*, 5 Wall., (U. S.), 475.

A manufacturer has no right to manufacture or sell without a permit. And a person with a permit who purchases of one having no permit, may set up the unlawful sale as a defense to an action for the price, or may recover the price paid. *Becker v. Betten*, 39 Id., 668.

The legislature has no power to make the operation or repeal of a statute dependent upon a vote of the people. *Santo v. The State*, 2 Id., 203; *Geebrick v. The State* 5 Id., 492; *The State v. Weir*, 33 Id., 135; *The State v. Beneke*, 9 Id., 203.

Chapters 222, laws of 1857, and 82 of the laws of 1870, held unconstitutional and void on the ground that they were made to depend for their force and vitality upon a vote of the people at large. *The State v. Weir*, 33 Id., 135.

Where A purchased of B intoxicating liquors, upon which an attachment was afterwards levied as the property of B, at the suit of C, whereupon A intervened, claiming the property under his purchase from B, averring in his petition that they were not purchased or kept by him with intent to sell the same in violation of the statute, it was held, that if the facts averred in his petition were true, A was entitled to recover the liquor. *Niles v. Fries*, 35 Id., 41.

At the present day it cannot be doubted that the state has the right and power to prohibit the

sale of intoxicating liquors as a beverage. The courts, both state and federal, have uniformly affirmed the existence of such right. Per SEEVERS, J., in *McLane et al. v. Leicht*, 69 Id., 405.

(Section 1524 repealed by chapter 71, laws of 1888.)

SEC. 1525. (*As substituted by ch. 143, 20th g. a.*) [Penalty for manufacturing.]—(Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor and upon his first conviction for said offense, shall pay a fine of two hundred dollars and costs of prosecution or be imprisoned in the county jail not to exceed six months and on his second and every subsequent conviction for said offense, he shall pay a fine of not less than five hundred dollars nor more than one thousand dollars and costs of prosecution, and be imprisoned in the county jail one year.)

Under this section, as 1561 of the revision, an allegation in an indictment for nuisance, that a certain building was used by two defendants as a place for the sale of intoxicating liquors, and that they did then and there keep intoxicating liquors for sale in said building, without a further averment that such building was under their control, was held sufficient; and where the indictment, after such statement of the offense, averred that it was "under his control," without naming which of the two defendants was meant, it was held, that the unnecessary averment should be treated as surplusage, and that it did not vitiate the indictment. *The State v. Schilling*, 14 Iowa, 455.

A manufacturer has no right to manufacture or sell without a permit; and a person with a permit who purchases of one having no permit may set up the unlawful sale as a defense to an action for the price, or to recover the price paid. *Becker v. Betten*, 39 Id., 668.

(Section 1526 was repealed by chapter 71, laws of 1888. Under that section the supreme court made some of the following rulings.)

This section is not in conflict with section one (1), of article (1), nor with section six (6) of the same article of the state constitution. *In re Ruth*, 32 Iowa, 250.

Under section 1526, a grocery keeper cannot obtain a permit to sell liquor for any purpose. Per DAY, J., in *Rindskoff & Bro. v. Curran*, 34 Id., 327.

The selling of intoxicating liquors even for medical purposes, without permission first obtained from the board of supervisors is a misdemeanor, and any person who uses a building for this purpose is guilty of committing a nuisance and may be punished therefor. *The State v. Waynick*, 45 Id., 516.

In an indictment for selling intoxicating liquors contrary to law, it is not necessary to aver that the liquors were not sold for sacramental, medicinal, mechanical or culinary purposes; nor that at the time of the sale of the liquor the defendant was the keeper of a hotel, grocery, eating house or confectionery. *The State v. Beneke*, 9 Id., 203.

A sale of intoxicating liquor by an agent is considered as made where the order is given, unless such order, after being forwarded to the principal, is to be subject to his approval before it is filled. *Taylor & Co. v. Picket et al.*, 52 Id., 467.

A grocery keeper cannot, under this section, legally obtain a permit to sell intoxicating liquors for any purpose. *Rindskoff & Bro. v. Curran*, 34 Id., 327. Nor does this section confer upon a manufacturer of intoxicating liquors a right to sell the same in this state even for mechanical, medicinal, culinary or sacramental purposes, without first obtaining a permit from the board of supervisors. *Becker v. Betten*, 39 Id., 668. To the same effect is *The State v. Waynick*, 45 Id., 516.

This section does not confer upon the manufacturer of intoxicating liquors the right to sell the same in this state, even for mechanical, medicinal, culinary or sacramental purposes, without permission first obtained from the board of supervisors of the county. *Becker v. Betten*, 39 Id., 668.

A person who, with a permit to sell intoxicating liquors, purchases a quantity of such liquors from a manufacturer having no permit to sell, may not only set up the unlawful sale to defeat an action for the price of the same, but where he has made a payment thereon may recover the amount thus paid. *Id.*

It is the duty of one authorized to sell intoxicating liquors for legal purposes to exercise due diligence and act in good faith in making such sales; when this is done, he is not responsible for the illegal use made of the liquors by the purchaser. *Taylor & Co. v. Picket*, 52 Id., 467.

(Sections 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537 and 1538 were repealed by chapter 71, laws of 1888.)

The bill passed by the nineteenth general assembly purporting to amend section 8, of chapter 75 of the laws of the eighteenth general assembly, and to repeal section 1527, and amend section 1537 and 1573 of the code, but which was not approved or disapproved by the governor, held that it was not law. *Darling v. Boesch*, 67 Iowa, 702.

SEC. 1539. (*As amended by ch. 143, 20th g. a.*) [Penalty for selling or giving to minors or intoxicated persons.]—It shall be unlawful for any person to sell, give away, by agent or otherwise, any spirituous or other intoxicating liquors, including wine or beer, to any minor for any purpose whatever, unless upon the written order of his parent, guardian, or family physician, or to sell the same to any intoxicated person, or to any person who is in the habit of becoming intoxicated. Any person violating the provisions of this section shall forfeit and pay to the school fund the sum of one hundred dollars for each offense, to be collected by action against him, or by action against him and the sureties on his bond, if one has been given, by any citizen in the county. [One-half of the amount so recovered shall go to the informer, and the other half shall go to the school fund of the county.]

The sale of intoxicating liquors to a minor is within the prohibition, notwithstanding the seller has no knowledge that the purchaser is a minor. And in an action under this section for the benefit of the school fund, it is not necessary to allege in the petition that the seller had such knowledge. *Jemison v. Burton*, 43 Iowa, 282.

Any citizen of the county may bring an action under this section for a forfeiture to the school fund against one who sells intoxicating liquors to a person in the habit of becoming intoxicated. *Church v. Higham*, 44 Id., 482.

This section applies as well to the giving as to the sale of liquors to an intoxicated person. *Id.* The fact that the seller did not know the person receiving the liquor to be intoxicated does not relieve him from liability. *Id.*

The sale by an agent, of intoxicating liquors, to a person in the habit of becoming intoxicated, renders the principal liable therefor, notwithstanding he may have been expressly forbidden by the principal to sell to such person. *Dudley v. Sauthbine*, 49 Id., 650.

Section 1539 applies not only to those having a permit to sell, but also to all persons who may sell intoxicating liquors to minors or to persons who are in the habit of becoming intoxicated. *Cobleigh v. McBride et al.*, 45 Id., 116.

A judgment in an action for selling intoxicating liquors to a minor, under this section, will not be a lien upon the premises where the liquor was sold, where they are owned by a third person, unless he have knowledge of and assent to the unlawful act for which the judgment is recovered. *Id.*

In an action under this section it is not competent to inquire of the plaintiff why he instituted the suit. *Id.*

Testimony that it was a matter of report and public notoriety that intoxicating liquors were sold by the defendant is not admissible. *Id.*

In an action under this section, it is proper to instruct the jury that plaintiff has no interest therein. *Id.*

A party cannot justify the act of giving intoxicating liquors to a minor by establishing that he did it by the order of the parent, unless he shows that the order was in writing. *The State v. Coenan*, 48 Id., 567.

This section forbids the sale of liquors by any person to minors, intoxicated persons, or those who are in the habit of becoming intoxicated, and imposes a penalty for sales to such persons, but does not make them misdemeanors. *State v. Douglass*, 34 N. W. R., 856.

Where a corporation by a committee sold beer to a person in the habit of becoming intoxicated, at a ball given under its supervision, it was held liable under this section the same as a natural person, for the penalty therein provided to be collected for the benefit of the school fund. *Stewart v. The Waterloo Turn Verein*, 71 Iowa, 226.

Upon the trial of an information for having in possession intoxicating liquor the state proved that the defendant, a pharmacist, had sold liquors to persons who were in the habit of becoming intoxicated. Held that, under section 1539 of the code, which provides that it shall be unlawful for any person to sell * * * intoxicating liquor * * * to any person who is in the habit of becoming intoxicated, the prosecution had made out a good case as to the unlawful sale, without proving any guilty knowledge on the part of the seller. *State v. Ward*, 30 N. W. R., 765.

SEC. 1540. (*As substituted by ch. 143, 20th g. a.*) [Penalty for selling without a permit: first offense.]—[If any person not holding such a permit by himself, his clerk, servant or agent, shall for himself or any person else, directly or indirectly, or on any pretense, or by any device, sell or in consideration of the purchase of any other property, give to any person any intoxicating liquors, he shall, for the first offense, be deemed guilty of a misdemeanor, and on conviction for said first offense shall pay a fine of not

less than fifty or more than one hundred dollars and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and every subsequent offense he shall pay on conviction thereof a fine of not less than three hundred dollars nor more than five hundred dollars and costs of prosecution, and be imprisoned in the county jail, not to exceed six months. All clerks, servants, and agents of whatever kind engaged or employed in the manufacture, sale, or keeping for sale in violation of this chapter, of any intoxicating liquor, shall be charged and convicted in the same manner as principals may be, and shall be subject to the penalties herein provided. Indictments and informations for violations under this section may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate indictments or informations, but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and subsequent convictions mentioned in this section shall be construed to mean convictions on separate indictments or information. And in default of the payment of fines and cost provided for the first conviction under this section, the person so convicted shall not be entitled to the benefit of chapter forty-seven, title twenty-five of this code, until he shall have been imprisoned sixty days.]

Where two or more defendants are indicted jointly for a violation of the liquor law, they may be tried jointly or separately, in the discretion of the court, but a separate judgment must be entered against each. *The State v. Hunter*, 33 Iowa, 361.

Under this section the selling of intoxicating liquor without a permit, for any purpose whatever, is a misdemeanor, and punishable as therein prescribed, and by section 1543 any person who uses any building to violate the provisions of section 1540 is guilty of a nuisance, and may be subjected to additional penalties for that offense. *State v. Waynick*, 45 Id., 516.

A defendant charged in an information with "selling intoxicating liquors unlawfully, having been heretofore convicted of the crime of selling intoxicating liquors unlawfully," may be found guilty as for a first offense. *Gordon v. The State*, 3 Id., 410; *Benham v. The State*, 1 Id., 542; *The State v. Ensley*; *The Same v. Weil*; *The Same v. Brown*; and *The Same v. Front*, 10 Id., 149.

It is no defense for a clerk or agent, charged with the sale of intoxicating liquors, that his employer is guilty of the same offense, and has been convicted and punished. *Id.*

But where an indictment is made unnecessarily particular by charging the unlawful sale of *whisky*, it will not be supported by proof of the sale of other intoxicating liquors. *Id.*, 494.

The first offense in selling intoxicating liquors in violation of law is necessarily included in the third, and so under section 4466 of the code, one charged with the third offense may be lawfully convicted of the first. *The State v. Gaffney*, 66 Id., 262.

Where two or more defendants are indicted jointly for a violation of the liquor law, they may be tried jointly or separately, in the discretion of the court, but a separate judgment must be entered against each. *The State v. Hunter*, 33 Id., 361.

In an indictment for selling intoxicating liquors in violation of law, it is not necessary to charge the particular kind of liquor sold. *The State v. Whalen*, 54 Id., 753; *The State v. Hesner*, 55 Id., 494. But where an indictment is made unnecessarily particular by charging the unlawful sale of *whisky*, it will not be supported by proof of the sale of other intoxicating liquors. *Id.*, 494.

That the defendant held a permit to sell intoxicating liquors for the purposes therein specified, did not shield him from a criminal prosecution, or limit the state to an action on his bond for the sale of such liquors as a beverage or for other purposes prohibited by law. *The State v. Adams*, 20 Id., 486.

This section as amended by chapter 143, laws of 1884, applies to licensed pharmacists, and they are liable for giving away intoxicating liquors for unlawful purposes, no matter how artfully done. *The State v. Harris*, 64 Id., 287.

Where the defendant in a prosecution for the sale of intoxicating liquors was a licensed pharmacist, an instruction to the effect that he was obliged to use the utmost good faith and ordinary caution to see that liquors were sold by him for medicine only, and that his license would not protect him if he artfully sold liquors for other purposes than as a medicine, and that no cover or subterfuge could be permitted to be used for a substantial violation of the law, was held not erroneous. *Id.*

Where the sale of intoxicating liquors is a crime under the statute, the purchaser is not a participant in the crime, and he cannot excuse himself from testifying as to such purchases made by

him, on the ground that his testimony would tend to criminate himself. *Wakeman v. Chambers*, 69 Id., 169.

The first offense, in selling intoxicating liquors unlawfully is necessarily included in the third, so that under section 4466 of the code, one may be lawfully found guilty of the first offense on trial under an indictment charging him with the third. *The State v. Gaffney*, 66 Id., 262.

In *The State v. Bissell et al.*, who were licensed pharmacists, and were indicted for selling intoxicating liquors for medical purposes, the supreme court held that, their license as pharmacists did not authorize such sale; that the provisions of the code as amended by chapter 143 of the laws of the twentieth general assembly had the effect to repeal section 8 of chapter 75, laws of the eighteenth general assembly. Opinion by BECK, J., at December term, 1885.

Any number of violations may be charged in separate counts and a separate conviction had on each. *Walter v. The State*, 5 Id., 507; but the first and second, or second and third offenses cannot be charged in the same indictment or information. *State v. Leis*, 11 Id., 416.

Under an information charging a second offense and a former conviction, defendant may be found guilty of a first offense. The latter is necessarily included in the former under section 4466. *The State v. Ensley*, 10 Id., 149.

An information for an offense under this section should charge that defendant sold, etc., to some person, giving the name if known. *The State v. Allen*, 32 Id., 491.

The giving, etc., of intoxicating liquors is not an offense under this section unless it is "in consideration of the purchase," etc., and the fact that the liquors were so given should be averred. *The State v. Finan*, 10 Id., 19.

That the defendant acted in the selling as a clerk of another, or as a volunteer and without pecuniary reward, is no defense. Clerks are also liable equally with their principals, and it is no defense that the principal has been convicted for the same act. *Id.*

If A. calls for liquor to be delivered to B. for B.'s benefit and it is so delivered, it is a sale to B. although A. pays for the liquor. *State v. Hubbard*, 60 Id., 466.

It is not an offense to give intoxicating liquors to an adult person not intoxicated nor in the habit of becoming so, when such gift is made without any consideration being received or expected in return, and without any subterfuge or attempt to evade the provisions of section 1540 of the code. *State v. Hutchins*, 36 N. W. R., 775.

Section 1540 of the code authorizes any number of violations of its provisions, by the same person, to be charged in a single information or indictment, but requires that each offense shall be charged in a separate count thereof, and that a separate judgment shall be rendered upon each count on which a verdict of guilty is rendered. Section 3829 provides a fee of five dollars to "any attorney selected to prosecute before a justice of the peace a prosecution for selling intoxicating liquors." Held that an attorney selected to prosecute an information of twelve counts, each count charging a separate sale to different persons, is not entitled to a fee of five dollars for each count prosecuted to conviction, there being but one prosecution. *Schutte v. Keokuk County*, 37 N. W. R., 376.

SEC. 1541. [Sale of mixed liquors; punished.]—Any person who shall mix any intoxicating liquor with any beer, wine or cider by him sold, and shall sell, or keep for sale as a beverage, such mixture, shall be deemed guilty under the preceding section, and shall be punished accordingly.

SEC. 1542. (As amended by ch. 143, 20th g. a.) [Owning or keeping with intent to sell.]—[No person shall own, or keep, or be in any way concerned, engaged or employed, in owning or keeping any intoxicating liquors with intent to sell the same in this state, or to permit the same to be sold therein in violation of the provisions hereof, and any person who shall so own or keep, or be concerned, engaged or employed in owning or keeping such liquor with any such intent, shall be deemed guilty of a misdemeanor, and shall, on his first conviction for said offense, pay a fine of twenty dollars and the cost of prosecution, and stand committed until the same be paid. On his second conviction for said offense, he shall pay a fine of fifty dollars and the costs of prosecution, and shall stand committed until the same be paid, and on his third and every subsequent conviction for said offense, he shall pay a fine of one hundred dollars and the costs of prosecution, or shall be imprisoned in the county jail not less than three nor more than six months. And upon the trial of every indictment or information for violations of the provisions of this section, proof of the finding of the liquor named in the indictment or information in the possession of the accused in any place except his private dwelling-house, or its dependencies, or in such dwelling-house or dependencies if the same be a tavern, public eating-house, grocery or other place of public resort,

shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to the provisions hereof.

A person who acts as the agent or employe of a social club, to keep and deal out its liquors to members purchasing and presenting tickets, may be indicted and punished for a violation of the prohibitory liquor law, under this section. *State v. Mercer*, 32 Iowa, 405.

While under this section the finding of intoxicating liquors upon the premises is presumptive evidence that they are kept there for sale contrary to law, yet where there is no evidence of any such liquors being in the defendant's possession or under his control, the testimony of one who is in the employ of the defendant that the witness on one occasion sold a small quantity of liquor, this evidence is not sufficient to warrant a conviction. *The State v. Findley*, 45 Id., 435.

An information charging a defendant with keeping intoxicating liquors for "the purpose of sale," is equivalent to one charging him with keeping "with intent to sell," the offense defined in the statute, and is sufficient. *The State v. Mohr*, 53 Id., 261.

The owning of intoxicating liquors in this state, in a state of transportation held not unlawful under the code of 1851. *Bowen & King v. Hale*, 4 Id., 430.

It was held under the prohibitory act of 1855, that the owning of intoxicating liquors in this state, in a state of transportation, was not unlawful; nor were such liquors under that act a nuisance, that any one might abate by destroying them. *Bowen & King v. Hale*, 4 Id., 530.

An information charging a defendant with "keeping intoxicating liquors for the purpose of sale," is equivalent to charging him with keeping "with intent to sell," the offense defined in the statute, and is sufficient. *The State v. Mohr*, 53 Id., 261.

The crime of keeping for sale and selling intoxicating liquors, as defined by this section, is not the same as that defined by 1543, and an acquittal upon an information under the former section is no bar to a subsequent prosecution upon an indictment under the latter section. *The State v. Harris*, 64 Id., 287.

The owning of intoxicating liquors, in this state, in a state of transportation, was held, under this chapter, not unlawful; nor were such liquors deemed a nuisance under the statutes prior to that date, which any one might abate by destroying them. *Bowen & King v. Hale*, 4 Id., 430.

The provision of this section, as amended by section 11, of chapter 143, of the laws of 1884, that in case of conviction, a fine and costs shall be imposed, and that in default of payment thereof the defendant shall be imprisoned for a certain time; the imprisonment is no part of the penalty, but simply a means of collection; and so when the fine provided does not exceed one hundred dollars the cause may be tried on information before a justice of the peace, under section 11, of article 1, of the constitution, although the time for which the convict may be imprisoned in default of payment of the fine and costs may exceed thirty days. It was accordingly held, that a justice of the peace has jurisdiction of the "first offense" contemplated in section 1542 as amended. *Albertson v. Kreeckbaum*, 65 Id., 11.

The provision of the statute which provides a fine of \$500 for the disobedience of an injunction against the unlawful sale of intoxicating liquors is not unconstitutional. *Jordan v. The Circuit Court*, 69 Id., 177.

SEC. 1543. (As amended by ch. 143, 20th g. a.) [**Building and contents declared a nuisance.**]-[In cases of violation of the provision of either of the preceding sections, or of section fifteen hundred and twenty-five of this chapter, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, use or give away, of any intoxicating liquor is carried on, or continued, or exists, and the furniture, fixtures, vessels, and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided, and whoever shall erect or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding one thousand dollars and costs of prosecution, and stand committed until the fine and costs are paid; and the provisions of chapter 47, title 25 of this code shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt by a fine of not less than five hundred nor more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court.]

The offense of nuisance under this section may be committed either by the manufacture, sale

or keeping with the intent to sell, intoxicating liquors, contrary to law; and while an indictment is sufficient which charges the commission of the offense by the doing of either one of the unlawful acts, it is bad for duplicity if it charges the offense to have been committed by doing two or three of the specified unlawful acts. *The State v. Baughman*, 20 Iowa, 497.

And in an indictment for a nuisance under this section, it is not sufficient to merely charge that the defendant used and kept a place for the sale of intoxicating liquors. It should be averred that he either had sold liquors at the place mentioned, or kept them there for the purpose of sale. *The State v. Hass*, 22 Id., 193; *The State v. Harris*, 27 Id., 429.

A license granted by the United States affords no protection against the penalties imposed for the sale of intoxicating liquors in violation of the state statute. *Id.* See, also, *State v. Carney*, Id., 82.

Where an indictment founded on this section charged that the defendant did use "a one-story building on the north side of main street, next door west from Chamber's store, in Agency City, Wapello county, Iowa, as a place in which to keep, and did then and there keep, intoxicating liquors with intent to sell," the district court held, that proof that the building in which the liquor was kept next door west of Chamberlain's store, instead of Chamber's store, as alleged, was not a fatal variance, and the supreme court being equally divided on the question, the case was affirmed. *The State v. Verden*, 24 Id., 126.

The power of the state to prohibit the traffic in intoxicating liquors having been recognized by the supreme court for many years, the power to enact whatever laws may be necessary to make the prohibition effectual, held to follow necessarily. *McLane v. Bonn et al.*, 70 Id., 752.

Proof that the defendant sold intoxicating liquors in violation of law in place charged in the indictment for nuisance, is sufficient to convict unless rebutted. *The State v. Harris*, 27 Id., 429; *The State v. Carney*, Id., 82.

The offense of nuisance, under this section, is complete by the doing of either of the acts prohibited in sections 1525, 1540, or 1542 of the code, as by doing of them all. Hence an indictment charging the offense to have been committed at a particular time and place, by keeping intoxicating liquors with intent to sell the same contrary to law, is the same accusation as that contained in another indictment charging the offense to have been committed at the same time and place by selling intoxicating liquors contrary to law; and a conviction on one indictment would be a bar to a prosecution on the other. *The State v. Layton*, 25 Id., 193.

Nor would the case be affected by the fact that in one indictment the offense is charged to have been committed on the first of the month, and in the other on the fifteenth of the same month. *Id.*

An indictment under this section is sufficient which charges the offense as having been committed by using and keeping a room and place for the purpose of selling, and by selling therein intoxicating liquors in violation of section 1562 of the revision. *The State v. Freeman*, 27 Id., 333.

Proof of occasional secret sales, without evidence that the place was notoriously or publicly known as a place for the sale of intoxicating liquor, is sufficient to convict in a prosecution for nuisance under this section. *Id.*

The finding of intoxicating liquors in any other building than one used as a private dwelling affords presumptive evidence that they are kept by their owner for sale, and will support an indictment for "keeping and maintaining a house for selling intoxicating liquors." *The State v. Norton*, 41 Id., 430.

The owner of premises upon which intoxicating liquors are kept for sale, contrary to law, is not guilty of an offense if he leased them for a lawful purpose and did not affirmatively assent to such unlawful use. The mere failure to prevent or attempt to prevent the illegal use or sale of the liquors does not subject him to the penalties of the statute. *The State v. Ballingall*, 42 Id., 87.

An indictment charging the defendant with keeping and controlling a building where intoxicating liquors were sold in violation of law, and where "gambling, fighting, drunkenness and breaches of the peace were permitted by him," held, not vulnerable to the objection of charging two offenses. *The State v. Dean et al.*, 44 Id., 648.

Nor where the indictment charged that the defendant kept intoxicating liquors for sale in a building and did then and there sell the same. *The State v. Beecher*, 29 Id., 438.

On the trial of an indictment under section 1543, the state is not bound to show affirmatively that the liquors were not kept in original vessels or packages, and that they were not sold for mechanical, medicinal or sacramental purposes. *Id.*

On an indictment under this section against the person, it is not necessary to describe the building and its specific location. *Id.*

An indictment for nuisance, which charges the keeping of intoxicating liquors with intent to sell the same, is good without the allegation that they were kept in violation of law. *The State v. Gordon*, 39 Id., 387; following *The State v. Collins*, 11 Id., 141.

Under this section, a bar-tender or clerk in a saloon where intoxicating liquors are sold by him in violation of law, may be indicted for nuisance. *The State v. Stucker*, 33 Id., 395.

Under this section, as enacted by section 12 of chapter 143, acts of 1854, any citizen of a county in which nuisance is kept, in the form of a place used for the unlawful sale of intoxicating liquors, may maintain an action in equity to enjoin and abate it; and said act is not repugnant to the constitution, as depriving the defendant of the right of trial by jury, or as being an attempt by the legislature to enforce a criminal law by civil action, nor because it authorizes any citizen of the county to maintain the action for injunction without showing that he is especially damaged by the nuisance, and in such case the court may grant a temporary injunction before the defendant has been convicted criminally. *Littleton v. Fritz*, 65 Id., 488. Reaffirmed in *Pontus v. Winebrenner*, (two cases), Id., 591.

An action to abate a nuisance under this section where intoxicating liquors are sold, is an action for the public benefit and according to the terms of the statute can be maintained only by a citizen of the county where the alleged nuisance exists. *Applegate v. Winebrenner*, 66 Id., 67.

Defendant was charged with nuisance, under this section, by keeping a place for the unlawful sale of intoxicating liquors. Held that if he kept the liquors with the intent that they should be sold only for lawful purposes, and himself made only lawful sales thereof, he was not criminally liable on account of unlawful sales thereof made by his clerk—the unlawful intent being an essential ingredient in the crime. *The State v. Hayes*, 67 Id., 27.

The case of *Littleton v. Fritz*, 65 Id., 488, followed and re-affirmed in *Shermerhorn v. Webber et al.*, 67 Id., 278; (four cases,) *Lundbeck v. Wiest et al.*, Id.; (nine cases,) *Farley v. Palen et al.*, Id.; (seven cases,) and *Myers v. Kirt*, 68 Id., 124.

An action to enjoin a nuisance caused by the unlawful sale and keeping for sale of intoxicating liquors, held not removable from the state court to the circuit court of the United States on the ground that a federal question is involved. *Lemon v. Wagner*, 68 Id., 660.

A person committed to the county jail for the non-payment of a fine imposed for the violation of an injunction restraining him from maintaining a nuisance under this section as amended, is not entitled to avail himself of the provisions of section 4611 of the code, and to be discharged upon tendering to the sheriff his note for the amount of the fine together with a written schedule of his property. *Hanbs v. Workman, Sheriff*, 29 N. W. R., 628. (October term, 1886.)

On conviction of a contempt for the violation of an injunction against keeping a place for the illegal sale of intoxicating liquors the defendant was fined \$500, and committed to jail "until the fine and costs should be paid, not exceeding as many days as three and one-third dollars are contained in the fine and costs." Held erroneous; this is the punishment for nuisance, but not for contempt. *Goetz v. Stutsman*, 36 N. W. R., 644.

Defendant was indicted for keeping a nuisance under section 1643 of the code, by keeping a place for the unlawful sale of intoxicating liquors, held that he kept the liquors with the intent that they should be sold only for lawful purposes, and himself made only lawful sales of such liquors, he was not criminally liable on account of unlawful sales made by his clerk—the unlawful intent being an essential ingredient in the crime. *The State v. Hays*, 67 Iowa, 27.

The lessor of a building used as a place for the unlawful sale of intoxicating liquors becomes an aider and abettor in violating the law, and he is a proper party to proceedings by injunction to restrain the traffic as a nuisance. *Martin v. Blattner et al.*, 68 Id., 289.

While only the second and subsequent offenses for the sale of intoxicating liquors, as defined by section 1542 of the code, are indictable, the same rule does not apply to section 1543, which provides for punishment for keeping nuisances for the sale of such liquors; and in an indictment for such nuisance it is not necessary to allege that it is the second offense, in order to give the district court jurisdiction. *State v. Howarth*, 70 Id., 158.

A former conviction under section 1542 before a justice of the peace is not a bar to indictment under this section. The two sections relate to different offenses. *State v. G. aham*, 35 N. W. R., 628.

Where on an indictment for nuisance in keeping a drug store for the unlawful sale of intoxicating liquors, the evidence showed that the defendant had sold such liquors to minors and inebriates, to show the absence of unlawful intent, the defendant put in evidence his statutory permit, and also written statements signed by the purchasers that they were 21 years old, and not inebriates. Held, that under sections 1543 and 1544 of the code, the unlawful intent may be presumed from the unlawful sales. *State v. Thompson*, 37 N. W. R., 104.

SEC. 1544. [Information: search warrant.]—If any credible resident of any county shall, before a justice of the peace of the same county, make written information, supported by his oath or affirmation, that he has reason to believe, and does believe, that any intoxicating liquor, described as particularly as may be, in said information, is in said county, in any place described, as particularly as may be, in said information; owned or kept by any person named or described in said information, as particularly as may be, and is intended by him to be sold in violation of the provisions of this chapter, said justice shall, upon finding probable cause for such information, issue his warrant of search, directed to any peace officer in

said county, describing, as particularly as may be, the liquor and the place described in said information, and the person named or described in said information as the owner or keeper of said liquor, and commanding the said officer to search thoroughly said place, and to seize the said liquor, with the vessels containing it, and to keep the same securely until final action be had thereon; whereupon, the said peace officer to whom such warrant shall be delivered, shall forthwith obey and execute, so far as he shall be able, the commands of said warrant, and make return of his doings to said justice, and shall securely keep all liquors so seized by him, and the vessels containing it, until final action be had thereon; *provided, however*, that if the place to be searched be a dwelling-house in which any family resides, and in which no tavern, eating-house, grocery, or other place of public resort is kept, such warrant shall not be issued unless said complaint shall, on oath or affirmation, declare before said justice that he has reason to believe, and does believe, that within one month next before the making of said information, intoxicating liquor has been, in violation of this chapter, sold in said house, or in some dependency thereof, by the person accused in said information, or by his consent, or permission; nor unless from the facts and circumstances disclosed by such complaint to said justice, the said justice shall be of opinion that said complainant has adequate reason for such belief.

If the justice issuing the warrant for the seizure of intoxicating liquors, under section 1544 of the code, has jurisdiction to authorize the seizure, and the information and all the proceedings thereunder are regular, the liquors cannot be taken from the custody of the officer by a writ of replevin; and police justices of cities under special charters have concurrent jurisdiction with justices of the peace to issue such warrants. *Weir v. Allen*, 47 Iowa, 482.

It is for the justice to determine whether an informant applying for a warrant under section 1544 of the code is a credible resident or not, but neither the information nor warrant need state such fact. *The State v. Thompson*, 44 Id., 399.

Where the information was entitled, "State of Iowa, Clayton county," it was held unnecessary to allege in the information that the liquors were in Clayton county. *Id.*

A description of the place to be searched, by giving the owner's name, the place where he lives, and the kind of liquors which he was believed to keep, was held sufficient. *Id.*

An objection to the warrant for insufficient description cannot be made for the first time on appeal in the district court. *Id.*

An information which charges the keeping of intoxicating liquors by the defendant, with the intent by him to be sold in violation of law, is sufficient, without specifying by title and chapter of the statute violated. *Id.*

Intoxicating liquors seized under proceedings for their forfeiture are not subject to an action of replevin. *Fries etc., v. Porch*, 49 Id., 351; *Funk & Hardman v. Israel*, 5 Id., 433; *Cooley v. Davis*, 34 Id., 128.

A particular description of the place to be searched, or the property to be seized, is required by this section; and the charge against the defendant is to be distinctly and fully stated. *Santo v. The State* 2 Id., 165.

The expression "as particular as may be" conveys the idea of the *greatest* degree of certainty, and this section is, therefore, not in conflict with the Const., Art. 1, Sec. 8, as authorizing a search warrant to issue without the particularity of description therein required; nor as authorizing *unreasonable* search or seizure. *Id.*, 212.

It is not necessary that either the information or warrant should state that the former is made by a "credible resident" of the county. That fact is to be found by the justice. *The State v. Thompson*, 44 Id., 399; *Weir v. Allen*, 47 Id., 482.

It will not be presumed that the place to be searched is a "dwelling house," etc., from the mere fact that the information avers that the liquors are kept in a certain house or place known, etc. *Saunders v. The State*, 2 Id., 230, 277.

A previous conviction of the owner for selling liquors in violation of law will not bar a prosecution under this section against the liquors. *Id.*

The jurisdiction here conferred upon justices of the peace is not exclusive, but may be exercised by police justices in cities acting under special charter. *Weir v. Allen*, 47 Id., 482.

Liquors seized as contemplated in this section cannot be taken from the custody of the officer by replevin. *Funk v. Israel*, 5 Id., 538; *The State v. Harris*, 38 Id., 242; *Weir v. Allen*, 47 Id., 482; *Fries v. Porch*, 49 Id., 352. Nor can the owner of the liquors recover from the officer by way of damages in an action of trespass unless he shows that he possessed them with lawful intent and was unlawfully deprived of them. *Plumer v. Harbut*, 5 Id., 308.

An information for a search warrant under this section for the seizure of liquors owned and kept with unlawful intent, must charge some specific person as the owner or keeper of the liquor with unlawful intent. *State v. Harris*, 36 Id., 136; *State v. Certain Intoxicating Liquors*, 64 Id., 300.

Certain intoxicating liquors were shipped by the Seipp Brewing Co., of Elroy, Wis., by rail, to Bigelow, Minn. The way bill, under the heading, "Consignee, Marks and Destination," read as follows: "The Seipp Brewing Co. Notify McEvoy & McClarty, Bigelow, Minn." The liquors were delivered to defendants at Bigelow, where they kept a saloon; but they also kept a saloon at the neighboring town of Sibley, Iowa, to which the liquors were conveyed by the defendants, and where they were seized and condemned to destruction under the laws of Iowa. The Seipp Brewing Co. drew upon the defendants at Sibley, Iowa, for the price of the liquors, but defendants refused to pay the draft. The bill of lading was attached to the draft, but was not in evidence, nor was it shown who appeared by the bill of lading to be the consignee of the liquors. It was shown, however, that the same company had made prior like consignments, which had in like manner been delivered to defendants, and that drafts to cover the same had been sent to Sibley for collection, and had been paid by defendants. The railroad company appeared in the proceedings against the liquor and claimed possession thereof, on the ground that the Seipp Brewing Co. was the consignee, and that the delivery to defendants at Bigelow was a mistake, and that their possession was wrongful; and that as the railway company had not violated the law by transporting the liquors into Iowa, they should be restored to it, for delivery to the proper consignee in Minnesota. *Held*, that this claim could not be maintained, and that the liquors were properly condemned. *State of Iowa v. McEvoy*, 69 Id., 63.

Under this section, providing that, "if any creditable resident of any county shall make written information on oath before a justice of the peace of the same county that he has reason to believe, and does believe, that any intoxicating liquor is kept for sale in such county in violation of law, the justice shall issue a search warrant," it is not necessary that the information shall show that the informant is a resident of such county; the residence may be shown by independent proof. *State v. Blair and Certain Intoxicating Liquors*, 34 N. W. R., 432.

Under this section it is not necessary, in case of an information against one holding a permit from the board of supervisors to sell liquors for lawful purposes, that the information shall charge that defendant has sold intoxicating liquors in violation of law, although section 1536 provides that a permit for the sale of intoxicating liquors shall be no bar to their confiscation and destruction if it shall be found that the party claiming them has sold such liquors in violation of law. That section simply operates to make the fact of sale evidence of the intent in keeping the liquors. *Id.*

SEC. 1545. [Information: what contain.]—The information and search warrant in such case, shall describe the place to be searched, as well as the liquors to be seized, with reasonable particularity. When any liquors shall have been seized by virtue of any such warrant, the same shall not be discharged or returned to any person claiming the same, by reason of any alleged insufficiency of description in the warrant of the liquor or place, but the claimant shall only have a right to be heard on the merits of the case.

SEC. 1546. [Notice of seizure served.]—Whenever upon such warrant such liquors shall have been seized, the justice who issued such warrant shall, within forty-eight hours after such seizure, cause to be left at the place where said liquor was seized, if said place be a dwelling house, store, or shop, posted in some conspicuous place on or about said buildings, and also to be left with or at the last known and usual place of residence of the person named or described in said information as the owner or keeper of said liquor, if he be a resident of this state, a notice, summoning such person and all others whom it may concern, to appear before said justice at a place and time named in said notice, which time shall not be less than five nor more than fifteen days after the posting and leaving of said notices, and show cause, if any they have, why said liquor, together with the vessels in which the same is contained, should not be forfeited; and said notice shall, with reasonable certainty, describe said liquor and vessels, and shall state where, when, and why, the same were seized. At the time and place prescribed in said notice, the person named in said information, or any other person claiming an interest in said liquor and vessels, or any part thereof, may appear and show cause why the same should not be forfeited. If any person shall so appear, he shall become a party defendant in said case, and said justice shall make a record thereof.

Whether any person shall so appear or not, said justice shall, at the prescribed time, proceed to the trial of said case, and said complainants, or either of them, may, and upon their default, the officer having such liquor in custody shall appear before said justice and prosecute said information, and show cause why such liquor should be adjudged forfeited. The proceeding in the trial of such case may be the same, substantially, as in cases of misdemeanor triable before justices of the peace, and if any person shall appear and be made a party defendant as herein provided, and shall make written plea that said liquor, or the part thereof claimed by him, was not owned or kept with intent to be sold in violation of this chapter, such party defendant may, at his option, demand a jury to try the issue, and, if upon the evidence then and there presented, the said justice or jury as the case may be, shall find for verdict that said liquor was, when seized, owned or kept by any person, whether said party defendant or not, for the purpose of being sold in violation of this chapter, the said justice shall render judgment that said liquor, or said part thereof, with the vessels in which it is contained, is forfeited. If no person be made defendant in manner aforesaid, or if judgment be in favor of all the defendants who appear and are made such, then the costs of the proceeding shall be paid as in ordinary criminal prosecutions where the prosecution fails. If the judgment shall be against only one party defendant appearing as aforesaid, he shall be adjudged to pay all the costs of proceedings in the seizure and detention of the liquor claimed by him up to that time, and of said trial. But, if such judgment shall be against more than one party defendant claiming distinct interests in said liquor, then the costs of said proceedings and trial shall be according to the discretion of said justice equitably apportioned among said defendants, and execution shall be issued on said judgments against said defendants for the amount of the costs so adjudged against them. Any person appearing and becoming party defendant as aforesaid, may appeal from said judgment of forfeiture as to the whole, or any part, of said liquor and vessels claimed by him and so adjudged forfeited to the district court as in ordinary cases of misdemeanor.

When intoxicating liquors are seized under a warrant issued under the provisions of the prohibitory liquor law, it is not competent for a party to take the case away from the tribunal whose jurisdiction has attached, by commencing an action of replevin for the liquors seized. *Funk & Hardman v. Israel*, 5 Iowa, 433; *Cooley v. Davis*, 34 Id., 128.

Intoxicating liquors seized under an information for their forfeiture are not the subject of replevin, and to take them from an officer by such process is an illegal act, and will subject the guilty party to punishment for contempt. *The State v. Harris, et al.*, 38 Id., 242.

The proceeding contemplated under this section is a criminal one. *State v. Harris*, 38 Id., 242.

SEC. 1547. [Destruction of liquor and vessels.]—Whenever it shall be finally decided that liquor seized as aforesaid is forfeited, the court rendering final judgment of forfeiture shall issue to the officer having said liquors in custody, or to some other peace officer, a written order, directing him forthwith to destroy said liquor and vessels containing the same, and immediately thereafter to make return of said order to the court whence issued, with his doings endorsed thereon and sworn to. Whenever it shall be finally decided that any liquor so seized is not liable to forfeiture, the court by whom such final decision shall be rendered shall issue a written order to the officer having the same in custody, or to some other peace officer, to restore said liquor, with the vessels containing the same, to the place where it was seized, as nearly as may be, or to the person entitled to receive it, which order the officer, after obeying the commands thereof, shall return to the said court with his doings thereon indorsed; and the costs of the proceedings in such case attending the restoration, as also the costs attending the destruction of such liquor in case of forfeiture, shall be taxed and paid in the same manner as is provided in case of ordinary criminal prosecution, where the prosecution fails.

To justify an order for the destruction of intoxicating liquors seized upon a warrant, it must be found that they were kept with the intention on the part of the owner, or the one in whose custody

they are found, of selling them *in violation of law*. A finding that they were kept "for the purpose of being sold within the state of Iowa," is not sufficient. *The State v. Harris*, 36 Iowa, 136.

A proceeding by information for the condemnation of intoxicating liquors alleged to be kept for illegal sale, is in the nature of a criminal one, and after trial in the district court it is error to sustain a motion by the state for a new trial. *State v. Harris et al.*, 4) Id., 95.

An action for the condemnation and destruction of intoxicating liquors kept for illegal sale, is a criminal action, and is not affected by the constitutional provision limiting the jurisdiction of justices of the peace in civil cases. Accordingly *held* that under sections 1541-1547 of the code a justice had jurisdiction of actions brought under these sections regardless of the value of the liquors involved therein. *The State v. Arlen et al.*, 71 Id., 216.

SEC. 1548. (*As amended by ch. 37, 15th g. a.*) [**Intoxicated person punished.**]—If any person shall be found in a state of intoxication, he shall be deemed guilty of a misdemeanor, and any peace officer may, without warrant, and it is hereby made his duty to take such person into custody, and to detain him in some suitable place until an information can be made before a magistrate and a warrant issued in due form, upon which he may be arrested and tried, and if found guilty, he shall pay a fine of ten dollars and the costs of prosecution, or shall be imprisoned in the county jail thirty days. But the magistrate before whom such person is tried and convicted may remit any portion of such penalty, and order the prisoner to be discharged upon his giving information, under oath, stating when, where, and of whom he purchased or received the liquor which produced the intoxication, and the name and character of the liquor obtained. (*Provided*, such intoxicated person gives bail for his appearance before the proper magistrate, court or jury to give testimony in any action or complaint against the party for furnishing such liquor.) In cases arising under this section, appeals may be allowed as in cases of ordinary misdemeanor within the jurisdiction of the justices of the peace.

The word "drunkenness" in a warrant of commitment has the same legal signification as the word "intoxication." *Smith v. Bigelow*, 19 Iowa, 459.

Under sections 1568 and 1586 of the revision, it was held that imprisonment for thirty days was an imperative part of the punishment for intoxication. *The State v. Patton*, Id., 453. But it is not so under the code. *Ed.*

A witness may state whether or not, in his opinion, a person was intoxicated, and is not confined to a statement of the conduct and demeanor of the person inquired about. *The State v. Huxford*, 47 Id., 16.

It is competent for a municipal corporation, under the powers conferred upon it by sections 456 and 432 of the code, to provide by ordinance for the arrest and punishment of persons found in a state of intoxication. The act may be an offense against the city as well as against the state, as provided in this section. *Town of Bloomfield v. Trimble*, 54 Id., 399.

SEC. 1549. [**Requisites of indictment or information.**]—In any indictment or information arising under this chapter, it shall not be necessary to set out exactly the kind or quantity of intoxicating liquors manufactured or sold, or kept for purposes of sale, nor the exact time of the manufacture, or sale, or keeping with intent to sell, but proof of the violation by the accused of any provision of this chapter, the substance of which violation is briefly set forth, within the time mentioned in said indictment or information, shall be sufficient to convict such person; nor shall it be necessary in any indictment or information to negative any exceptions contained in the enacting clause, or elsewhere, which may be proper ground of defense; and, in any prosecution for a second or subsequent offense as provided herein, it shall not be requisite to set forth in the indictment or information the record of a former conviction, but it shall be sufficient briefly to allege such conviction; nor shall it be necessary in every case to prove payment in order to prove a sale within the true meaning and intent of this chapter, and the person purchasing any intoxicating liquor sold in violation of this chapter, shall, in all cases, be a competent witness to prove such sale.

The *precise* time when the offense was committed is not material; it is sufficient if it is alleged that the offense was committed prior to the finding of the indictment and within the period of the statute of limitations, although a particular time is alleged in the indictment. *The State v. Layton*, 25 Iowa, 193, 196.

The time of selling need not be proved as laid in the indictment. *The State v. Curley*, 33 Id., 359; *The State v. Malling*, 11 Id., 239.

Since the taking effect of the present constitution, the offense of selling intoxicating liquors is not subject to indictment, but of an information before a justice of the peace. *The State v. Kœhler*, 6 Id., 398.

In an information for selling intoxicating liquors in violation of the law, it is not necessary to set forth the kind of liquors sold. *Foreman v. Hunter*, 59 Id., 550.

SEC. 1550. [Payments for liquor illegal.]—All payments or compensation for intoxicating liquor sold in violation of this chapter, whether such payments or compensation be in money, goods, land, labor, or anything else whatsoever, shall be held to have been received in violation of law and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money or the just value of such goods, land labor or other thing. All sales transfers, conveyances, mortgages, liens, attachments, pledges, and securities of every kind, which either in whole or in part shall have been made for or on account of intoxicating liquors sold in violation of this chapter shall be utterly null and void against all persons in all cases, and no rights of any kind shall be acquired thereby, and action of any kind shall be maintained in any court in this state for intoxicating liquors, or the value thereof, sold in any other state or country contrary to the law of said state or country, or with intent to enable any person to violate any provision of this chapter, nor shall any action be maintained for the recovery or possession of any intoxicating liquor, or the value thereof, except in cases where persons owning or possessing such liquor with lawful intent, may have been illegally deprived of the same. Nothing, however, in this section shall affect in any way negotiable paper in the hands of holders thereof in good faith for valuable consideration, without notice of any illegality in its inception or transfer, or the holder of land or other property who may have taken the same in good faith, without notice of any defect in the title of the person from whom the same was taken, growing out of a violation of the provisions of this chapter, and all evidence given in actions brought by or against such holders, shall be in no way affected by the provisions of this section.

The sale of intoxicating liquors in this state, in violation of the law for the suppression of intemperance, even by an agent of the firm residing in another state, will be held illegal and void without any showing of intent to enable the purchaser to violate the law. *The Second Nat. Bk. of Louisville v. Curran*, 36 Iowa, 55; *Tregler & Co. v. Shipman*, 33 Id., 194; see also *Whitlock v. Workman & Co.*, 15 Id., 351; *Dalter v. Lane*, 13 Id., 538; *Smith v. Grable*, 14 Id., 429; *Davis v. Bronson*, 6 Id., 410.

But to defeat a recovery on a contract for the sale of intoxicating liquors made with a firm in the state where they reside, it must appear that the vendors had knowledge of our law, and made the sale with intent to enable the purchaser to violate the same. Knowledge of the law alone would not be sufficient. *The Second National Bank v. Curran*, *supra*.

Where a claim for rent, payable in corn, was sold and transferred by the lessor to a third person in consideration of intoxicating liquors, sold in violation of law, in an action by the assignee of the rent against the lessee the court held, that he could not recover because the statute declares all contracts on account of intoxicating liquors, sold in violation of law, to be "utterly null and void against all persons in all cases." *Davis v. Slater*, 17 Id., 250.

The vendor of intoxicating liquors, sold contrary to law, may be garnished by a creditor of the vendee and required to pay the money received for such liquors in satisfaction of the debt of such vendee to the garnishing creditor. *Church v. Simpson*, 25 Id., 408.

The judgment, by default, of a justice of the peace cannot be impeached by affidavits showing that the default was taken before the proper time therefor. His record showing that the judgment was rendered at a proper time is conclusive as to the fact. *Cory v. King & Co.*, 49 Id., 365.

The term "liens," as employed in section 1550 of the code, does not include the lien of a judgment, and if a judgment be rendered in favor of a party selling intoxicating liquors, it cannot be pleaded in another action that such judgment is void, because the subject matter of the action came within the prohibition of the statute. *Smith et al. v. Leddy et al.*, 50 Id., 112.

A contract for the sale of intoxicating liquor for purposes forbidden by law is void, and such sale, when the purpose thereof is known to the seller, will not constitute a sufficient consideration for a promissory note for the purchase price. *Tolman & King v. Johnson*, 43 Id., 127.

If liquors thus sold have been paid for, the money paid may be recovered back in an action at law; or in an action by the seller against the purchaser upon a general account, the amount of such payment may be pleaded as a counter-claim. *Id.*

The owner of intoxicating liquors in an action for damages against an officer who has been adjudged to have no authority for their detention, must allege and prove that he owned and kept them with a lawful intent, and not for the purpose of sale contrary to law. *Walker v. Snook et al.*, 49 Id., 264.

The order to the officer to return the liquors to the plaintiff did not relieve him from the necessity of making such allegation and proof. *Id.*

A promissory note given in part for intoxicating liquors, sold in violation of law, is wholly void and cannot be enforced, even to the extent of the legal consideration. *Taylor & Co. v. Pickett et al.*, 52 Id., 467.

And in an action by the indorsee of a negotiable promissory note, if it be established that the note was given for intoxicating liquors sold in violation of law, the burden is upon the plaintiff to show that he took the note for value before maturity and without notice of the infirmity. *The Rock Island Nat. Bank v. Nelson*, 51 Id., 563.

A sale of intoxicating liquors by an agent is considered as made where the order is given, unless such order, after being forwarded to the principal, is to be subject to his approval before it is filled. *Taylor & Co. v. Pickett et al.*, 52 Id., 467.

A person authorized to sell liquors for legal purposes is bound to exercise due diligence and act in good faith in making such sales; when this is done he is not responsible for the illegal use made of them by the purchaser. *Id.*

In an action against a common carrier to recover the value of intoxicating liquors lost or destroyed, the plaintiff must prove, not only that he has been illegally deprived of the same, but that he owned or possessed them with lawful intent and not for the purpose of sale contrary to law. *Summer v. Cate*, 22 Id., 585.

While traffic in intoxicating liquor as an article of beverage is, under the statute, unlawful, it nevertheless retains the character of property. *Montz v. Arenson*, 25 Id., 383.

In order to defeat a recovery on a contract for the sale of intoxicating liquors made with a firm in the state, not Iowa, where they reside, it must appear that the vendors had knowledge of our law, and made the sale with intent to enable the purchaser to violate the same. Knowledge of the law alone is not sufficient. *The Second Nat. Bank. v. Curran*, 36 Id., 555.

If an agent of a person engaged in the sale of intoxicating liquors in another state, merely takes an order of a person residing in this state for a quantity of liquor to be forwarded to him, which order is taken by the agent subject to the approval or disapproval of his principal, the sale will be regarded as made in the state where the vendor resides, and the case will not fall within section 1550. *Tegler & Co. v. Shipman*, 33 Id., 194.

But if, in such case, the agent had authority to contract the sale, or if the sale was made with intent on the part of the vendor to enable the purchaser to violate any of the provisions of our law for the suppression of intemperance, it would be otherwise; the sale would be void under section 1550. *Id.*

Although mere knowledge on the part of the vendor, residing in another state, that the purchase is with intent to violate our law is not held sufficient to defeat the contract, yet it is a fact from which, with other circumstances, the jury may infer such intent. *Id.*

One who with permission to sell intoxicating liquors, purchases a quantity of such liquors from a manufacturer who has not permission to sell, may not only set up the unlawful sale as a defense in an action to recover the price of the liquors, but where he has made a payment thereon may recover back the amount paid. *Becker v. Betten*, 39 Id., 668.

A party seeking to recover for the seizure and destruction of intoxicating liquors, must show that he possessed them with a lawful intent, and that he has been deprived of them unlawfully, before he can recover their value. *Plummer v. Harbut et al.*, 5 Id., 308.

A note given in whole or in part consideration for intoxicating liquors sold in violation of law, is void in the hands of the payee or any assignee having notice of the consideration. The illegal part cannot be separated from the legal part of the consideration. It taints the whole. *Braitch v. Guelick*, 37 Id., 212.

When the consideration of a contract is the illegal sale of intoxicating liquors, it is, by statute, utterly void as against all persons. *Davis v. Slater*, 17 Id., 250.

An action under section 1550 to recover the price of intoxicating liquors sold in violation of law, is a civil action, and not quasi criminal in character, and a motion for a new trial on the ground that the verdict is contrary to the evidence is allowable. *Woodward v. Squires & Co.*, 39 Id., 435.

An action under this section for the recovery of money paid for intoxicating liquors in violation of law, will not be barred by the statute of limitations until five years from the time the payment was made. *Woodward v. Squires & Co.* 41 Id., 677.

It was held in *Marienthal, Lehman & Co. v. Shafer et al.*, 6 Id 223, and in *Funk & Hardman v. Israel*, 5 Id., 438, that an illegal vendor of intoxicating liquors could not maintain an action of replevin against attaching creditors of the vendee, on the ground that the sale was void and the right of possession still remained in the vendor. But the contrary seems to be held in *Monty v. Arneson*, 25 Id., 383.

Intoxicating liquors are property in so far as they are the subject of larceny. *The State v. May*, 20 Id., 305.

Where a party exchanges goods for intoxicating liquors sold in violation of law, he may recover the same by an action at law. *Smith v. Grable*, 41 Id., 429.

A sale of intoxicating liquors by an agent is considered as made where the order is given, unless such order, after being forwarded to the principal, is to be subject to his approval before it is filled. *Taylor & Co. v. Pickett et al.*, 52 Id., 467.

Where orders for liquors were sent by defendant from Vermont to plaintiffs in New York by mail, and where other orders were taken by plaintiff's agent in Vermont, but sent by him to plaintiffs in New York, to be accepted or rejected by them at pleasure, and the liquors ordered were consigned to the defendant by rail, he paying the carrier's charges thereon, held that the contracts were consummated in New York and were not in violation of the laws of Vermont in regard to the sale of such goods, and that recovery may be had thereon in this state notwithstanding the provisions of this section of the code. *Engs & Sons v. Priest*, 65 Id., 232.

This section declaring the sale, without permit, of intoxicating liquors void, and authorizing a person making payment to recover back the money paid in pursuance thereof, when the contract of sale was made in Iowa, the presumption is that payment was intended to be made and was in fact made therein in the absence of evidence to the contrary. *Connely v. Scarr*, 72 Id., 223.

SEC. 1551. (As amended by ch. 143, 20th g. a.) [Officers to give information of violations.]—All peace officers shall see that the provisions of this chapter are faithfully executed, and when informed that the law has been violated, or when they have reason to believe that the law has been violated, and that proof of the fact can be had, such officers shall go before a magistrate and make information of the same and of the person so violating the law. Upon the filing of such information before a magistrate he shall institute a suit and proceed to the arrest and trial thereof according to law. Upon trials before a magistrate, it shall be the duty of the *district* (county) attorney to appear before the state, unless the person filing such information shall select some other attorney. Any peace officer failing to comply with the provisions of this section shall be guilty of a misdemeanor, and pay a fine of not less than ten nor more than fifty dollars, and a conviction shall work a forfeiture of his office. [Every peace officer shall give evidence when called upon, of any facts within his knowledge, tending to prove a violation of the provisions of this chapter, but his evidence shall in no case be used against him in any prosecution against him for a violation of the provisions of this chapter.]

A constable appointed by a justice of the peace "for the purpose of assisting peace officers of Clinton to seize liquors." is not thereby authorized to select an attorney for the prosecution of a case under the prohibitory law. *Foster & Foster v. Clinton County*, 51 Iowa, 541. Nor can the district attorney render the county liable for the services of an attorney requested by him to conduct a prosecution. *Id.*

Under this section a county is not liable to an attorney for his services in prosecuting for a violation of the prohibitory liquor law, where the services are rendered at the request of one not a peace officer. *Blair & Bronson v. Dubuque County*, 27 Id., 181.

A peace officer cannot refuse to answer questions touching his knowledge of the places where intoxicating liquors are being sold in violation of law, on the ground that under section 1551 of the code he would criminate himself. When the question involves only facts of recent occurrence the answer cannot criminate the witness. *Hunt v. McCalla, Sheriff*, 20 Id., 20.

SEC. 1552. [Principal and sureties jointly and severally liable.]—The principal and sureties in the bond mentioned in sections fifteen hundred and twenty-eight and fifteen hundred and twenty-nine, shall be jointly and severally liable for all fines and costs that may be adjudged against the principal for any violation of any of the provisions of this chapter, and shall also jointly and severally be liable for all civil damages and costs that may be adjudged against said principal in any civil action brought against him by the provisions of this chapter.

SEC. 1553. (*As substituted by ch. 66, 21st g. a., and amended by ch. 73, 22d g. a.*) **[Penalty for transporting intoxicating liquors.]**—[If any express company, railway company, or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or of any other person, [shall] transport or convey between points, or from one place to another within this state, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell such intoxicating liquors in such county. Such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense and pay costs of prosecution, and the cost shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete and shall be held to have been committed in any county of the state, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this state to issue the certificate herein contemplated, to any person having such permit and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires as shown by the county records.] [Provided, however, that the defendant may show, as a defense hereunder, by a preponderance of evidence, that the character and circumstances of the shipment and its contents were unknown to him.]

The *giving* of intoxicating liquors to an intoxicated person construed to be within the prohibition of selling to such a person as provided in section 1539 of the code. *Church v. Higham*, 44 Iowa, 482.

Where in an action by the wife for selling intoxicating liquors to her husband it was shown that the husband was in the habit of dealing with the defendant, it was *held*, that the jury might infer from that fact that the liquor he obtained was a purchase and not a gift, although it was not paid for by him or charged to him. *Rafferty v. Buckman*, 46 Id., 195.

This section changes the common law rule of strict construction, as applied to criminal statutes. *Woolheather v. Risley*, 38 Id., 486, 491.

Intoxicating liquors imported into this state by express, and held by the express company as agent for the consignor, to be delivered to the consignee upon payment of the purchase price, are subject to be seized and destroyed as contraband property in a proceeding against the liquors. It is wholly immaterial in such case whether the officers of the express company know the character of the property, or the uses to which it is to be put; and where the company voluntarily appears in the proceeding and claims the liquors, the costs may be assessed against it. *The State v. U. S. Express Co.*, 70 Id., 271.

SEC. 1554. **[Construction of statute.]**—Courts and jurors shall construe this chapter so as to prevent evasion, and so as to cover the giving as well as selling by persons not authorized.

This section changes the common law rule of strict construction, as applied to criminal statutes. *Woolheather v. Risley*, 38 Iowa 486, 491.

The giving of intoxicating liquors to an intoxicated person was construed to be within the prohibition of selling to such person, as provided in section 1539 of the code. *Church v. Higham*, 44 Id., 482.

Where in an action by the wife for selling intoxicating liquors to her husband, it was shown that the husband was in the habit of dealing with the defendant, it was *held*, that the jury might infer from that fact that the liquor he obtained was a purchase and not a gift, although it was not paid for by him or charged to him. *Rafferty v. Buckman et al.*, 46 Id., 195.

This section applies to licensed pharmacists, and they are liable for giving away intoxicating liquors for unlawful purposes, no matter how artfully done. *The State v. Harris*, 64 Iowa, 287.

SEC. 1555. (*As substituted by ch. 8, 20th g. a.*) [Wherever the words **intoxicating liquors** occur in this chapter, the same shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatever; and no person shall manufacture for sale, or sell, or keep for sale, as a beverage, any intoxicating liquors whatever, including ale, wine and beer. And the same provisions and penalties of law in force relating to intoxicating liquors, shall in like manner be held and construed to apply to violations of this act, and to the manufacture, sale, or keeping for sale, or keeping with intent to sell, or keeping or establishing a place for the sale of ale, wine and beer, and all other intoxicating liquors whatever.]

In a prosecution for violation of the prohibitory liquor law, the time of selling need not be proved as laid in the indictment, nor need it be alleged in the indictment nor proved by the state that the liquors sold were such as are not included in the exceptions of the statute [the exceptions no longer exist]. The burden of proving this rests upon the accused. *The State v. Curley*, 33 Id., 359; *Worley v. Spurgeon*, 33 Id., 465.

Wine and beer were held included in the terms "intoxicating liquors." for the sale of which a right of action is given. *Worley v. Spurgeon*, *supra*, and *Jewett v. Wanshura*, 43 Id., 574.

This section must be regarded as a police regulation, and not in any just sense a regulation of commerce, or as in conflict with section 8, of article 1, of the constitution of the United States, relating to commerce. *The State v. Stucker*, 58 Id., 496.

After a statute has been enforced, in both the civil and criminal courts for a long period, it will not be held unconstitutional unless its unconstitutionality is so obvious as to admit of no doubt. *Id.*

Where a witness testified that he drank beer at defendant's saloon and did not pay for it, but supposed that his companion paid for it, he was not positive. The court instructed the jury as follows: "The statute expressly requires courts and jurors to construe its provisions so as to prevent evasion, and so as to cover the act of giving as well as selling." *Held correct. The State v. Reinhardt*, 69 Id., 224.

The state may, as a police regulation, prohibit the sale of one kind of intoxicating liquor and allow the sale of another kind, and the prohibition of wines made from fruits grown in other states is no invasion of the immunities or privileges of the citizens of these states, and not repugnant to section 2, of article 4, of the constitution of the United States. *Id.*

Under section 1555 of the code, as amended by chapter 8, laws of 1884, it was held that cider made from apples and intoxicating in quality, was included in the terms "all intoxicating liquors whatsoever." *The State v. Hutchison*, 34 N. W. R., 421.

Where a common carrier refused to transport a product called "New Era Beer," into Iowa because of the prohibitory law, it was held that as the product was denominated "beer" with nothing to show that it was not intoxicating, the carrier had a right to assume that it was intoxicating and refuse to transport it. *Milwaukee M. E. Co. v. Chicago, R. I. & P. R'y Co.*, 34 N. W. R., 761.

The sale of cider, when intoxicating, is forbidden by the statutes for the suppression of intemperance, it being included in the terms, "intoxicating liquors," as defined by section 1555 of the code as amended by chapter 8, laws of 1884. *The State v. Hutchinson*, 72 Id., 561.

SEC. 1556. [**Taking care of intoxicated person: expense of.**]
—Any person who shall by the manufacture or sale of intoxicating liquors, contrary to the provisions of this chapter, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and one dollar per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in a civil action before any court having jurisdiction thereof.

There can be no recovery under section 1556, unless it be shown that the liquor sold either caused or contributed to the husband's intoxication. *Welch v. Jugenheimer*, 56 Iowa, 11; *Fox v. Wunderleck*, *supra*.

SEC. 1557. [**Action by persons injured by intoxicated person.**]
—Every wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, against any person who shall, by selling intoxicating liquors, cause the intoxication of such person, for all damages actually sus-

tained, as well as exemplary damages; and a married woman shall have the same right to bring suits, prosecute, and control the same and the amount recovered as if a single woman; and all damages recovered by a minor under this section, shall be paid either to such minor or his parent, guardian, or next friend, as the court shall direct, and all suits for damages under this section shall be by civil action in any court having jurisdiction thereof.

A seller of intoxicating liquors to the husband, by which the wife is injured in her means of support, is not released from liability if a part of the liquors causing the intoxication were sold by others. He is liable if he contributed thereto. *Woolheather v. Risley*, 38 Iowa, 486.

A joint action will not lie against several defendants, whose places of business were distinct and who had no business connection with each other, for injuries caused the plaintiff by the sale of intoxicating liquors to her husband. *La France v. Krager et al.*, 41 Id., 143.

Whether such an action could be maintained if successive sales by the several defendants produced a single act of intoxication from which the injury resulted. *quare? Id.*

It has been subsequently held, that if several persons sell intoxicating liquors to another, whereby he becomes intoxicated, and inflicts injuries upon persons or property, each of the sellers is liable for all of the injuries, although there can be but one satisfaction therefor. *Kearney v. Fitzgerald*, 43 Id., 580.

Where several persons have sold intoxicating liquors to the husband, a settlement by the wife with one of such persons will not operate to discharge the others from liability. *Jewett v. Wanshura*, Id., 564.

In an action by a wife for damages for injury to her means of support by the sale of intoxicating liquors to her husband, evidence of the number and ages of her children is not admissible to affect the damages. *Huggins v. Kavanagh*, 52 Id., 368.

Where it is sought to recover for a series of sales a defendant can only be held liable for injuries to which he contributed, and an instruction charging the jury that if they were unable to separate the damages to which the defendant contributed from those which he did not, he would be liable for the whole amount of injury, was held erroneous. *Id. Ennis v. Shilley* 47 Id., 552.

Under sections 1557 and 1558 a joint action for injury to the wife from the sale of liquors to her husband, and to charge the premises on which the liquors were sold with the lien of the judgment, may be maintained against the seller and owner of the property. *Loan v. Heiney & Etzell*, 53 Id., 89.

Such an action is triable at law as against both defendants, and either party is entitled to a jury; the lien following as a matter of law upon the finding of facts requisite under the statute in favor of the plaintiff. *Id.*

The fact that the wife has recovered damages for injury to her means of support, by the sale of intoxicating liquors, cannot be pleaded in mitigation in another action for the same cause against other parties. The fact may be introduced in evidence, not in mitigation, but to show more accurately the damages for which the defendant was liable. *Ennis v. Shirley et al.* 47 Id., 552; *Engleken v. Webber et al.*, Id., 558; 38 Id., 465; 46-195; 44-670; 50-34.

In an action for damages from injuries resulting from the sale of intoxicating liquors, the seller may be joined as defendant with the owner of the land upon which the liquor was sold and upon which it is sought to establish a lien. *La France v. Krager et al.*, 42 Id., 143.

Where the injury resulting from the sale of intoxicating liquors proceeds not from a particular act of intoxication, but rather from a general besotted condition, those who may have contributed to such a condition by the sale to him of intoxicating liquors are not jointly liable with those who have contributed to the immediate act. *Hitchner v. Eplers et al.*, 44 Id., 40.

A married woman has the right to rely upon the support of her husband, and is entitled to damages from the person who injures her in her means of support by the sale of intoxicating liquors to her husband, irrespective of his conduct previous to the sale. *Woolheather v. Risley*, 38 Id., 486.

If the wife has a horse which she claims and uses as her own with the knowledge of her husband, and the husband sells it while he is intoxicated, she may recover its value of the seller of the liquor causing the intoxication. *Id.*

In an action by the wife for damages caused by the sale of intoxicating liquors to the husband, a witness may be asked if the husband had been frequently intoxicated, before the introduction of the evidence that such intoxication was caused by the defendant. The order of proof rests in the discretion of the court. *Id.*

It is not necessary that the fact of marriage shall be established to enable a person suing as wife, under this section, to recover for injuries to her person and property. *Kearney v. Fitzgerald*, 43 Id., 580.

A wife cannot recover damages against a person who sells intoxicating liquors to her husband, for injuries to her person or property, if she voluntarily drinks with him or sanctions the sale to him. *Id.*

Although the wife may have purchased liquors and taken them home for the purpose of detaining her husband there, this act will not deprive her of the benefit of the statute. *Id.*

In this class of cases damages are not allowed for wounded feelings and disgrace, and evidence that the defendant has sold to plaintiff's husband since the commencement of the action is not, therefore, competent. *Id.*

By the statutes in force prior to September 1st, 1873, no right of action was given for injuries produced by the sale of beer. *Woodey v. Coenan*, 44 Id. 19.

But now under section 1539 of the code, wine and beer are included in the terms *intoxicating liquors* in section 1557, for the sale of which a right of action is thereby given. *Jewett v. Wanshura*, 42 Id., 574; *Worley v. Spurgeon*, 38 Id., 465.

When the wife had forbidden the sale of liquors to her husband, and subsequently in his presence gave permission to the seller to let him have all he wanted; held, that the seller should have inferred that she acted under coercion in giving the permission, and that he was not thereby exempted from liability. *Id.*

The fact that the wife has upon other occasions ordered the sale of intoxicating liquors to her husband will not prevent her recovery of damages for a sale upon a particular occasion when she did not assent thereto. *Rafferty v. Buckman et al.*, 46 Id., 195.

The giving of money by the wife to her husband for the purpose of procuring liquor to drink, would not justify the inference that she contributed to his intoxication, in the absence of proof that he procured the liquor with that money. *Id.*

It was held, competent for the wife to testify that her husband was in the habit of returning from the defendant's store intoxicated, because he would state upon leaving home his intention of going there, and upon his return in that condition would bring articles from the store. *Id.*

This section authorizes the recovery of damages for the death of a husband, which has been caused by intoxication, from the party who sold him the liquors producing the intoxication. *Id.*

In the case of the death of the husband the jury may estimate the damages with reference to the fact that it is the duty of the husband to provide the wife with present support, as well as maintenance for the future, and that she is entitled to such sum as in a pecuniary point of view would make her whole. *Id.*

In an action by the wife for damages for injury to her means of support by the sale of intoxicating liquors to her husband, it was held, error to instruct the jury that the husband's previous habit of becoming intoxicated should be considered in aggravation of damages, where it did not appear that the defendant was acquainted with such previous habit. *Goodenough v. McGrew*, 44 Id., 670.

The allowance of exemplary damages lies in the discretion of the jury, and it is not within the province of the court to instruct that any fact entitles the plaintiff to such damages. *Id.*

The recovery of exemplary damages, in actions of this character, is not limited to cases where the injury complained of is in the nature of a tort, but may be allowed when no breach of the peace has resulted from the alleged sale of the liquors. *Id.*

In an action by the wife for damages for the sale of intoxicating liquors to her husband, a verdict for exemplary damages is sustained by evidence showing that the defendant sold such liquors to plaintiff's husband when he was intoxicated, and when he was known to the defendant to be in the habit of becoming intoxicated. *Wietz v. Ewen*, 50 Id., 34.

In an action by a wife for damages for injury to her means of support by the sale of intoxicating liquors to her husband, evidence of the number and ages of her children is not admissible to affect the damages. *Huggins v. Kavanaugh*, 52 Id., 368.

Where it is sought to recover for a series of sales a defendant can only be held liable for injuries to which he contributed, and an instruction charging the jury that if they were unable to separate the damages to which the defendant contributed from those which he did not, he would be liable for the whole amount of injury was held erroneous. *Id. Ennis v. Shirley*, 47 Id., 552.

Under sections 1557 and 1558 a joint action for injury to the wife from the sale of liquors to her husband, and to charge the premises on which the liquors were sold with the lien of the judgment, may be maintained against the seller and owner of the property. *Loan v. Heiney & Etzell*, 53 Id., 89.

Such an action is triable at law as against both defendants, and either party is entitled to a jury; the lien following as a matter of law upon the finding of facts requisite under the statute in favor of the plaintiff. *Id.*

The fact that the wife has recovered damages for injury to her means of support, by the sale of intoxicating liquors, cannot be pleaded in mitigation in another action for the same cause against other parties. The fact may be introduced in evidence, not in mitigation, but to show more accurately the damages for which the defendant was liable. *Ennis v. Shirley et al.*, 47 Id., 552; *Engleken v. Webber et al.*, Id., 553.

In an action by a wife to recover damages for injuries caused by the sale of intoxicating liquors to her husband, evidence that the husband when intoxicated used abusive language toward his family is not admissible, it not being shown that the plaintiff's health was affected thereby; following *Callaway v. Laydon*, 47 Id., 456; *Welch v. Jugenheimer*, 56 Id., 10. So, also, evidence

of the number and ages of the plaintiff's children is also inadmissible to affect the damage in such action. *Id.*

In an action by a woman for damages caused by the unlawful sale of intoxicating liquors to her husband, where the owner of the saloon building was not made a party, and it was not sought to create a lien upon the building for the damages, a description of the saloon property in the petition was held to be mere surplusage, and that plaintiff was not limited to proof of damages caused by sales made in the building so described. *Gustafson v. Wind*, 62 Id., 231. And under the facts of this case, it was held, that evidence of sales made more than two years prior to the bringing of the action was properly admitted as rebutting testimony. *Id.*

It was held that no action could be maintained for damages caused by the sale of wine or beer, unless sold contrary to the provisions of section 1539 of the code. *Myers v. Conway et al.*, 55 Id., 166.

But now under section 1539 of the code, wine and beer are included in the terms *intoxicating liquors* in section 1557, for the sale of which a right of action is thereby given. *Jewett v. Wanshura*, 43 Id., 574; *Worley v. Spurgeon*, 38 Id., 465.

Plaintiff's action was based upon the wrongful sale of intoxicating liquors to her husband during six months previous to the action, whereby she was injured in her person, property and means of support. Held that evidence of personal injuries inflicted upon her by her husband, as the result of his intoxication, more than six months prior to the commencement of the action was not relevant to the issue. *Applegate v. Winnebrenner*, 67 Id., 235.

In an action by the wife for damages for injury to her means of support by the sale of intoxicating liquors to her husband, it was held, error to instruct the jury that the husband's previous habit of becoming intoxicated should be considered in aggravation of damages, where it did not appear that the defendant was acquainted with such previous habit. *Goodenough v. McGrew*, 44 Id., 670.

The allowance of exemplary damages lies in the discretion of the jury, and it is not within the province of the court to instruct that any fact entitles the plaintiff to such damages. *Id.*

The recovery of exemplary damages, in actions of this character, is not limited to cases where the injury complained of is in the nature of a tort, but may be allowed when no breach of the peace has resulted from the alleged sale of the liquors. *Id.*

In an action by the wife for damages for the sale of intoxicating liquors to her husband, a verdict for exemplary damages is sustained by evidence showing that the defendant sold such liquors to plaintiff's husband when he was intoxicated, and when he was known to the defendant to be in the habit of becoming intoxicated. *Weitz v. Ewan*, 50 Id., 34.

In an action by a wife to recover damages for injuries caused by the sale of intoxicating liquors to her husband, evidence that the husband when intoxicated used abusive language toward his family is not admissible, it not being shown that the plaintiff's health was affected thereby; following *Callaway v. Laydon*, 47 Id., 456. *Welch v. Jugenheimer*, 56 Id., 10. So, also, evidence of the number and ages of the plaintiff's children is also inadmissible to affect the damage in such action. *Id.*

Under this section, a wife who is injured in her means of support by the unlawful sale to her husband of intoxicating liquors, causing his intoxication, is entitled to recover, besides her actual damages, exemplary damages, the amount thereof, but not the right to recover, being left to the discretion of the jury, under proper instructions by the court. *Fox v. Wunderlich*, 64 Id., 187.

Evidence that she was supported by her own labor and by the county is material and admissible. *Id.*

The allegations of a petition in an action for damages for the unlawful sale of intoxicating liquors to plaintiff's husband were considered and held sufficient against the lessor's motion in arrest of judgment in *Myers v. Kirt*, 64 Id., 27.

Where the wife sues for damages on account of being deprived of her means of support through the sale of intoxicating liquors to her husband, evidence that she was supported by her own labor and by the county is material. *Fox v. Wunderlich*, Id., 187.

In an action under this section a married woman may not only recover actual damages for injuries to her means of support, but may also recover exemplary damages. *Id.*

Whoever, by the wrongful sale of intoxicating liquors, contributes to the formation of habits of intoxication, is liable only for the damages caused by his own wrongful act. *Flint v. Gauer*, 66 Id., 696; following *Richmond v. Schickler*, 57 Id., 463; *Emies v. Shirley*, 47 Id., 552; and *Engleken v. Webber*, Id., 558.

In an action for damages against one who wrongfully sold intoxicating liquors to the plaintiff's husband, which resulted in his intoxication and death, wherein it was shown that the plaintiff was accustomed to let her husband have portions of his wages previously deposited with her, when she had reason to believe that he would purchase liquors with the money and become intoxicated, held that it was properly left to the jury to determine from all the circumstances, as shown by the evidence, whether the plaintiff thus voluntarily contributed to the injury, with an instruction that if she did, she could not recover. *Huff v. Altman*, 69 Id., 71.

In an action for damages sustained by reason of the intoxication of plaintiff's husband by liquor sold to him by defendants, the evidence showed that the husband had previously been a drunkard, and had had *delirium tremens*, but had made some attempts to reform. The court instructed the jury, in substance, that if defendants contributed to the intoxication, then they were liable, even though the intoxication had become habitual. *Held* correct. *Cox v. Newkirk et al.*, 34 N. W. R., 492. See also *Arnold v. Barkalow*, Id., 807.

SEC. 1558. (*As substituted by ch. 66, laws 21st g. a.*) [**Personal and real property subject to costs and fines.**—[For all fines and costs assessed, or judgments rendered, of any kind, against any person for any violation of the provisions of this chapter, or costs paid by the county on account of such violations, the personal and real property, except the homestead and the personal property of such person which is exempt from execution, as well as the premises and property, personal or real, occupied and used for the purpose, with the knowledge of the owner thereof or his agent by the person manufacturing or selling, or keeping with intent to sell, intoxicating liquors contrary to law, shall be liable; and all such fines, costs and judgments shall be a lien on such real estate until paid. And where any person is required by section fifteen hundred and twenty-eight (1528) and fifteen hundred and twenty-nine (1529) of this chapter to give bond with sureties, the principal and sureties on such bond, shall be jointly and severally liable for all civil damages, costs and judgments that may be adjudged against the principal in any civil action authorized to be brought against him for any violation of the provisions of this chapter; costs paid by any county for the prosecution or on account of any violation of the law prohibiting the illegal sale of intoxicating liquors, that would be a lien on the property under the foregoing provisions and including costs paid in seizure and condemnation proceedings, may be recovered by such county, by the enforcement of such lien by execution, or by action against the owner to subject the property to sale for the payment thereof. And evidence of the general reputation of the place shall be admissa(i)ble on the question of knowledge and written notice given him or his agent by any citizen of the county shall be sufficient to charge the owner with knowledge under the provisions of this section.]

Under this section the lien of a judgment for damages for the sale of intoxicating liquors, in an action under section 1557, does not take priority over the lien of a mortgage executed before the judgment was rendered. *Goodenough v. McCord & Phillips*, 44 Iowa, 659.

A defendant, in an action to charge his property under this section, who, through ignorance of his homestead rights, neglects to assert them in his defense, cannot afterward maintain an action to prevent the enforcement of the lien established thereon. *Collins v. Chantland, et al.*, 48 Id., 241.

In order to charge the premises with the lien of a judgment for damages resulting from the unlawful sale of intoxicating liquors thereon, it must be shown that the owner of the premises had knowledge of such unlawful use of the same, and also that he consented thereto. *Myers v. Kirt*, 57 Id., 421. But the consent of the owner need not be alleged in the petition of the plaintiff in an action under this section. *Judge v. Flournoy*, 37 N. W. R., 330; *Same v. O'Connor*, Id., 131.

Under section 12 of chapter 66, laws of 1886, which provides that the premises and property occupied and used for the purpose of illegally selling intoxicating liquors with the knowledge of the owner shall be liable for any judgment rendered on account of such sale, a petition to charge such property, in an action by the wife to recover damages for injuries to her support, caused by selling her husband intoxicating liquors, need not allege that such sale was made with the consent of the owner. *Judge v. Flournoy et al.*, 37 N. W. R., 130; *Same v. O'Connor*, Id., 131.

It is not necessary, however, to show the consent of the owner by any positive and affirmative act, but it may be inferred from circumstances, and from knowledge of the illegal sales under such conditions as properly call forth a protest, and a failure to make any objection. *Loan v. Etzel*, 62 Iowa, 429; see, also *Putney v. O'Brien*, 53 Id., 117.

The right to make a judgment a lien, rests in the exercise of the police power and not in the right of eminent domain. The property is made liable only after it was established in a competent court by a legal jury that it is used for the illegal purpose with the knowledge or consent of the owner. This section does not, therefore, authorize the taking of the property without trial. It is not an *ex post facto* law, nor does it impair vested rights. *Polk County v. Heirb*, 37 Id., 361.

The lien attaches only on the rendition of the judgment, and is subject to that of a mortgage previously executed. *Goodenough v. McCoid*, 44 Id., 659.

The court should specifically ascertain and fix the property on which the lien should attach. *Engleken v. Webber*, — Id., 558.

To render the property subject to the lien, both knowledge and assent on the part of the owner, of the unlawful selling, must be shown. *Cobleigh v. McBride*, 45 Id., 116; *Myer v. Kirt*, 57 Id., 421.

She may sue the seller alone, and by subsequent action enforce the judgment against the property. Or may join the seller and owner in the same action. See *La France v. Krayner*, 42 Id., 143. *Loan v. Hiney*, 53 Id., 89; *Putney v. O'Brien*, 53 Id., 117; *O'Brien v. Putney*, 55 Id., 292.

Under this section the lien of a judgment for damages for the sale of intoxicating liquors, in an action under this section, does not take priority over the lien of a mortgage executed before the judgment was rendered. *Goodenough v. McCoid & Phillips*, 44 Id., 659.

A defendant, who, in an action under this section, through ignorance of his homestead rights, neglects to assert them in his defense, cannot afterwards maintain an action to prevent the enforcement of the lien established thereon. *Collins v. Chautland*, 48 Id., 241.

An action under this section is barred by the statute of limitations (code, § 2529,) in two years. The cause of the action is the selling of the liquor, and the *personal injury* is that done to the one intoxicated, although the *right of action* is given to the wife or other persons as provided. *Emmert v. Grill*, 39 Id., 690.

Before premises used for the purpose of selling intoxicating liquors can be subjected to sale for the satisfaction of a fine and judgment under this section, it must be shown that the owner not only had knowledge of and consented to the sales complained of, but also that he had knowledge of the particular facts which made said sales unlawful. Accordingly, where it was shown that the owner of the premises knew of and consented to the sale of beer upon the premises to the plaintiff's husband, who was in the habit of becoming intoxicated, *held*, that this alone was not sufficient to render the premises liable, but that it was necessary to show, further, that the owner knew that the plaintiff's husband was in the habit of becoming intoxicated. *Myer v. Kirt*, 64 Id., 27.

Where plaintiff had obtained judgment against one W. for wrongfully selling intoxicating liquors to her husband, upon property leased of defendant G., and in this action she seeks to have her said judgment established and enforced as a lien on the leased property under the provisions of this section. To prove the amount for which she should have a lien, the plaintiff introduces against the objection of the defendant the record of the judgment, *held*, that the record was not admissible as against G., who was not a party thereto, as to the amount to which his property ought to be subjected. *Buckham v. Grape et al.*, 65 Id., 335.

In such cases the property owner should be made a party in the original action, so as to make the judgment a lien on his property. *Id.*

In an action by a wife for damages on account of unlawful sales of liquors to her husband, and for a lien against the saloon property, the original petition asked a lien, but possibly did not state all the facts necessary to establish it. More than two years after the alleged sales, plaintiff amended her petition by alleging that the owner of the building had notice of and consented to the unlawful sales. *Held*, that the original petition was, at all events, sufficient to prevent the running of the statute of limitations against the claim for a lien. *Myers v. Kirt*, 63 Id., 124.

In such case a purchaser of the property pending the action takes it subject to the plaintiff's right to a lien, as finally established. *Id.*

The lessor of a building used for the unlawful sale of intoxicating liquors, becomes an aider and abettor in the violation of the law, and he is a proper party to a proceeding to enjoin the unlawful traffic as a nuisance. *Id.*

After verdict against a defendant for damages for wrongful sale of intoxicating liquors to the plaintiff's husband, an affidavit was filed, showing that the premises in which the liquors were sold were the property of the defendants. *Held*, that such affidavit was not competent evidence in the case, and that a decree based thereon making the judgment a lien upon the premises was erroneous. *Flint v. Gauer*, 66 Id., 696.

Where it is alleged, and admitted by demurrer, that the unlawful sale of liquors is conducted in a building with permission of the owner thereof, this is equivalent to saying that it is done with his knowledge and consent, and a temporary injunction should issue to restrain him from permitting the use of his building for such a purpose; but at that stage of the proceeding a temporary injunction against the *premises* would be without authority of law. *Gray v. Stienes*, 69 Id., 124.

Under this section, declaring fines, costs and judgments against any person for unlawful sales of liquors, a lien on all property used or occupied for such purposes with the owner's knowledge, no lien attaches until the fines and costs are assessed or the judgment rendered; and the sale by the owner of property alleged to have been so occupied, pending proceedings for such unlawful sales, should not be enjoined. *Bonesteel v. Downs*, 35 N. W. R., 924.

Where a house and lot owned by the wife, was occupied by the family as a homestead, but the front room of the house was used by the husband as a saloon, *held*, that under this section of the statute the part used for a saloon was subject to execution for the satisfaction of a judgment

against the husband for damages caused by the unlawful sale by him of liquors in such room. *Arnold v. Gotshall*, 71 Iowa, 572.

SEC. 1559. [**Penalty for making false statement to person authorized to sell.**—If any one purchasing intoxicating liquors of a person authorized to sell, shall make to such person any false statement regarding the use to which such liquor is intended by the purchaser to be applied, such person so obtaining such liquor shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, forfeit and pay a fine of ten dollars, together with costs of prosecution, or shall stand committed until the same is paid. For the second offense he shall pay a fine of twenty dollars and costs of prosecution, and be imprisoned in the county jail not less than ten nor more than thirty days.

(CHAPTER 82, LAWS OF 1880.)

INTOXICATING LIQUORS ON ELECTION DAY.

An Act to prohibit the furnishing, or giving, or offering to give, intoxicating liquors, including ale, wine and beer, to voters at or within one mile of the polls on election day.

SECTION 1. [**Unlawful to give or offer any intoxicating liquors within one mile of where an election is held.**—*Be it enacted by the general assembly of the state of Iowa:* That it shall be unlawful for any person to furnish or give any intoxicating liquors, including ale, wine and beer, to voters at or within one mile of the polls, during the day upon which any election is held in this state, prior to the closing of the polls.

SEC. 2. [**Penalty for violating the provisions of this act.**—Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, nor less than five dollars, or by imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment, in the discretion of the court, and in case of fine he shall stand committed until the same be paid.

Approved March 22, 1880.

(CHAPTER 143, LAWS OF 1884.)

RELATING TO THE SALE OF INTOXICATING LIQUORS.

An Act to amend chapter 6, title XI of the code, relating to intoxicating liquors and to provide additional penalties for violations of the provisions of said chapter and the amendments thereto.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* (This section repeals section 1525 of the code, and enacts a substitute in lieu thereof which will be found in its proper place herein.)

SEC. 2. (This section provides a slight amendment of section 1526 of the code which has been added thereto, which see.)

SEC. 3. (This section provides a similar amendment to section 1527 of the code, which see.)

SEC. 4. (This section enacts an amendment to section 1528 of the code by an addition thereto, which see.)

SEC. 5. (This section amends section 1531 of the code, which is printed therein.)

SEC. 6. (This section in like manner amends section 1535 of the code, which see.)

SEC. 7. (This section amends section 1537 by adding a clause thereto, which see.)

SEC. 8. (This section repeals 1538 of the code and enacts a substitute therefor, which see herein before inserted.)

SEC. 9. (This section amends section 1539 of the code, which see.)

SEC. 10. (This section repeals section 1540 of the code and enacts a substitute in lieu thereof, which see.)

SEC. 11. (This section repeals and substitutes section 1542 of the code, which see.)

SEC. 12. (This section repeals and substitutes section 1543 of the code, which see.)

SEC. 13. (This section enacts an amendment to section 1551 of the code which see.)

SEC. 14. (This section repeals and enacts a substitute for section 1553 of the code which has been repealed and substituted by chapter 66 of the laws of 1886, and inserted herein as thus amended, which see, ante.)

SEC. 15. [**Club houses prohibited.**—Every person who shall, directly or indirectly, keep or maintain, by himself, or by associating or combining with others, or who shall in any manner aid, assist, or abet, in keeping or maintaining any club room or other place in which intoxicating liquors are received or kept for the purpose of use, gift, barter or sale, or for distribution or division among the members of any club or association by any means whatever, and every person who shall use, barter, sell or give away, or assist or abet another in bartering, selling or giving away any intoxicating liquors as received or kept, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months.

SEC. 16. [**Inconsistent statutes repealed: proviso.**—All statutes and acts and parts of acts inconsistent with the provisions of this chapter as hereby amended are hereby repealed; *provided, however*, that this repeal shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time such repeal takes effect, and no offense committed, nor penalty or forfeiture incurred, and no suit or prosecution pending when the repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by this repeal, and the provisions of section 1555, as amended and substituted by the act of this general assembly, approved March 4, 1884, shall apply and have relation to the provisions of this code as herein amended, and all penalties as herein provided shall be held to apply to intoxicating liquors as defined in said act March 4, 1884.

Approved April 3, 1884.

Ever since the year 1855, in this state, the building or place where prohibited liquors have been kept or sold has been declared by law a nuisance, and the statute provided for its abatement. Chapter 143 of the laws of 1884, in providing that such nuisances may be restrained by injunction, merely provides an additional remedy for the enforcement of the law, and before a defendant in such an action can claim that he is about to be deprived of his property without compensation, in violation of the constitution of the United States, must show that such property was owned by him, or those under whom he claims, and that it was used for the sale of intoxicating liquors prior to the enactment of the statute of 1855, *McLane v. Leicht*, 69 Iowa, 401.

In *Martin v. Blattner et al.*, 68 Id., 286, it was adjudged that chapter 143, laws of 1884, was not repugnant to section 29, of article 3, of the constitution, which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title," nor is it in conflict with section 6, of article 1, which declares that "all laws of a general nature shall have a uniform operation." It was further held in the same case, that the act was not repugnant to section 23, of article 1, which forbids involuntary servitude except for the punishment of crime, in that the statute provides for the imprisonment of persons guilty of contempt in violating an injunction; nor are the fines provided by said chapter

"excessive" within the meaning of section 17, of article 1, of the constitution; nor is said chapter in conflict with the fourteenth amendment to the constitution of the United States, on the ground that it abridges the privileges of the citizens of the United States.

Section 4509 of the code, is mandatory in its requirement that when a fine is imposed, and the court orders the defendant to be committed until it is paid, it must specify the extent of the imprisonment, which must not exceed one day for every three and one-third dollars of the fine; and in consideration of said section in connection with other statutes *in pari materia*, held that the same rule applies where persons are convicted for violation of the prohibitory liquor law under sections 10 and 11 of chapter 143, of the laws of 1884. *Ex parte Fincher*, 69 Id., 393.

Where one has been fined for violating an injunction issued under the prohibitory liquor law, he may, upon default in paying the fine, be imprisoned under the general provisions of section 4509 of the code, and under section 12 of chapter 143, of the laws of 1884, such person cannot avail himself of the benefits of section 4611 of the code, which permits a poor person, after being imprisoned thirty days for failure to pay a fine in a criminal case, to be released upon giving his note for the amount of the fine, together with a written schedule of his property. *Hanks v. Workman*, 69 Id., 600.

Chapter 143 of laws of 1884, repeals section 8 of chapter 75, of laws of 1880, and enacts a general prohibitory law, without exception in favor of pharmacists; and the result is that licensed pharmacists may not, under existing legislation (December 1885) sell intoxicating liquors without a permit. *The State v. Bissell et al.*, 67 Id., 616.

A person who holds a permit to manufacture or sell intoxicating liquors, and who fails to make returns to the county auditor on the last Saturday of each month, or within five days thereafter, renders himself and bondsmen liable for the penalty provided in this section of the code, as amended by section 8 of chapter 143, laws of 1884. *The State, ex rel. Pearson, v. McEntee et al.*, 58 Id., 331.

While a licensed pharmacist is required by sections 1537 and 1538 to make a report on or before the tenth day of each month of sales of intoxicating liquors made during the previous month, and is forbidden to sell the liquors at a greater profit than thirty-three and one-third per cent, yet the violation of these provisions will not make him liable as for an unlawful sale of such liquors. *State v. Von Hattschuherr*, 34 N. W. R., 323.

(CHAPTER 66, LAWS OF 1886.)

RELATING TO THE SALE OF INTOXICATING LIQUORS.

An Act amendatory of chapter 143 of the acts of the twentieth general assembly, relating to intoxicating liquors, and providing for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and abatement of nuisances.

SECTION 1. [Chapter 143, acts 20th g. a., amended.]—*Be it enacted by the general assembly of the state of Iowa:* That actions to enjoin nuisances as authorized by section 12, of chapter 143, of the acts of the twentieth general assembly, may be brought in the name of the state of Iowa, by the district or county attorney of the proper county; and it shall be the duty of such district or county attorney where any such nuisance exists, to institute and prosecute such action for the abatement thereof; *provided, however*, if after notice or information given him of such nuisance, said district or county attorney refuse or neglect to bring suit, and prosecute the same with reasonable diligence, then any citizen residing in the county may institute and prosecute such action in the name of the state for the abatement of such nuisance. But nothing in this section shall prevent any citizen of a county from instituting and maintaining in his own name an action under said section 12, of said chapter 143, and to all of such actions, whether brought under the provisions of said section 12 of said chapter 143 or of this act, the provisions contained in this act shall apply. All such actions shall be triable at the first term of court, after due and timely notice of the commencement thereof has been given. Evidence of the general reputation of the place designated in the petition shall be admissable for the purpose of proving the existence of such nuisance, and if successful in the action the plaintiff shall be entitled

to an attorney's fee of not less than twenty-five dollars, to be taxed and collected as costs against the defendant.

SEC. 2. [Injunction shall be granted.]—In any such action the court, if in session, or the judge thereof in vacation, shall upon the demand of the attorney or party charged with the management of the cause for the plaintiff, grant a temporary injunction without bond, if it be made to appear to the satisfaction of the court or judge, by evidence in the form of affidavits or otherwise as the court or judge may order, that such nuisance actually exists, or is being maintained, and when the cause is continued at the instance of the defendant, a temporary injunction shall be issued as a matter of course without bond.

SEC. 3. [For violation of injunction.]—In case of the violation of any injunction granted in such action, the court, or in vacation the judge thereof, shall have power to try summarily and punish the party or parties guilty thereof, as required by section 12 of chapter 143, of the acts of the twentieth general assembly; *provided*, that if the penalty inflicted for such contempt, be imprisonment alone, it shall not be for less than three nor more than six months. The evidence in such proceeding or trial for contempt, may be in the form of affidavits, or on the demand of either party the witnesses shall be brought before the court for examination, and the provisions of section 3404 of the code shall not be held to apply to persons charged with violating injunctions issued under this act and the act to which this is amendatory.

Where the selling of intoxicating liquors has been enjoined, proceedings for contempt in disobeying the injunction may be entitled the same as the action in which the injunction was issued. *Manderscheid v. District Court*, 69 Iowa, 240.

Section 3 of chapter 66, laws of 1886, expressly authorizes the reception of oral evidence in cases of contempt for violating an injunction against illegal sale of intoxicating liquors. *Goetz v. Stusman, Judge*, 36 N. W. R., 644.

Where a judge of the district court in vacation, on information filed, fined and committed a person for contempt under section 3 of chapter 66, laws of 1886, it was *held* the proceeding authorized by the statute was not in conflict with section 1 of article 5 of the state constitution; that when a statute authorizes the doing of a judicial act in vacation, such act has the effect of an act done by a court, and the commitment was valid. *McLane v. Granger, Judge*, 37 N. W. R., 123.

SEC. 4. [Penalty upon conviction.]—Whoever is convicted of keeping a nuisance as provided in section 12, of chapter 143, acts of the twentieth general assembly, shall pay a fine not exceeding one thousand dollars, nor less than three hundred dollars, and costs of prosecution, and the cost shall include a reasonable attorney fee to be assessed by the court, and stand committed until the fine and costs are paid, and the provisions of chapter 47, title 25, of the code, shall not be applicable to persons committed under this section.

SEC. 5. [Nuisance abated: how.]—If the existence of the nuisance be established either in criminal or equitable action, it shall be abated under the judgment and order of the court, by seizing and destroying the liquor therein, and removing from the building, erection or place, all fixtures, furniture, vessels, and all moveable property, used in or about the premises, in carrying on the unlawful business, and selling the same in a manner provided for sale of chattels under execution, and by securely closing the said building, erection, or place, as against the use or occupation of the same for saloon purposes, and keeping the same securely closed for the period of one year (unless sooner released as hereinafter provided) and any person breaking open said building, erection, or place, or using the premises so ordered to be closed, shall be punished as for contempt as above provided in case of the violation of injunctions, *provided, however*, that when leasehold premises are adjudged to be a nuisance, the owner thereof shall have the right to terminate the lease by giving three days' notice thereof, in writing, to the tenant, and when this is done the premises shall be turned over to the owner upon the order of the court or judge. But the release of the property shall be upon condition that the nuisance shall

not be continued, and the return of the property shall not release any lien upon said property occasioned by any prosecution of the tenant.

SEC. 6. [Proceeds, how applied.]—The proceeds of the sale of the personal property as provided in the preceding section, shall be applied, first: in payment of the costs of the action and abatement; secondly, to the satisfaction of any fine and costs adjudged against the proprietor of the premises and keepers of said nuisance, and the balance, if any, shall be paid to the defendant.

SEC. 7. [Owner may pay costs, etc., and abate nuisance.]—If the owner appear and pay all costs of the proceedings and file a bond with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or in vacation by the clerk, auditor and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within the period of one year thereafter, the court, or in vacation the judge, may, if satisfied of his good faith, order the premises taken and closed under the order of abatement, to be delivered to said owner, and said order of abatement cancelled as far as the same may relate to said property, and if the proceeding be an action in equity, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated; *provided, however*, that the release of the property under the provisions of this section shall not release it from any judgment lien or penalty, or liability to which it may be subject under any other statute or law.

SEC. 8. [Presumption of possession.]—In all actions, prosecutions and proceedings under the laws of this state prohibiting the illegal manufacture and sale of intoxicating liquors, the finding of such liquors, except in the possession of one legally authorized to sell the same or except in a private dwelling house, which does not include, or is not used in connection with a tavern, public eating house, restaurant, grocery or other place of public resort, shall be presumptive evidence that such liquors were kept for illegal sale; and proof of actual sale shall be presumptive evidence of illegal sale.

SEC. 9. [Penalty for re-engaging in keeping nuisance.]—Any person who shall have been convicted of keeping a nuisance under the laws prohibiting the illegal sale of intoxicating liquors, or who shall have been enjoined under the provisions of this act or the act to which this is amendatory, and shall again directly or indirectly engage in such unlawful business, of keeping a nuisance or selling such liquors in violation of law, in the same or in any other county in this state, shall upon conviction thereof be punished by imprisonment in the county jail not less than three months or more than one year. But no equitable proceeding, order or judgment shall be construed as a conviction under the provisions of this section.

(Sec. 10 repeals section 1553 of the code and enacts a substitute therefor, which is found in its proper place.)

SEC. 11. [Penalty for false statements to procure shipments.]—If any person for the purpose of procuring the shipment, transportation, or conveyance of any intoxicating liquors from point to point, or from one place to another, within this state, shall make to any company, corporation or common carrier, or to any agent of such company, corporation or common carrier, or other person, any false statements as to the character or contents of any box, barrel, or other vessel or package containing such liquors, or shall refuse to give correct and truthful information as to the contents of any such box, barrel, or other vessel or package so sought to be transported or conveyed; or shall falsely mark, brand or label such box, barrel, or other vessel or package, in order to conceal the fact that the same contains intoxicating liquors for the purpose aforesaid; or shall by any device or concealment procure or attempt to procure the conveyance or transportation of such

liquors as herein prohibited, he shall upon conviction be fined for each offense one hundred dollars, and costs of prosecution, and the costs shall include a reasonable attorney fee, to be assessed by the court, which shall be paid into the county fund, and be committed to the county jail until such fine and costs are paid. Any peace officer of the county, under process or warrant to him directed, shall have the right to open any box, barrel, or other vessel or package, for examination, if he has reasonable ground for believing that it contains intoxicating liquors, either before or while the same is being so transported or conveyed.

(Sec. 12 repeals section 1558 of the code and enacts a substitute therefor, which is found in its proper place.

SEC. 13. [**Acts inconsistent, repealed.**—All acts and parts of acts, inconsistent with this act, are hereby repealed; *provided, however*, that this repeal shall not affect any act done, or right accruing or accrued, or which has been established, nor any action or proceeding commenced before the time this repeal takes effect, nor any offense committed, or penalty or forfeiture incurred; and any suit or proceeding pending when the repeal takes effect, or thereafter brought, for any offense committed, or for recovery of a forfeiture or penalty incurred prior thereto, shall be maintained and prosecuted under the law, as in force prior to the taking effect of this act.

Section 12 of ch. 143 of the laws of 1884 (see code, section 1543), provides for enjoining and abatement of nuisances kept in violation of the prohibitory liquor law, but it does not expressly provide how the nuisance shall be abated. Chapter 66, laws of 1886, expressly defines the method of such abatement, "by seizing and destroying the liquor therein," etc. *Held*, that this method of abatement was properly adjudged to be employed in cases which were pending when the statute was enacted, but which were not finally determined until after that time:—the objection that the law thus becomes *ex post facto* in its operation, in violation of the constitution, being of no force, since actions of this character are not criminal in their nature, and the acts done in abating nuisances of this character are not done in the punishment of crimes. *McLane v. Bonn et al.*, and two other causes, 70 Iowa, 752.

(CHAPTER 113, LAWS OF 1886.)

RELATING TO SALE OF INTOXICATING LIQUORS.

An Act in relation to the sale of intoxicating liquors.

SECTION 1. [**Possession of revenue liquor tax receipt: evidence of violation.**—*Be it enacted by the general assembly of the state of Iowa:* The fact that any person engaged in any kind of business, has or keeps posted, in or about his place of business, a receipt, or stamp, showing payment of the special tax, levied under the laws of the United States, upon the business of selling distilled, malt or fermented liquors, or shall have paid such special tax for the sale of distilled malt or fermented liquors in the state of Iowa, shall be evidence that said person or persons so owning or controlling such receipts or stamps, or having paid such special tax, are engaged in keeping, and selling intoxicating liquors contrary to the provisions of chapter 143, of the laws of the twentieth general assembly of the state of Iowa, and also *prima facie* evidence that any and all intoxicating liquors found in the possession or under the control of any person so holding such receipts or stamp or having paid such special tax, are kept for sale in violation of law; and on conviction shall be subject to the penalties provided for in said chapter 143; *Provided, however*, that this act shall not apply to persons lawfully authorized to keep for sale and to sell intoxicating liquors for such purposes as are authorized by law.

Approved April 9, 1886.

(CHAPTER 73, LAWS OF 1888.)

AMENDMENTS OF PROHIBITORY LAW.

An Act supplemental to chapter 143, of the acts of the twentieth general assembly, and chapter 66 of the acts of the twenty-first general assembly, relating to the sale of intoxicating liquors and abatement of nuisances.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa: In the abatement of a nuisance* as provided in section 5, of chapter 66, of the acts of the twenty-first general assembly, the officer shall be entitled to the same fees for removing and selling the movable property that he would be for levying on and selling like property on execution, and for closing and keeping closed, the building, erection or place, as in said section required, he shall receive such reasonable fees as the court may allow. All such fees and costs to be paid out of the proceeds of the property sold, so far as the same may be available.

SEC. 2. [**Demand for advance fee.**]—In any action brought by a citizen of the county, as provided by section 1, chapter 66, of the acts of the twenty-first general assembly, no officer or witness shall be entitled to demand his fees for services or attendance in advance. And the costs, in case of failure of the prosecution, or inability to collect the same from the defendant, shall be paid in the same manner as provided by law for the payment of fees in the case of criminal prosecutions. But nothing herein shall prevent the court trying such action from taxing the costs to the party bringing the same, in case it appears that the action was brought maliciously and without probable cause.

SEC. 3. [**Temporary injunction.**]—In any action to restrain a nuisance brought under chapter 143, of the acts of the twentieth general assembly, or chapter 66, of the acts of the twenty-first general assembly, the party entitled under section 2, of said chapter 66, of the acts of the twenty-first general assembly, to demand a temporary injunction, shall be entitled, on such application for a temporary injunction, to prove the existence of such nuisance, by affidavits, depositions or testimony of witnesses examined orally in court, at his election, unless the court has by previous order or otherwise fixed the form and manner of evidence to be adduced; *provided, however*, that the plaintiff shall serve the defendant or his counsel with notice of such application, at least three days before such hearing.

SEC. 4. [**Operation of injunction.**]—In any action to enjoin a nuisance as authorized by section 12, of chapter 143, of the acts of the twentieth general assembly, and chapter 66, of the acts of the twenty-first general assembly, the injunction granted shall be binding on the party or parties enjoined throughout the judicial district in which the action is brought. And any person enjoined in such action, who shall while such injunction remains in force, again engage in, or be in any manner concerned in the selling or keeping for sale, contrary to law, of any intoxicating liquor, anywhere within the jurisdiction of the court, he shall be deemed guilty of contempt of court and punished accordingly.

SEC. 5. [**Violation of injunction.**]—In all cases of proceedings against persons charged with contempt for violating any injunctions, either temporary or permanent, issued or decreed, under said chapter 143, acts of the twentieth general assembly, or chapter 66, acts of the twenty-first general assembly, or under this act, the court shall order that the attorney prosecuting or constructing such proceedings against the person so charged, shall be allowed ten per cent of the amount of the fine assessed against such person, if a fine be assessed against him, and the clerk of the court, when such fine is paid, shall pay over to such attorney the amount thus allowed him.

SEC. 6. (*As amended by ch. 66, 21st g. a.*) That section 1553, of the code as substituted and enacted in section 10 of chapter 66, of the acts of the twenty-first general assembly, be amended by striking out the words, "knowingly bring within this state for any other person or persons or corporation or shall knowingly," where they occur in said section, and insert in lieu of the words so stricken out, the word "shall," and that said section 1553 be and same is further amended by adding at the end thereof the following: *Provided, however,* that the defendant may show as a defense hereunder by preponderance of evidence that the character and circumstances of the shipment and its contents were unknown to him.

SEC. 7. [**Shipped package properly labelled.**].—It shall be unlawful for any common carrier or other person, to transport or convey by any means, from point to point or from one place to another within this state, any intoxicating liquor, unless the vessel or other package containing such liquors shall be plainly and correctly labelled or marked, showing the quantity and kind of liquor contained therein as well as the name of the party to whom it is to be delivered, and no person shall be authorized to receive or keep such liquors unless the same be marked or labelled as herein required. The violation of any provision of this section, by any common carrier or any agent, or employe of such carrier, or by any other person, shall be punished the same as provided in section 1553, as substituted and enacted in section 10, chapter 66, acts of twenty-first general assembly for the violation of the provisions of that section, and liquors conveyed or transported, or delivered without being marked or labelled as herein required, whether in the hands of the carrier or some one to whom it shall have been delivered, shall be subject to seizure and condemnation as liquor kept for illegal sale.

Approved April 12, 1888.

(CHAPTER 71, LAWS OF 1888.)

INTOXICATING LIQUORS.

An Act to provide for and regulate the sale of intoxicating liquors for necessary purposes; and to make more efficient the laws for the suppression of intemperance; and to repeal sections 1524, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537 and 1538 of the code of 1873, as amended by chapter 143, of the acts of the 20th general assembly, and all that part of section two (2), chapter eighty-three (83) acts of the 21st general assembly after the words "medicines and poisons" in the fifth line thereof; and to amend sections 1 and 4, chapter 76, acts of the 18th general assembly, and to provide penalties and proceedings for violations of the provisions thereof.

SECTION. 1. [**Manufacture and sale prohibited.**].—*Be it enacted by the general assembly of the state of Iowa:* That after this act takes effect no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter or dispense any intoxicating liquor, for any purpose whatever, otherwise than as provided in this act. Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medical purposes and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purpose whatever; and all permits must be procured as hereinafter provided from the district court of the proper county at any term thereof after this act takes effect, and a permit to buy and sell intoxicating liquors when so procured shall continue in force for one year from date of its issue unless revoked according to law or until applicant for renewal is disposed of, if such application is made before the year expires. *Provided,* that renewals of permits may be annually granted upon written application by permit holders who show to the satisfaction of the court or judge that they have during the preceding year complied with the

provisions of this act, and to execute a new bond as in this act required to be originally given, but parties may appear and resist renewals the same as in applications for permits.

SEC. 2. [**Application for permit.**]—Notice of an application for a permit or renewal thereof must be published for three consecutive weeks in a newspaper regularly published and printed in the English language and of general circulation in the city or town where the applicant proposes to keep and sell intoxicating liquors, or if there be no newspaper regularly published in such city or town, such publication shall be made in one of the official papers of the county, the last of which publications shall be not less than ten days nor more than twenty days before the first day of the term; and state the name of the applicant, the purpose of the application, the particular location or the place where the applicant proposes to keep and sell liquors, and that the petition provided for in the next section will be on file in the clerk's office at least ten day before the first day of the term, naming it, when the application will be made, and a copy thereof shall be served personally on the county attorney in the same manner and time as required for service of original notices in the district court.

SEC. 3. [**Form of Application.**] Applications for permits shall be made by petition signed and sworn to by the applicant and filed in the office of the clerk of the district court of the proper county at least ten days before the first day of the term, which petition shall state the applicant's name, place of residence, in what business he is then engaged, and in what business he has been engaged for two years previous to filing petition; the place, particularly describing it, where the business of buying and selling liquors is to be conducted; that he is a citizen of the United States and of the state of Iowa; that he is a registered pharmacist, and now is and for the last six months has been lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for, and as the proprietor of such pharmacy, that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last two years next preceding his application; and is not the keeper of a hotel, eating house, saloon, restaurant or place of public amusement; that he is not addicted to the use of intoxicating liquors as a beverage, and has not within the last two years next preceding his application been directly or indirectly engaged, employed or interested in the unlawful manufacture, sale or keeping for sale of intoxicating liquors, and that he desires a permit to purchase, keep and sell such liquors for lawful purposes only.

SEC. 4. [**Applicant to give bond.**]—This permit of renewal thereof shall issue only on condition that the applicant shall execute to the state of Iowa a bond in the penal sum of one thousand dollars with good and sufficient sureties, to be approved by the clerk of the court, conditioned that he will well and truly observe and obey the laws of Iowa now or hereafter in force in relation to the sale of intoxicating liquors; that he will pay all fines, penalties, damages and costs that may be assessed or recovered against him for a violation of such laws during the term for which said permit or renewal thereof is granted.

Said bond shall be for the use and benefit of any person or persons who may be injured or damaged by reason of any violation of the law relative to intoxicating liquors purchased, sold or given away during the term for which said permit or renewal thereof is granted. The said bond shall be deposited with the county auditor, and suit shall be brought thereon at any time by the county attorney, or any person for whose benefit the same is given, and in case the conditions thereof or any of them shall be violated, the principal and sureties therein shall also be jointly and severally liable for all civil damages, costs and judgments that may be obtained against the principal in any civil action brought by a wife, child, parent, guardian, employer, or other person, under the provisions of sections fifteen hun-

dred and fifty-six, fifteen hundred and fifty-seven and fifteen hundred and fifty-eight of the code of Iowa, as the same is amended and now in force, and section twelve, chapter sixty-six, acts of the twenty-first general assembly of the state of Iowa.

All other money collected for breaches of such bond shall go to the school fund of the county.

Said bond shall be approved by the clerk of the district court under the rules and laws applicable to the approval of official bonds.

SEC. 5. [Application to be filed with clerk, supported by petition of freeholders.]—At least ten days before the first day of the term the applicant shall file with the clerk in support of the application, a petition signed by one-third of the freehold voters of the township, incorporated town, city or ward in which the permit is to be used, and each person aforesaid shall sign said petition by his own true name and signature, and state that each, before signing the same, has read said petition and understands the contents and meaning thereof, and is well and personally acquainted with the applicant, that the applicant is a resident of the county, is over twenty-one years of age, is of good moral character, reputed to be law abiding, and has not been found guilty of violating the laws relating to intoxicating liquors in any proceeding at law or in equity, within the last two years next preceding the date of his application as far as the petitioner has knowledge or information, and is not in the habit of using intoxicating liquors as a beverage; and that the permit prayed for is necessary for the convenience and accommodation of the people of said locality and that they believe that the applicant is worthy of confidence and will observe the laws governing permitted persons in conducting the dispensation of liquors. On or before 9 o'clock A. M. of the first day of the term any resident of the county may file a remonstrance against granting the permit applied for, which must show the residence, sex and age of the person signing it and the grounds of objection to granting the permit.

SEC. 6. [Notice to be given of petition filed, etc.]—No application for a permit or renewal thereof shall be considered or acted upon by the court until the requisite notice has been given and petitions filed as provided by this act, and each is in form and substance such as required. On the first day of the term, having ascertained that the application is properly presented, the court shall proceed to hear the application, unless objection thereto be made, in which case the court shall appoint a day during the term, but not later, when the same shall be heard; and in doing so shall consider the convenience of the court, and the interested parties and their counsel so far as the state of the business and the necessities of the case will permit. If unavoidable causes prevent a hearing during the regular time allotted to the term, the same shall be heard and disposed of in vacation by the judge as soon as practicable thereafter.

The county attorney, or other counsel, or any citizen may in person or by counsel appear and resist the application, and whether resisted or objection be made or not the court shall not grant the permit until it shall first be made to appear by competent evidence that the applicant is possessed of the character and qualifications requisite, is worthy of confidence, and to receive the trust, and will be likely to execute the same with fidelity; and that the statements made in his application and the petition of residents are all and singular true, and considering the population of the locality and the reasonable necessities and convenience of the people, such permit is proper. If the application is resisted the court or judge shall hear controversy upon the petition, remonstrances and objections, and the evidence offered, and grant or refuse such permit, as the public good may require. If there be more than one permit applied for in the same locality, they shall all be heard at the same time, unless for good cause otherwise directed.

and the court may grant or refuse any or all of the applications, as will best subserve the public interest.

SEC. 7. [**When permit shall issue.**—If the application for the permit or renewal thereof is granted it shall not issue until the applicant shall make and subscribe an oath before the clerk, which shall be indorsed upon the bond to the effect and tenor following:

“I, ———, do solemnly swear (or affirm) that I will well and truly perform all and singular the conditions of the within bond, and keep and perform the trust confided in me to purchase, keep and sell intoxicating liquors. I will not sell, give or furnish to any person any intoxicating liquors otherwise than as provided by law, and, especially, I will not sell or furnish any intoxicating liquors to any person who is not known to me personally, or duly identified; nor to any minor, intoxicated person or persons who are in the habit of becoming intoxicated; and I will make true, full and accurate returns of all certificates and requests made to or received by me as required by law; and said returns shall show every sale and delivery of such liquor, made by or for me during the month embraced therein, and the true signature to every request received and granted; and such returns shall show all the intoxicating liquors sold or delivered to any and every person as returned.”

Upon taking said oath and filing bond as hereinbefore provided, the clerk shall issue to him a permit authorizing him to keep and sell intoxicating liquors as in this act provided; and every permit so granted shall specify the building, giving street and number or location in which intoxicating liquors may be sold by virtue of the same, and the length of time the same shall be in force, which in no case shall exceed twelve months.

SEC. 8. [**Permits deemed trusts, etc.**—Permits granted under this act shall be deemed trusts reposed in the recipients thereof, not as a matter of right but of confidence, and may be revoked upon sufficient showing, by order of the court or judge thereof. Complaint may be presented at any time to the district court or one of the judges thereof, which shall be in writing and signed and sworn to by three citizens of the county in which the permit was granted, and a copy of such complaint shall, with a notice in writing of the time and place of hearing, be served on the accused, five days before the hearing, and if the complaint is sufficient, and the accused appear and deny the same, the court or judge shall proceed without delay, unless continued for cause, to hear and determine the controversy, but if continued or appealed at the instance of the permit holder, his permit to buy and sell liquors may, in the discretion of the court, be suspended pending the controversy. The complainant and accused may be heard in person or by counsel or both, and submit such proofs as may be ordered by the parties; and if it shall appear upon such hearing, that the accused has in any way abused the trust or so conducted the business under the permit as to acquire notoriety and public repute that liquors are sold by the accused or his employes in violation of law, or if it shall appear that any liquor has been sold or dispensed unlawfully or has been unlawfully obtained at said place from the holder of the permit or any employe assisting therein, or that he has in any proceeding, civil or criminal, since receiving his permit, been adjudged guilty of violating any of the provisions of this act or the acts for the suppression of intemperance, the court or judge shall by order revoke and set aside the permit; the papers and order in such case shall be immediately returned to and filed by the clerk of the court, if heard by the judge, and the order entered of record as if made in court, and if in this or any other proceeding, civil or criminal, it shall be adjudged by the court or judge that any registered pharmacist, proprietor or clerk has been guilty of violating this act or the act for the suppression of intemperance and amendments thereto, by unlawfully manufacturing, selling, giving away, or unlawfully keeping with intent to sell intoxicating liquors, such adjudica-

tion may in the discretion of the commissioners of pharmacy work a forfeiture of his certificate of registration, and the commissioners of pharmacy shall, upon receipt of a transcript of a judgment or order authenticated by the clerk of the court showing a second and subsequent violation, cancel his registration.

It shall be the duty of the clerk to forward to the commissioners of pharmacy such transcripts without charge therefor as soon as practicable after final judgment or order.

SEC. 9. [Permits may be granted to regular pharmacists.]—Registered pharmacists who show themselves to be fit persons and who comply with all the requirements of this act may be granted permits, and in any township where there is a registered pharmacist conducting a pharmacy and no pharmacist obtains a permit, if found necessary the court may grant a permit to one discreet person in such township not a pharmacist, but having all other qualifications requisite under this act, upon like notice and proceedings as pertain to permitted pharmacists and subject to the same liabilities, duties, obligations and penalties.

SEC. 10. [Clerk of court to preserve all petitions, bonds, etc., relating to permits, and keep record books.]—The clerk of the court granting the permit shall preserve, as part of the record and files of his office, all petitions, bonds and other papers pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. Whether said permit be granted or refused the applicant shall pay the costs incurred in the case, and when granted he shall make payment before any permit issue, except the court may tax the cost of any witnesses summoned by private persons, resisting said application, and the fees for serving such subpoenas to such persons when it is shown that such witnesses were summoned maliciously or without probable cause to believe their evidence material. A fee of one dollar and fifty cents shall be taxed for the filing of the petition and one dollar for entering the order of the court approving bond and granting said application, and witnesses shall be entitled to mileage and per diem as in other cases. And fees for serving notices and subpoenas shall be the same as in other cases in the district court.

SEC. 11. [Mode of purchasing liquors.]—When any person holding a permit in full force desires to purchase or procure any intoxicating liquors to be kept and sold under his permit, the county auditor shall, upon the written or printed application of the permit-holder, signed by him, specifying the kind and quantity of liquors desired by him, issue to such holder under seal of his office a certificate authorizing him to purchase and cause to be transported from the place of purchase to his place of business described in his permit, the kind and quantity of liquors mentioned in such certificate. Said certificate shall be dated as of its true date when issued and attached to the way-bill accompanying the shipment, and when so attached shall be authority for the common carrier in whose hands it may be, to transport and deliver the package or packages containing the liquors therein described and in packages therein designated, according to the direction of the certificate. Upon receipt of the liquors the certificate shall be returned to the auditor who issued the same and be cancelled, filed and preserved by him in his office. No certificate so issued authorizing the purchase and transportation of any intoxicating liquors shall be used more than once, or later than thirty days following its date; and such certificate shall be in the following form, to-wit:

“State of Iowa, }
 “.....County. } ”

“ I hereby certify that, who is permitted under the laws of Iowa to buy and sell intoxicating liquors at, in said county of, is hereby authorized to purchase and ship to, the following described intoxicating

liquors, to-wit:....., provided such liquors are shipped in the following described packages, to-wit:.....

“Witness my hand and the seal of the county this day of 18..
 “....., Auditor.”

SEC. 12. [**Manner of selling.**].—Before selling and delivering any intoxicating liquors to any person a request must be printed or written, dated of the true date, stating the age and residence of the signer, for whom and whose use the liquor is required, the amount and kind required, the actual purpose for which the request is made and for what use desired and his or her true name and residence, and where numbered by street and number if in a city, and that neither the applicant nor the person for whose use requested habitually uses intoxicating liquors as a beverage, and the request shall be signed by the applicant by his own true name and signature and attested by the permit-holder who receives and fills the request by his own true name and signature in his own hand writing.

[**When sale refused.**].—But the request shall be refused notwithstanding the statement made unless the permit holder has reason to believe said statement to be true, and in no case unless the permit holder filling it personally knows the person applying to be of good moral character, reliable and trustworthy, that he is not a minor, that he is not intoxicated, and that he is not in the habit of using intoxicating liquors as a beverage; or if the applicant is not so personally known to the permit holder before filling the order or delivering the liquor, he shall require identification and the statement of a reliable and trustworthy person of good character and habits, known personally to him, that the applicant is not a minor and is not in the habit of using intoxicating liquors as a beverage, and is worthy of credit as to the truthfulness of the statements in the application, and this statement shall be signed by the witness in his own true name and handwriting, stating his residence correctly. The requests shall be made upon blanks furnished by the county auditor in packages of one hundred each to the holders of the permits from time to time as the same shall be needed and shall be consecutively numbered by the auditor. The blanks shall be in two series, one for requests by persons known to the seller, and one for requests by unknown applicants, identified and vouched for by a known witness both on one sheet, and each request and identification shall, when used, be attested by the seller, and such attestation shall be conclusive evidence against the permit holder that the seller did fill the order and deliver the liquor as stated therein and that the sale was made with knowledge of the habits and character of the purchaser or witness. The blanks aforesaid shall be procured by the county auditor in uniform cheap books like blank checks, at the expense of the county, and furnished to the holders of permits by the county auditor at actual cost, and the proceeds be by said auditor paid into the county treasury, and the date of delivery shall be endorsed by the county auditor on each book and receipt taken therefor, and preserved in his office. The permit holder shall preserve the application in the original form and book except the filling of the blanks therein until returned to the county auditor. When return thereof is made if the book be full the county auditor shall endorse thereon the date of return and file, and preserve the same. If the book is not filled the auditor shall remove those filled, inclose the same in an envelope and endorse thereon the name of the permit holder, the date of return and number thereof, and file and preserve the same and redeliver the book, with endorsement of the date thereon, and statement of the number remaining therein, and so on until the book is filled and return thereof made. All unused or mutilated blanks shall be returned or accounted for before other blanks are issued to such permit holders.

SEC. 13. [**Permit holder to report to county auditor.**].—On or before the tenth day of each month each permit holder shall make full returns to the county

auditor of all requests filled by him and his clerks during the preceding month and accompany the same with a written or printed oath duly taken and subscribed before the county auditor or notary public, which shall be in the following form, to-wit: "I, being duly sworn, on oath state that the requests for liquors herewith returned are all that were received and filled at my pharmacy (or place of business) under my permit during the month of, 18.., that I have carefully preserved the same, and that they were filled up, signed and attested at the date shown thereon, as provided by law; that said requests were filled by delivering the quantity and kind of liquors required and that no liquors have been sold or dispensed under color of my permit during said month except as shown by the requests herewith returned, and that I have faithfully observed and complied with the conditions of my bond and oath taken by me thereon endorsed and with all the laws relating to my duties in the premises." Every permit holder shall keep strict account of all liquors purchased or procured by him in a book kept for that purpose, which shall be subject at all times to the inspection of the commissioners of pharmacy and the county attorney, any grand juror or peace officer of the county, and such book shall show of whom such liquors were purchased or procured, the amount and kind of liquors purchased or procured, the date of receipt and amount sold and amount used in compounding medicines, tinctures and extracts, amount on hand of each kind for each month; such book shall be produced by the party keeping the same, to be used as evidence on the trial of any prosecution against him or against liquors alleged to have been seized from him or his house, on notice duly served that the same will be required as evidence; and at the same time he returns requests to the county auditor he shall file a statement of such account with such auditor, except that the items of sales need not be embraced therein, but the aggregate amount of each kind shall be, and such statement shall be verified before the county auditor or a notary public. All forms necessary to carry out the provisions of this act not otherwise provided for shall be as may be provided by the commissioners of pharmacy.

SEC. 14. [Penalty on holders of permits.]—Every permit holder or his clerk under this act shall be subject to all the penalties, forfeitures and judgments, and may be prosecuted by all the proceedings and actions, criminal and civil, and whether at law or in equity provided for or authorized by the laws now or hereafter in force for any violation of this act, and the act for the suppression of intemperance, and any law regulating the sale of intoxicating liquors and by any or all of such proceedings applicable to complaints against such permit holder; and the permit shall not shield any person who abuses the trust imposed by it or violates the laws aforesaid, and in case of conviction in any proceeding, civil or criminal, all the liquors in possession of the permit holder shall by order of the court be destroyed.

On the trial of any action or proceeding against any person for manufacturing, selling, giving away or keeping with intent to sell intoxicating liquors in violation of law, or for any failure to comply with the conditions or duties imposed by this act, the requests for liquors and returns made to the auditor as herein required, the general repute of the accused and his place of business and the manner of conducting the same, the quantity and kinds of liquors sold or kept, purchased or disposed of, the purpose for which liquors were obtained by or from him and for which they were used, the character and habits of applicants for liquor and their general repute as to habits of sobriety or otherwise, shall be competent evidence and may be considered so far as applicable to the particular case with any other recognized, competent and material facts and circumstances bearing on the issues involved in determining the ultimate facts. In any suit, prosecution or proceeding for violations of this act or the acts for the suppression of intemperance and accus amendatory thereof, the court may compel the production in evidence of any books or papers required by this act to be kept, and may compel any permit holder, his

clerk or any person who has purchased liquors of either of them to appear and give evidence, and the claim that any such testimony or evidence will tend to criminate the person giving such evidence shall not excuse such person or witness from testifying or producing such books or papers in evidence; but such oral evidence shall not be used against such person or witness on the trial of any criminal proceeding against him. Any number of distinct violations of this act may be charged in one indictment in different counts and all tried in the same action, the jury specifying the counts, if any, on which the defendant is found guilty.

SEC. 15. [**Registered pharmacists not holding permits.**—Registered pharmacists, conducting pharmacies and not holding permits, and manufacturers of proprietary medicines are hereby authorized to purchase of permit-holders in the counties of their residence intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage. Said permit-holders shall not charge such registered pharmacists over ten per cent net profit for liquors so sold; such purchasers shall keep a record of uses to which the same are devoted, giving the kind and quantity so used, and on or before the tenth day of each calendar month they shall make and file with the county auditor sworn reports for the preceding calendar month, giving full and true statements of the quantity and kinds of such liquors purchased and used, the uses to which the same have been devoted, and giving the names of the permit-holders of whom the same were purchased and the dates and quantities so purchased, together with an invoice of the amount of each kind still in stock and kept for such compounding. The commissioners of pharmacy are hereby empowered and directed to make further rules and regulations regarding the quantity of intoxicating liquors to be kept in stock by such pharmacists at any one time, and such further rules and regulations with respect to the purchase, use and keeping of such liquors as they may deem proper for the prevention of abuses of the trusts reposed in such purchasers, and if the said registered pharmacist sell, barter, give away, exchange or in any manner dispose of said liquors, or use the same for any purpose other than authorized in this section, he shall, upon conviction before any district court thereof, forfeit his certificate of registration, and be liable to all the penalties, prosecutions and proceedings at law or in equity provided against persons selling without a permit, and upon any such conviction the clerk of the district court shall, within ten days after said judgment or order, transmit to the commissioners of pharmacy the certified record thereof, upon receipt of which the commission shall strike his name from the list of pharmacists and cancel his certificate. *Provided* that nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound under any name, form or device which may be used as a beverage and which is intoxicating in its character.

SEC. 16. [**Permit-holder liable for sales by clerk.**—A permit-holder may employ not more than two registered pharmacists as clerks to sell intoxicating liquors in conformity to the permit and provisions of this act, but in such case the acts of his clerks in conducting the business shall be deemed the acts of the permit-holder, who shall be liable therefor, as if he had personally done the acts, and in making returns the verification of such requests as may have been received, attested and filled by a clerk must be made by such clerk, and the clerk who transacted any of the business under the permit must join in the general oath required of the employer so far as relates to his own connection therewith.

If for any cause a registered pharmacist who holds a permit shall cease to hold a valid and subsisting certificate of registration or renewal thereof, his permit shall thereby be forfeited and be null and void.

SEC. 17. [**Permits in force when law takes effect.**—Any person holding a permit in force when this act takes effect may continue to purchase, keep and sell

intoxicating liquors according to the laws under which his permit was given, until such time as the permit can be obtained under the provisions of this act, but all such permits shall expire on the first day of October, 1888.

SEC. 18. [Persons convicted of violation of law.]—If any person shall be convicted of violating any of the provisions of this act, or of the acts regulating the practice of pharmacy, or any acts for the suppression of intemperance, or amendments thereto, by reason of a prosecution by the commissioners of pharmacy, all fines so imposed and collected shall be paid into the county treasury of the proper county for the use of the school fund, and the commissioners of pharmacy shall be entitled to draw from the state treasury an amount not exceeding fifty per cent of the amount of the fines so collected, to be used solely in prosecution instituted by them for failure to comply with the provisions of this act or of the acts regulating the practice of pharmacy. And the court before whom any prosecution instituted and prosecuted by the commissioners of pharmacy shall certify to the auditor of state all cases in which they have appeared as prosecutors, either in person or by their attorney, and the amount of fines imposed and collected in such cases; and the commissioners of pharmacy shall have power to revoke the certificate of registration of pharmacists for repeated violation of this act. Said amount to be drawn from time to time upon the warrants of the state auditor, which shall issue for the payment of expenses actually incurred in said prosecutions after said expenses shall have been audited by the executive council.

SEC. 19. [Penalty for false statement or signature.]—If any person shall make any false or fictitious signature or sign any name other than his own or her own to any paper required to be signed by this act, or make any false statement in any paper or application signed to procure liquors under this act, the person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$20 (twenty dollars) nor more than one hundred dollars (\$100) and costs of prosecution, and shall be committed until said fine and costs are paid, or be imprisoned not less than ten nor more than thirty days. If any permit-holder or his clerk shall make false oath touching any matter required to be sworn to under the provisions of this act, the person so offending shall upon conviction therefor be punished as provided by law for perjury.

If any person holding a permit under this law shall purchase or procure any intoxicating liquors otherwise than authorized by this act, or in any larger quantities than shall be stated in the county auditor's certificate obtained by him for that purpose, or make any false return to the county auditor, or use any request for liquors for more than one sale, or the county auditor's certificate for purchasing liquors for more than one purchase, in any of such cases he shall be deemed guilty of a misdemeanor, and upon conviction punished accordingly.

SEC. 20. [Repeals.]—That sections 1524, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537 and 1538 of the code of 1873, as amended by chapter 143 of the acts of the twentieth general assembly, and all that part of section two (2) chapter eighty-three (83) acts of the twenty-first general assembly, after the words "medicines and poisons" in the fifth line thereof, be and the same is hereby repealed, and by inserting after the word poison in the fifth line of section two, chapter eighty-three, acts of the twenty-first general assembly, the following words: "excepting intoxicating liquors." *Provided* that nothing in this act shall be construed to abate any action or proceeding now pending in any court in this state for a violation of the provisions of the sections hereby repealed, or to operate to bar any prosecutions hereafter brought for any such violations committed prior to the passage and taking effect of this act.

SEC. 21. [Amendment.]—That section one, chapter 75, of the acts of the eighteenth general assembly, be and the same is hereby amended by striking out the words "for medical use, except as hereinafter provided," at the end of said

section, and inserting in lieu thereof the words "and any person violating the provisions of this section shall be liable to pay a penalty of five dollars for each day of such violation and costs of prosecution."

Suits brought to recover any of the penalties provided for in this act or the acts to which it is amendatory, shall be instituted in the name of the state of Iowa by the county attorney, or under the direction and by the authority of the commissioners of pharmacy for the state of Iowa. In all cases brought under this act or the acts to which it is amendatory, the prosecution need not prove that the defendant has not the required pharmacy certificate of registration; if the defendant has such certificate he must produce it.

SEC. 22. [Same.]—That section 4, chapter 75, of the acts of the eighteenth general assembly, be and the same is hereby amended by striking out the words "a duplicate of which is to be kept in the secretary of state's office," in the second and third lines of said section.

Approved April 12, 1888.

(CHAPTER 72, LAWS OF 1888.)

RELEASE OF PENALTIES.

An Act to release certain penalties for failure to make and file reports of sales of intoxicating liquors by holders of permits, within the time required by law, and to dismiss suits.

WHEREAS, The twentieth general assembly of the state of Iowa passed an act amending title eleven (11), chapter six (6) of the code of Iowa, and fixing the time within which parties holding permits for the sale of intoxicating liquors shall make and file their monthly reports with the county auditor within five days from the last Saturday of each month, as provided in sections 1537 and 1538 of the code of Iowa, and chapter 143 of the laws of the twentieth general assembly of the state of Iowa; and

WHEREAS, Said law fixed and attached a penalty of one hundred dollars for each failure to make and file said monthly report within five days from the last Saturday in each month, one-half of said penalty to go to the informer and one-half to the school fund; and

WHEREAS, A large number of druggists residing in the state and holding permits under the law, have failed to make and file their monthly reports within the five days as required, but in truth and in fact have made and filed said monthly reports with the county auditor as required by law, but not within the five days as aforesaid; and

WHEREAS, In many cases large penalties have been incurred by reason of failure to make and file said monthly reports with the county auditor within the five days as aforesaid, without any intention of violating the prohibitory law on the part of the holders of said permit; therefore,

SECTION 1. [Penalties released.]—*Be it enacted by the general assembly of the state of Iowa:* That in all cases in which any druggist holding a permit for the sale of intoxicating liquors has heretofore failed to make and file the monthly reports and statements with the county auditor within the five days required by sections 1538 and 1539 of the code of Iowa, and as amended by chapter 143 of the acts of the twentieth general assembly of the state of Iowa, and within the time therein limited, but has in truth and in fact, prior to the commencement of prosecution subsequently, made and filed such reports with the county auditor as required by law, such filing of monthly reports shall be taken and deemed to be a fulfillment of the requirements and provisions of said law on the part of said drug-

gist holding said permits as to the time of filing said reports, and shall have the same force and effect as though said monthly reports had been filed within the time limited and fixed in said chapter 143 of the acts of the twentieth general assembly of the state of Iowa, and title eleven (11), chapter six (6) of the code of Iowa, and no fine, penalty or forfeiture shall be held or deemed to have been incurred by any druggist holding such permit as aforesaid, by reason of a failure to make and file such monthly reports with the county auditor within the time limited by law. And all penalties, fines and forfeitures heretofore incurred by, and not adjudged against, any druggist holding such permit on failure to make and file said monthly reports within the said five days, the same is hereby released, remitted and discharged.

SEC. 2. [**Dismissal of cases in court.**]—That in all cases the same shall be dismissed by the court upon payment by the defendant of all costs made in the case, and a reasonable attorney's fee to plaintiff's attorney, to be fixed by the court.

Approved April 11, 1888.

(Took effect by publication in newspapers.)

(CHAPTER 151, LAWS OF 1880.)

STATE BOARD OF HEALTH AND VITAL STATISTICS.

An Act to establish a state board of health in the state of Iowa, to provide for collecting vital statistics, and to assign certain duties to local boards of health, and to punish neglect of duties.

SECTION 1. [**Appointment of board.**] *Be it enacted by the general assembly of the state of Iowa:* That the governor, with the approval of the executive council, shall appoint nine (9) persons, one of whom shall be the attorney-general of the state (by virtue of his office), one a civil engineer, and seven (7) physicians, who shall constitute a state board of health. The persons so appointed shall hold their offices for seven (7) years: *Provided*, that the terms of office of the seven physicians first appointed shall be so arranged by lot that the term of one shall expire on the thirty-first (31st) day of January of each year; and the vacancies thus occasioned, as well as all other vacancies otherwise occurring, shall be filled by the governor, with the approval of the executive council.

SEC. 2. [**Power of board.**]—The state board of health shall have the general supervision of the interest of the health and life of the citizens of the state. They shall have charge of all matters pertaining to quarantine; they shall supervise a state registration of marriages, births and deaths, as hereinafter provided; they shall have authority to make such rules and regulations and such sanitary investigations as they may from time to time deem necessary for the preservation or improvement of the public health; and it shall be the duty of all public officers, sheriffs, constables, and all other officers of the state, to enforce such rules and regulations, so far as the efficiency and success of the board may depend upon their official co-operation.

SEC. 3. (*As amended by ch. 140, 19th g. a.*) [**Duties of clerks of courts.**] The clerk of the district and circuit courts of each of the several counties in the state shall be required to keep separate books for the registration of the names and post-office address of physicians and mid-wives, for births, for marriages, and for deaths, which record shall show the names, date of birth, death or marriage; the names of parent and sex of the child, when a birth, and when a death, shall give the age, sex and cause of death, with the date of the record, and the name of the person furnishing the information. Said books shall always be open for

inspection without fee; and the clerks of said courts shall be required to render a full and complete report of all births, marriages and deaths to the secretary of the board of health annually, on the first day of October of each year, and at such other times as the board may direct. [For which service the clerk shall receive in addition to the compensation already allowed him by law, the sum of ten cents for each birth, marriage or death so recorded by him, and the further sum of ten cents for each one hundred words of written matter contained in said report, the same to be paid out of the county fund.]

SEC. 4. [**Duties of state board.**]—It shall be the duty of the board of health to prepare such forms for the record of births, marriages and deaths as they may deem proper; the said forms to be furnished by the secretary of said board to the clerks of the district and circuit courts of the several counties, whose duty it shall be to furnish them to such persons as are herein required to make reports.

SEC. 5. [**Duties of physicians and midwives.**]—It shall be the duty of all physicians and mid-wives in this state to register their names and post-office address with the clerk of the district and circuit courts of the county where they reside; and said physicians and mid-wives shall be required, under penalty of ten dollars (\$10), to be recovered in any court of competent jurisdiction in the state at suit of the clerk of the court, to report to the clerk of the courts, within thirty (30) days from the date of their occurrence, all births and deaths which may come under their supervision, with a certificate of the cause of death, and such other facts as the board may require, in the blank forms furnished, as hereafter provided.

SEC. 6. [**Parent to report, when.**]—When any birth or death shall take place, no physician or mid-wife being in attendance, the same shall be reported by the parent to the clerk of the district and circuit courts within thirty (30) days from the date of its occurrence, and if a death, the supposed cause of death, or if there be no parent, by the nearest of kin not a minor, or, if none, by the resident householder where the birth or death shall have occurred, under penalty provided in the preceding section of this act. Clerks of the district and circuit courts shall annually, on the first day of October of each year, send to the secretary of the state board of health a statement of all births and deaths recorded in their offices for the year preceding said date, under a penalty of twenty-five dollars (\$25) in case of failure.

SEC. 7. [**Coroners shall report.**]—The coroners of the several counties shall report to the clerk of the courts all cases of death which may come under their supervision, with the cause or mode of death, etc., as per form furnished, under penalty as provided in section 5 of this act.

SEC. 8. [**Special fund.**]—All amounts recovered under the penalties of this act shall be appropriated to a special fund for carrying out the object of this law.

SEC. 9. The first meeting of the board shall be within twenty days after its appointment, and thereafter in May and November of each year, and at such other times as the board shall deem expedient. The November meeting shall be in the city of Des Moines. A majority of the members of the board shall constitute a quorum. They shall choose one of their number to be president, and shall adopt rules and by-laws for their government, subject to the provisions of this act.

SEC. 10. (*As amended by ch. 173, 20th g. a.*) [**Election and salary of secretary.**]—They shall elect a secretary, who shall perform the duties prescribed by the board and by this act. He shall receive a salary, which shall be fixed by the board, not exceeding \$1,200 per annum. He shall, with the other members of the board, receive actual traveling and other necessary expenses incurred in the performance of official duties; but no other member of the board shall receive a salary. The president of the board shall [monthly] certify the amount due the secretary, and on presentation of said certificate the auditor of state shall draw his warrant on the state treasurer of [for] the amount.

SEC. 11. (*As amended by ch. 82, 22d g. a.*) [**Biennial report to the governor.**]
—It shall be the duty of the board of health to make a biennial report through their secretary or otherwise, in writing, to the governor of the state; and such report shall include so much of the proceedings of the board, such information concerning vital statistics, such knowledge respecting diseases, and such instruction on the subject of hygiene as may be thought useful by the board, for dissemination among the people, with such suggestions as to legislative action as they may deem necessary.

SEC. 12. (*As amended by ch. 173, 20th g. a.*) [**\$5,000 annually appropriated.**]
—The sum of five thousand dollars (\$5,000) per annum, or so much thereof as may be necessary, is hereby appropriated to pay the salary of the secretary, meet the contingent expenses of the office of the secretary, and expenses of the board, and all costs of printing, which together shall not exceed the sum hereby appropriated. Said expenses shall be certified and paid [monthly] in the same manner as the salary of the secretary. The secretary of state shall provide rooms suitable for the meetings of the board and office-room for the secretary of the board.

SEC. 13. [**Mayors, aldermen and trustees—local boards of health.**]
—The mayor and aldermen of each incorporated city, the mayor and council of any incorporated town or village in the state, or the trustees of any township, shall have and exercise all the powers and perform all the duties of a board of health within the limits of the cities, towns and townships of which they are officers.

Under section 13 of this act, the mayor and alderman of each city, or the mayor and councilmen of each town, constitute a board of health, and are clothed with the powers prescribed by the act, and this provision repeals section 525 of the code. *Staples v. Plymouth County*, 62 Iowa, 364.

SEC. 14. [**Local boards appoint physician and regulate fees.**]
—Every local board of health shall appoint a competent physician to the board, who shall be the health officer within its jurisdiction, and shall hold his office during the pleasure of the board. The clerks of the townships and the clerks and recorders of cities and towns shall be clerks of the local boards. The local boards shall also regulate all fees and charges of persons employed by them in the execution of the health laws and of their own regulations.

SEC. 15. [**Report of physician and clerk of local boards.**]
—It shall be the duty of the health physician of every incorporated town, and also the clerk of the local board of health in each city or incorporated town or village in the state, at least once a year, to report to the state board of health their proceedings, and such other facts required, on blanks and in accordance with instructions received from said state board. They shall also make special reports whenever required to do so by the state board of health.

SEC. 16. [**Regulation respecting nuisances.**]
—Local boards of health shall make regulations respecting nuisances, sources of filth and causes of sickness within their jurisdiction and on board any boats in their ports or harbors as they shall judge necessary for the public health and safety; and if any person shall violate any such regulations, he shall forfeit a sum of not less than twenty-five [dollars] (\$25) for every day during which he knowingly violates or disregards said rules and regulations, to be recovered before any justice of the peace or other court of competent jurisdiction.

SEC. 17. [**Duty of local boards.**]
—The board of health of any city or incorporated town or village shall order the owner of any property, place or building (at his own expense) to remove any nuisance, source of filth or cause of sickness found on private property, within twenty-four (24) hours, or such other time as is deemed reasonable, after notice served as hereinafter provided; and if the owner or occupant neglects to do so, he shall forfeit a sum not exceeding twenty dollars (\$20)

for every day during which he knowingly and willfully permits such nuisance or cause of sickness to remain after the time prescribed for the removal thereof.

SEC. 18. [Power of local board.]—If the owner or occupant fails to comply with such order, the board may cause the nuisance, source of filth or cause of sickness to be removed, and all expenses incurred thereby shall be paid by the owner, occupant or other person who caused or permitted the same, if he has had actual notice from the board of health of the existence thereof, to be recovered by civil action in the name of the state before any court having jurisdiction.

SEC. 19. [To purify dwellings.]—The board, when satisfied upon due examination, that any cellar, room, tenement, or building in its town, occupied as a dwelling place, has become, by reason of the number of occupants, or want of cleanliness, or other cause, unfit for such purpose, and a cause of nuisance or sickness to the occupants or the public, may issue a notice in writing to such occupants, or any of them, requiring the premises to be put in proper condition as to cleanliness, or, if they see fit, requiring the occupants to remove or quit the premises within such time as the board may deem reasonable. If the persons so notified, or any of them, neglect or refuse to comply with the terms of the notice, the board may cause the premises to be properly cleaned at the expense of the owners, or may remove the occupants forcibly and close up the premises, and the same shall not again be occupied as a dwelling place without permission in writing of the board.

SEC. 20. [Can enter place, building or vessel to remove or prevent nuisance.]—Whenever the board of health shall think it necessary for the preservation of the lives or health of the inhabitants to enter a place, building or vessel in their township, for the purpose of examining into and destroying, removing or preventing any nuisance, source of filth or cause of sickness, and shall be refused such entry, any member of the board may make complaint, under oath, to any justice of the peace of his county, whether such justice be a member of the board or not, stating the facts of the case, so far as he has knowledge thereof. Such justice shall thereupon issue a warrant, directed to the sheriff or any constable of the county, commanding him to take sufficient aid, and, being accompanied by two or more members of said board of health, between the hours of sunrise and sunset, repair to the place where such nuisance, source of filth or cause of sickness complained of may be, and the same destroy, remove, or prevent, under the direction of such members of the board of health.

SEC. 21. [To guard against small-pox and other infectious diseases.]—When any person coming from abroad, or residing within any city, town or township within this state, shall be infected, or shall lately have been infected with small-pox, or other sickness dangerous to the public health, the board of health of the city, town or township where said person may be, shall make effectual provision, in the manner in which they shall judge best, for the safety of the inhabitants, by removing such sick or infected person to a separate house, if it can be done without damage to his health, and by providing nurses and other assistance and supplies, which shall be charged to the person himself, his parents or other person who may be liable for his support, if able; otherwise at the expense of the county to which he belongs.

SEC. 22. [Make provision for infected persons, when cannot be moved.]—If any infected person cannot be removed without damage to his health, the board of health shall make provision for him, as directed in the preceding section, in the house in which he may be, and in such case they may cause the persons in the neighborhood to be removed, and may take such other measures as may be deemed necessary for the safety of the inhabitants.

SEC. 23. [Duties of justices of the peace.]—Any justice of the peace, on application under oath showing cause therefor by a local board, or any member

thereof, shall issue his warrant under his hand, directed to the sheriff or any constable of the county, requiring him, under the direction of the board of health, to remove any person infected with contagious diseases, or to take possession of condemned houses and lodgings, and to provide nurses and attendants, and other necessaries for the care, safety and relief of the sick.

SEC. 24. (*As amended by ch. 65, 22d g. a.*) [**Meetings and report of local boards.**].—Local boards of health shall meet for the transaction of business on the first Monday of [April] and the first Monday in [October] of each year, and at any other time the necessities of the health of their respective jurisdictions may demand; and the clerk of each board shall transmit his annual report to the secretary of the state board of health within two weeks after the [October] meeting. Said report shall embrace a history of any epidemic disease which may have prevailed within his district. The failure of the clerk of the board to prepare, or cause to be prepared, and forward such report as above specified, shall be considered a misdemeanor, for which he shall be subject to a fine of not more than twenty-five dollars (\$25).

SEC. 25. All laws in conflict with this act are hereby repealed.

(Took effect by publication in newspapers, April 3, 1880.)

Under section 13 of this act, the mayor and aldermen of each city, or the mayor and councilmen of each town, constitute a board of health, and are clothed with the powers prescribed by the act, and this provision repeals section 525 of the code. *Staples v. Plymouth County*, 62 Iowa, 364.

A county is liable for expense incurred by a board of health in the case of persons afflicted with small-pox, under section 21 of this act, only when the patients themselves, or those who are liable for their support, are unable to make compensation therefor. *Gill v. Appanoose County*, 68 Id., 20.

Where one has suffered damages on account of the maintenance of a nuisance, it is not necessary that the board of health should first find the nuisance to be such, in order to entitle him to maintain an action for damages. Section 16, of chapter 151, of the laws of 1880, does not have that effect. *Baker v. Bohannon*, 69 Id., 60.

CHAPTER 7.

OF FIRE COMPANIES.

SECTION 1560. [**Members exempt from military duty and working highways.**].—Any person who is an active member of any fire engine, hook and ladder, hose, or any other company for the extinguishment of fire, or the protection of property at fires, under the control of the corporate authorities of any city or incorporated town, shall during the time he shall continue an active member of such company, be exempted from the performance of any military duty, and from the performance of labor on the highways on account of poll-tax, and from serving as a juror; and any person who shall have been an active member of such company in any city or town as aforesaid, and shall have faithfully discharged his duties as such for the term of ten years, shall be forever thereafter exempted from the performance of military duty in the time of peace, from serving as a juror, and from the performance of labor on the highways.

SEC. 1561. [**Same.**].—Any person who has served in any company for the term of ten years, as provided in the preceding section, shall be entitled to receive from the foreman of the company of which he shall have been a member, a certificate to that effect, and on the presentation of such certificate to the clerk or recorder of the proper city or town, such clerk or recorder shall file the same in his office, and give his certificate, under the corporate seal, to the person entitled thereto, setting forth the name of the company of which such person shall have been a member,

and the duration of such membership; and such certificate shall be received in all courts and places as evidence that the person legally holding the same is entitled to the exemption hereinbefore mentioned.

SEC. 1562. [**Same.**—To entitle any person to exemption from labor on the highway before the expiration of the aforesaid term of ten years, he shall, on or before the first day of April of each year, file with the clerk or recorder of the proper city or town, a certificate signed by the foreman of the company of which said person is a member, that the person holding said certificate is an active member of said fire company, and thereupon the clerk or recorder shall enter said exemption upon the street tax list for that year.

SEC. 1563. [**Misrepresentation: punished.**—Any person who shall either by misrepresentation or by the use of a false certificate, or the certificate of any other person, endeavor to avail himself of the benefits of this chapter, upon conviction thereof before any mayor, recorder, or magistrate of any incorporated city or town, or before any district court, shall be sentenced to imprisonment in the county jail for a period of not more than six months, or less than one month, and to pay a fine of not less than ten dollars, or more than one hundred dollars.

SEC. 1564. [**Destruction of fire apparatus punished.**—Any person or persons who shall willfully destroy or injure any engines, hose carriage, hose, hook and ladder carriage, or anything whatever, used for the extinguishment of fires, belonging to any fire company, on conviction thereof shall be sentenced to imprisonment in the penitentiary for a period of not less than one year, nor more than three years.

SEC. 1565. [**Removal of fire apparatus punished.**—It shall not be lawful for any person to remove an engine or other apparatus for the extinguishment of fire from the house or other place where the same shall be kept or deposited, except in time of fire or alarm of fire, unless properly authorized so to do by the president and director, or foreman, of the company to whom the same shall belong, or their duly authorized agent; and any person offending against the provisions of this section shall forfeit and pay a sum of not less than five dollars nor more than twenty dollars, to be sued for and recovered in the name of the state, for the use of the school fund, before any mayor, recorder or magistrate of the city or town wherein the offense has been committed.

SEC. 1566. [**False alarm of fire punished.**—It shall not be lawful for any person or persons to cause false alarm of fire, either by setting fire to any combustible material, or by giving an alarm of fire without cause, and any person offending against the provisions of this section shall be fined a sum of not less than five dollars nor more than twenty dollars, to be sued for and recovered as specified in the foregoing sections.

CHAPTER 8.

(CHAPTER 21, LAWS OF 1884.)

MINES AND MINING.

An Act to regulate mines and mining, and to repeal chapter 202 of the acts of the eighteenth general assembly.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:*—(Sections 1, 2, 3, 4, 5 and 6, of chapter 21, laws of 1884, are repealed by chapter 140 of the laws of 1886.)

SEC. 7. The agent or owner of every coal mine shall make or cause to be made, an accurate map or plan of the working of such mine on a scale of not less than one hundred feet to the inch, showing the area mined or excavated. Said map or plan shall be kept at the office of such mine. The owner or agent shall, on or before the first day of September of each year, cause to be made a statement and plan of the progress of the workings of such mine up to date, which statement and plan shall be marked on the map or plan herein required to be made. In case of refusal on part of said owner or agent for two months after the time designated to make the map or plan, or addition thereto, the inspector is authorized to cause an accurate map or plan of the whole of said mine to be made at the expense of the owner thereof, the cost of which shall be recoverable against the owner in the name of the person or persons making said map or plan. And the owner or agent of all coal mines hereafter wrought out and abandoned, shall deliver a correct map of said mine to the inspector, to be filed in his office.

SEC. 8. [Outlets or escapes.]—It shall be unlawful for the owner or agent of any coal mine worked by a shaft, to employ or permit any person to work therein unless there are to every seam of coal worked in such mine, at least two separate outlets, separated by natural strata of not less than one hundred feet in breadth, by which shafts or outlets distinct means of ingress and egress are always available to the persons employed in the mine, but in no case shall a furnace shaft be used as an escape shaft; and if the mine is a slope or drift opening, the escape shall be separated from the other openings by not less than fifty feet of natural strata; and shall be provided with safe and available traveling ways, and the traveling ways to the escapes in all coal mines shall be kept free from water and falls of roof; and all escape shafts shall be fitted with safe and convenient stairs at an angle of not more than sixty degrees descent, and with landings at easy and convenient distances, so as to furnish easy escape from such mine, and all air shafts used as escapes where fans are employed for ventilation, shall be provided with suitable appliances for hoisting the underground workmen; said appliances to be always kept at the mine ready for immediate use; and in no case shall any combustible material be allowed between any escape shaft and hoisting shaft, except such as is absolutely necessary for operation of the mine; *provided*, that where a furnace shaft is large enough to admit of being divided into an escape shaft and a furnace shaft, there may be a partition placed in said shaft, properly constructed so as to exclude the heated air and smoke from the side of the shaft used as an escape shaft, such partition to be built of incombustible material for a distance of not less than fifteen feet up from the bottom thereof; and *provided*, that where two or more mines are connected underground, each owner may make joint provisions with the other owner for the use of the other's hoisting shaft or slope as an escape, and in that event the owners thereof shall be deemed to have complied with the requirements of this section. *And provided further*, that in any case where the escape shaft is now situated less than one hundred feet from the hoisting shaft there may be provided a properly constructed underground traveling way from the top of the escape shaft, so as to furnish the proper protection from fire, for a distance of one hundred feet from the hoisting shaft; and in that event the owner or agent of any such mine shall be deemed to have complied with the requirements of this section; and *provided further*, that this act shall not apply to mines operated by slopes or drift openings where not more than five persons are employed therein. [And *provided further*, that any escapement shaft that is hereafter sunk and equipped, before said escapement shaft shall be located or the excavation for it begun, the district inspector of mines shall be duly notified to appear and determine what shall be a suitable distance for the same. The distance from the main shaft shall not be less than three hundred feet without the consent of the inspector, and no

buildings shall be put nearer the escape shaft than one hundred feet, except the house necessary to cover the fan.] (*As amended by ch. 56, 22d g. a.*)

SEC. 9. [Time allowed for making outlets.]—In all mines there shall be allowed one year to make outlets provided in section eight, when such mine is under two hundred feet in depth, and two years when such mine is over two hundred feet in depth, but not more than twenty men shall be employed in such mine at any one time until the provisions of section eight are complied with, and after the expiration of the period above mentioned should said mines not have the outlets aforesaid, they shall not be operated until made to conform to the provisions of section eight. [“And provided, further that this act shall not apply to mines where the escape way is lost or destroyed by reason of the drawing of pillars preparatory to the abandonment of the mine,” *Provided*, that not more than twenty persons shall be employed in said mine at any one time.]

SEC. 10. [Ventilation.]—The owner or agent of every coal mine, whether it be operated by shaft, slope, or drift, shall provide and maintain for every such mine an amount of ventilation of not less than one hundred cubic feet of air per minute for each person employed in such mine, and not less than five hundred cubic feet of air per minute for each mule or horse employed in the same, which shall be distributed and circulated throughout the mine in such manner as to dilute, render harmless, and expel the poisonous and noxious gasses from each and every working place in the mine. [And, whenever, the inspector shall find men working without sufficient air, or under any unsafe conditions, he shall first give the operator or his agent a reasonable notice to rectify the same, and upon refusal or neglect so to do the inspector may himself order them out until said portion of the mine shall be put in proper condition.] And all mines governed by the provisions of this act shall be provided with artificial means for producing ventilation, such as exhaust or forcing fans, furnaces, or exhaust steam, or other contrivances of such capacity and power as to produce and maintain an abundant supply of air for all the requirements of the persons employed in the mine; but in case a furnace is used for ventilating purposes it shall be built in such manner as to prevent the communication of fire to any part of the works by lining the upcast with incombustible material for a sufficient distance up from said furnace to ensure safety.

SEC. 11. [Safety appliances.]—The owner or agent of every coal mine operated by a shaft or slope, in all cases where the human voice cannot be distinctly heard, shall forthwith provide and maintain a metal tube, or other suitable means for communication from the top to the bottom of said shaft or slope, suitably calculated for free passage of sound therein, so that communication can be held between persons at the bottom and top of the shaft or slope. And there shall be provided a safety catch of approved pattern and a sufficient cover overhead on all carriages used for lowering and hoisting persons, and on the top of every shaft an approved safety gate, and also approved safety spring on the top of every slope, and an adequate brake shall be attached to every drum or machine used for raising or lowering persons in all shafts or slopes, and a trail shall be attached to every train used on a slope, all of said appliances to be subject to the approval of the inspector.

SEC. 12. [Hoisting engines: operation.]—No owner or agent of any coal mine operated by shaft or slope shall knowingly place in charge of any engine used for lowering into or hoisting out of such mine persons employed therein, any but experienced, competent and sober engineers, and no engineer in charge of such engine shall allow any person except such as may be deputed for that purpose by the owner or agent, to interfere with it, or any part of the machinery; and no person shall interfere or in any way intimidate the engineer in the discharge of his duties; and the maximum number of persons to ascend out of or descend into any coal mine on one cage shall be determined by the inspector, but in no case shall such number exceed ten, and no person shall ride upon or against any loaded cage or car in any shaft or slope except the conductor in charge of the train.

SEC. 13. No boy under twelve years of age shall be permitted to work in any mine; and parents or guardians of boys shall be required to furnish an affidavit as to the ages of their boys when there is any doubt in regard to their age, and in all cases of minors applying for work the agent or owner of the mines shall see that the provisions of this section *is* [are] not violated.

SEC. 14. In case any coal mine does not, in its appliances for the safety of the persons working therein, conform to the provisions of this act, or the owner or agent disregards the requirements of this act for twenty days after being notified by the inspector, any court of competent jurisdiction, while in session, or the judges in vacation may, on application of the inspector, by civil action in the name of the state, enjoin or restrain by writ of injunction, the said agent or owner from working or operating such mines, [“with more persons at once than are necessary to make the improvements needed.” (*As amended by ch. 56, 22d g. a.*)] except as provided in section eight and nine, until it is made to conform to the provisions of this act, and such remedies shall be cumulative, and shall not take the place of,

or affect any other proceedings against such owner or agent authorized by law, for the matter complained of in such action; and for any willful failure or neglect to comply with the provisions of this law by any owner, lessee, or operator of any coal mine or opening whereby any one is injured, a right of action shall accrue to the party so injured for any damage he may have sustained thereby; and in case of loss of life by reason of such willful neglect or failure aforesaid, a right of action shall accrue to the widow, if living, and if not living, to the children of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained.

SEC. 15. [**Malicious mischief.**—Any miner, workman or other person who shall knowingly injure or interfere with any air-course or brattice, or obstruct, or throw open doors, or disturb any part of the machinery, or disobey any order given in carrying out the provisions of this act, or ride upon a loaded car or wagon in a shaft or slope, except as provided in section twelve, or do any act whereby the lives and health of the persons, or the security of the mines and machinery is endangered; or if any miner or person employed in any mine governed by the provisions of this act, shall neglect or refuse to securely prop or support the roof and entries under his control, or neglect or refuse to obey any order given by the superintendent in relation to the security of the mine in the part of the mine under his charge or control, every such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

SEC. 16. (*As amended by ch. 43, 21st g. a.*)—Whenever **written charges of gross neglect of duty or malfeasance in office** against any inspector shall be made and filed with the governor, signed [and sworn to by five miners], or one or more operators of mines, together with a bond in the sum of five hundred dollars, payable to the state, and signed by two or more responsible freeholders, and conditioned for the payment of all costs and expenses arising from the investigation of such charges, it shall be the duty of the governor to convene a board of examiners, to consist of two practical miners, one mining engineer and two operators, at such time and place as he may deem best, giving ten days' notice to the inspector against whom charges may be made, and also the person whose name appears first in the charges, and said board when so convened, and having first been duly sworn or affirmed truly to try and decide the charges made, shall summon any witnesses desired by either party and examine them on oath or affirmation, which may be administered by any member of the board, and depositions may be read on such examination as in other cases, and report the result of their investigation to the governor, and if their report shows that said inspector has grossly neglected his duties, or is incompetent, or has been guilty of malfeasance in office, it shall be the duty of the governor forthwith to remove said inspector and appoint a successor, and said board shall award the costs and expenses of such investigation against the inspector or person signing said bond.

SEC. 17. (Repealed by chapter 53, twenty-second general assembly.)

SEC. 18. [**Supply of props.**—The owner, agent or operator of any coal mine shall keep a sufficient supply of timber to be used as props, so that the workmen may at all times be able to properly secure the workings from caving in, and it shall be the duty of the owner, agent or operator to send down all such props when required.

SEC. 19. [**Penalties.**—Any person willfully neglecting or refusing to comply with the provisions of this act when notified by the mine inspector to comply with such provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not exceeding five hundred dollars, or imprison-

ment in the county jail not exceeding six months, except when different penalties are herein provided.

SEC. 20. Chapter 202 of the acts of the eighteenth general assembly is hereby repealed.

Approved March 18, 1884.

(CHAPTER 52, LAWS OF 1888.)

STATE MINE INSPECTORS.

An Act to amend section 4, chapter 140, of the laws of the twenty-first general assembly, and to amend chapter 21 of the laws of the twentieth general assembly, relative to state mine inspectors, their duties and manner of appointment.

SECTION 1. (*Amendment of section 4, of ch. 140, laws of 1886.*)—*Be it enacted by the general assembly of the state of Iowa:* That section 4, chapter 140, of the acts of the twenty-first general assembly, be and the same is hereby amended by adding thereto the following words: "And each of said mine inspectors shall, during his term of office, have and keep a residence in the district to which he is assigned, without expense to the state. Also have and keep an office at a place designated by the governor, accessible to railroad and telegraph, in their respective districts, where, at all reasonable times and when not actually engaged elsewhere, such inspectors shall be found."

SEC. 2. That chapter 21, laws of the twentieth general assembly, be and the same is hereby amended by enacting the following supplementary sections:

SEC. 22. [**Executive council must appoint board of examiners.**]*—*The executive council shall appoint a board of examiners composed of two practical miners, two mine operators and one mining engineer, who shall have at least five years experience in his profession. The members of said board shall be of good moral character, and citizens of the United States and state of Iowa, and they shall, before entering upon their duties take the following oath (or affirmation): "I, . . . , do solemnly swear (or affirm) that I will perform the duties of examiner of candidates for the office of mine inspector to the best of my ability, and that in recommending any candidate I will be governed by the evidence of qualification to fill the position under the law creating the same, and not by any consideration of political and personal favors; that I will grant certificates to candidates according to their qualifications and the requirements of the law." They shall hold their office for two years.

SEC. 23. [**Meeting of board of examiners.**]*—*Said board shall meet biennially on the first Monday in April of each even numbered year, except that for the year 1888 said board shall meet on the second Monday of May in the office of the state mine inspector in the capitol, and they shall publish in at least one newspaper published in each mining district of the state, the date fixed by them for the examination of candidates. They shall be furnished with the necessary stationery and other necessary material for said examination, in the same manner as other state officers are now provided. They shall receive as compensation the sum of \$5 per day for time actually employed in the duties of their office and actual traveling expenses. The said compensation and expenses shall be paid in the same manner as the salaries and expenses of other state officers are now paid; *provided*, that in no case shall the per diem received by any member exceed \$50 for each biennial session.

SEC. 24. [**Certificates: to whom granted.**]*—*Certificates of competency shall be granted only to citizens of the United States and state of Iowa, of good moral character, not less than twenty-five years of age, who shall have at least

five years' experience in the mines, and who shall not have been acting agent or superintendent of any mine for at least six months prior to their appearance for examination.

SEC. 25. [**Manner of examination for mine inspector.**—The examination of candidates for the office of mine inspector shall consist of oral and written questions in theoretical and practical mining and mine engineering, on the nature and properties of noxious and poisonous gases found in mines, and on the different systems of working and ventilating of coal mines. The candidates shall not be allowed to have in their possession, at the time of their examination, any book, memoranda or notes to be used as aids in said examination. The board of examiners shall give to all persons examined, who, in their judgment possess the requisite qualifications, certificates of such qualification, and from the persons holding such certificates the governor shall appoint the state mine inspectors.

Approved April 12, 1888.

(CHAPTER 140, LAWS OF 1886.)

PROVIDING FOR MINE INSPECTORS—THEIR APPOINTMENT, DUTIES AND COMPENSATION.

An Act to repeal sections 1, 2, 3, 4, 5 and 6 of chapter 21, acts of the twentieth general assembly, and enact substitutes therefor, providing for mine inspectors, their manner of appointment, compensation, and defining their duties and terms of office.

SECTION 1. [**Governor shall appoint three inspectors of mines.**—*Be it enacted by the general assembly of the state of Iowa:* That there shall be appointed by the governor with the advice and consent of the senate, three inspectors of mines who shall hold their offices for two years. The said inspectors, subject, however, to be removed by the governor for neglect of duty or malfeasance in office. Said term of office shall commence on the first day of April of each even numbered year. Said inspectors shall have a theoretical and practical knowledge of the different systems of working and ventilating coal mines, and of the nature and properties of the noxious and poisonous gases of mines and of mining engineering; and said inspectors before entering upon the discharge of their duties shall take an oath or affirmation to discharge the same faithfully and impartially, which oaths or affirmations shall be endorsed upon their commissions, and their commissions so endorsed shall be forthwith recorded in the office of the secretary of state, and such inspectors shall each give bonds in the sum of two thousand (\$2,000) dollars, with sureties to the approval of the governor, conditioned for the faithful discharge of their duties. The governor shall divide the state into inspection districts and shall assign the inspectors to duty in such place or districts as he shall deem proper.

SEC. 2. [**Duties.**—Said inspectors shall give their whole time and attention to the duties of their offices respectively and shall examine all the mines in this state as often as their duties will permit, to see that the provisions of this act are obeyed, and it shall be lawful for such inspectors to enter, inspect and examine any mine in this state, and the works and machinery belonging thereto, at all reasonable times by night or by day, but so as not to unnecessarily obstruct or impede the working of the mines, and to make inquiry and examination into the state and condition of the mine as to ventilation and general security as required by the provisions of this act. The inspectors shall make a record of all examinations of mines inspected by them, showing the date when made, the condition in which the mines are found, the extent to which the laws relating to mines and mining are observed or violated, the progress made in the improvement and security of life

and health sought to be secured by the provisions of this chapter, number of accidents, injuries or deaths in or about the mines; the number of mines visited, the number of persons employed in or about the mines, together with all such facts and information of public interest concerning the condition of mines as they may think useful and proper, or so much thereof as may be of public interest, to be included in their biennial report. The owner and agents of all coal mines are hereby required to furnish the means necessary for such inspection, and it shall be the duty of the person having charge of any mine, whenever any loss of life shall occur by accident connected with the workings of such mine, to give notice forthwith by mail or otherwise to the inspector of mines of his district and to the coroner of the county in which such mine is situated, and the coroner shall hold an inquest on the body of the person or persons whose death has been caused, and inquire carefully into the cause thereof, and shall return a copy of the verdict and all testimony to the said inspector. No person having a personal interest in or employed in the mines where a fatal accident occurs shall be qualified to serve on the jury empaneled on the inquest, and the owner or agent of all coal mines shall report to the inspector all accidents to miners in and around the mines, giving cause of same, such report to be made in writing and within ten days from the time any accident occur.

SEC. 3. [Inspectors shall not be interested.]—Said inspectors while in office shall not act as agents or managers or mining engineers, or be interested in operating any mine, and the inspector shall biennially, on or before the fifteenth day of August preceeding the regular session of the general assembly, make a report to the governor, of their proceedings and the condition and operation of the mines in this state, enumerating all accidents in or about the same, and giving all such information as they may think useful and proper, and making such suggestions as they may deem important as to future legislation on the subject of mining.

SEC. 4. (As amended by ch. 52, 22d g. a.) [Compensation: how paid.]—The inspectors provided for in this act shall each receive a salary of twelve hundred dollars (\$1,200) per annum, payable monthly, and shall be furnished with necessary stationery, and actual traveling expenses not to exceed five hundred dollars (\$500) per annum; *Provided*, that each inspector shall file at the end of each quarter of his official year with the auditor of state a sworn statement of his actual traveling expenses incurred in the performance of his official duty for such quarter. The said salary and expenses to be paid by the state as the salaries and expenses of other state officers are provided for. They shall have and keep an office in the capitol at Des Moines, in which shall be kept all records, correspondence, papers, apparatus and property pertaining to their duties belonging to the state, and which shall be handed over to their successors in office. [And each of said mine inspectors shall, during his term of office, have and keep a residence in the district to which he is assigned without expense to the state. Also have and keep an office at a place designated by the governor, accessible to railroad and telegraph in their respective districts where, at all reasonable times and when not actually engaged elsewhere, such inspector shall be found.]

SEC. 5. [Vacancies.]—Any vacancy occurring in the office of inspector when the senate is not in session, either by death or resignation, removal by the governor or otherwise, shall be filled by appointment by the governor, which appointment shall hold good until his successor is appointed and qualified.

SEC. 6. [Instruments, etc.]—There shall be provided for such inspectors all instruments necessary for the discharge of their duties under this act, which shall be paid for by the state on the certificate of the inspectors, and shall be the property of the state.

SEC. 7. That sections 1, 2, 3, 4, 5 and 6 of chapter 21, acts of the twentieth general assembly be and the same are hereby repealed.

Approved April 10, 1886.

(CHAPTER 53, LAWS OF 1888.)

WEIGHING COAL AT MINES.

An Act to amend chapter 21 of the acts of the twentieth general assembly, providing for the weighing of coal at mines.

SECTION 1. [**Scales provided.**]*—Be it enacted by the general assembly of the state of Iowa:* That the owner or agent of each coal mine within this state at which the miners are paid by weight shall provide at each mine suitable scales of standard make for the weighing of all coal mined.

SEC. 2. [**Weighmaster to be sworn.**]*—*The owner or agent of such mine shall require the person authorized to weigh the coal delivered from said mine to be sworn before some person having authority to administer oaths, to keep the scales correctly balanced, to accurately weigh and to record a correct account of the amount weighed of each miner's car of coal delivered from such mine, and such oath shall be kept conspicuously posted at the place of weighing. The record of the coal mined by each miner shall be kept separate, and shall be open to his inspection at all reasonable hours, and also for the inspection of all others pecuniarily interested in such mine.

SEC. 3. [**Check weighmaster may be furnished.**]*—*In all coal mines in this state the miners employed and working therein may furnish a competent check weighman, who shall at all proper times have full right of access and examination of such scales, machinery and apparatus, and seeing all measures and weights of coal mined and accounts kept of the same, provided that not more than one person on behalf of the miners collectively shall have such right of access, examination and inspection of scales, measures and accounts at the same time, and that such person shall make no unnecessary interference with the use of such scales, machinery or apparatus. The agent of the miners as aforesaid shall, before entering upon his duties, make and subscribe to an oath before some officer duly authorized to administer oaths, that he is duly qualified and will faithfully discharge the duties of check weighman. Such oath shall be kept conspicuously posted at the place of weighing.

SEC. 4. [**Penalty for fraud in weighing.**]*—*Any person, company or firm having or using any scale or scales for the purpose of weighing the output of coal at mines so arranged or constructed that fraudulent weighing may be done thereby, or who shall knowingly resort to or employ any means whatsoever by reason of which such coal is not correctly weighed or reported in accordance with the provisions of this act, or any weighman or check weighman who shall fraudulently weigh or record the weights of such coal, or connive at or consent to such fraudulent weighing, shall be deemed guilty of a misdemeanor, and shall, upon conviction for such offense, be punished by a fine of not less than two hundred dollars (\$200) nor more than five hundred dollars (\$500), or by imprisonment in the county jail for a period not to exceed sixty days, or by both such fine and imprisonment, proceeding to be instituted in any court of competent jurisdiction.

SEC. 5. [**Failure to comply with law.**]*—*Any person, owner or agent, operating a coal mine in this state, who shall fail to comply with the provisions of this act, or who shall obstruct or hinder the carrying out of its requirements, shall be fined for the first offense not less than fifty dollars (\$50) nor more than two hundred dollars (\$200), for the second offense not less than two hundred dol-

lars (\$200) nor more than five hundred dollars (\$500), and for a third offense not less than five hundred dollars (\$500); *provided*, that the provisions of this act shall apply only to coal miners whose product is shipped by rail or water.

SEC. 6. That section 17, of chapter 21, of the laws of 1884, is hereby repealed.
Approved April 6, 1888.

(CHAPTER 54, LAWS OF 1888.)

WEIGHING COAL AT MINES.

An Act to establish a uniform system of weighing coal at the mines of this state, and to punish certain irregularities connected therewith.

SECTION 1. [**Coal to be weighed before screening.**]*—Be it enacted by the general assembly of the state of Iowa:* That all coal mined in this state under contract for payment by the ton or other guaranty shall be weighed before being screened, unless otherwise agreed upon in writing, and the full weight thereof shall be credited to the miner of such coal; and eighty pounds of coal as mined shall constitute a bushel, and two thousand pounds of coal as mined shall constitute a ton; *provided*, that nothing in this act shall be so construed as to compel payment for sulphur, rock, slate, black-jack, or other impurities, including slack and dirt, which may be loaded with or amongst such coal.

SEC. 2. [**Inspector's apparatus.**]*—Each state mine inspector shall procure from the state superintendent of weights and measures, at the expense of the state, a full and complete set of standards, balances, and other means of adjustment, such as are necessary in the comparison and adjustment of the scales, beams and other apparatus used in weighing coal at the mines, to the state standard of weight; and it shall be the duty of said inspectors to examine, test and adjust as often as occasion demands, all scales, beams, and other apparatus used in weighing coal at the mines.*

SEC. 3. [**Damages recovered.**]*—Any person damaged by reason of coal mined not having been weighed and credited to him in accordance with the provisions of this act, may recover his damages in a civil action against the employer, but such action must be begun within two years after the right thereto accrued; but this right to recover in such action shall not be barred by reason of his having knowledge of the violation of this act at the time.*

Approved April 12, 1888.

(CHAPTER 55, LAWS OF 1888.)

PAYING MINERS.

An Act to provide for the payment of workmen employed in mines, in the state of Iowa, in lawful money of the United States, and to protect said workmen in the management and control of their own earnings.

SECTION 1. [**Scrip, checks, drafts, etc., unlawful.**]*—Be it enacted by the general assembly of the state of Iowa:* It shall be unlawful for any person, firm, company or corporation, owning or operating coal mines in the state of Iowa, to sell, give, deliver, or in any manner issue, directly or indirectly, to any person employed by him or it, in payment for wages due for labor, or as advances on the wages of labor not due, any scrip, check, draft, order, or evidence of indebtedness, payable or redeemable otherwise than in their face value in money; any such person, firm, company or corporation who shall violate any of the provisions of this

section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding three hundred (300) dollars nor less than twenty-five (25) dollars; and the amount of any scrip, token, check, draft, order, or other evidence of indebtedness, sold, given, delivered, or in any manner issued in violation of the provisions of this act, shall recover in money at the suit of any holder thereof, against the person, firm, company or corporation selling, giving, delivering, or in any manner issuing the same; *provided*, that this act shall not apply to any person, firm, company or corporation employing less than ten (10) persons.

SEC. 2. [**Coercion in purchases forbidden.**]-Whoever compels, or in any manner seeks to compel, or coerce an employe of any person, firm, company or corporation, to purchase goods or supplies from any particular person, firm, company or corporation, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred (500) dollars, or imprisonment in the county jail not exceeding sixty days, or both, at the discretion of the court.

SEC. 3. [**Violation of law.**]-The county attorney of any organized county, upon complaint being made to him of the violation of any of the provisions of this act within his county, shall cause such complaint to be investigated before the grand jury of the county where such wrong has been complained of, and at the next session following the time such complaint is made.

Approved April 6, 1888.

CHAPTER 9.

OF QUARTERLY BANK STATEMENTS.

SECTION 1570. [**When, to whom made, and what to contain.**]-All associations organized under the general incorporation laws of this state, for the purpose of transacting a banking business, buying or selling exchange, receiving deposits, discounting notes, etc., shall make a full, clear, and accurate statement of the condition of the association as hereinafter provided, which shall be verified by oath of the president or vice-president, cashier or secretary, and two of the directors, which statement shall contain:

1. The amount of capital stock actually paid in, and then remaining as the capital of such association;
2. The amount of debts of every kind due to banks, bankers, or other persons, other than regular depositors;
3. The total amount due depositors, including sight and time deposits;
4. The amount subject to be drawn at sight then remaining on deposit with solvent banks or bankers of the country, specifying each city and town and the amount deposited in each and belonging to such association;
5. The amount of gold and silver coin and bullion belonging to such association at the time of making the statement;
6. The amount then on hand of bills of solvent specie-paying banks.
7. The amount of bills, bonds, notes and other evidences of debt, discounted or purchased by such association, and then belonging to the same, specifying particularly the amount of suspended debts, the amount considered good, the amount considered doubtful, and the amount in suit or judgment;
8. The value of real or personal property held for the convenience of such association, specifying the amount of each;
9. The amount of the undivided profits, if any, then on hand;
10. The total amount of all liabilities to such associations on the part of the

directors thereof; which statement shall be forthwith transmitted to the auditor of state, and be by him filed in his office.

SEC. 1571. [**Auditor of state may require additional reports.**]-The auditor of state shall, at any time he may see proper, make, or cause to be made, an examination of any association, as hereinafter provided, contemplated in this chapter, or he shall call upon any such association for a report of its state and condition as hereinbefore provided, upon any given day which has passed, as often as four times a year, and which reports the auditor shall cause to be published for one day in some daily newspaper published in the county where such association shall be located, or if there be no such newspaper published in said county, then such report shall be published in some weekly newspaper printed in said county for one week; the expenses of such publication shall be paid by each institution.

SEC. 1572. [**Insolvent: receiver appointed.**]-If such auditor is satisfied from said examination or reports that any such institution is insolvent, he shall direct the attorney-general to commence the proper proceedings, to have a receiver appointed and said institution wound up, and the assets thereof ratably distributed among the creditors thereof, giving preference in payment to depositors.

Authority is found in this and the preceding section for the appointment of a receiver to wind up the affairs of the bank. *Stewart v. Lay*, 45 Iowa, 604, 612.

SEC. 1573. [**Forfeiture.**]-Any willful failure or neglect of the proper officers of such association to comply with the provisions of this chapter, shall be regarded as a forfeiture of all the rights and privileges of such association.

SEC. 1574. [**Failure to report: officer criminally liable.**]-Any officer whose duty it is made to make statement and publication as aforesaid, who shall willfully neglect or refuse to do so, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not less than three months nor more than three years in the penitentiary.

SEC. 1575. [**Existing association: how affected: four statements required each year.**]-The provisions of sections fifteen hundred and seventy-three and fifteen hundred and seventy-four, of this chapter, shall not apply to or be enforced against any such banking institution, or the officers thereof, who heretofore have been incorporated and come under the provisions of this chapter; *provided*, that on or before the first day of September, 1873, any such institution shall have shown by a statement of its condition to the satisfaction of the auditor of state, that it is now in a sound condition. In no case shall more than four statements in one year be required.

SEC. 1576. [**Amount of capital required.**]-No associations shall be organized under the provisions of this chapter with a less amount of paid up capital than fifty thousand dollars, except in cities or towns having a population not exceeding three thousand, where such association may be organized with a paid up capital of not less than twenty-five thousand dollars. But no association shall have the right to commence business until its officers elect, or its stockholders, shall have furnished to the auditor of state a sworn statement of the paid up capital, and when the auditor of state is satisfied as to the fact, he shall issue to such association a certificate authorizing such association to commence business, a copy of which shall be published as provided in section fifteen hundred and seventy-one of this chapter.

(CHAPTER 60, LAWS OF 1874.)

IN RELATION TO SAVINGS BANKS.

An Act to provide for the organization and management of savings banks.

SECTION 1. [**May be formed.**]*—Be it enacted by the general assembly of the state of Iowa:* That corporations to be known as savings banks may be formed, under and in accordance with the provisions of this act, for the purpose of receiving on deposit the savings and funds of others, and preserving and safely investing the same, and paying interest or dividends thereon; and such corporations and the stockholders thereof, shall be subject to all the conditions and liabilities herein imposed; and hereafter no association shall be formed under the general incorporation acts for the purpose of transacting such banking business; and all corporations now organized thereunder and doing business as savings banks, shall, on or before the first day of July, A. D. 1875, conform to and reorganize under the provisions of this act, as hereinafter provided, and any failure or neglect of the proper officers of such associations to comply with the provisions of this act shall be regarded as a forfeiture of all rights and privileges of such association.

SEC. 2. [**Organization: amount of capital.**]*—It shall be lawful for any number of persons, not less than five, to organize savings banks under the provisions of this act, with a paid up capital stock of not less than ten thousand dollars in cities and towns of ten thousand inhabitants or under; and a paid up capital stock of not less than fifty thousand dollars in cities of over ten thousand inhabitants; which said corporations shall be known as savings banks, and shall have power to transact the usual business of such institutions, but not to issue bank notes to circulate as money, but no such association shall have the right to commence business until its officers elect, or its shareholders, shall have furnished to the auditor of state a sworn statement of the paid up capital, and, when the auditor of state is satisfied as to the fact, he shall issue to such association a certificate authorizing it to commence business, a copy of which shall be published in some newspaper printed in the county where such association is located, for four consecutive weeks, at the expense of such association. If the auditor of state should deem it necessary before issuing a certificate, he may make a personal examination of capital stock, or cause one to be made by some competent person appointed by him, the expense of which shall be paid by the association.*

SEC. 3. [**Articles of incorporation.**]*—Any five or more persons of full age, a majority of whom shall be citizens of this state, who may desire to form an incorporated company for the purposes hereinbefore specified, shall make, sign and acknowledge, before some officer competent to take acknowledgments of deeds, and file in the office of the recorder of the county wherein the principal place of business of the company is intended to be located, and a certified copy thereof in the office of the secretary of state, articles of incorporation, in which shall be stated the corporate name of the corporation, the object for which the corporation shall be formed, the amount of its capital stock, the time of its existence, not to exceed fifty years, the number of its directors or trustees, and their names, who shall manage the affairs of the association for the first year, and the name of the city, or town, and county in which the principal place of business of the company is to be located; and a notice must be published in some newspaper published in the county wherein said bank is located for four consecutive weeks, stating the substance of the above requirements.*

SEC. 4. [**Certified copy evidence.**]*—A copy of any articles of incorporation, filed in pursuance of this act, and certified to by the recorder of the county in which,*

it is filed, or by the secretary of state, shall be received in all courts, and in all actions and proceedings, as presumptive evidence of the facts therein stated.

SEC. 5. [Enumeration of powers.]—When the certificate of the auditor shall have been received, and the articles of incorporation shall have been filed and recorded, and publication shall have been made as hereinbefore provided, the persons who shall have signed and acknowledged the same, and such persons as thereafter become their associates or successors, shall be a body politic and corporate, and by their corporate name shall have succession for the period limited, and power:

First—To sue and be sued in any court.

Second—To make and use a common seal, and to alter the same at pleasure.

Third—To purchase, hold, sell, convey, and release from trust or mortgage, such real and personal estate as hereinafter provided for in this act.

Fourth—To appoint such officers, agents, and servants, as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation, and to require of them such security as may be thought proper for the fulfillment of their duties.

Fifth—To loan and invest the funds of the corporation; to receive deposits of money, and to loan and invest the same as hereinafter provided, and to repay such deposits without interest, or with such interest as the by-laws of the constitution may provide.

Sixth—To make by-laws, not inconsistent with the laws of this state, for the organization of the company, and the management of its property, the regulation of its affairs, the condition on which deposits will be received, the time and manner of dividing the profits and of paying interest on deposits, and for carrying on all kinds of business within the objects and purposes of the company.

SEC. 6. (*As amended by ch. 89, laws of 22d g. a.*) [Management.]—The business and property of such savings banks shall be managed by a board of directors or trustees, of no less than five nor more than nine, all of whom shall be shareholders and citizens of this state, the first board to be designated in the articles of incorporation; and who shall organize by taking an oath, diligently, faithfully, and impartially to perform the duties imposed upon them by this act, and not knowingly to violate, or willingly permit to be violated, any of the provisions thereof; that said directors or trustees are the *bona fide* owners in their own right of the stock standing in their respective names on the books of the bank; and that the same are not hypothecated, or in any manner pledged as security for any loan obtained, or debt owing to said savings bank; a certificate of which oath, signed by each director, and certified to by the officers before whom it was taken, shall be filed and preserved in the office of the auditor of state. The call for the first meeting of directors or trustees shall be signed by one or more persons named as directors or trustees in the certificate, setting forth the time and place of meeting, which notice shall be delivered personally to each director, or published at least ten days in some newspaper published in the county in which is the principal place of business of the corporation, or, if no newspaper is published in the county, then in a newspaper nearest thereto. At their first meeting, and as often thereafter as their by-laws shall require, the directors or trustees shall elect, from their number, a president and one or more vice-presidents for the ensuing year; and shall appoint a treasurer or cashier, and such other subordinate officers, agents, and servants as may be required, who shall hold their offices at the pleasure of the board, and who shall give such security for the faithful performance of their duties as may be required by the by-laws. All vacancies in the board of directors or trustees shall be filled at the next regular meeting after such vacancy shall arise, from among the stockholders, and the person receiving a majority of the votes of the whole number of directors or trustees shall be duly elected. The directors or trustees, to hold office after the expiration of the term of those named

in the certificate of incorporation, shall be annually elected at such time and place, and in such mode, and upon such notice as shall be provided by the by-laws of the company, and shall hold office for one year, or until their successors are elected and qualified. All such elections shall be by ballot, and each stockholder shall be entitled to one vote for every share of stock held by him, and the persons so receiving the greater number of votes, shall be directors *of* [or] trustees. Shareholders may vote by proxy duly authorized, and no shareholder shall be entitled to vote whose liability to said bank is past due and unpaid. If it should happen at any time that an election of directors or trustees shall not be had on the day designated in the by-laws of the company, it shall be lawful on any other day to hold such election, after giving due notice, and the directors or trustees shall be continued in office until their successors are elected and qualified. A majority of the directors or trustees shall constitute a quorum of said board for the transaction of business, but said bank may provide in the by-laws that a smaller number, not less than five, one of whom shall be the president *and* [or] vice-president, shall constitute a quorum, which number shall thereupon be authorized to transact business, [but in no case shall a measure be declared carried unless receiving three affirmative votes.]

SEC. 7. All savings banks organized under this act may receive, on deposit, all such sums of money as shall from time to time be offered by tradesmen, merchants, laborers, servants, minors, and others. All such banks with a paid-up capital of ten thousand dollars may receive deposits to the amount of one hundred thousand dollars; those with a paid-up capital of twenty-five thousand dollars may receive deposits to the amount of two hundred and fifty thousand dollars; those with a paid-up capital of fifty thousand dollars, deposits to the amount of five hundred thousand; those with a paid-up capital of one hundred thousand dollars, deposits to the amount of one million dollars; and no greater amount of deposits shall be received without a like proportionate increase of cash capital, *and* which capital shall be regarded a guaranty fund for the better security of depositors, and so invested in some safe and available securities. The deposits so received for the purpose of safe keeping, and invested as provided in this act, shall be paid to such depositor or his or her representatives when requested at such time or times, and with such interest, and under such regulations as the board of directors or trustees shall from time to time prescribe, not inconsistent with the provisions of this act which regulations shall be printed and conspicuously exposed in some place, accessible and visible to all, in the business office of said bank, and no alteration, which may at any time be made in such rules or regulations, shall in any manner affect the rights of depositors in respect to deposits, or the interest thereon, made previous to such alteration. It shall be lawful for savings banks to require sixty days written notice of the withdrawal of any deposits, but when there are sufficient funds on hand the officers of the bank may in their discretion waive this requirement. It shall be lawful for savings banks to close any accounts upon written notice, as may be provided for in the by-laws, to a depositor to withdraw his deposit, after which notice it shall cease to draw interest; *provided*, nothing in this act shall be so construed as to prevent such bank in their discretion from issuing certificates of deposits, payable on demand.

SEC. 8. [Accounts closed by limitation.]—All accounts upon which no deposit or drafts shall be made for a period of ten years in succession shall be so far closed that neither the sum deposited, nor the interest that shall have accrued thereon, shall be entitled to any interest after the expiration of ten years from the date of the last deposit or draft. This provision, however, shall not apply to endowments for children, to trust estates, nor to other cases where special provision is made therefor at the time of the deposit thereof.

SEC. 9. [Investment of funds.]—It shall be lawful for the directors or trustees of any such savings bank to invest the funds or capital belonging to said bank, and all moneys deposited therein, and all the gains and profits thereof, only as follows, to-wit:

First—In the stocks or bonds, or interest-bearing notes or certificates, of the United States.

Second—In the stocks or bonds, or evidences of debt bearing interest, of this state.

Third—In the stocks, bonds, or warrants of any city, town, county, village, or school district of this state, issued pursuant to the authority of any law of this state, but not exceeding twenty-five per cent of the assets of the bank, shall consist of town, village, or school district bonds or warrants.

Fourth—In notes or bonds secured by mortgage or deed of trust upon unincumbered real estate in this state, worth at least twice the amount loaned thereon.

Fifth—It shall be lawful for said banks to discount, purchase, sell, and make loans upon commercial paper, notes, bills of exchange, drafts, or any other personal or public security; but said bank shall not purchase, hold, or make loans upon the shares of its capital stock.

Sixth—[**Loans upon real estate.**]—In all cases of loans upon real estate, all the expenses of searches, examinations, and certificates of title, or the inspection of property, appraisals of value, and of drawing, perfecting, and recording papers, shall be paid by such borrowers. Whenever buildings are included in the valuation of any real estate upon which a loan shall be made by said bank, they shall be insured by the mortgagor, for the benefit of the bank, for at least two-thirds their value, in some reliable company, and the policy of insurance shall be duly assigned to the bank; and it shall be lawful for said bank to renew such policy of insurance from year to year, in case the mortgagor neglects to do so, and may charge the same to him. All the necessary charges and expenses paid by said bank for such renewals shall be paid for by such mortgagor to said bank, and shall be a lien upon the property so mortgaged until paid.

SEC. 10. [Real estate held by bank.]—It shall be lawful for savings banks to purchase, hold and convey real estate only as follows, to-wit:

First—The lot and building in which the business of the bank may be carried on.

Second—Such as shall have been purchased at sales upon foreclosure of mortgages owned by the bank, or upon judgment or decrees obtained or rendered for debts due it; and all such real estate as is described in this clause shall be sold by said bank within ten years after the title of the same shall be vested in it by purchases or otherwise.

SEC. 11. [Interest on deposits.]—It shall be the duty of the board of directors or trustees, from time to time, to regulate the rate of interest or dividends to be allowed to depositors, and to pay the same upon the presentation of the deposit book or certificates; and after the payment of, or setting aside a sufficient amount to pay the interest to depositors of said banks, and after deducting the necessary expenses of said banks, the board of directors or trustees may make from the surplus profits in hand in cash such dividends on the capital stock as in their discretion may seem best and proper.

SEC. 12. [Shares.]—The capital stock of all banks organized under this act shall be divided into shares of one hundred dollars each, and shall be deemed personal property, and shall be transferable on the books of the banks in such manner as shall be prescribed by the by-laws. No certificate representing shares of stocks shall be issued (nor shall such stock be considered as re[ac]quired) until the sum of money which said certificate purports to represent shall have been paid into the corporation. Shareholders in banks organized under the provisions of this act shall be individually and severally liable to the creditor[s] of the corporation of

which they are shareholders, over and above the amount of stock by them held, to an amount equal to their respective shares so held, for all its liabilities accruing while they remained shareholders, and no transfer of stock shall affect such liability for the period of six months thereafter; and should any such bank become insolvent, and its assets be found insufficient to pay its debts and liabilities, its shareholders may, to that extent, be compelled to pay such deficiency, in proportion to the amount of stock owned by each.

SEC. 13. [Stock held by executor, guardian, etc.: by married women.]

—Whenever any stock is held by any person as executor, administrator, trustee, or guardian, he may represent such stock, in person or by proxy, and any married women holding stock in her own name, in any bank organized under this act, may cast her vote or appoint her own proxy to vote for her.

SEC. 14. [Other associations having deposits or holding stock.]—Any person authorized thereto, by resolution of the board of directors or trustees of any corporation, association, or society, having funds deposited, or owning stock, in any bank formed under this act, shall be entitled to receive such deposit or to transfer such stock, and to cast the vote of such corporation, association, or society thereon.

SEC. 15. [Deposits by executors, etc. By minors.]—Whenever any deposits are held by any person or [as] executor, administrator, trustee, or guardian, he shall be entitled to receive the same; and whenever any deposit shall be made by any minor the directors or trustees shall pay to such depositor such sum as may be due to him or her, although no guardian shall have been appointed by or for such minor, or the guardian of such minor shall not have authorized the drawing of the same; and the check, receipt, or acquittance of such minor shall be as valid as if the same *was* [were] of full age, if such deposit were made personally by said minor; and whenever any deposit shall be made in her own name by any woman being or thereafter becoming married, said director [s] or trustees shall pay such sum as may be due to her on her receipt or acquittance.

SEC. 16. [Not to issue circulating notes nor to contract debts except, etc.]—No bank organized under this act shall, by implication or construction, be deemed to possess the power of creating and issuing bills, notes, or other evidences of debt for circulation as money; nor shall it be lawful for such bank, or the directors or trustees thereof, to contract any debt or liability against the bank, for any purpose whatever, except for deposits and the necessary expenses of management and transacting its business; and the capital stock and the assets of the bank shall be security to depositors.

SEC. 17. [Directors not to be paid.]—No director or trustee of a saving[s] bank shall, as such, receive any pay or emolument for his services; and no trustee, officer, or servant of such savings bank shall, directly or indirectly, in any manner, use the funds of the said bank, or its deposits, or any part thereof, except for regular business transactions, and all loans made to said trustees, officers, servants, and agents of the bank shall be upon the same security [as] required of others, and in strict conformity to the rules and regulations of the bank; and all such loans shall be made only by the board, and shall be acted upon in the absence of the party applying therefor; but such reasonable compensation may be paid to the officers of the bank as may from time to time be fixed in the by-laws.

SEC. 18. [Limit of liabilities to the bank.]—The total liabilities to any association of any person or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members of thereof, shall at no time exceed twenty per cent of capital stock actually paid, in: *provided*, that the discount of bona fide bills of exchange drawn against actually existing value and the discount of commercial or business paper

actually owned by the person or persons, corporation, or firm negotiating the same, shall not be considered money borrowed.

SEC. 19. [**Misnomer.**—The misnomer of any such savings bank, in any instrument, shall not vitiate or impair the same if it be sufficiently described to ascertain the intention of the parties.

SEC. 20. [**Unauthorized use of the term "savings bank" prohibited.**—It shall not be lawful for any bank, banking association or private bankers, to advertise or put forth a sign as a savings bank or savings institution; and any bank, banking association or private banker, violating these provisions, shall forfeit and pay, for every such offense, the sum of one hundred dollars for every day such offense shall be continued, to be sued for, and recovered in the name of the people of the state, in any court having cognizance thereof, for the use of the school fund.

SEC. 21. [**Same.**—Any person or persons who shall put up or cause to be put up or exhibited any sign, or who shall issue or circulate any card, circular or advertisement purporting to be a savings bank not being organized under this act shall, on conviction thereof, be adjudged guilty of a misdemeanor, and be punished by a fine not exceeding fifty dollars for each offense or for each day such offense shall be continued.

SEC. 22. [**Banking associations to make quarterly statements.**—All associations organized under the general incorporation laws of this state, for the purpose of transacting a banking business, buying, selling, exchange, receiving deposits, discounting notes, etc., shall make a full, clear and accurate statement of the condition of the association as hereinafter provided, which shall be verified by the oath of the president or vice-president or cashier and two of the directors, which statement shall contain:—

First—The amount of capital stock actually paid in.

Second—The amount of debts of every kind due to banks, bankers or other persons other than regular deposits.

Third—The total amount due depositors, including sight and time deposits.

Fourth—The amount subject to be drawn at sight then remaining on deposit with solvent banks or bankers of the country, specifying each city and town and the amount deposited in each and belonging to such association.

Fifth—The amount of gold and silver coin and bullion belonging to such association at the time of making statement.

Sixth—The amount then on hand of bills of solvent banks.

Seventh—The amount of bills, bonds and other evidences of debt, discounted or purchased by such association, and then belonging to the same, specifying particularly the amount of suspended debts, the amount considered good, the amount considered doubtful and the amount in suit or judgment.

Eighth—The value of real or personal property held for the convenience of such association, specifying the amount of each.

Ninth—The amount of undivided profits if any then on hands.

Tenth—The total amount of all liabilities to such association on the part of the director thereof:

Which statement shall be forthwith transmitted to the auditor of state and be by him filed in his office.

SEC. 23. [**Auditor to examine association.**—The auditor of state shall at any time he may see proper, make, or cause to be made, an examination of any association, as here[in] after provided, contemplated in this chapter, or he shall call upon any such association for a report of its state and condition as hereinbefore provided, upon any given day which has passed, as often as four times in a year, and which report the auditor shall cause to be published for one day in some daily newspaper published in the county where such association shall be located, or, if

there be no such newspaper published in said county, then such report shall be published in some weekly newspaper printed in said county for one week, and the expenses of such publication shall be paid by such institution.

SEC. 24. [**Auditor to report to general assembly.**—It shall be the duty of the auditor of state to communicate to the legislature, at each session, a statement of the condition of every savings bank from which reports have been received for the preceding year, and to suggest any amendments in the law relative to savings banks which in his judgment may be necessary or proper to increase the security of depositors.

SEC. 25. [**Duty of auditor where bank is violating law, or doing unsafe business.**—Whenever it shall appear to the auditor that any savings bank has been guilty of violating this act or the law, or is conducting its business in an unsafe manner, he shall, by an order under his hand and seal of office, addressed to the institution so offending, direct discontinuance of such illegal and unsafe practices, and he shall demand a conformity with the requirements of this act, and whenever any such savings bank shall refuse or neglect to comply with such order he shall communicate the fact to the attorney-general of the state, whose duty it shall be to institute proceedings against such savings banks as are now, or may be hereafter, authorized in law in cases of insolvent corporations. The auditor of state may appoint, and the person or persons who may be appointed by him, to examine the affairs of any savings banks, shall have power to administer oaths to any person whose testimony may be required on any such examination, and to compel the appearance and attendance of any such person, for the purpose of such examination, by summons, subpoena, or attachment, in the manner now authorized in respect to the attendance of persons as witnesses in the courts of this state, and all books and papers which it may be deemed necessary to examine by the auditor, on the examination so appointed, shall be produced, and their production may be compelled in like manner. The expenses of any examination, made in pursuance of this act, shall be paid by the savings banks so examined, in such amount as the auditor shall certify to be just and reasonable.

SEC. 26. [**Penalty for false statements, etc.**—Every officer, agent, or clerk of any savings bank organized under this act, who shall willfully and knowingly subscribe or make any false statements or false entries in the books of such bank, or shall knowingly subscribe or exhibit false papers with the intent to deceive any person authorized to examine as to the condition of said institution, or shall willfully or knowingly subscribe or make false reports, shall be deemed guilty of felony, and upon conviction thereof shall be fined not exceeding ten thousand dollars, and be imprisoned in the state prison not less than two nor more than five years, and be forever after incapable of holding any office created by this act.

SEC. 27. [**Intentional fraud punished.**—Intentional fraud on the part of savings banks organized under this act, or in deceiving the public or individuals in relation to their means or their liabilities or diversion of the funds of the bank to other objects than those mentioned in its certificate of incorporation, and the payment of dividends which leave insufficient funds to meet the liabilities of the bank, shall subject those guilty thereof to fine of not less than five hundred dollars, or imprisonment of not less than one year, or *by* both such fine and imprisonment, at the discretion of the court, and shall cause a forfeiture of all the privileges herein conferred, and the court may proceed to close the bank by an information in the manner prescribed by law.

SEC. 28. [**Taxation of capital.**—The paid-up capital of all savings banks organized and doing business under this act shall be subject to the same rates of taxation and rules of valuation as other taxable property, by the revenue laws of the state, which taxes shall be levied on and paid by the banks, and not the individual stockholders, and the general assembly shall never impose any greater tax

upon property employed in banking under this act than is or may be imposed upon the property of individuals. The franchise of all such banks, the savings and funds deposited therein, and the mortgages and other securities, wherever the same are invested, are not to be taxed, but are expressly exempted therefrom, and may be omitted from assessments of the bank required by the revenue laws of this state.

SEC. 29. [**Mode of increasing capital stock.**]—Whenever it is desired to increase the amount of capital stock of such banks, a meeting of stockholders may be called by a notice signed by the officers of said bank, and at least a majority of its directors, and published at least thirty days in every issue of some newspaper published in the county where the principal place of business of the bank is located, which notice shall specify the object of the meeting, the time and place when it is to be held, and the amount which it is proposed to increase the capital stock; and a vote of two-thirds of all the shares of stock of said bank shall be necessary to an increase of the amount of capital stock. If at any meeting so called a sufficient number of votes have been given in favor of increasing the amount of capital stock, a certificate of the proceedings, showing a compliance with these provisions, the amount of capital stock actually paid in, and the amount to which the capital stock is to be increased, and the manner of such increase, shall be made out, signed and verified by the affidavit of the chairman and secretary of the meeting, certified by a majority of the directors or trustees, and filed and recorded as required by the third section of this act. When this is done the capital stock of the bank shall be increased to the amount specified in the certificate.

SEC. 30. [**Voluntary dissolution.**]—All savings banks organized under this act may be dissolved, prior to the period fixed upon in the certificate of incorporation, by the affirmative votes of stockholders holding three-fourths of the capital stock, at a meeting of stockholders to be called for this purpose, in the manner and after publication of notice as required in the preceding section. In all cases of dissolution of a bank hereunder, or the commencement of proceedings under this act to close the same, the receiver or receivers appointed thereunder shall not be required or permitted by forced sale to sell the securities of said banks, but shall proceed as expeditiously as possible to collect the same and make distribution of proceeds to those entitled thereto.

SEC. 31. [**Existing banks may reorganize.**]—Any bank or association existing under and by virtue of any law of this state may be reorganized under the provisions of this act, and when duly organized all securities, real estate, or property may be transferred to such new organization; but no such reorganization shall have the effect to discharge the original bank, its directors or stockholders, from any liability to its depositors or any other person; but the same shall continue until legally discharged, and such new organization or bank shall be legally liable to pay every claim or demand existing against the bank whose assets or property, or any part thereof, it has received by reason of such reorganization. All such banks may avail themselves of the provisions [of] and become incorporated under this act, by filing with the recorder of the county in which the principal place of business is located, and a certified copy thereof in the office of the secretary of state, a certificate stating their intention and election to become so incorporated thereunder, which election and intention may be made and declared by the directors or trustees of such bank or association, or a majority of them. The certificate stating such intention may be signed by the president and secretary of such corporation, association, or bank, and shall be acknowledged before some officer competent to take acknowledgments of deeds; and in all other respects existing banks and associations reorganizing hereunder shall comply with, and conform to, all the provisions and requirements of this act with reference to the original organization of savings banks, so far as the same may be applicable, and as soon there-

after as the auditor's certificate is received and published, as hereinbefore provided, may proceed to transact business.

SEC. 32. [**Prohibited from advertising more capital than is paid in.**—Any saving[s] bank organized under the provisions of this act is hereby prohibited from advertising in any way, either by publication or otherwise, any greater amount of capital than such bank *have* [has] actually paid in, and such bank shall be subject to a fine of twenty-five dollars for each and every violation of this section.

SEC. 33. All acts and parts of acts in conflict with this act are hereby declared to be inoperative so far as they affect this act.

Approved March 21, 1874.

(CHAPTER 153, LAWS OF 1880.)

TO PROTECT DEPOSITORS AND PUNISH FRAUDULENT BANKING.

An Act to protect depositors in banks and banking institutions, and to punish fraudulent banking.

SECTION 1. [**Shall not receive on deposit, etc., any bills of insolvent bank.**—*Be it enacted by the general assembly of the state of Iowa:* That no bank, banking-house, exchange broker, deposit office, or firm, company, corporation, or party, engaged in the banking, broker, exchange, or deposit business, shall accept or receive on deposit, with or without interest, any moneys, bank bills, or notes, or United States treasury notes, or currency, or other notes, bills or drafts circulating as money or currency, when such bank, banking-house, exchange, broker or deposit office, firm or party, is insolvent.

SEC. 2. [**Punishment for violating act.**—If any such bank, banking-house, exchange, broker, or deposit office, firm, company, corporation, or party, shall receive or accept on deposit any such deposits as aforesaid, when insolvent, any officer director, cashier, manager, member, party, or managing party thereof, knowing of such insolvency, who shall knowingly receive or accept, be accessory, or permit, or connive at the receiving or accepting on deposit therein, or thereby, any such deposits as aforesaid, shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for a term not to exceed ten years, or by imprisonment in the county jail not to exceed one year, or both fine and imprisonment, the fine not to exceed ten thousand dollars.

(Took effect by publication in newspapers, April 4, 1880.)

(CHAPTER 208, LAWS OF 1880.)

DOUBLE LIABILITY OF STOCKHOLDERS.

An Act to amend chapter one (1), of title nine (9) of the code of 1873, creating double liability of stockholders or shareholders in corporations organized under said chapter one (1) aforesaid, for the purpose of transacting a banking business, buying or selling exchange, receiving deposits of money, or discounting notes.

SECTION 1. [**Stockholders in banks individually liable to creditors.**—*Be it enacted by the general assembly of the state of Iowa:* That chapter one (1), of title nine (9), of the code of 1873, be and the same is hereby amended by adding thereto as follows: That all stockholders or shareholders in associations or corporations organized under said chapter one, (1) aforesaid, for the purpose of transacting a

banking business, buying or selling exchange, receiving deposits of money or discounting notes, shall be individually and severally liable to the creditors of such association or corporation of which they are stockholders or shareholders, over and above the amount of stock by them held therein, to an amount equal to their respective shares so held for all its liabilities accruing while they remained such stockholders, and should any such association or corporation become insolvent and its assets be found insufficient to pay its debts and liabilities, its stockholders may be compelled to pay such deficiency in proportion to the amount of stock owned by each, not to exceed the extent of the additional liability hereby created.

SEC. 2. [Liability for balance of debts distributed among stockholders.]—That should the whole amount for which the stockholders are made individually responsible, as provided by section one of this act, be found in any case to be inadequate to the payment of all the debts of any such association or corporation, after the application of its assets to the payment of such debts, then the amount due from such stockholders on account of their individual liability created by this act, as such, shall be distributed equally among all the creditors of such corporation in proportion to the amount due to each.

SEC. 3. That the personal liability in this chapter provided for is over and above the stock owned by the stockholders in such corporations and any amount paid thereon.

(Took effect by publication in newspapers, April 6, 1880.)

(CHAPTER 72, LAWS OF 1886.)

RELATING TO STATE BANKS.

An Act requiring banking corporations other than savings banks to incorporate the word "state" in their corporate name, and to prohibit associations, partnerships or individuals engaged in banking business, buying, or selling exchange, receiving deposits, discounting notes, etc., from adopting, or using the word state in connection with such association, partnership, or individual name.

SECTION 1. [Banks incorporated under general law to include word "state" in their name.]—*Be it enacted by the general assembly of the state of Iowa:* That all associations hereafter organized under the general incorporation laws of this state, for transacting a banking business, buying, or selling exchange, receiving deposits, discounting notes etc., other than savings banks, shall have the word "state" incorporated in and made a part of the name of such corporation, and no such corporation shall be authorized to transact business unless the provisions of this act have been complied with.

SEC. 2. [May change name to comply with this chapter.]—All such banking associations other than savings banks, incorporated at the time of the taking effect of this act may change their corporate name, by amendment of their respective articles of incorporation, so as to embrace the word "state" in their respective corporate names.

SEC. 3. [Other banks not to use word state in their name.]—It shall be unlawful for any association, not incorporated, partnership, or individual engaged in banking business, buying or selling exchange, receiving deposits, discounting notes and bills etc., to incorporate or embrace in the name of such associations, partnership, or individual the word "state," *provided*, this act shall not apply to banking associations organized under the laws of the United States.

Approved April 5, 1886.

TITLE XII.

OF EDUCATION.

CHAPTER 1.

OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

SECTION. 1577. [**Duties.**—The superintendent of public instruction shall be charged with the general supervision of all the county superintendents and all the common schools of the state. He may meet county superintendents in convention at such points in the state as he may deem most suitable for the purpose, and by explanation and discussion endeavor to secure a more uniform and efficient administration of school laws. He shall attend teachers' institutes in the several counties of the state, as far as may be consistent with the discharge of other duties imposed by law, and assist by lecture or otherwise in their instruction and management. He shall render a written opinion to any school officer asking it, touching the exposition or administration of any school law, and shall determine all cases appealed from the decision of county superintendents.

SEC. 1578. [**Office: to file papers and documents.**—An office shall be provided for him at the seat of government, in which he shall file all papers, reports, and public documents, transmitted to him by the county superintendents each year, separately, and hold the same in readiness to be exhibited to the governor, or to a committee of either house of the general assembly, at any time when required; and he shall keep a fair record of all matters pertaining to his office.

SEC. 1579. (*As amended by ch. 59, 22d g. a.*) [**Publish amendments to school law: prepare certificate.**—[After the adjournment of the eighteenth general assembly, and every four years thereafter, if deemed necessary, he may cause to be printed and bound in cloth the school laws, and all amendments thereto, with such notes, rulings, forms and decisions as may seem of value to aid school officers in the proper discharge of their duties. Appropriate reference shall be made to the previous law that has been amended or changed, so as clearly to indicate the effect of such amendment or changes. He shall send to each county superintendent a number of copies sufficient to supply each school district in his county with one copy of such laws, with decisions. He shall also cause to be printed and bound in paper covers the school laws, with notes and with forms necessary to be used in carrying out the school laws; *provided* that he shall furnish each of the members of the boards of directors with one copy of the laws bound in paper covers, which shall be turned over to their successors in office.

[**Took effect by publication in newspapers.**—After such sessions of the general assembly *as* [if] the state superintendent shall not deem it necessary to publish the laws as provided for in section one of this act, he shall cause to be published in pamphlet form all the amendments to the school laws passed by such general assembly, in sufficient numbers to supply each of the county superintendents and school officers of the state with one copy free of charge, which said amendments shall be sent to the several county superintendents for distribution.]

SEC. 1580. (Repealed by chapter 102, laws of 1878.)

SEC. 1581. [**May subscribe for Iowa School Journal.**]—He may, if he deem it expedient, subscribe for a sufficient number of the Iowa School Journal, or of such other educational journal published in the state as he may select to furnish each county superintendent with one copy, and his certificate of having thus subscribed, shall be authority for the auditor of state to issue his warrant for the amount of said subscription; *provided*, he shall cause to be inserted in the journal he may so select a correct copy of any decision he may deem it necessary to make for the efficient carrying out of the school law.

SEC. 1582. [**Report to auditor.**]—He shall, annually, on the first day of January, report to the auditor of state the number of persons in each county between the ages of five and twenty-one years.

SEC. 1583. (*As amended by ch. 82, 22d g. a.*) [**Report to each regular session of general assembly.**]—(He shall make to the governor biennially a report,) which shall embrace, first, a statement of the condition of the common schools of the state; the number of district townships and sub-districts therein; the number of teachers; the number of schools; the number of school-houses and the value thereof; the number of persons between five and twenty-one years of age; the number of scholars in each county that have attended school the previous year, as returned by the several county superintendents; the number of books in the district libraries; and the value of all apparatus in the schools and such other statistical information as he may deem important. Second, such plans as he may have matured for the more perfect organization and efficiency of common schools. He shall cause one thousand copies of his report to be printed, and shall present it to the general assembly on the second day of its session.

SEC. 1584. [**May appoint teachers' institute: appropriation for.**]—Whenever reasonable assurance shall be given by the county superintendent of any county to the superintendent of public instruction, that not less than twenty teachers desire to assemble for the purpose of holding a teachers' institute in said county, to remain in session not less than six working days, he shall appoint the time and place of said meeting, and give due notice thereof to the county superintendent; and for the purpose of defraying the expenses of said institute there is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, a sum not exceeding fifty dollars annually for one such institute in each county held as aforesaid, which the said superintendent shall immediately transmit to the county superintendent in whose county the institute shall be held, who shall therewith defray the necessary expenses of the institute, and, if any balance remains, he shall pay the same into the county treasury and the same shall be credited to the teachers' fund.

CHAPTER 2.

OF THE STATE UNIVERSITY.

SECTION 1585. [**Objects of: course of study.**]—The objects of the state university, established by the constitution at Iowa City, shall be to provide the best and most efficient means of imparting to young men and women on equal terms, a liberal education and thorough knowledge of the different branches of literature, the arts and sciences, with their varied applications. The university, so far as practicable, shall begin the courses of study in its collegiate and scientific departments, at the points where the same are completed in the high schools; and no

student shall be admitted who has not previously completed the elementary studies, in such branches as are taught in the common schools throughout the state.

The state university is an institution established by the constitution, and its organization provided for, and its existence secured by the statutes. The institution is intended to be an efficient means of promoting intellectual improvement. Per Bæck, J., in *The State v. Sherman*, 46 Iowa, 415, 422.

The state university is not a corporation, but a creature of the legislature, whose property belongs to the state as essentially as does that which is being used for asylums for the insane, the deaf and dumb, the blind, etc. It is not liable to be sued in an action at law. *Weary et al. v. The State University*, 42 Id., 335.

SEC. 1586. [**Control of.**]—The university shall never be under the exclusive control of any religious denomination whatever.

SEC. 1587. (*As amended by ch. 181, 21st g. a.*) [**Governed by board of regents: who composes.**]—(The university shall be governed by a board of regents, consisting of the governor of the state, who shall be president of the board by virtue of his office, the superintendent of public instruction, who shall be a member by virtue of his office, together with one person from each congressional district of the state, who shall be elected by the general assembly.)

SEC. 1588. [**Members classed.**]—The members of said board shall be divided into three classes, consisting of two each. The number in each class, as the congressional districts of the state increase, shall be kept as nearly equal as practicable, and the members in each class shall hold office for the term of six years from their election, and until their successors are elected and qualified. The general assembly shall elect members every two years, as the terms of office of the respective classes expire. The board of regents shall fill all vacancies occurring therein, except when the legislature is in session, and the persons so appointed shall hold their offices until the next session of the general assembly.

SEC. 1589. [**May purchase apparatus, library, etc.**]—The university shall include a collegiate, scientific, normal, law, and such other departments, with such courses of instruction and elective studies as the board of regents may determine; and the board shall have authority to confer such degrees, and grant such diplomas and other marks of distinction as are usually conferred and granted by other universities.

SEC. 1590. [**Meeting of: special: how called.**]—The meetings of the board of regents shall be held at such times as the board may appoint. The president of the board may call special meetings when he deems it expedient, or special meetings may be called by any three members of the board.

SEC. 1591. [**Executive committee appointed: power: duty of.**]—An executive committee, consisting of three competent and responsible persons, shall be appointed by the board of regents, who shall audit all claims, and whose chairman shall draw all orders for such audited claims on the treasurer, but before payment such orders shall be countersigned by the secretary. Said committee shall keep a specific and complete record of all matters involving the expenditure of money, which record shall be submitted to the board of regents at each regular meeting of the same.

SEC. 1592. [**Elect secretary: to keep record of proceedings.**]—The board of regents shall elect a secretary, who shall hold his office at the pleasure of the board. He shall record all the proceedings of the board of regents, and carefully preserve all its books and papers. His books shall exhibit what parts of the university lands have been sold, when the same were sold and at what price, and to whom, on what terms, what portion of the purchase money has been paid, and when paid, on each sale, how much is due on each sale, by whom and how secured, and when payable, what lands remain unsold, where situated, and their appraised value, if appraised, or their estimated value, if not appraised. His books shall also show how the permanent fund of the university has been invested, the

amount of each kind of stocks, if any, with the date thereof and when due, and the interest thereon and when and where payable, the amount of each loan, if any, and when made, and payable to whom, and how secured, and at what rate of interest, and when and where payable. When any further sales of lands, or further instruments shall be made, the secretary shall enter the same upon his books as above set forth. The secretary shall countersign and register all orders for money on the treasurer, and the treasurer shall not pay an order on him for money unless the same be countersigned by the secretary.

SEC. 1593. [Elect treasurer: to give bond: how approved: where filed: duty of.]—The board of regents shall elect a treasurer, who shall hold his office at the pleasure of the board. He shall keep a true and faithful account of all moneys received and paid out by him, and before entering upon the duties of his office he shall take and subscribe an oath that he will faithfully perform the duties of treasurer; and he shall also give a bond in the penalty of not less than fifty thousand dollars, conditioned for the faithful discharge of his duties as treasurer, and that he will at all times keep and render a true account of moneys received by him as such treasurer, and of the disposition he has made of the same, and that he will at all times be ready to discharge himself of the trust, and to pay over when required; which bond shall have two or more good securities, and shall be approved as to its form and the sufficiency of its sureties by the board of regents, and also the auditor and secretary of state, and shall be filed in the office of the latter.

SEC. 1594. [Books of: what accounts kept by treasurer.]—The treasurer of the university shall have a set of books, in which he shall keep an accurate account of all transactions relative to the sale and disposition of university lands, and the management of the funds arising therefrom; which books shall exhibit what parts and portions of the land have been sold, at what prices and to whom, and how the proceeds have been invested, and on what securities, and what lands still remain unsold, where situated, and of what value respectively.

SEC. 1595. [Notify persons in default owing university.]—The treasurer shall, on the first day of June and December of each year, notify in writing each person in default of payment of either principal or interest of funds loaned by or due to the university, and shall cause suit to be commenced against such delinquents, when, in his judgment, the best interest of the institution requires it.

SEC. 1596. The board of regents shall enact laws for the government of the university, and shall appoint a president and the requisite number of professors and tutors, together with such other officers as they may deem expedient, and shall determine the salaries of such officers, the compensation of the secretary and treasurer, and the amount of fees to be paid for tuition. They shall remove any officer connected with the university, when, in their judgment, the good of the institution requires it.

SEC. 1597. [Purchase apparatus, library, etc.]—The board of regents is authorized to expend such portion of the income of the university fund as it may deem expedient, in the purchase of apparatus, library and a cabinet of natural history, in providing suitable means to keep and preserve the same, and in procuring all other necessary facilities for giving instruction.

SEC. 1598. [Cabinet of natural history.]—All specimens of natural history and geological and mineralogical specimens, which are or hereafter may be collected by the state geologist of Iowa, or by any others appointed by the state to investigate its natural history and physical resources, shall belong to and be the property of the state university, and shall form a part of its cabinet of natural history, which shall be under the charge of the professor of that department.

SEC. 1599. [Lands of: how sold and proceeds invested.]—No sales of lands belonging to the university shall hereafter take place unless the same shall have been decided upon at a regular meeting of the board of regents, or at one

called for that particular purpose; and then only in the manner, upon the notice, and on the terms which the board shall prescribe; and no member of the board shall be either directly or indirectly interested in any purchase of such lands upon sale, nor shall the secretary or treasurer be so interested. It shall be lawful for the board to invest any portion of the permanent endowment fund, not otherwise invested, as well as any surplus income which is not immediately required for other purposes, in United States stock, or stocks of the state of Iowa, or by note and mortgage on unencumbered real estate, the value of which, after deducting the value of all perishable improvements thereon, shall be double the amount of the sum loaned, and hold the same for the university, either as a permanent fund, or as an income to defray current expenses, as said board of regents may deem expedient. It shall not be lawful for the board to use any portion of the permanent fund for the ordinary expenses of the institution.

SEC. 1600. [**President to report to regents.**]—The president of the university shall make a report on the fifteenth day of September preceding the meeting of the general assembly, to the board of regents, which shall exhibit the condition and progress of the institution in its several departments, the different courses of study pursued therein, the branches taught, the means and methods of instruction adopted, the number of students, with their names, classes and residences, and such other matters as he may deem proper to communicate.

SEC. 1601. (*As amended by ch. —, 22d g. a.*) [**Regents report to superintendent of public instruction.**]—The board of regents shall, on the first day of October preceding each regular meeting of the general assembly, make a report to the superintendent of public instruction, which report, with that of the president of the university, shall be embodied in the said superintendent's report to the [governor]. The report of the board of regents shall contain the number of professors, tutors and other officers, with the compensation of each, the condition of the university fund, and the income received therefrom, the amount of expenditures and the items thereof, with such other information and recommendations as they may deem expedient to lay before the [governor].

SEC. 1602. [**Compensation of.**]—The regents shall receive no compensation except for mileage in traveling to and from the meetings of the board, which shall be at the same rate, and computed in the same manner, as the mileage allowed to members of the general assembly. The auditor of state is hereby authorized to audit and allow the claims for such attendance, for not more than three meetings annually.

SEC. 1603. [**Member of general assembly not eligible.**]—No member of the general assembly shall be eligible to the office of regent during the term for which he was so elected.

(CHAPTER 76, LAWS OF 1878.)

STATE UNIVERSITY.

An Act for the endowment and support of the state university. (Additional to code, title XII, chapter 2, "Of the state university.")

SECTION 1. [**\$20,000 endowment.**]—*Be it enacted by the general assembly of the state of Iowa:* That there be and is hereby appropriated out of any money in the state treasury, not otherwise appropriated, the sum of twenty thousand (20,000) dollars annually to the state university as an endowment fund for said institution, to be paid in installments of five thousand (5,000) dollars each. The first installment of five thousand (5,000) dollars to be paid on the first

day of July, one thousand eight hundred and seventy-eight (1878) and the same sum quarterly thereafter.

SEC. 2. [**\$10,000 for repairs.**—That there be and is hereby appropriated, in addition to the amounts appropriated in the first section of this act, the sum of ten thousand (10,000) dollars for repairs on the buildings, and for fencing and walks, and for no other purpose. One-half of said amount to be paid on the first day of September, one thousand eight hundred and seventy-eight, and one half on the first day of September, one thousand eight hundred and seventy-nine.

SEC. 3. [**Money to be drawn on order of executive committee.**—The money hereby appropriated shall be drawn from the state treasury by the treasurer of said state university, on the order of the executive committee appointed by the board of regents of said university, countersigned by the secretary thereof under the university seal.

Approved March 22, 1878.

(CHAPTER 115, LAWS OF 1878.)

STATE UNIVERSITY.

An Act to prevent the use of funds of the state university for support of the preparatory department after July 1, 1879.

SECTION 1. [**Funds shall not be used for preparatory department.**—*Be it enacted by the general assembly of the state of Iowa:* That after the first day of July, 1879, no part of the funds belonging to or appropriated for the state university shall be used for the support of the preparatory or non-collegiate course of studies heretofore taught in said university.

Approved March 25, 1878.

(CHAPTER 178, LAWS OF 1886.)

RELATING TO STATE UNIVERSITY LANDS.

An Act to authorize the secretary of state to issue patents to state university lands in certain cases.

SECTION 1. [**Patents to university lands may be issued, where certificate of purchase has been lost.**—*Be it enacted by the general assembly of the state of Iowa:* The secretary of state is hereby authorized to issue patents for lands, the legal title to which is vested in the state university of Iowa, in cases wherein it is shown to the satisfaction of the governor and attorney general that such lands have been in fact sold by the authority of the state and paid for, and that the certificates of purchase have been lost or destroyed.

SEC. 2. [**Patent inures to benefit of original purchaser.**—The patents thus issued shall inure to the benefit of the original purchaser and his granters (grantees) only, and a clause to this effect shall be inserted in the patent.

Approved April 13, 1886.

(CHAPTER 45, LAWS OF 1878.)

ESTABLISHING THE IOWA WEATHER SERVICE.

An Act to establish a central station of the "Iowa weather service," and for the appointment of a director thereof.

SECTION 1. [Central station at Iowa City.]—*Be it enacted by the general assembly of the state of Iowa:* That there be and hereby is established, at Iowa City, a central station for the Iowa weather service, with Gustavus Hinrichs as director thereof; and in case of his death or disability, his successor shall be appointed by the governor.

SEC. 2. [Duties of director.]—The duties of said director shall be to establish volunteer weather stations throughout the state, and supervise the same, to receive reports therefrom, and reduce the same to tabular form, and to report the same quarterly to the state printer, for publication, in the form of the "Iowa weather report."

SEC. 3. [Report to be printed and distributed.]—That the state printer be authorized to print two thousand copies of the said Iowa weather report quarterly, one thousand copies of which shall be for distribution by the said director, and one thousand copies delivered to the secretary of state, to be by him distributed in the same manner as other state documents.

SEC. 4. [\$1,000 appropriated annually.]—That there is hereby appropriated the sum of one thousand dollars annually, or so much thereof as may be necessary, for the purpose of meeting the actual expenses in carrying out the provisions of this measure, but no part of said sum shall be used in payment of salaries to any officer or officers, except for clerk hire, and only upon the order of the said director.

(Took effect by publication in newspapers March 20, 1878.)

CHAPTER 3.

OF THE STATE AGRICULTURAL COLLEGE AND FARM.

SECTION 1604. (As amended by ch. 76, 20th g. a.) [Controlled by board of trustees—one from each congressional district.]—The lands, rights, powers, and privileges granted to and conferred upon the state of Iowa by the act of congress entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July 2, 1862, are hereby accepted by the state of Iowa, upon the terms, conditions, and restrictions contained in said act, and there is hereby established an agricultural college and model farm, to be connected with the entire agricultural and mechanical interests of the state; the said college and farm to be under the control and management of a board [of trustees consisting of one person from each congressional district of the state. But the present board of trustees shall continue as members of the board of trustees from their several congressional districts until their terms of office expire.]

SEC. 1605. (As amended by ch. 76, 20th g. a.) [Election and term of trustees.]—[That of the members of said board representing the different congressional districts there shall be elected by this general assembly one to serve two years, four to serve four years, and three to serve six years from the first day of

May, A. D. 1884, and as the term of office of the members of the board expire, the general assembly shall elect their successors, whose term of office shall be six years. The board of trustees shall fill all vacancies occurring therein, except when the legislature is in session, and the persons so appointed shall hold their office until the next session of the general assembly after such appointment; but neither the president nor any other officer or employe of the college and farm, nor any member of the general assembly shall be eligible as trustees.]

SEC. 1606. [**The board of trustee shall have power:**]

1. To elect a chairman from their own number, a president of the college and farm, a secretary, a treasurer, professors and other teachers, superintendents of departments, a steward, a librarian, and such other officers as may be required for the transaction of the business of the board; also to fix the salaries of officers and prescribe their duties; and to appoint substitutes who shall discharge the duties of such officers during their temporary absence;

2. **To manage and control** all the property of the college and farm, whether real or personal;

3. **To make rules and regulations** for the government of the college and farm;

4. (*As amended by ch. 119, 16th g. a.*) **To establish rules** regulating the number of hours which shall be devoted to manual labor, and to fix the compensation therefor; *provided*, no student shall be exempt from labor except in cases of sickness or other infirmity, or where students from the advanced classes may be employed as teachers;

5. **To arrange courses** of study and practice, and to establish such professorships as they may deem best to carry into effect the provisions of this chapter; also to prescribe conditions of admission to the college;

6. **To grant diplomas**, on the recommendation of the faculty, to any student who has completed either of the industrial courses prescribed by said board, or an equivalent thereof;

7. **To remove any officer** by a majority vote of all the members of the board of trustees;

8. **To direct the expenditure** of all appropriations which the general assembly shall from time to time make to said college and farm, and the income arising from the congressional grant, and from all other sources;

9. **To keep a full and complete record** of their proceedings, and to do such other acts as are found necessary to carry out the intent and meaning of this chapter.

SEC. 1607. [**Quorum.**]—A majority of the trustees shall be a quorum for the transaction of business.

SEC. 1608. (*As amended by ch. 7, 15th g. a.*) [**Compensation.**]—The trustees shall receive as their compensation five dollars a day for each and every day actually employed in the discharge of their duties, and five cents per mile for each and every mile actually traveled on such business; *provided*, that no member shall receive compensation for more than thirty days in each year, (to be audited by the state auditor.)

SEC. 1609. **The annual meetings** of the board of trustees shall be held at the agricultural college on the second Wednesday of November.

SEC. 1610. (*As amended by § 9, ch. 159, 16th g. a.*) [**College year: report of trustees to governor.**]—The college year shall begin on Thursday after the second Wednesday in November of each year, and end on the second Wednesday of November of the following year. The biennial report of the board of trustees shall be filed in the office of the governor, not later than the first day of December preceding the regular meeting of the general assembly.

SEC. 1611. [**Power and duty of president.**]—The president of the college and farm shall control, manage and direct the affairs of the college and farm herein established, subject to such rules as may be prescribed by the board of trustees, and shall report to said board at their annual meeting in November, and at such other times as they shall direct, all his acts as such president, and the condition of the several departments of the college and farm, together with his recommendations for the future management thereof.

SEC. 1612. [**Of secretary.**]—The secretary shall keep the documents and a record of the proceedings of the board of trustees, and conduct their official correspondence. All acts of the board of trustees as to the management, disposition, or use of the lands, funds, or other property of the institution shall be entered in the record of its proceedings, and said record shall show how each member voted on each proposition. He shall also make the biennial report of the board to the general assembly. Upon the election of any person to an office under said board, he shall give notice thereof to the secretary of state. He shall also keep an account with the treasurer, charging him with all money paid to him from any source, and crediting him with the amounts paid out by him upon the order of the board of audit, which account shall be balanced monthly.

SEC. 1613. [**President and secretary compose board of audit.**]—The president and secretary shall constitute a board of audit, who shall, under the rules of the board of trustees, examine all bills presented for payment, and no bills shall be paid without their joint indorsement thereon; *provided*, that no bill shall be so audited for whose payment the board of trustees has not made appropriation; also, the board of audit shall examine the treasurer's books and vouchers monthly, and at such other times and so often as they shall deem necessary. All the proceedings as contemplated in this section shall be reported by the secretary to the board of trustees at each meeting thereof.

SEC. 1614. [**Treasurer to have custody of money, notes, and contracts.**]—The treasurer shall receive and keep all notes and other evidence of indebtedness, contracts, and all moneys arising from the income of the congressional grant, from the appropriations of the general assembly, from the sales of the products of the farm, from the payments of students, and from all other sources, and shall pay out the same upon bills duly audited as above prescribed, and he shall retain such bills with the receipt for their payment as his vouchers; but no bill shall be paid for which appropriation had not been made by the board of trustees. He shall keep an accurate account of the revenue and expenditures of said college and farm from all sources, and in such manner that the receipts and disbursements of each and every one of the several departments thereof shall be apparent at all times, and the gains and losses in such department shall be carefully set forth; and he shall report to the board of trustees at their annual meeting in November, and at such other times as they shall direct. He shall also execute duplicate receipts of all money received by him, specifying the source from which received, and the fund to which it belongs, one of which must be filed with the secretary, and no receipt for money paid him shall be valid unless the duplicate is so filed. The treasurer shall be elected annually, and give a bond every year in double the highest amount of money likely to be in his hands at any one time, with such sureties as the executive council shall prescribe, and said bond shall be filed in the office of the secretary of state, and the treasurer may appoint a deputy who shall reside at the college, and the board of trustees shall fix the compensation to be paid to such deputy, and the treasurer shall be responsible on his official bond for all acts done by such deputy.

SEC. 1615. [**President and secretary: oath of treasurer.**]—The president and secretary shall have their respective offices at the college, and they, with the

treasurer, shall take and subscribe the oath provided in section one hundred and twenty-six, chapter nine, title two of this code.

(SEC. 1616. Repealed by chapter 71, laws of 1874.)

SEC. 1617. (*As substituted by ch. 91, 16th g. a.*) [**Money arising from sales paid to state treasurer and invested.**]—[The money arising from the sale of said lands shall be paid into the state treasury, and shall be invested by the state treasurer subject to the approval of the executive council, in stocks of the United States, or of the states, or some other safe stocks, yielding not less than five per centum per annum on the par value of said stocks as directed by the act of congress granting said lands, and the money arising from the interest on said stocks, on the deferred payments, and on the leases of said lands, as rental thereof, shall be paid over to the board of trustees, and may be loaned by said board of trustees on good and sufficient security when not needed to defray such expenses of the college as said moneys are legally applicable to.]

SEC. 1618. [**Agents appointed: to give bond.**]—The trustees are hereby endowed with all the necessary authority to appoint agents, or do any other acts necessary to carry out the provisions of the three preceding sections. But no such agent shall be appointed with authority to receive any money until he has executed a good and sufficient bond to be approved by the trustees in a sum double the amount he will be likely to receive. And every such agent shall make a monthly statement under oath to the college treasurer of the amount received by him, and transmit therewith all funds shown to be in his hands.

SEC. 1619. [**Tuition free: prior right of counties.**]—Tuition in the college herein established shall be forever free to pupils from this state over sixteen years of age, who have been residents of the state six months previous to their admission. Each county in this state shall have a prior right to tuition for three scholars from such county, the remainder equal to the capacity of the college shall be by the trustees distributed among the counties in proportion to the population, subject to the above rule. Transient scholars otherwise qualified may at all times receive tuition.

SEC. 1620. [**Sale of liquors or wine and beer prohibited.**]—No person shall open, maintain or conduct any shop or other place for the sale of wine, beer or spirituous liquors, or sell the same at any place within a distance of three miles from the agricultural college and farm; *provided*, that the same may be sold for sacramental, mechanical, medical or culinary purposes; and any person violating the provisions of this section shall be punished, on conviction by any court of competent jurisdiction, by a fine not exceeding fifty dollars for each offense, or by imprisonment in the county jail for a term not exceeding thirty days, or by both such fine and imprisonment.

SEC. 1621. (*As amended by ch. 27, 20th g. a.*) [**Branches of study.**]—[That there shall be adopted and taught at the state agricultural college a broad, liberal and practical course of study in which the leading branches of learning shall relate to agriculture and the mechanic arts, and which shall also embrace such other branches of learning as will most practically and liberally educate the agricultural and industrial classes in the several pursuits and professions of life, including military tactics.]

SEC. 1622. [**Money cannot be diverted from appropriate fund.**]—No money shall be diverted from the fund to which it belongs, or used for any purpose other than is provided by law, and any trustee, officer or employe of said institution who may, by vote, direction or act, violate the provisions of this section, shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the penitentiary or county jail not less than six months.

(CHAPTER 72. LAWS OF 1884.)

TO PROVIDE FOR DISPOSING OF AGRICULTURAL COLLEGE LANDS.

An Act to provide for selling, leasing, and patenting the lands belonging to the Iowa state agricultural college and farm. [Amends chapter 117, acts 10th general assembly, and repeals chapter 71, acts 15th general assembly.]

SECTION 1. [**Trustees authorized to sell.**]*—Be it enacted by the general assembly of the state of Iowa:* That the trustees of the Iowa state agricultural college and farm be, and they are hereby, authorized to sell the lands granted to the state of Iowa by an act of congress entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and mechanic arts," approved July 2, 1862. Such sales shall be for cash, or upon a partial credit not exceeding ten years, at such appraised value as shall be fixed by said trustees. All deferred payments shall draw interest at the rate of eight per cent per annum, payable annually in advance.

[**Failure to pay interest for sixty days a forfeiture.**]*—Upon a failure to pay the annual interest or principal within sixty days after it becomes due and within sixty days after notice thereof in writing, by mail or otherwise, from the trustees or land agent of said college to the holder of the lease shall have been given, the purchaser shall forfeit all claim to said land and the improvements made thereon, and all sums paid on said contract, unless in the opinion of the trustees an extension should be allowed.*

SEC. 2. [**Trustees may lease for ten years at 8 per cent.**]*—Said trustees are also authorized to lease the said lands for a term not exceeding ten years, at an annual rent equal to eight per cent per annum upon the appraised value of the tract, payable annually in advance, and the said lessee, his heirs or assigns, shall have the privilege of purchasing said tract of land at the expiration of the lease at the appraised value stated in the lease. The lessee failing to pay the annual interest upon said lease within sixty days after the same becomes due and within sixty days after notice thereof in writing, by mail or otherwise, from the trustees or land agent of said college to the holders of the lease shall have been given, shall forfeit his lease, together with the interest thereon, and improvements made on said lands.*

SEC. 3. [**Trustees may cause purchase price to be reviewed.**]*—The said trustees are authorized at their option to cause to be reviewed [reviewed] the purchase price of the land so sold or leased, or which has been heretofore sold or leased, before the same becomes due, upon such terms and conditions of payment as said trustees may deem for the best interest of the institution.*

[**May renew leases: subject to taxation.**]*—Said trustees may also renew leases as they expire, and when so renewed the leasehold estate shall be subject to taxation as provided in chapter one hundred and sixty-nine of the acts of the nineteenth general assembly, entitled "An act to provide for taxation of leasehold estates in agricultural college lands," approved March 25, 1882.*

SEC. 4. [**All leases assignable.**]*—Leases heretofore issued by said trustees under the authority of former acts of the general assembly of this state, and all renewals of such leases, shall be deemed assignable, and all transfers of such leases or renewals heretofore made shall be valid, and the owner, whether holding one or more than one such lease or renewal, who has made the annual payments therein required, shall be entitled to all the benefits of such contract or contracts, and shall have the privilege of purchasing the tract or tracts of land so held by him as provided in the lease, and upon payment of the purchase money shall be entitled to a patent for the land described in said lease or leases.*

SEC. 5. [**Lands acquired by purchase, subject to same conditions.**]—The said trustees be and they are hereby authorized in like manner to sell or lease the lands belonging to the said Iowa agricultural college acquired by purchase with accumulated interest fund.

SEC. 6. [**President and secretary to issue certificate to purchaser.**] Whenever a sale shall be made of any of said lands as hereinbefore provided, the president of the said agricultural college shall issue to the purchaser a certificate, countersigned by the secretary of said board, stating the fact of purchase, the name of the purchaser, description of land and the appraised value thereof. Upon payment of such purchase price to the treasurer of state the purchaser or his assigns shall be entitled to a patent or patents for such tract or tracts of land. And upon presentation of such certificate to the secretary of state, with the receipt of the treasurer of state showing full payment of the purchase money and stating the amount thereof, said secretary of state shall issue to the purchaser, or his assignee, patent or patents for the tract or tracts of land therein described, which patents shall be signed by the governor and secretary of state, as other patents or deeds for lands conveyed by the state, and shall vest in the purchaser all the right, title and interest of the state and of said college in and to the lands therein described.

SEC. 7. [**Treasurer of state to hold funds.**]—The principal of all moneys collected under the provisions of this act shall be paid to and held by the treasurer of state, and shall be drawn out for the purpose of investment on the order of the board of trustees, only when required to complete a loan. The interest collected shall be paid to the treasurer of the college upon the order of the board of trustees.

SEC. 8. [**Repeal.**]—Chapter seventy-one of the acts of the fifteenth general assembly, entitled "An act to regulate the leasing of the lands belonging to the Iowa state agricultural college," approved March 19, 1874, and all acts and parts of acts conflicting with this act be and the same are hereby repealed.

(Took effect by publication in newspapers April 2, 1884.)

(CHAPTER 7, LAWS OF 1874.)

COMPENSATION OF TRUSTEES OF AGRICULTURAL COLLEGE.

An Act to pay the board of trustees of the Iowa state agricultural college and farm. [Amendatory of chapter 3, title XII, of the code.]

SECTION 1. [**Aditor to audit pay of trustees.**]—*Be it enacted by the general assembly of the state of Iowa:* That the auditor of state is hereby authorized to audit and allow the claims of the board of trustees from and after the first day of September, 1873, in accordance with section 1608 of the code of 1873.

(Took effect by publication in newspapers, March 9, 1874.)

(CHAPTER 169, LAWS OF 1882.)

TAXATION OF AGRICULTURAL COLLEGE LEASEHOLDS.

SECTION 1. [**Leasehold interest taxable.**]—*Be it enacted by the general assembly of the state of Iowa:* That in all cases where leases of lands executed by the trustees of the agricultural college have been or shall hereafter be renewed ten years after the date of the original lease has expired, the interest in such lands of the lessee, his heirs, or assigns, shall be subject to assessment and taxation as real property. The value of such interest shall be ascertained by deducting from the value of such lands and the improvements thereon the amount required to be paid by the terms of the lease to acquire the title thereto. Such leasehold interest shall

be assessed, taxed, and sold for delinquent taxes, and redemption from such sale be made or tax-deed be issued, in all respects like other real estate, save as herein otherwise provided, with the same rights, liabilities, and effect, and the treasurer's tax-deed shall operate as a full and complete assignment of said leasehold interest to the grantee named in such deed.

SEC. 2. [Holder of certificate may pay interest and principal.]—At any time after such leasehold interest shall have been sold for delinquent taxes the holder of the certificate of purchase may pay any interest or principal due by the terms of the lease, or do any other act necessary to prevent a forfeiture of such lease by the terms thereof, and the proper voucher for such payment shall be filed with the auditor of the county where the land is situated. No redemption from a sale of such land shall be allowed until the amounts paid by the holder of the certificate of sale by virtue of this act, together with interest thereon at eight per cent per annum from the dates of payment, shall be paid to the auditor, with all other amounts required by law to complete such redemption, to be by him paid to the holder of such certificate, and the certificate of redemption shall show the amounts paid by the party redeeming on account of such lease.

SEC. 3. [Tax purchaser may buy lands according to lease.]—Where any leasehold interest has been sold for delinquent taxes and a treasurer's deed issued thereon, the grantee in such deed named, his heirs, or assigns, shall be entitled to purchase the land conveyed by such deed at the price and on the terms specified in the lease therefor then in force, and to receive a patent therefor. In case such lease shall expire before the holder of the certificate of sale shall be entitled to a treasurer's deed, such holder may pay the amount required by the terms of such lease to acquire the title in fee of said land, and receive a conveyance of the same, and after such conveyance is made no redemption from the tax sale of the land thereby conveyed shall be allowed.

SEC. 4. [Evidence of tax purchaser's right.]—The right of the tax sale purchaser or his assigns to pay any amount due by virtue of any lease shall be evidenced by a copy of the certificate of sale, or treasurer's deed as the case may be, duly certified by the officer, or officers, executing the same, and in case no tax deed has been issued the auditor of the proper county shall further certify that redemption from the tax sale has not been made; such copy and certificate shall be filed with the secretary of the board of trustees and become a part of the records of his office.

SEC. 5. [Board to certify to county auditor lists of lands held under renewed leases.]—The board of trustees shall cause to be certified to the auditor of each county in which leased college lands are situated, on or before the first day of April, A. D. 1882, and on or before the fifth day of January of each year thereafter, a list of such lands held under renewed leases, together with name of each lessee thereof, the date and terms of each lease, the amounts to be paid thereunder, and the dates when such amounts will become due. Each auditor of a county in which such lands are situated shall deliver to the assessor of each township which contains any of said lands, on or before the first day of April, A. D. 1882, and on or before the fifteenth day of January for each year thereafter, a list of such land situated in such township, together with a statement showing the lessee of each tract and the amounts to be paid by virtue of the lease thereon, and the dates of payment.

SEC. 6. [Leaseholds not to be taxed for past years.]—Nothing in this act shall be so construed as to authorize the taxation of any leasehold interest under and by virtue of this act for any year prior to 1882.

SEC. 7. [Repealing clause.]—All acts and parts of acts, so far as they conflict with this act, are hereby repealed.

(Took effect March 29, 1882.)

(CHAPTER 193, LAWS OF 1884.)

ENDOWMENT FUND OF THE AGRICULTURAL COLLEGE.

An Act to provide for the investment of the endowment fund of the Iowa state agricultural college and farm. [Amendatory of code, chapter 3, title XII.]

SECTION 1. [Management and investment of endowment fund vested in trustees.]—*Be it enacted by the general assembly of the state of Iowa:* That the board of trustees of the Iowa state agricultural college and farm, be, and they are hereby charged and intrusted with the management and investment of the endowment fund of said college, derived from the sale of the lands granted to the state of Iowa by an act of congress entitled, "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and mechanic arts," approved July 2, 1862. Such investment may be in stocks of the United States, or of the states, or some other safe stocks yielding not less than five per centum of the par value of said stocks, as provided by act of congress granting said lands.

[Approved by executive council.]—Before the purchase of any such stocks shall be made the proposed investment shall be submitted to and approved by the state executive council.

SEC. 2. [Funds: how loaned.]—Said board of trustees are also authorized to loan said fund upon approved real estate security in accordance with the following rules and regulations:

First—Each loan shall be for a term not exceeding ten years, at a rate of interest to be fixed by said board not exceeding ten per centum, and not less than six per cent per annum, payable annually.

Second—Each loan shall be secured by a mortgage paramount to all other liens upon improved farm lands in the state of Iowa, and shall not exceed forty per cent of the cash value of the mortgaged premises, exclusive of buildings.

Third—Principal and interest shall be payable to the order of said board at the office of the state treasurer at Des Moines, Iowa, and the notes and mortgages shall provide for the payment, by the borrower, of all expenses, attorneys' fees and costs, which shall be incurred in collecting the principal and interest of such loans, or any part thereof, by reason of the default of such borrower.

Fourth—A register containing a complete abstract of such loan, and showing its actual condition shall be kept by the secretary of said board, and shall be at all times open to inspection. The attorney-general, under the direction of the executive council, shall prepare all blanks, forms and instructions necessary to carry into effect the provisions of this section, and to keep the funds loaned as herein provided secure and unimpaired.

SEC. 3. (As amended by ch. 58, 22d g. a.) Trustees authorized to appoint a financial agent.]—That for the purpose of carrying into effect the provisions of this act, the said trustees are authorized to appoint a financial agent to receive applications and negotiate loans in accordance with the conditions herein contained. [And to take charge of the foreclosure of the mortgages and collection of bonds from delinquent debtors to said fund, when so directed by the said trustees.] The trustees shall require any agent appointed under this act, before entering upon the discharge of his duties, to give bond with approved sureties in a penal sum to be determined by said board of trustees, which shall be at least double the amount of funds liable to come into his hands at any time, and shall be for the use and benefit of said Iowa state agricultural college and farm, and actions for breach of the conditions hereof may be brought in the name of said board of

trustees. The appointment of such agent, and the bond given by him, shall be subject to approval by the state executive council. Such agent shall hold his office during the pleasure of the board of trustees.

SEC. 4. [Duty of the secretary.]—The secretary of the board of trustees shall semi-annually report to the executive council, and to the board of trustees at every meeting, all loans made under this act, giving a description of the security taken and the value thereof, the name of the borrower, length of time, and amount of loan and rate of interest.

SEC. 5. [Foreclosure of mortgages.]—Foreclosure of mortgages taken under this act may be made in the name of the board of trustees of the Iowa state agricultural college and farm, and in case of sale on execution under such foreclosure the mortgaged premises may be bid off in the name of the state of Iowa, and if deed therefor be made, said premises shall be held by the state in trust for the benefit of said agricultural college. Such land shall be subject to lease or sale the same as other land belonging to the college.

SEC. 6. [Compensation of agent.]—The agent provided for by section three of this act shall receive compensation to be fixed by said board of trustees at a rate not exceeding the sum of two thousand dollars per annum, and all necessary expenses while necessarily away from his office, in the discharge of his official duties, to be paid as other officers, out of the treasury of the state.

SEC. 7. [Money to be paid into state treasury and principal kept by treasurer of state.]—Moneys collected from delinquents shall be paid at once into the state treasury. The principal of the fund shall be kept by the treasurer of state and shall be drawn out for the purpose of investment as hereinbefore provided upon the order of the board of trustees, subject to such restrictions as may be imposed by the attorney-general and the state executive council.

[Monthly report of treasurer.]—The treasurer of state shall make monthly reports to the secretary of the board of trustees, showing all payments of principal and interest, and shall remit to the treasurer of the college all interest then in his hands, as shown by such reports.

SEC. 8. [Repealing clause.]—All acts and parts of acts conflicting with the provisions of this act are hereby repealed.

(CHAPTER 58, LAWS OF 1888.)

An act to amend chapter 193 of laws of the twentieth general assembly, in relation to the management and investment of the endowment fund of the Iowa agricultural college.

SECTION 1. (Amendment of ch. 193, 20th g. a.)—*Be it enacted by the general assembly of the state of Iowa:* That section 3, of chapter 193, laws of the twentieth general assembly of Iowa, be and the same is hereby amended by inserting after the word "contained," in the fourth line of said section as the same is printed in the session acts of said twentieth general assembly, the following: "And to take charge of the foreclosure of the mortgages and collection of bonds from delinquent debtors to said fund when so directed by the said trustees."

SEC. 2. [Bond of financial agent.]—It shall be the duty of said trustees, upon the passage of this act, to require the said financial agent to execute an additional bond in such sums as shall be fixed by the trustees, conditioned for the faithful performance of the additional duties herein required, and for the payment into the state treasury of all sums of money which shall come into his hands belonging to such endowment fund. And when any such agent shall hereafter

be appointed by said trustees, his bond as required by said section three shall cover all the duties provided in said original section and in this act.

Approved April 12, 1888.

(Took effect by publication in newspapers, April 18, 1888.)

(CHAPTER 155, LAWS OF 1886.)

ESTABLISHING FISH HATCHERY AT SPIRIT LAKE.

An Act to locate the state fish hatching house at Spirit Lake, and sell the property heretofore used for a fish hatchery in Jones county, to abolish the office of assistant fish commissioner, and to appropriate money for the purposes of this act.

SECTION 1. [Hatchery in Jones county transferred to Spirit Lake.]—*Be it enacted by the general assembly of the state of Iowa:* The state fish hatchery now located in Jones county, Iowa, is hereby transferred and located at Spirit Lake, in Dickinson county, Iowa, and the state shall hereafter keep and maintain but the one hatchery located in Dickinson county.

SEC. 2. [Commissioner authorized to purchase land for same.]—The fish commissioner is hereby authorized to purchase, on behalf of the state, the necessary land, at an expense to the state not to exceed one dollar, upon which the state fish hatching house shall be located, and to take a deed of said land in the name of the state of Iowa, and have the same recorded in the proper office for the record of such deed.

SEC. 3. [Time when hatchery shall be removed.]—The fish commissioner shall, as soon as practicable, and not later than the first day of September, 1886, remove all fish and movable property belonging to the state now at said hatching house in Jones county, to Spirit Lake, and shall proceed as soon as possible to make the necessary improvements and preparations for said fish hatching house at Spirit Lake.

SEC. 4. [Property in Jones county to be sold.]—The fish commissioner is hereby directed, with the approval of the executive council, to sell the real estate and such other property as cannot be profitably removed, now located in Jones county, as soon as the same can be sold for the best interest of the state. Said sale may be either public or private, as shall be deemed best. The proceeds of said property, or so much thereof as may be necessary, shall be expended in purchasing and improving the grounds for the hatchery at Spirit Lake. There is hereby appropriated out of any money in the treasury not otherwise appropriated, for the purpose of this act, the sum of two thousand dollars, one thousand dollars of which may be drawn prior to June, 1887, and the balance prior to June, 1888.

SEC. 5. [Wherever the law in regard to the propagation of fish now in force refers to the hatching house at Anamosa the same shall be deemed hereafter to refer so far as applicable to the hatching house at Spirit Lake.]—

SEC. 6. [Office of assistant fish commissioner abolished.]—The office of assistant fish commissioner is hereby abolished.

SEC. 7. The fish commissioner shall hereafter have his office and headquarters at Spirit Lake, Dickinson county, Iowa.

Approved April 10, 1886.

(CHAPTER 129, LAWS OF 1876.)

STATE NORMAL SCHOOL.

An Act to establish and maintain a school for the instruction and training of teachers of common schools.

SECTION 1. [**Where established.**]*—Be it enacted by the general assembly of the state of Iowa:* That a school for the special instruction and training of teachers for the common schools of this state is hereby established at Cedar Falls, in Black Hawk county.

SEC. 2. (*As amended by ch. 64, 22d g. a.*) [**How managed.**]*—*The school shall be under the management and control of a board of directors consisting of six members, no two of whom shall be from the same county. [And the superintendent of public instruction shall be *ex-officio* a member of said board and president thereof.] [The board of directors] shall be elected by the general assembly, two for two years, two for four years and two for six years, and the general assembly shall elect two members of said board every two years, for the full term of six years as the terms of office of the respective classes expire. Their term of office shall commence on the first day of June following their election. No member of the board shall be a teacher in the school or receive other compensation for his services than a reimbursement of his actual expenses to be certified to by him and paid out of the state treasury. Any vacancy occurring in the board shall be filled by the appointment of the governor.

SEC. 3. [**Board shall convene and organize.**]*—*The board shall convene at the call of the superintendent of public instruction on or before June 15, 1876, and having each qualified according to law, shall organize by the election of a vice-president from their member, (number) and a secretare and a treasurer who shall be persons not *numbers* (members) of the board. The secretary shall receive such compensation as may be fixed by the board not to exceed the sum of one hundred dollars and actual traveling expenses. The treasurer shall receive no compensation, but shall receive reimbursement of actual expenditures.

SEC. 4. [**Treasurer.**]*—*The board shall require a bond in the sum of twenty thousand dollars of the treasurer with proper and sufficient sureties, conditional for the safe-keeping of funds coming into his hands. He shall receive and disburse all moneys hereby appropriated, and any other funds as the board may provide. The board may require of any other officer or employe who may be authorized to receive or pay out money a like bond.

SEC. 5. [**Duties of board.**]*—*It shall be the duty of the board, in every necessary manner with the means at their disposal, to provide for and carry out the object for which the school is established. For that purpose they shall employ competent and suitable teachers, and other employes. They shall direct, use and control all the property of the state coming into their hands for that purpose. They shall control and direct the expenditure of all moneys. They shall make all necessary rules for the management of the school and the government thereof, and shall provide for the admission of pupils from the several counties of the state in proportion to their respective population and upon the appointment of respective boards of supervisors, or as the board may direct. They shall establish and publish uniform rules for the admission of pupils thereto, and such rules shall provide for equal rights in said school to all the teachers in the state, but they shall require in all cases satisfactory evidence of the good character of the pupil. They shall also further require all pupils upon their admission to the school to sign a statement of their intention in good faith to follow the business of teaching in the schools

of the state. It shall also be the duty of the board to make all possible and necessary arrangements with the means at their disposal for the boarding and lodging of pupils, but the pupils shall pay the cost of the same. They shall require each pupil to pay a fee for contingent expenses amounting to not more than one dollar per month. The school shall be opened during such part of the year as the board shall determine, but the sessions shall continue at least twenty-six weeks.

SEC. 6. [**To take buildings used as soldiers' orphans' home.**—At the close of the year, and on or before the first day of July, 1876, it shall be the duty of the board of trustees of the Iowa soldiers' orphans' home, to deliver over to the board of directors provided for herein, the buildings and grounds at Cedar Falls, Iowa, now occupied by said home, transferring for the purpose the inmates of said home to the home at Davenport. They shall also at the same time turn over in like manner all the personal property at said home at Cedar Falls, except such as is necessary for and adapted to the personal use of such inmates at Davenport, and a careful inventory and appraisal thereof shall be made, and a proper voucher given therefor by said board of directors.

SEC. 7. [**Board may make changes in same.**—The board of directors shall at once proceed to make such improvements and changes in said buildings and grounds as may be necessary to *adopt* [adapt] the same to the use of said school, but without greater expense to the state than is provided for in this act, and shall, on or before September 10, 1876, open the same to the use and instruction of pupils.

SEC. 8. [**\$14,500 appropriated.**—In addition to the property the use of which is hereby set apart for the purposes of the school, the following sums are hereby appropriated for the establishment and maintenance thereof:

For necessary improvement and repairs, three thousand dollars.

For salaries of teachers and employes, ten thousand dollars.

For contingent expenses, fifteen hundred dollars:

The amount appropriated for repairs and improvements may be paid at any time, on the order of the board; the remaining sums shall be paid in equal quarterly payments, commencing September 1, 1876.

SEC. 9. (*As amended by ch. 64, 22d g. a.*) [**Board to report to superintendent of public instruction.**—The said board shall make, at the end of each school year, to the [governor], a detailed report of their proceedings during the year. Their report shall also contain the number of teachers employed in the school, with the compensation of each, the number of pupils, classified; the amount of receipts and expenditures and the items thereof, with such other information and recommendations as they may deem expedient, which report shall be embodied in the superintendent's report to the general assembly.

(Took effect by publication in newspapers, March 29, 1876.)

CHAPTER 4.

OF THE SOLDIERS' ORPHANS' HOMES.

SECTION 1623. (*As amended by ch. 74, 22d g. a.*) [**Trustees: how appointed.**—The board of trustees of the Iowa soldiers' orphans' home [and home for destitute children, shall consist of three persons, one of whom shall be a woman, one of whom shall be a resident of Scott county, and no two of whom shall be residents of the same congressional district. The twenty-third general assembly shall appoint one of the said trustees to serve for two years, one for four years and one for six years, and each general assembly thereafter shall appoint one trustee for said home to serve for a period of six years.]

SEC. 1624. [**Make rules and manage affairs of.**—Said board shall govern and manage said homes, and shall have power to enact laws and rules for the regulation of all their concerns, and power also to alter the same from time to time as shall seem to them proper; and shall also have full power to carry on and manage all the affairs in said homes; *provided*, that the county recorder of the county in which each home is located shall act in connection with the resident trustee in making quarterly settlements with the orphans' home superintendents, for which service he shall be allowed three dollars per day, to be audited and drawn in the same manner with the mileage of trustees.

SEC. 1625. [**Members of general assembly.**—No member of the general assembly shall be eligible to the office of trustee during the term for which he was elected.

SEC. 1626. The members of said board shall each receive the same mileage, going to and returning therefrom, as members of the general assembly.

SEC. 1627. [**Oath of.**—Said trustees shall, before entering upon the discharge of their duties, take and subscribe an oath or affirmation to support the constitution of the United States and of this state, and also faithfully to discharge the duties required of them by law, and the by-laws that may be established.

SEC. 1628. [**Superintendents to give bond.**—The board of trustees of the soldiers' orphans' homes shall require the respective superintendents of the soldiers' orphans' homes to give a good and sufficient bond with sureties thereto for the faithful performance of their respective duties.

SEC. 1629. [**President, secretary, treasurer: bonds.**—Said board shall have all the power of reception, transmission and succession which belongs to an incorporation, and shall choose a president, treasurer and secretary from their own body, and determine the bonds to be given.

SEC. 1630. [**Appropriation for.**—For the support of the several orphans' homes, there is appropriated out of any money in the state treasury not otherwise appropriated the sum of ten dollars per month for each orphan actually supported, counting the average number sustained in the several homes for the month, and upon the presentation to the auditor of state each month of a sworn statement of the average number of orphan children supported by the institution for the preceding month, the auditor shall draw his warrant upon the treasurer of state in favor of the treasurer of the board of trustees of the Iowa soldiers' orphans' homes for the sum hereinbefore provided.

SEC. 1631. [**Expenses.**—The expenses of the transmission of orphans to the homes, and of the board and management, shall be paid out of the fund so provided.

SEC. 1632. (*As amended by ch. 82, 22d g. a.*) [**Report to general assembly.**—The board of trustees shall make a full and minute report of all the disbursements of the homes, and of their condition, financial and otherwise. (biennially to the governor).

SEC. 1633. [**Enumeration of orphans.**—In the enumeration of persons between the ages of five and twenty-one years, as provided by section seventeen hundred and forty-four of chapter nine of this title, the orphans at the several homes shall in no case be enumerated in the school district in which such homes are located, except in cases where the mother, guardian, or other person having the legal charge or control of such child, other than the officers of the home, shall reside in such district.

SEC. 1634. [**Adoption of children: trustees to approve.**—Any child in either of the orphans' homes may, with the consent of the parents or guardian of such child, be adopted by any citizen of this state, but no article of adoption shall be of any force or validity until approved by the board of trustees, nor shall any child so adopted be removed from the home until articles of adoption are so approved. The board of trustees shall have power to discharge from the homes

all children who are of proper age, or have sufficient means to provide for themselves, or whose mothers have sufficient means and are competent to take care of them. Any child adopted from either of the homes shall be returned to the home from which it was taken upon the order of the board of trustees, and the board shall make such order whenever they are satisfied that such child is not properly trained, educated, and provided for by the person by whom it was adopted. Such order shall be entered on the minutes of the proceedings of the board of trustees, and shall discharge and cancel the articles of adoption.

SEC. 1635. [Assessor to enumerate children of deceased soldiers.]—The assessor of each ward and township, when he is making assessment for each term of two years, shall take an enumeration of all the children of deceased soldiers who were in the military service of the government of the United States from his ward or township, naming the company, regiment, battery, battalion, or organization to which the deceased soldiers belonged, and make accurate returns to the board of supervisors of his county, designating the name, age, and sex of the children belonging to the family of the deceased, for which the assessor shall receive the same compensation as for other services.

SEC. 1636. [Supervisors to revise.]—The board of supervisors shall revise said enumeration list of orphans from time to time, by adding thereto or striking therefrom as they may deem proper.

SEC. 1637. [Auditor to furnish blanks.]—The county auditor shall furnish to the assessors of the several townships in his county, such blanks as may be necessary for taking the aforesaid enumeration.

SEC. 1638. [Orphan fund: control of.]—The board of supervisors of the several counties shall have control of the county orphan funds, and shall use the same for the maintenance and education of the orphans aforesaid, in such a manner and in such sums as the exigencies of the case may demand, and for no other purpose.

SEC. 1639. [Provided by tax.]—The board of supervisors may levy a tax, not to exceed one-half mill on the dollar in any one year, on all the taxable property in their county, provided that there are any such orphans in their county needing such aid, and shall apply said fund in such manner as hereinbefore directed.

SEC. 1640. [Supervisors to see children are cared for.]—If the children of the deceased soldiers aforesaid have no natural or other guardian, or are neglected, the board of supervisors may appoint some suitable person in the township, who shall see that said children are cared for according to the spirit and intent of this chapter.

SEC. 1641. [Soldiers' county orphan fund.]—The funds raised under the provisions of section sixteen hundred and thirty-nine shall be called the soldiers' county orphan fund, and shall be levied, collected, and paid out in the same manner as other county funds.

SEC. 1642. [Orphans may attend homes.]—The provisions regarding this county tax shall not be so construed as to prevent the orphans, or any number thereof, from their respective counties, to attend any orphans' home in this state.

(CHAPTER 94, LAWS OF 1876.)

SOLDIERS' ORPHANS' HOMES.

An Act to enlarge the powers of the trustees of the soldiers' orphans' homes, and provide for other indigent children of the state, and make provision for industrial pursuits therein. (Additional to code, chapter 4, title XII, "Of the soldiers' orphans' homes.")

SECTION 1. [Who may be admitted: not restricted to soldiers' orphans.]
—Be it enacted by the general assembly of the state of Iowa: That the board of trustees of the soldiers' orphans' home may receive into the care and privileges of the said home at Davenport, such destitute children as should, in their judgment, properly be admitted into said institution; *provided*, that the destitute children referred to in this act shall in all cases have a legal settlement in this state; and *provided further*, that the soldiers' orphans now at the other Iowa soldiers' orphans' homes shall be received at this institution and properly provided for before other children shall be received into this institution.

SEC. 2. (As substituted by ch. 111, 21st g. a.) [Application for admission: how made.]—(Applications for admission of such children may be made to any court of record, or to any judge thereof, or to the board of supervisors of the county wherein the children to be admitted reside.)

SEC. 3. [Government.]—That all children admitted to the said home under the provisions of this act, shall from and after the date of their reception be subject to all the rules and regulations therein in force; and the trustees of said home shall have all the control over and all the powers and rights of disposal of said children as are now or may be by law given them, in respect to the orphans of soldiers.

SEC. 4. [Trustees to determine who shall be admitted.]—That the propriety of admitting any child, under the provisions of this act, into the said home, shall be determined by the trustees of said institution. They may refuse to admit any child, who from any cause is deemed to be inadmissible.

SEC. 5. [Payment for support.]—That payment to the said home, for the support and maintenance of children admitted as herein provided, and expenses of transmission of children to said home, shall be made by the state auditor, at the same time and in the same manner as is now, or may be, provided by law for the maintenance of soldiers' orphans.

SEC. 6. [Board of supervisors shall provide.]—The board of supervisors of the county from which such children are received into said home shall make provisions for the payment, from any funds of the county not otherwise appropriated, for the amounts due monthly for the support of said children, and expenses of their transmission to said home, which amounts shall be paid to the state auditor at the same time that the state taxes are paid.

SEC. 7. [Employment.]—The trustees shall provide for the regular employment of all children received into the home, in some useful industrial pursuit, in order to enable them to support themselves after their discharge from the home, and shall also provide for each child the means of obtaining a common school education while such children remain inmates of the home. And any profits arising from any such labor shall go into the general support of the home, and shall be accounted for by the managers.

SEC. 8. In cases of neglect or refusal of the board of supervisors of any county in the state to make the necessary levy for the support of children sent from said county, then, and in that case, the state board of equalization is hereby authorized and empowered to make the levy for such delinquent county or counties.

SEC. 9. [Removal of orphans from other homes to Davenport.]—*And be it further enacted:* That the soldiers' orphans now at the other state homes shall be removed to the Davenport home within ninety days after the taking effect of this act.

SEC. 10. [Amendment.]—Section 1623 of the code is hereby amended by striking out from the second and third lines thereof, the words "one person from each of the counties in which the said homes are located, and one from the state

at large," and by inserting in lieu thereof the words "three persons from the state at large."

Approved March 15, 1876.

(CHAPTER 165, LAWS OF 1884.)

PUBLISHING NAMES OF EX-SOLDIERS AND MARINES.

An Act to provide for the publication of names of ex-soldiers, sailors and marines residing in Iowa.

SECTION 1. [**Assessor shall make list of persons who served in army or navy.**]*—Be it enacted by the general assembly of the state of Iowa:* The assessor in each township shall make and deliver to the county auditor of their respective counties at the time of making their annual assessment in the year of 1885, a corrected list of all persons who served in the United States army, navy, or marine corps during the war of 1812, the Mexican war, and the war of the rebellion, designating the rank, company, regiment, battery, or vessel in which they served, and their present residence, town and county, which several lists shall be returned with the assessor's books to the county auditor, who shall on or before the first day of June, 1885, certify to the adjutant-general a true copy of said lists alphabetically arranged.

SEC. 2. [**Adjutant-general shall publish said lists: distribution.**]*—*The adjutant-general on receipt of said lists from the county auditors, shall proceed to consolidate said lists alphabetically, and publish three thousand copies in book form as a roster of the ex-soldiers, sailors, and marines now residents of Iowa, three copies of which shall be furnished each post of the grand army of the republic in the state of Iowa, one hundred copies to the state library for exchange with other libraries, one copy to the office of each county auditor in the state, the remaining books to be retained by the adjutant-general for distribution.

SEC. 3. [**Appropriation.**]*—*There is hereby appropriated the sum of two thousand dollars, or so much thereof as may be necessary for the purposes named in this act, and all warrants against said appropriation shall be drawn by the auditor of state upon the state treasurer upon the certificate of the adjutant-general.

Approved April 5, 1884.

(CHAPTER 58, LAWS OF 1886.)

ESTABLISH SOLDIERS' HOME.

An Act to establish and maintain a soldiers' home in the state of Iowa, and making an appropriation for the purchase of land and the construction or purchase of necessary buildings.

SECTION 1. [**Soldiers' home established.**]*—Be it enacted by the general assembly of the state of Iowa:* That there be and is hereby created and established in this state an institution to be known as the "Iowa Soldiers' Home," and that the sum of seventy-five thousand dollars, or so much thereof as is necessary, be and is hereby appropriated, out of any money in the treasury not otherwise appropriated, for the purchase and preparation of grounds and for the erection and completion or purchase of suitable buildings and fixtures thereon, and furnishing and equipping the same; and the further sum of twenty-five thousand dollars, or so much thereof as may be necessary, for the purpose of maintaining such soldiers' home for the year 1887; *provided, however,* that it shall not be lawful for the board of

managers hereinafter created to draw upon the sum hereby appropriated an amount exceeding seventy-five thousand dollars in the year 1886, and the sum of twenty-five thousand dollars in the year 1887.

SEC. 2. [**Applicants must have resided in the state three years, or have served in Iowa regiment.**]-The object of the "Iowa Soldiers' Home" shall be to provide a home and subsistence for all honorably discharged soldiers, sailors and marines who have served in the army or navy of the United States and who are disabled by disease, wounds or otherwise; *provided*, that no applicant shall be admitted to said home who has not been a resident of the state of Iowa for three years next preceding his application for admission therein unless he served in an Iowa regiment or was accredited to the state of Iowa. The board of commissioners shall determine the eligibility of applicants for admission to said home as herein provided.

SEC. 3. (*As substituted by ch. 129, 21st g. a.*) [**Governor shall appoint a commission to locate home.**]-[Said home shall be located by a commission to be appointed by the governor, to consist of one member from each congressional district, no more than seven of whom shall belong to the same political party, and no one of whom shall be a resident of any county in which is located any locality that is a candidate for the location of said home, nor a resident of any county in which is situated any other state institution. The appointment of commissioners shall be made within five days from the approval of this act, and on the third Tuesday thereafter said commissioners shall assemble at the capitol in Des Moines for the purpose of locating said home, and, after having first taken the oath of office prescribed by statute, shall organize by selecting from their number a chairman and secretary, and a correct record of all proceedings, and all votes cast shall be kept and certified by said chairman and secretary to the governor. Said commissioners shall take into consideration only the localities which have made propositions to the general assembly under concurrent resolution relating thereto, and all propositions, bonds, petitions and papers relating to said home and now in possession of the twenty-first general assembly or the soldiers' home or military committees thereof, shall be deposited with the secretary of state and by him turned over to the commissioners for their information, and no other or additional propositions shall be considered or received. Said commissioners, if deemed best, may hear representatives of the different localities that are candidates for the location of the home, but not later than seven days from the assembling of said commissioners as prescribed, said commissioners shall determine by vote the location for the soldiers' home, and balloting shall continue till a majority of all votes cast are cast for one locality, *provided*, a majority decision is reached by the twentieth ballot; otherwise, the place receiving the lowest number, or places receiving the lowest and an equal number of votes upon the twenty-first ballot, shall be dropped on the next succeeding ballot, provided if two or more of the places having the lowest number have an equal number of votes, then the commission shall vote to decide which shall be dropped, and not more than one place shall be dropped until another ballot is taken, and this same provision shall obtain in the succeeding ballots, and balloting shall continue under this provision until some one place shall receive a majority of the votes of all the commissioners, which place shall be declared the location for said home and so certified to the governor as provided for in this section, whereupon the commission shall dissolve. Said commissioners while in the actual discharge of their duty under this act shall receive as compensation \$5.00 per day and actual expenses each, and ten cents per mile for the actual number of miles traveled in reaching the capital. Anything in said chapter 58 in conflict with this section is hereby repealed.]

SEC. 4. [**Government: number of commissioners appointed by governor.**]-The general supervision and government of said soldier's home shall

be vested in a board of commissioners, to consist of six members, who shall be appointed by the governor, by and with the consent of the senate, immediately after the taking effect of this act, not more than four of whom shall belong to the same political party, and no two of whom shall be from the same congressional district, and no member of the general assembly shall be eligible to the office, but all shall be ex-union soldiers. The members of the board shall hold their office for the respective terms of two, four, and six years, from the first day of May, eighteen hundred and eighty-six, and until their successors shall be appointed and qualified, said respective terms of office to be determined by lot, and thereafter there shall be two members of said board appointed every two years during the session of the general assembly, whose term of office shall continue for six years from the first day of May next ensuing, or until their successors are appointed and qualified. The governor shall call a meeting of said board for the purpose of organization, within thirty days after the first appointments are made. No compensation shall be allowed any member of the board of commissioners other than president, treasurer, and secretary, save their actual expenses; *provided, however*, that a building committee may be appointed from the members of said board, consisting of not more than two persons, whose duty it shall be to visit and inspect the buildings at least once in two weeks during their period of construction, and who may receive in addition to their actual expenses the sum of five dollars for each day so actually employed. *Provided, however*, that no member of said building committee shall receive compensation for more than ten days' service in any month. In case of a vacancy in the board of commissioners by death or any other cause, the appointing power provided for shall have power to fill the vacancy for the unexpired portion of the term. Four members of the board shall constitute a quorum for the transaction of business; *provided*, that for the adoption of plans and the letting of contracts for buildings and the selection of a commandant for said home, the affirmative vote of a majority of the entire board shall be required.

SEC. 5. [**Board to qualify and give bond.**—Before entering upon his duties each member of the board of commissioners shall take and sign an oath and execute a bond in the penal sum of ten thousand dollars for the use of the state of Iowa, to be approved by the executive council and filed in the office of the secretary of state, conditioned for the faithful performance of his duties and the honest and faithful disbursement of and accounting for all moneys which may come into his hands under the provisions of this act. The said board having first taken the oath prescribed for the trustees of state institutions, is hereby empowered and required to cause to be prepared suitable plans and specifications by a competent architect, but no plans shall be adopted which shall not first have been approved by the governor. Such plans shall contemplate the erection of a home which shall accommodate not less than one hundred and fifty nor more than three hundred inmates, and shall be accompanied by specifications, and by a detailed estimate of the amount, quality and description of all material and labor required for the entire and full completion of the buildings, and no plan shall be adopted that contemplates the expenditure of more money for its completion than the amount appropriated by this general assembly added to any donations received by the state for the erection of the home.

SEC. 6. [**Architect or superintendent.**—That the said board of commissioners may at their discretion employ a competent architect or superintendent of construction, who may, in the discretion of said board, be the same person, and who shall receive such compensation as the board shall, by agreement, determine.

SEC. 7. [**Bids advertised for.**—Whenever the said plans and specifications shall have been approved and adopted, the commissioners shall cause to be inserted in the Iowa State Register and Des Moines Leader, newspapers published in the city of Des Moines, Iowa, an advertisement for sealed bids for the construc-

tion of the buildings herein authorized, and they shall furnish a printed copy of this act and of the specifications to all parties applying therefor, and all parties interested who may desire it shall have free and full access to the plans and specifications with the privilege of taking notes and making memoranda.

SEC. 8. [**Bids opened in 30 days.**]—Not less than thirty days after the publication of said proposals for bids, on a day and hour to be named in said advertisement at the place where said institution shall be located in the presence of the bidders, or so many of them as may be present, the bids received shall be opened for the first time, and the contract for building shall be let to the lowest and best bidder; *provided*, that should the commissioners deem it for the interest of the state they reject any and all bids and advertise again, and also provided, that no contract shall be made, and no expense incurred for any building or buildings, requiring for the completion of the same and fixtures thereon and furnishing and equipping the same, a greater expense than is provided for in the appropriation made in this act, added to any donations received by the state for the erection of the home. And *provided further*, that no bid shall be accepted which is not accompanied by a good and sufficient bond in the sum of ten thousand dollars, signed by at least three good and sufficient sureties who shall be resident free-holders of the state of Iowa conditioned as a guarantee for the responsibility and good faith of the bidder, and that he will enter into a contract and give bond as provided in this act in case his bid is accepted.

SEC. 9. [**Contract bond: architect or superintendent.**]—The contract to be made with the successful bidder shall be accompanied by a good and sufficient bond, to be approved by the governor before being accepted, conditioned for the faithful performance of his contract, shall provide for the appointment of an architect or a superintendent of construction, who shall receive not more than five dollars per day for his services, and who shall carefully and accurately measure the work done, and the materials upon the ground, at least once a month; for the payment of the contractor upon the aforesaid measurement, and for the withholding of twenty per cent of the value of the work done and materials on hand until the completion of the buildings. And for a forfeiture of a stipulated sum per diem for every day that the completion of the work shall be delayed after the time specified for the completion of the contract, and for the full protection of all persons who may furnish labor or materials by withholding payment from the contractor and by paying the parties to whom any moneys are due for service or materials, as aforesaid, directly for all work done or materials furnished by them; and for a settlement of all disputed questions as to the value of alterations and extras by arbitration, at the time of final settlement, as follows: one arbitrator to be chosen by the commissioners, one by the contractor, and one by the governor of the state, and all three of said arbitrators to be practical mechanics and builders. And said contract shall provide for the power and privilege of the commissioners to order changes in the plans and specifications at their discretion, and to refuse to accept any work which may be done not fully in accordance with the letter and spirit of the plans and specifications; and all work not accepted shall be replaced at the expense of the contractor, and be deducted from the contract price. They may also make such other provisions and conditions in the said contract not hereinabove specified as may seem to them necessary or expedient; *provided*, that no conditions shall be inserted contrary to the letter and spirit of this act, and that in no event shall the state be liable for a greater amount of money than is appropriated for said buildings and appurtenances.

SEC. 10. [**Contract signed.**]—The said contract shall be signed by the president of the board of commissioners in behalf of the board, after a vote authorizing him so to sign shall have been entered upon the minutes of the board, and it shall be attested by the signature of the secretary of the board and by the seal of the

institution hereinafter provided for. It shall be drawn in triplicate, and one copy of the same shall be deposited in the office of the secretary of state.

SEC. 11. [**Bids to show cost.**]—All bids shall show the estimated cost of the work to be done of each description in detail; and the commissioners shall have the right and power at their discretion to accept bids for particular portions of the work, if for the advantage of the state, and all measurements and accounts as the work progresses shall show in detail the amount and character of the work for which payment is made.

SEC. 12. [**Location and grounds.**]—The cost of location, including the cost of suitable grounds, may be paid out of the appropriations herein made, but shall not exceed the sum of ten thousand dollars. *Provided*, that should the land be purchased with suitable buildings erected thereon, the same shall not exceed the sum of fifty thousand dollars, and in that case the parts of this act which refer to erections of buildings shall not apply.

SEC. 13. [**Moneys, how payable.**]—The moneys herein appropriated shall be paid to the parties to whom they may become due and payable, directly from the treasurer of state, on the warrant of the auditor of state, and the auditor is hereby authorized and required to draw the said warrants for money due under this act, upon the order of the board of commissioners, accompanied by vouchers approved by the governor in the usual manner, and the board is authorized to advance and pay on contracts, before the same are fully completed, not exceeding eighty per cent on the estimates of material delivered or labor performed. All other moneys appropriated by this act shall be drawn quarterly on the requisition of the board of commissioners, in the usual manner, and then only in such amounts as the wants of the institution may require.

SEC. 14. [**Interest of commissioners.**]—No commissioner or officer of the said institution shall be in any way interested in any contract for the erection or purchase of said buildings, or furnishing any materials for said buildings, and if any such commissioner or officer shall be so interested he shall be deemed guilty of a misdemeanor, and on conviction be fined in any sum not exceeding five thousand dollars.

SEC. 15. [**Meetings of board, annual.**]—It shall be the duty of the board of commissioners to meet annually on the second Wednesday in May of each year, and at said annual meeting they shall elect from their own body a president, treasurer and secretary, whose compensation shall be determined by the board, and who shall hold office for one year, or until their successor shall be elected and qualified. The treasurer shall give a bond, which shall be approved by the executive council, for double the amount of money liable to come into his hands at any one time. The board of commissioners shall meet at least once in three months, on the second Wednesday in August, November and February, and oftener if they deem it advisable, and shall have the power to adopt a seal and make rules and regulations, not inconsistent with the laws and constitution of the state, for the management and government of said home, including such rules as they may deem necessary for the preserving of order, enforcing discipline and preserving the health of its inmates. If necessary, for the purpose of procuring a better insight into the practical working of similar homes, and for the better information of the board, they may authorize not more than three of their number to visit similar institutions now in operation, that they may have the benefit of their personal observation and investigation, and the expense actually incurred in any such visit may be charged against the appropriation hereinbefore made. The board of commissioners shall make full and minute report of all the disbursements of the home, and of its condition, financial and otherwise, to each regular session of the general assembly.

SEC. 16. [**Commandant: appointment.**]—The board of commissioners shall have the power and it shall be their duty to appoint a commandant for said home, who shall serve as such during the pleasure of the board of commissioners, and who shall be one who has been honorably discharged from the military or naval service of the United States, whose salary shall not exceed twelve hundred dollars per annum, and who shall nominate for the action of the board of commissioners, all necessary subordinate officers, who shall also be persons who have been honorably discharged from the military or naval service of the United States, who may be removed by said commandant for inefficiency or misconduct; but in case of every removal a detailed statement of the cause shall be reported to the board of commissioners by the commandant. The board of commissioners shall have the power to fix the salary of all subordinate officers; *provided*, the amount so paid shall not exceed such reasonable compensation as is paid for like service in similar institutions.

SEC. 17. Every contract and duty required by this act to be acted upon by the board of commissioners must receive the approval of the majority of the board in regular session duly called, in order to make the same binding and valid; that all the proceedings of said board shall be recorded in a book and open to the inspection of anybody on request.

Approved March 31, 1886.

(CHAPTER 62, LAWS OF 1886.)

SOLDIERS' MONUMENTS AND MEMORIAL HALLS.

An Act to repeal chapter 162 of the acts of the twentieth general assembly, and to enact a substitute therefor, in relation to soldiers' monuments and memorial halls, and providing for levying a tax therefor.

SECTION 1. (*Chapter 162, acts 20th g. a., repealed.*) [**Tax may be voted, of one mill for monuments and memorials.**] *Be it enacted by the general assembly of the state of Iowa:* That a tax, not to exceed one mill on the dollar on the assessed valuation of any county, may be voted for the purpose of erecting monuments and memorial halls on which or in which shall be included the names of all deceased soldiers and sailors, and all who may hereafter die, who enlisted or entered the service from the county where such appropriations may be made, and also the names of such other deceased soldiers as the grand army posts of said county shall direct, as hereinafter provided.

SEC. 2. [**Board of supervisors to submit upon petition to a vote.**]—Whenever a petition shall be presented to the board of supervisors of any county in this state, signed by a majority of the members of the grand army posts in said county, asking said board of supervisors to submit to the legally qualified voters of said county, at the next general election after said petition shall have been presented, the question of aiding in the erection of a soldiers' and sailors' monument or memorial hall, as provided in section one of this act. At such election the question of taxation shall be submitted; the form of the ballot shall be "for taxation" and "against taxation," and if a majority of the ballots polled be for taxation, then the board of supervisors of said county at the time of levying the ordinary taxes, next succeeding said election, shall levy such tax as is voted under the provisions of this act, the same to be placed upon the tax lists of said county and collected as other taxes.

SEC. 3. [**Taxes, how drawn and expended.**]—The taxes, when collected by the county treasurer, shall be drawn and expended for the erection of such soldiers' and sailors' monuments or memorial halls under the direction of a committee of

three to be selected by a majority of all the members of the grand army posts in the county where such tax is voted, and the county auditor shall draw his warrants upon the treasurer for said money at the times and in the amounts as may be directed by said committee, and shall charge it with the same, and the committee shall settle and account with the board of supervisors for all money so drawn in the same manner as is now or may hereafter be provided by law for the settlement of the accounts of township clerks; *provided*, that this act shall not be held to apply to any county which has before the passage of this act made an appropriation for the erection of a soldiers' monument under the provisions of said chapter 162 of the acts of the twentieth general assembly.

SEC. 4. That chapter 162 of the acts of the twentieth general assembly be and the same is hereby repealed.

Approved April 1, 1886.

(CHAPTER 105, LAWS OF 1888.)

An Act to provide for the relief of union soldiers, sailors and marines and the indigent wives, widows and minor children of indigent or deceased union soldiers, sailors and marines.

SECTION 1. [**Relief tax to be levied.**]*—Be it enacted by the general assembly of the state of Iowa:* That the board of supervisors of the several counties of this state are hereby authorized to levy, in addition to the taxes now levied by law, a tax not exceeding three-tenths of one mill upon the taxable property of their respective counties, to be levied and collected as now provided by law for the assessment and collection of taxes, for the purpose of creating a fund for the relief and for funeral expenses of honorably discharged union soldiers, sailors and marines, and the indigent wives, widows and minor children not over fourteen years of age in boys and not over sixteen years of age in case of girls, of such indigent or deceased union soldiers, sailors or marines, having a legal residence in said county, to be disbursed as hereinafter provided.

SEC. 2. [**Soldiers' relief commission created.**]*—*The board of supervisors in each county of this state shall on or before the first Monday of September, 1888, appoint three persons, who are residents of such county, at least two of whom shall be honorably discharged union soldiers, one to serve three years, one to serve two years, one to serve one year from date of appointment, and each year thereafter one person to serve for three years, such persons so appointed, when organized by the selection of one of their number as chairman, and one as secretary, shall be designated and known as "the soldier's relief commission." The members of said commission shall be qualified by taking the usual oath of office and shall each give bonds in the sum of five hundred dollars for the faithful performance of their duties. In the event of a vacancy in said commission occurring from any cause, the board of supervisors shall fill the vacancy for the unexpired term.

SEC. 3. [**Meetings and duties of commission.**]*—*The soldiers' relief commission shall meet at the county auditor's office on the first Monday in September of each year, and at such other times as is deemed necessary, and shall examine and determine who are entitled to relief under the provisions of this act, and shall make lists of such persons, and at the September meeting such commission after determining the probable amount necessary for the purpose provided herein, shall certify the amount to the board of supervisors, and the board of supervisors of each county, at its September meeting each year, shall make such levies as shall be necessary to raise the required relief fund, not exceeding three-tenths of a mill on the taxable property of such county. The soldier's relief commission shall fix the amount to be paid in each case, the aggregate not to exceed the

levy of said tax for any one year, and shall certify the lists to the county auditor. The auditor shall, within twenty days thereafter, transmit to the township clerks in his county, a list of the names of the persons in the respective townships to whom relief has been awarded, and the amount thereof. The auditor, on the first Monday of each month after said fund is ready for distribution shall issue his warrant to the soldier's relief commission, upon the county treasurer, for the several amounts awarded. Such commission shall disburse the same to the person or persons named in the lists, taking receipts therefor; or such fund may be disbursed in any other manner directed by the commission; *provided, however*, that when said commission is satisfied that any person entitled to relief under this act will not properly expend the amount allowed, the commission may pay the amount to some suitable person who shall expend the same for such person in such manner as the commission may direct; *and provided further*, that said commission, at any meeting, may decrease, increase or discontinue any amount before awarded, and may add new names to the list, which shall be certified to the county auditor. The soldier's relief commission shall, at the end of each year, make to the board of supervisors a detailed report of the transactions of such commission; such report shall be accompanied with vouchers for all moneys disbursed.

SEC. 4. [Commissioners may be removed.]—The board of supervisors may at any time remove any member of the commission for neglect of duty or maladministration and appoint others in the place of members thus removed.

Approved March 31, 1888.

CHAPTER 5.

OF THE STATE INDUSTRIAL SCHOOL.

SECTION 1643. (*As amended by ch. 153, 20th g. a.*) [An industrial] school shall be permanently located at Eldora, in Hardin county, and maintained for the reformation of such boys and girls under the age of [sixteen] years who may be committed to it as hereinafter provided.

SEC. 1644. [Trustees: appointment of.]—There shall be a board of trustees, whose name and style shall be, "The board of trustees of the Iowa [industrial] school," and it shall consist of five persons, who shall be appointed by the general assembly, no two of whom shall be taken from the same congressional district, and who shall hold office for the term of six years each and until their successors are appointed and qualified. All vacancies in said board shall be filled by appointment by the governor of the state. No member of the general assembly shall be hereafter chosen a trustee of the [industrial] school, and no appointment shall be made till the number of trustees is reduced to five.

SEC. 1645. Said trustees shall, before entering upon the discharge of their duties, take and subscribe an oath or affirmation to support the constitution of the United States and of this state, and faithfully discharge the duties required of them by law.

SEC. 1646. [Compensation of.]—The members of said board shall receive no compensation except the same mileage going to and returning from the place of meeting as members of the general assembly, computed for the actual distance from their residence to the place of meeting; *provided*, that while employed in superintending the erection of buildings for said school they shall receive the sum of three dollars per day and their actual traveling expenses, the amount due each trustee to be certified by the president and secretary of the board.

SEC. 1647. [**Officers chosen by trustees: rules: bond of treasurer.**—Said board of trustees shall, from their board, appoint a president, secretary, and treasurer, and shall take charge of the general interests of the institution; shall have power to enact by-laws and rules for the regulation of all its concerns not inconsistent with the constitution and laws of this state; to see that its affairs are conducted in accordance with the requirements of law, and that strict discipline is maintained therein; to provide employment and instruction for the inmates; to appoint a superintendent, a steward, a teacher or teachers, and such other officers as in their judgment the wants of the institution may require, and prescribe their duties; to exercise a vigilant supervision over the institution, its officers and inmates; to remove such officers at their pleasure and appoint others in their stead, and determine the salaries to be paid to the officers; and shall also require the treasurer to execute a bond to the state of Iowa in a sufficient amount to be approved by the executive council and filed in the office of the secretary of state.

SEC. 1648. [**Pupils taught: trustees to prescribe.**—They shall cause the boys and girls under their charge to be instructed in piety and morality, and in such branches of useful knowledge as are adapted to their age and capacity, and in some regular course of labor, either mechanical, manufacturing, or agricultural, as is best suited to their age, strength, disposition and capacity, and as may seem best adapted to secure the reformation and future benefit of the boys and girls.

SEC. 1649. [**Pupils bound out with consent of parents or guardians.**—The trustees, with the consent in writing of their parents or guardians, as the case may be, or in case they have no parents or guardians, may bind out boys and girls committed to the school until they attain their majority, or for any less time, stipulating in the indentures for the needful amount of education, and from time to time, as the rightful guardians of the boys and girls, ascertain whether the duties and obligations of the person to whom the boy or girl is bound are faithfully performed, and if not, cancel the indenture and receive the boy or girl into the school again.

SEC. 1650. (*As amended by ch. 82, 22d g. a.*) [**School visited: report of trustees and superintendent.**—When there shall be twenty or more boys and girls in the school, one or more of the trustees shall visit the school once in every month and examine the boys and girls in their school room and labor, and inspect the register and accounts of the superintendent. A record shall be kept of these visits in the books of the superintendent. Once in each year, or oftener if the trustees think it necessary, they shall examine the school in all its departments, including the accounts, vouchers and documents of the superintendent, and prepare a report on the condition of the institution on the first Monday in [July] next preceding the meeting of the general assembly, which, together with a full report of the superintendent, and a list of the officers and their salaries, with an estimate of the value of the personal property of the state in connection with the school, shall be laid before the general assembly.

SEC. 1651. [**Superintendent and officers of: duties defined.**—The superintendent, with such subordinate officers as the trustees may appoint, shall have the charge and custody of the boys and girls; he shall discipline, govern, instruct, employ, and use his best endeavors to reform the inmates in such manner as, while preserving their health, will secure the promotion, as far as possible, of moral, religious, and industrious habits, and regular, thorough progress and improvement in their studies, trades, and employment.

SEC. 1652. [**Superintendent to give bond, etc.**—He shall, before entering upon his duties, give a bond to the state, with sureties, the amount and sureties to be satisfactory to the board of trustees, conditioned that he shall faithfully perform all his duties, and account for all money received by him as superintendent, which bond shall be filed in the office of the secretary of state; he shall have charge

of all the property of the institution within the precincts thereof; he shall keep in suitable books complete accounts of all his receipts and expenditures, and of all property intrusted to him, showing the income and expenses of the institution, and in such manner as the trustees may require, for all money received by him. His books and documents relating to the school shall, at all times, be open to the inspection of the trustees. He shall keep a register containing the name, age and circumstances connected with the early history of each boy and girl, and shall add such facts as shall come to his knowledge relating to his or her history while at the institution, and after leaving it.

SEC. 1653. (*As amended by sec. 2, ch. 38, 16th g. a.*) [**When convicted of crime: may be sent to school by the court.**]-When a boy or girl under the age of (sixteen) years, shall, in any court of record, be found guilty of any crime, excepting murder, the said court may, if in its opinion the accused is a proper subject therefor, instead of entering judgment, cause an order to be entered that said boy or girl be sent to the state (industrial) school pursuant to the provisions of this chapter, and a copy of said order, duly certified by the clerk, under the seal of said court, shall be a sufficient warrant for carrying said boy or girl to the school, and for his or her commitment to the custody of the superintendent thereof.

SEC. 1654. (*As amended by sec. 4, ch. 38, 16th g. a.*) [**Proceedings when convicted.**]-When a boy or girl under the age of (sixteen) shall be convicted before a justice of the peace or other inferior court of any crime, or of being a disorderly person, it shall be lawful for the magistrate before whom he or she may be convicted, to forthwith send such boy or girl, together with all the papers filed in his office on the subject, under the control of some officer to a judge of a court of record, who shall then issue an order to the parent or guardian of said boy or girl, or such person as may have him or her in charge, or with whom he or she has last resided, or one known to be nearly related to him or her, if he or she be alone and friendless, then to such person as said judge may appoint to act as guardian for the purposes of the case, requiring him or her to appear at a time and place stated in said order, to show cause why said boy or girl should not be committed to the reform school for reformation and instruction. (But no boy or girl shall ever be committed to the Iowa reform school in any case, who is under the age of seven years, or who is not of sound mind.)

SEC. 1655. [**Order: how served: compensation of officer.**]-Said order shall be served by the sheriff or other officer, by delivering a copy thereof, personally, to the party to whom it is addressed, or leaving it with some person of full age at the place of residence or business of said party, and immediate return shall be made to the said judge of the time and manner of such service. The fees of the sheriff or other officer under this chapter, shall be the same as now allowed by law for like services.

For conveying a convict to the reform school, the sheriff is entitled to the same fees as for conveying a convict to the penitentiary, which is sixteen cents per mile of travel, as his full compensation therefor. *Bringolf v. Polk County*, 41 Iowa, 554.

SEC 1656. [**Hearing: commitment.**]-At the time and place mentioned in said order, or at the time and place to which it may be adjourned, if the parent or guardian to whom said order may be addressed shall appear, then in his or her presence, or if he or she shall fail to appear, then in the presence of some suitable person whom the said judge shall appoint as guardian for the purposes of the case, it shall and may be lawful for the said judge to proceed to take the voluntary examination of said boy or girl, and to hear the statements of the party appearing for him or her, and such testimony in relation to the case as may be produced, and if upon such examination and hearing the said judge shall be satisfied that the boy or girl is a fit subject for the state reform school, he may commit him or her to said school by warrant.

SEC. 1657. [**Warrant: contents of.**]-The judge shall certify in the warrant the place in which the boy or girl resided at the time of his or her arrest, also his or her age, as near as can be ascertained, and command the said officer to take the said boy or girl and deliver him or her, without delay, to the superintendent of said school, or other person in charge thereof, at the place where the same is established; and such certificate, for the purpose of this chapter, shall be conclusive evidence of his or her residence or age. Accompanying this warrant, the judge shall transmit to the superintendent by the officer executing it a statement of the nature of the complaint, together with such other particulars concerning the boy or girl as the judge is able to ascertain.

SEC. 1658. [**Appeal.**]-If the judge is of the opinion that the boy or girl is not a fit subject for the school, or if said boy or girl shall appeal from the decision of the court in which the conviction was had, he shall remand him or her to the custody of the officer who had him or her in charge, to be returned to the magistrate before whom the conviction was had, to be dealt with according to law.

SEC. 1659. (*As amended by ch. 150, 19th g. a.*) [**Complaint by parent of guardian: proceedings.**]-If any parent or guardian shall make complaint to a judge of a court of record, that any boy or girl, the child or ward of such parent or guardian, is habitually vagrant or disorderly, or incorrigible, it shall and may be lawful for said judge to issue a warrant to have the sheriff or constable to cause said boy or girl to be brought before him at such time and place as he may appoint, when and where said judge shall examine the parties, and if in his judgment the boy or girl is a fit subject for the reform school he may issue an order, with the consent of said parent or guardian indorsed thereon, to be executed by a sheriff or constable, committing said boy or girl to the custody of the superintendent of said school for reformation and instruction till he shall attain the age of [twenty-one years]; *provided*, that security for the payment of said complaint, commitment, and of carrying said boy or girl to the reform school, and the expenses of board at such school, may, in the discretion of said judge, be required of said parent or guardian.

SEC. 1660. (*As amended by ch. 150, 19th g. a.*) [**Majority: discharge.**]-No boy or girl shall be committed to said [industrial] school for a longer term than until he or she attain the age of [twenty-one years,] but the said trustees by their order may, at any time after one year's service, discharge a boy or girl from said school as a reward of good conduct in the school and upon satisfactory evidence of reformation.

SEC. 1661. [**Pupils retained: effect of binding out.**]-Any boy or girl committed to the state [industrial] school shall be there kept, disciplined, instructed, employed and governed, under the direction of the trustees, until he or she arrives at the age of [twenty-one years,] or is bound out, reformed or legally discharged: The binding out or discharge of a boy or girl as reformed, or having arrived at the age of [twenty-one years,] shall be a complete release from all penalties incurred by conviction of the offense for which he or she was committed.

SEC. 1662. [**Unruly or incorrigible pupil.**]-If any boy or girl, convicted of a felony, committed to the [industrial] school, shall prove unruly or incorrigible, or if his or her presence shall be manifestly and persistently dangerous to the welfare of the school, the trustees shall have power to order his or her removal to the county from which he or she came and delivery to the jailor of the said county, and proceedings against him or her shall be resumed as if no warrant or order committing him or her to the reform school had been made.

SEC. 1663. [**Punishment for aiding pupil to escape.**] Every person who unlawfully aids or assists any boy or girl lawfully committed to the [industrial] school in escaping, or attempting to escape therefrom, or knowingly conceals such

boy or girl after his or her escape, shall be punished by fine not exceeding one thousand dollars, and imprisonment in the penitentiary not exceeding five years.

(CHAPTER 153, LAWS OF 1884.)

CHANGING NAME OF REFORM TO INDUSTRIAL SCHOOL.

An Act to change the name of the reform schools to industrial schools. [Amendment to code, chapter 5, title XII.]

SECTION. 1. [Name of reform schools changed to industrial schools.]—*Be it enacted by the general assembly of the state of Iowa:* That the reform schools of this state shall be hereafter known as industrial schools instead of reform schools and the trustees of said schools shall be known as the board of trustees of the industrial schools.

Approved April 5, 1884.

(Under authority conferred by chapter 171, laws of 1880, the state executive council purchased for the use and occupancy of the girls department of the industrial school, the building, furniture and grounds of the "Mitchell seminary," located at Mitchellville, Iowa, where such department of the industrial school has been established and remains.)

CHAPTER 6.

COLLEGE FOR THE BLIND.

SEC. 1664. [Trustees of: who compose: how chosen.]—There shall be maintained at Vinton, in the county of Benton, a college for the blind, under the supervision of a board of trustees consisting of six persons who shall be chosen by the general assembly as their present or future terms of office expire, and hold their offices for four years from the date of each appointment.

SEC. 1665. No member of the general assembly shall hereafter be chosen a trustee of the college for the blind.

SEC. 1666. [Supervisors: power of trustees:]—The trustees shall have the general supervision of the institution, adopt rules for the government thereof, provided teachers, servants, and necessaries for the institution, and perform all other acts necessary to render the institution efficient and to carry out the purposes of its establishment.

SEC. 1667. [Quorum.]—Three of said trustees shall constitute a quorum for the transaction of business.

SEC. 1668. [Compensation of trustees.]—Trustees residing more than ten miles from the institution shall be allowed five dollars per day for actual services and ten cents per mile to and from their place of meeting, which shall be paid out of the funds of the institution, for attendance at the quarterly and annual meetings of the board.

SEC. 1669. [Trustees to fix compensation of officers.]—The board of trustees shall fix the compensation of all the officers and employes of said institution, at such rate as shall by them be deemed just and equitable; *provided*, that in no event shall the total amount of expenses of their institution exceed the total amount of appropriation for the same.

SEC. 1670. [Officers, appointment of.]—The assistant officers shall receive their appointment from the board, upon the nomination of the principal, and

shall be responsible to the principal for the faithful performance of their duties, and the principal shall be held responsible to the board for the performance of his duties.

SEC. 1671. [**Steward, duty of.**—The trustees shall appoint some one of the employes, steward, at such compensation as they may deem just, who, under their direction, shall purchase all supplies for the institution.

SEC. 1672. [**Non-residents.**—Persons not residents of the state shall be entitled to the benefits of this institution, on paying to the treasurer thereof the sum of (fifty-four dollars a quarter in advance, *provided*, that no such person shall be so received to the exclusion of any resident of this state.

SEC. 1673. [**President: treasurer to give bond.**—The board of trustees shall elect one of their number president and another treasurer of the institution, and the treasurer shall enter into bonds, with security, in the sum of not less than thirty thousand dollars, to be approved by the executive council, conditioned for the faithful performance of his duties, and the honest disbursement of and accountal for all moneys belonging to the institution, which bond shall be filed with the secretary of state.

SEC. 1674. [**Indebtedness.**—The board of trustees shall not create any indebtedness against the institution, exceeding the amount appropriated by the general assembly for the support thereof.

SEC. 1675. (*As amended by ch. 166, 19th g. a.*) [**Appropriation for.**—To meet the ordinary expenses of the institution, including furniture, books and maps, the compensation of principal, matron, teachers and employes, and to provide for contingencies, there is hereby appropriated the sum of (ten) thousand dollars annually, or so much thereof as may be necessary to meet the wants of the institution.

SEC. 1676. (*As substituted by ch. 166, 19th g. a.*) **Current expense allowance increased from.**—(For the purpose of meeting current expenses there is appropriated out of the state treasury so much as is necessary, not to exceed forty dollars per quarter for each pupil in said institution except non-residents at the time of their reception.)

SEC. 1677. (*As amended by ch. 82, 22d g. a.*) [**Report to governor.**—The principal of said institution shall report to the governor, on or before the fifteenth day of (August) preceding each regular session of the general assembly, the number of pupils in attendance, with the name, age, sex, residence, place of nativity, and also the cause of blindness of each pupil. He shall also make a report of the studies pursued and trades taught in said institution, together with a complete statement of the expenditures, and also the number, kind and value of articles manufactured and sold.

SEC. 1678. [**Clothing for pupils: how procured.**—When the pupils of said institution are not otherwise supplied with clothing, they shall be furnished by the principal, who shall make out an account therefor in each case against the parent or guardian, if the pupil be a minor, and against the pupil if he or she have no parent or guardian, or has attained the age of majority, which account shall be certified to be correct and sign by the principal, and shall be presumptive evidence of its correctness in the courts, and such principal shall forthwith remit such account to the treasurer of the proper county, who shall proceed to collect the same by suit, if necessary, in the name of such institution, and pay the same into the state treasury, and said principal shall, at the same time, remit a duplicate of such account to the auditor of state, who shall credit the same to account of the college for the blind, and charge it to the proper county.

SEC. 1679. [**Appropriation: how drawn.**—The above appropriations, including account of clothing furnished pupils, shall be drawn quarterly on the order of the trustees of the institution made on the auditor of state, who shall draw his warrant in the name of such institution on the treasurer, as ordered by the trustees.

SEC. 1680. [**Education furnished at expense of state.**]—All blind persons, residents of this state, of suitable age and capacity, shall be entitled to an education in this institution at the expense of the state. Each county superintendent of common schools shall report on the first day of November of each year to the superintendent of the college for the blind, the name, age, residence and post office address of every blind person, and every person blind to such an extent as to be unable to acquire an education in the common schools, and who resides in the county in which he is superintendent.

(Sections 1681, 1682 and 1683 repealed by chapter 71, laws of 1876.)

SEC. 1684. [**Vacancies in board: how filled.**]—Upon the death, resignation or removal from the state of any member of the board of trustees, the general assembly, if in session at the time, shall fill the vacancy, but if the general assembly is not in session, then shall the governor fill such vacancy by appointment, to continue until the next regular session of the general assembly and until a successor shall be by that body elected. The refusal or neglect of any duly elected or appointed member of said board to act, shall be deemed a resignation.

CHAPTER 7.

OF THE INSTITUTION FOR THE DEAF AND DUMB.

SECTION 1685. (*As amended by sec. 5, ch. 136, 17th g. a.*) [**Trustees.**]—There shall be permanently maintained at Council Bluffs, in the county of Pottawattamie, an institution for the support and education of the deaf and dumb, under the supervision of a board of trustees.

SEC. 1686. [**Power and duty of.**]—The trustees shall have the general supervision of the institution, adopt rules for the government thereof, provide teachers, servants and necessities for the institution, and perform all other acts necessary to render it efficient, and to carry out the purposes of its establishment.

SEC. 1687. [**Quorum: record kept.**]—Three of said trustees shall constitute a quorum for the transaction of business, and their proceedings at each meeting shall be recorded in a minute book, which shall be signed by those present and form a record of their proceedings.

SEC. 1688. [**Non-residents.**]—Persons not residents of the state, of suitable age and capacity, shall be entitled to an education in said institution, on paying to the trustees thereof the sum of forty dollars a quarter in advance.

SEC. 1689. [**Education to residents furnished by state.**]—Every deaf and dumb citizen of the state, of suitable age and capacity, shall be entitled to receive an education in said institution at the expense of the state, and each county superintendent of common schools shall report on the first day of November in each year to the superintendent of the institution the name, age and post office address of every deaf and dumb person between the ages of five and twenty-one years residing in his county, including all such persons as may be too deaf to acquire an education in the common schools.

SEC. 1690. [**Treasurer to give bond.**]—The board of trustees shall select one of their number as president and another as treasurer of the institution, and the treasurer shall enter into bonds, with security, in such sum as the board shall direct, conditioned for the faithful paying over of all money belonging to the institution upon the order of the board, which bond shall be approved by the executive council and filed with the secretary of state.

SEC. 1691. [**Indebtedness.**]—The board shall not create any indebtedness

against the institution exceeding the amount appropriated by the general assembly for the use thereof.

SEC. 1692. (*As amended by ch. 105, 19th g. a.*) [**Appropriation.**]—For the purpose of meeting current expenses, there is hereby appropriated the sum of [thirty-five] dollars per quarter for each pupil in said institution.

SEC. 1693. (*As further amended by ch. 105, 19th g. a.*)—To meet the ordinary expenses of the institution, including furniture, books, school apparatus, and compensation of officers and teachers, there is hereby appropriated the sum of [sixteen] thousand dollars per annum, or so much thereof as may be necessary, which may be drawn quarterly, in such sums as the necessities of the institution may require.

SEC. 1694. (*As amended by ch. 82, 22d g. a.*) [**Superintendent to report to governor: contents of.**]—The superintendent of said institution shall report to the governor, on or before the fifteenth day of [August] preceding each regular session of the general assembly, the number of pupils in attendance, with the name, age, sex, residence, place of nativity, and also the cause of the deafness of each pupil. He shall make a report of the studies pursued and trades taught in said institution, together with a complete detailed statement of the expenditures for said institution and the receipts on account of the same, the salaries paid to each officer and teacher, and also the kind, number and value of all articles manufactured and sold.

SEC. 1695. [**Clothing for pupils furnished: how procured.**]—When the pupils of said institution are not otherwise supplied with clothing, they shall be furnished by the superintendent, who shall make out an account of the cost thereof in each case, against the parent or guardian if the pupil be a minor, and against the pupil if he or she have no parent or guardian or have attained the age of majority; which account shall be certified to be correct by said superintendent; and when so certified, such an account shall be presumed correct in all courts. The superintendent shall thereupon remit the said accounts by mail to the treasurer of the county from which the pupil so supplied shall have come to said institution; such treasurer shall proceed at once to collect the same by suit in the name of his county if necessary, and pay the same into the state treasury; the superintendent shall, at the same time, remit a duplicate of such account to the auditor of state, who shall credit the same to the account of the institution, and charge it to the proper county; *provided*, if it shall appear by the affidavit of three disinterested citizens of the county not kin to the pupil, that the pupil or his or her parents would be unreasonably oppressed by such suit, then such treasurer shall not commence the said suit, but shall credit the same to the state on his books, and report the amount of such account to the board of supervisors of his county, and the said board shall levy sufficient tax to pay same to the state, and to cause the same to be paid into the state treasury.

SEC. 1696. [**Appropriations: how drawn.**]—The above mentioned appropriations, including the accounts for clothing aforesaid, shall be drawn quarterly on the requisition of the board of trustees of the institution, in the usual manner, and then only in such amounts as the wants of the institution may require.

(CHAPTER 136, LAWS OF 1878.)

INSTITUTION FOR EDUCATION OF DEAF AND DUMB.

An Act to provide for the rebuilding of the institution for the deaf and dumb, and to provide for the government of the same, and repeal a portion of section 1685, chapter 7, title XII, of the code.

SECTION 1. [**Board of trustees: term of.**]*—Be it enacted by the general assembly of the state of Iowa:* That the board of trustees of the institution for the deaf and dumb shall consist of three persons, to be elected by the present general assembly, one for two years, one for four years, and one for six years; and each subsequent general assembly shall elect one trustee to serve for six years. Two of said trustees shall constitute a quorum for the transaction of business. Said trustees shall enter upon the duties of their office on the first day of May in the year in which they are elected.

SEC. 2. [**Teachers, etc., may not reside in the institution.**]*—*And no teacher, superintendent, steward, or other employe, shall reside in the institution, or receive board, or any allowance of provision, clothing, fuel, or other supplies from the funds or supplies furnished for the support of the institution, except by arrangement made in advance with the trustees, and at and for prices that shall be just to the state.

SEC. 3. [**\$40,000 appropriated to rebuild.**]*—*There is hereby appropriated out of any funds in the treasury, not otherwise appropriated, the sum of \$40,000, or so much thereof as shall be necessary, to be expended under the direction of the board of trustees, for the purpose of rebuilding and completing in a plain and substantial manner the main building of the said institution; and the trustees shall cause to be utilized for this purpose so much of the material in the walls of the old main building and east wing as may be suitable for that purpose; *provided*, that not more than five thousand dollars of said appropriation shall be drawn from the state treasury before the first day of April, A. D., 1879.

SEC. 4. [**Inmates may be used in any suitable labor.**]*—*The trustees shall have authority to utilize the inmates of the institution, so far as practicable, without interfering with the proper education of the inmates, in any suitable labor on the farm, in the workshops, in the erection of buildings belonging to the institution, or in the domestic service of the same.

SEC. 5. [**Code, § 1685, amended.**]*—*All that portion of section 1685 of the code, after the word "trustees," in the fourth line, and all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed.

SEC. 6. There is further appropriated for the purchase of furniture for use of pupils in said institution, the sum of two thousand dollars, or so much thereof as may be necessary.

(Took effect by publication in newspapers, March 30, 1878.)

CHAPTER 8.

OF COUNTY HIGH SCHOOLS.

SECTION 1697. [May be established.]—Each county having a population of two thousand inhabitants or over, as shown by the last state or federal census, may establish a high school on the conditions and in the manner hereinafter prescribed, for the purpose of affording better educational facilities for pupils more advanced than those attending district schools, and for persons desiring to fit themselves for the vocation of teaching.

SEC. 1698. [Petition for election: notice published.]—When one-third of the electors of a county, as shown by the returns of the last preceding election, shall petition the board of supervisors requesting that a county high school be established in their county at the place in said petition named, then, or when said board in its discretion shall deem proper, said board shall give twenty days' notice previous to the next general election, or previous to a special election duly called for that purpose, that they will submit the question to the electors of said county whether such high school shall be established; at which election said electors shall vote by ballot, for or against establishing such county high school. The notice contemplated in this section shall be given through one or more newspapers published in said county, if any be published therein, and by at least one written or printed notice to be posted in each township.

SEC. 1699. [Votes canvassed: trustees appointed: qualification of.]—After said election, the ballots on said question shall be canvassed in the same manner as in the election for county officers; and if a majority of all the votes cast on said question shall be in favor of establishing said school, the board of supervisors shall immediately proceed to appoint six persons, who shall be residents of the county, but not more than two of whom shall be residents of the same township, who shall, with the county superintendent of common schools, constitute a board of trustees for said high school. Each of said trustees appointed as aforesaid shall hold his office until his successor is elected and qualified, and shall be required, within ten day after appointment, to qualify by taking the oath of office, and giving such bond as may be required by the said board of supervisors, for the faithful discharge of his duties.

SEC. 1700. [Trustees classified: election of.]—At the next general election after said appointment, there shall be elected in said county six high school trustees, who shall be divided into three classes of two each; each class to hold their office one, two, and three years, respectively, and their respective terms to be decided by lot. And each year thereafter there shall be two such trustees elected to succeed those whose term is about to expire. And said trustees shall qualify and enter upon the duties of their office in the same manner, and at the same time as other county officers.

SEC. 1701. [County superintendent president of board.]—The county superintendent shall, by virtue of his office, be president of said board of trustees; and at their first meeting in each year, they shall appoint from their own number a secretary and treasurer, who shall perform the usual duties devolving upon such officers for the term of one year, or until their successors are appointed to take their places.

SEC. 1702. [Trustees to make estimate of funds: tax for levied.]—At said meeting, or at some succeeding meeting called for such purpose, said trustees shall make an estimate of the amount of funds needed for building purposes, for payment of teachers' wages, and for contingent expenses, and they shall present to the board of supervisors a certified estimate of the rate of tax required to raise

the amount desired for such purposes. But in no case shall the tax for such purposes exceed in one year the amount of five mills on the dollar on the taxable property of the county, and, when the tax is levied for the payment of teachers' wages and contingent expenses only, shall not exceed two mills on the dollar.

SEC. 1703. [Collected and paid over.]—The said tax shall be levied and collected in the same manner as other county taxes, and when collected the county treasurer shall pay the same to the treasurer of the county high school, in the same manner that school funds are paid to the district treasurers as required by law.

SEC. 1704. [Treasurer of board to give bond: accounts kept.]—The said treasurer of the high school shall give such additional bond as the board of trustees may deem sufficient, and receive all moneys from the county treasurer and from other parties that belong to the funds of said school, and pay the same out only by direction of the board of trustees upon orders duly executed by the president, countersigned by the secretary thereof, stating the purpose for which they were drawn. Both the secretary and treasurer shall keep an accurate account of all moneys received and expended for said school; and at the close of each year, and as much oftener as required by the board, they shall make a full statement of the financial affairs of the school.

SEC. 1705. [Trustees to select site: purchase materials: make contracts.]—The said board of trustees shall proceed as soon as practicable after their appointment as aforesaid, to select the best site in accordance with the vote of the county, that can be obtained without expense to the same, and the title thereof shall be vested in said county. They shall then proceed to make such purchases of material, and to let such contracts for their necessary school buildings as they may deem proper, but shall not make any purchase or contract in any year to exceed the amount on hand and to be raised by the levy of tax that year.

SEC. 1706. [Trustees to employ teachers: schools encouraged.]—When said board of trustees shall have furnished a suitable building for the school, they shall employ some competent teacher to take charge of the same, and furnish such assistant teachers as they deem necessary, and provide for the payment of their salaries. As far as practicable model schools shall be encouraged, and advanced students and those preparing to become teachers may be employed a portion of their time in teaching the younger pupils, in order that they may become familiar with the practice as well as theory of successful school-teaching, and also avoid, as far as practicable, the expense of employing other assistant teachers.

SEC. 1707. [Tuition free to residents of county: trustees to make rules.]—Tuition shall be free to all pupils of such school residing in the county where the same is located. The board of trustees, however, shall make such general rules and regulations as they deem proper in regard to age and grade of attainments essential to entitle pupils to admission in the school. If there should be more applicants than can be accommodated at any time, each district shall be entitled to send its equal proportion of pupils according to the number of pupils it may have, as shown by the last report to the county superintendent of common schools. And the boards of the respective school districts shall designate such pupils as may attend.

SEC. 1708. [Pupils from other counties admitted.]—If, at any time, the school can accommodate more pupils than apply for admission from that county, the vacancies may be filled by applicants from other counties, upon the payment of such tuition as the board of trustees may prescribe; but at no time shall such pupils continue in said school to the exclusion of pupils belonging in the county in which such high school is situated.

SEC. 1709. [Principal make rules.]—The principal of any high school, with the approval of the board of trustees, shall make such rules and regulations as he

deems proper in regard to the studies, conduct and government of the pupils under his charge, and if any such pupils will not conform to and obey the rules of the school, they may be suspended or expelled therefrom by the board of trustees.

SEC. 1710. [**Trustees to report to supervisors: contents.**].—The said board of trustees shall annually make a report to the board of supervisors of their county, which shall specify the number of students, both male and female, who have been in attendance at the county high school during the year, the branches of learning taught, the text-books used, the number of teachers employed, the amount of salary paid to them, the amount expended for library and apparatus, and for buildings and all other expenses; also the amount of funds on hand, debts unpaid, and other information deemed important or expedient to report. Said report shall be printed in at least one newspaper in the county, if any is published therein, and a copy of the report shall be forwarded to the state superintendent of public instruction.

SEC. 1711. [**Vacancies in board filled by supervisors.**].—The board of supervisors shall have power to fill any vacancy that may occur in the board of trustees of that county by appointment, until the next general election, and a majority of any such board of trustees shall be a quorum for the transaction of business.

SEC. 1712. [**Compensation of trustees.**].—The board of supervisors may allow each member of the board of trustees the sum of two dollars per day for the time actually employed in the discharge of his official duties, and when such accounts are presented for payment, they shall be audited and paid out of the county treasury in the same manner as other accounts against the county, and said trustees shall not be entitled to any further remuneration for services or expenses.

CHAPTER 9.

OF THE SYSTEM OF COMMON SCHOOLS.

SECTION 1713. [**School districts.**].—Each civil township now or hereafter organized, and each independent school district organized as such prior to the taking effect of this code, is hereby declared a school district for all the purposes of this chapter, subject to the provisions hereinafter made.

The school law of this state contemplates that school districts shall coincide in boundary with civil townships. Section 1797 of the code provides the only exception to this rule. *District Township of Union v. Independent District of Greene*, 41 Iowa, 30.

No such restrictions upon the formation of independent districts, which may be created from two or more civil townships, or parts thereof, situated even in adjoining counties. *Id.*

A school district is not liable for personal injuries sustained on account of the negligent construction of a school-house, or for negligence in failing to keep it in repair. Following *Kinnard v. Hardin County*, 53 Id., 430; *Lane v. The District Township of Woodbury*, 58 Id., 462.

SEC. 1714. [**When no officers: how supplied.**].—When an organized district has been left without officers, the township trustees shall give such notice for a special election of directors, as is required in cases of regular district elections; and the persons elected shall continue in office until their successors are elected and qualified.

SEC. 1715. [**Division of district: apportionment of assets and liabilities.**].—When changes in civil township boundaries are made, or any district shall be divided into two or more entire townships for civil purposes, the existing board of directors shall continue to act for both or all the new districts, or parts of districts, until the next regular district election thereafter, at which time the new

district townships shall organize by the election of directors. The respective boards of directors shall, immediately after such organization, make an equitable division of the then existing assets and liabilities between the old and new districts; and in case of a failure to agree, the matter may be decided by arbitrators, chosen by the parties in interest. A similar division shall be made in case of the formation or changes of boundaries of independent districts.

Upon the division of a district township into independent districts, the board of directors of the former are empowered to make a division of the assets, wherein their jurisdiction is exclusive, and their judgment cannot be set aside in a collateral proceeding. *Ind. School Dist. of Oakville v. Ind. School Dist. of Asbury*, 43 Iowa, 444.

Where the subdistricts of a district township were organized into independent districts, and the directors made a distribution of assets and liabilities and instituted an action at law against the debtor districts for the amount due from them, pending which the term of office of the directors expired, it was held, that the creditor districts could, in equity, compel an accounting and payment of the amounts due them. *Ind. School Dist. of Georgia v. Ind. School Dist. of Victoria*, 41 Id., 321.

When a district township is divided into two or more districts under the provisions of chapter 172, laws of 1862, school-houses and real estate used for school purposes, situated within the divided districts are to be estimated in making the division of assets contemplated by that act. *The District Township of Williams v. The District Township of Jackson*, 36 Id., 216.

This construction of the statute does not require an actual division or partition of the real property of the district. The respective districts, after the division, which do not receive their just proportion of the property, have a claim, which they may enforce by action, against those who obtain more than the share to which they are entitled. *Id.*

When a part of the territory of one school district is attached to another, the board of directors of the two districts, or arbitrators chosen by them, shall apportion the assets upon the re-organization of the districts, and their jurisdiction for this purpose is exclusive. *The District Township of Viola v. The District Township of Audubon*, 45 Id., 104. See also the *Ind. School Dist. of Lowell v. The Ind. School Dist. of Duser*, Id., 391, holding the same view as to the conclusiveness of the action of the board of directors.

Upon the subdivision of a district township into independent districts, the directors of the district township are authorized to apportion the assets and liabilities, and it is only upon their failure to agree that the matters in dispute are to be referred to arbitrators. The consent of the various independent districts is not necessary to the jurisdiction of the directors of the district township. *The Ind. School Dist. of Lowell v. The Ind. School Dist. of Duser*, 45 Id., 391.

Where territory is set into an adjoining county or township, or attached to an independent school district in an adjoining county or township, for school purposes, or is restored from an independent district to the district to which it geographically belonged, there must be an equitable apportionment of all the assets and liabilities. *Albin et al. v. The Board of Directors of Independent District of West Branch*, 58 Id., 77.

A school district township is a political or municipal corporation within the meaning of article 2, section 3 of the constitution, inhibiting such corporation from incurring indebtedness to an amount exceeding five per cent on the taxable property within the corporation. *Winspear v. The Dist. Tp. of Holman*, 37 Id., 542.

Where a district township abandons its organization and the territory is organized into independent districts, a creditor of the district township may join such independent district as defendants in an action upon his claim, and a joint and several judgment may be rendered against them therein. *The Dist. Tp. of White Oak et al. v. The Dist. Tp. of Oskaloosa et al.*, 52 Id., 73.

Neither this section nor section 1820 has any application to the claim of one township against another, accruing after the division of the debtor township into independent districts. *Id.*

The circuit court as a court of equity has jurisdiction of an action to set aside an award made by arbitrators, chosen under this section (1715) to make a division of assets between two district townships. And the petition having alleged, among other errors committed by the arbitrators, a mistake in computation of the amount of the award, it was held sufficient in default of an answer to authorize the setting aside of the award and a re-submission of the matter in dispute to other arbitrators. *Dist. Tp. of Algona v. Dist. Tp. of Lott's Creek*, 54 Id., 236.

The arbitration contemplated by this section is the arbitration provided by sections 3416 and 3431 of the code. The award has the force and effect of a verdict of a jury, and the court which renders judgment on the award must follow the award, and has no power to render a different judgment. *Dist. Tp. of Little Sioux v. Ind. Dist. of Little Sioux*, 60 Id., 141.

Before a county can be called on to pay bills for aid furnished to paupers on the orders of township trustees, the trustees must certify the bills to be "correct," and it is not enough to certify that they ordered the aid furnished. *Sloan v. Webster Co.*, 61 Id., 738.

In an action to compel directors of a district township, out of which an independent district

was carved, to meet the directors of the independent district and agree on division of assets, it appearing in the evidence that they had not refused so to meet, but had met repeatedly, and were unable to agree upon a division, it was held, that the petition should have been dismissed. *Mandamus* would possibly lie in such a case to compel the appointment of arbitrators, but this action was not for that purpose. *Case v. Blood et al.*, 68 Id., 486.

SEC. 1716. [**Body corporate.**]—Every school district which is now or may hereafter be organized, is hereby made a body corporate by the name of the “district township,” or “independent district,” (as the case may be), of, in the county of, and in that name may hold property, become a party to suits and contracts, and do other corporate acts.

SEC. 1717. [**Annual meeting.**]—Each district township shall hold an annual meeting on the second Monday in March, and the electors of the district, when legally assembled at such meeting, shall have the following powers:

1. To appoint a chairman and secretary in the absence of the regular officers;
 2. (*As amended by ch. 51, 19th g. a.*) To direct the sale or other disposition to be made of any school-house or the site thereof, and of such other property, personal and real, as may belong to the district, the manner in which the proceeds arising therefrom shall be applied; to determine what additional branches shall be taught in the schools of the district; or to delegate any of these powers to the board of directors; [and to authorize the board of directors to obtain, at the expense of the district township, such highways as such board may deem necessary for proper access to the school-houses in their districts.]

3. (*As amended by ch. 51, 19th g. a.*) To vote such tax, not exceeding ten mills on the dollar in any one year, on the taxable property of the district township, as the meeting shall deem sufficient for the purchase of grounds and the construction of the necessary school-houses for the use of the district, and for the payment of the debts contracted for the erection of school-houses, and for procuring district libraries. [And for obtaining highways for access to school-houses.]

[4. (*As amended by ch. 63, 18th g. a.*) To instruct the board of directors to transfer any surplus in the school-house fund, not appropriated, to either the contingent or teachers' fund.]

Contracts for mere *repairs* of school-houses may be made by the directors of the district township and paid out of “contingent fund,” without being specially authorized by a vote of the directors. Whether the improvements in a given case are of a character to come within the meaning of the term “repairs,” is a question of fact to be established by proof. *Williams v. Pienny*, 25 Iowa, 436.

The school directors of a district township have no power to bind the district by a contract for the purchase of school apparatus unless authorized thereto by a vote of the electors of the district. *Manning v. The District Township of Van Buren*, 28 Id., 332. Nor would such a contract become binding upon the district township by an acceptance and acquiescence in the use in the schools of the apparatus so purchased. *Id.* Also, *Taylor v. The District Township of Wayne*, 25 Id., 448. See, also, *Herrington v. The District Township of Liston*, 47 Id., 11.

This section authorizes the electors of a district township “to direct the sale or other disposition to be made of any school-house or the site thereof, and of such other property, personal or real, as may belong to the district.” But they have no power to discharge a debtor of the district without consideration. *District Township of Washington v. Thomas*, 59 Id., 50.

The electors of a district township when legally assembled may lawfully authorize the use of the school-houses in their districts to be used for purposes of religious worship and Sunday-schools, and under the authority thus conferred a subdirector is empowered to permit the school-house in his district to be so used. *Davis v. Boget et al.*, 50 Id., 11; *Townsend v. Hagan et al.*, 35 Id., 194.

The use of the school-house for such purposes, when thus authorized, is not prohibited by section 3 of article 1 of the state constitution. *Id.*

There is nothing in the statute limiting subdistricts to but one school-house each. *Wood v. Farmer*, 69 Id., 533.

SUBDISTRICTS.

SEC. 1717½. [**In case of fire.**]—(When a school district, by fire or otherwise, has been deprived of a school building, and the board of directors of such district, by the use of the powers in them vested, are unable to provide for the continuance of the school therein, then such board of directors shall call a meeting of such district. The manner of calling such meeting, and the powers of such meetings, shall be as follows:

First—[**Manner of calling meeting.**]—The board of directors shall cause to be posted in three public places in such district, at least ten days prior to the designated time of holding such meeting, written notices of such meeting, in which shall be stated the time and place of such meeting and the object or purpose for which the same is called.

Second—[**Powers of such meetings.**]—The powers of such meeting shall be the same as is prescribed in section 1717 hereof, except those powers which are set forth in paragraph two, after the word “applied” in the fourth line thereof, and in paragraph three, after the word “district” in the fifth line thereof.)

(CHAPTER 67, LAWS OF 1874.)

VOTING OF SCHOOL TAXES.

An Act allowing school districts lying in two adjoining counties the right to vote mills instead of specific sums for school purposes. (Additional to code, title XII, chapter 9: “Of the system of common schools.”)

SECTION 1. [**May vote mills for schools.**]—*Be it enacted by the general assembly of the state of Iowa:* That all school districts lying in two adjoining counties shall have the right to vote mills instead of specific sums for school purposes. Approved March 21, 1874.

SEC. 1718. [**Meetings of.**]—The several subdistricts shall, annually, on the first Monday in March, hold a meeting for the election of a subdirector, five days’ notice of which meeting shall be given by the then resident subdirector, or, if there is none, by the district secretary posting a written notice in three public places therein, and such notice shall state the hour of meeting.

Where the board of directors had in due form created a subdistrict, and then a vote was obtained in such subdistrict in favor of an independent organization, it was *held* that the fact that a subdirector had not been elected before the organization of the independent district did not invalidate such organization. *Independent School District No. 8, etc., v. Independent School District of Burr Oak*, 48 Iowa, 157; *Townsend v. Hogan et al.*, 35 Id., 194.

The electors of a district township when legally assembled, may authorize the use of the school-houses of the district for religious purposes, and under the authority thus conferred, a subdirector is empowered to permit the school-house in his subdistrict to be so used. *Davis v. Boget et al.*, 50 Id., 11.

SEC. 1719. (*As amended by § 1, ch. 7, 18th g. a.*) [**Chairman and secretary appointed.**]—At the meeting of the subdistrict, a chairman and secretary shall be appointed, who shall act as judges of the election, and give a certificate of election to the subdirector elect. (When there is a tie vote between two persons for the office of subdirector, the secretary shall notify the secretary of the district township board of such tie vote, and shall notify said persons to appear at the regular meeting of the board on the third Monday in March, to determine the tie vote by lot before one or more members of the board elected, and the certificate of election shall be given accordingly. Should either party fail to appear, or take part in the lot, the secretary shall draw for him.)

The law intends that frankness and liberality shall characterize elections for school officers; and where the polls were kept open only forty minutes, and votes refused that were offered a few minutes after, the proceeding held invalid. *The State, ex rel. Hanks, v. Wollem*, 37 Iowa, 131.

SEC. 1720. [**Number of subdirectors: how chosen.**]—In all district townships comprising but one subdistrict, the board of directors shall consist of three subdirectors; and in all district townships comprising but two subdistricts it shall consist of one subdirector chosen from each subdistrict, and one from the district township at large, who shall in both cases be elected in the manner provided by law for the election of one subdirector from each subdistrict. The judges of the respective subdistrict elections shall canvass the votes for subdirector chosen from the district township at large, and shall issue a certificate of election to the person elected.

BOARD OF DIRECTORS.

SEC. 1721. (*As amended by ch. 27, 15th g. a.*) [**Subdirectors constitute organization of board.**]—(The subdirectors of the several subdistricts shall constitute a board of directors for the district township, and shall enter upon their duties upon the day fixed for the regular meeting of the board in March, at which time they shall organize by electing from their own number a president, who shall simply be entitled to a vote as a member of the board; and from the district township at large, (at their regular meeting on the third Monday of September in each year,) a secretary and a treasurer, unless there are at least five subdirectors in the district township, in which case they may be selected from the board, (and said secretary and treasurer thus elected shall qualify and enter upon the duties of their respective offices within ten days following the date of their election.) If selected from the district township at large, they shall have no vote in the proceedings of the board.)

The treasurer of a school district township is not necessarily a member of the board of directors, and has no authority to bind the district township by his contracts or admissions, and his indorsement of payments upon a warrant, within ten years, would not defeat the operation of the statute of limitations. *Carpenter v. The District Township of Union*, 58 Iowa, 335.

SEC. 1722. (*As substituted by ch. 176, 18th g. a.*) [**Meetings of.**]—[The board of directors shall hold their regular meetings on the third Monday in March and September of each year; and may hold such special meetings as occasion may require, at the call of the president, or by request of a majority of the board; *provided*, that the board of directors of a district township may hold their meetings at any place within the civil or district township in which such district township is situated.]

SEC. 1723. [**Make contracts and purchases.**]—They shall make all contracts, purchases, payments and sales, necessary to carry out any vote of the district; but before erecting any school-house they shall consult with the county superintendent as to the most approved plan of such buildings. And all school-houses erected or repaired at a cost exceeding three hundred dollars, shall be so erected or repaired by contract, and no such contract for labor or materials shall be let until proposals for the same shall have been invited by advertisement for four weeks in some newspaper published in the county where the work is to be done, if there be one published therein, if not, in the nearest newspaper in an adjoining county; and such contract shall be let to the lowest responsible bidder, and bonds with sufficient sureties for the faithful performance of the contract shall be required.

The directors of a school district have power to borrow money to discharge a debt which has been legitimately created, and are authorized to pledge the credit of the district for that purpose. *Austin v. The District Township of Colony*, 51 Iowa, 102.

They cannot, however, make the obligation evidencing such debt bear a higher rate of interest than six per cent. *Id.*

The board of directors of a district township having power to make contracts for the erection of

school houses in the subdistricts may, by its acts in respect thereto, so ratify a contract of this character, informally entered into, as to give full force and validity to the same. *Stevenson et al. v. The District Township of Summit*, 35 Id., 462.

The directors of a district township have no power to bind the district by a contract for the purchase of school apparatus, unless authorized thereto by a vote of the electors. *Manning v. The District Township of Van Buren*, 28 Id., 332. Having no power to make an express contract of this character, unless so authorized, they cannot make an implied one, nor ratify an express contract by using or accepting the apparatus purchased. *Id. Taylor v. District Township of Wayne*, 25 Id., 448.

The board has no power, in the absence of any consideration, to direct the release from liability of one justly indebted to the district. *District Township of Taylor v. Morton et al.*, 37 Id., 550.

A school district has authority under this section to provide, in a contract for the erection of a school house, that the contractor shall deliver the building to the district "free from liens or claims of every kind," and where a bond taken for the performance of the contract provided that the contractor should "pay all claims for material, labor, etc., used in the construction of the building and produce proper receipts," persons furnishing materials for the building may, in default of payment thereof, have an action upon the bond against the contractor and sureties—the bond being regarded in law as intended for their security. *Baker & Co. et al. v. Bryan et al.*, 64 Id., 561.

SEC. 1724. [Select site for school houses.]—They shall fix the site for each school-house, taking into consideration the geographical position and convenience of the people of each portion of the subdistrict, and shall determine what number of schools shall be taught in each subdistrict, and for what additional time beyond the period required by law they shall be continued during each year.

A district school board has the power to change the established site of a school-house, and remove the building to a new site; and where the board, in ordering such change, does not exceed its jurisdiction, nor otherwise act illegally, a court of equity will not interfere with its action, nor restrain its proceeding thereunder. The remedy for unwise or inexpedient action in such case is by appeal to the county superintendent. *Vance v. The District Township of Wilton*, 23 Iowa, 408.

Neither the board of directors of a district township, nor the subdirector of a subdistrict has the power to bind the district by a contract for the insurance of a school-house, without being authorized by a vote of the electors of the district authorizing or satisfying the same. *American Insurance Co. v. The District Township of Willow et al.*, 55 Id., 606.

Prima facie, an order drawn upon the treasurer of a school district for payment for a lightning-rod out of the contingent fund is invalid, an expenditure for that purpose not being indispensable to the operation of the school. *Wolf & Son v. The Independent School District et al.*, 51 Id., 432.

The board of directors of an independent school district has no power to employ one of the members of the board to oversee the completion of a school-house that has been abandoned by the contractor, and bind the district for his payment, nor can he recover from the district for services so rendered. *Moore v. The Independent District of Toledo City*, 55 Id., 654.

See *Williams v. Peinny*, 25 Id., 436, and note to section 1717, *ante*. Also, *Manning v. The District Township of Van Buren*, 28 Id., 332, and note to section 1717, *ante*.

The board of directors of a district township have no authority, without a vote of the electors, to purchase lightning-rods for school-houses and give the obligation of the district township therefor. *The Monticello Bank v. Township of Coffin's Grove*, 51 Id., 350.

The ruling in *Vance v. The District Township of Wilton*, 23 Id., 408, above noted, adhered to and followed in *Atkinson v. Hutchinson*, 67 Id., 161.

SEC. 1725. (*As amended by ch. 124, 21st g. a.*) [Divide districts, etc.]—They shall determine where pupils may attend school, and for this purpose may divide their districts into such subdistricts as may by them be deemed necessary; *provided*, that no such subdistrict shall be created for the accommodation of less than fifteen pupils, but the board of directors shall have power to rent a room and employ a teacher for the accommodation of any [ten] scholars: [*Provided, further*, that nothing in this chapter contained shall be construed to prohibit the construction of as many school-houses, out of moneys derived from taxes levied previous to January 1st, 1876, in any subdistrict, where the subdistrict comprises the entire district township, as shall have been authorized and provided for at the annual meeting of the district township electors.]

An injunction will not lie to restrain the collection of a tax voted to erect a new school-house, on the ground that the independent district already has a school-house, and that it has not divided its territory as required by this section, where it is not shown that the district does not need the new

school-house to take the place of the old one, which may have become unfit for school house purposes. *Casey v. Ind. Dist. of Nutt et al.*, 64 Iowa, 659.

Whether the directors of a district township shall rent a room and employ a teacher for the accommodation of any five scholars under this section, is a matter wholly in their own discretion, and their action is to be reviewed, if at all, by appeal to the county superintendent. *Mandamus* will not lie. *Aananson v. Anderson*, 70 Id., 102.

SEC. 1726. (*As amended by ch. 109, 16th g. a.*) [**Graded schools.**]—They may establish graded or union schools wherever they may be necessary, and may select a person who shall have the general supervision of the schools in their districts, subject to the rules and regulations of the board.

SEC. 1727. [**Schools: time taught, etc.**]—In each subdistrict there shall be taught one or more schools for the instruction of youth between the ages of five and twenty-one years, for at least twenty-four weeks, of five school days each, in each year, unless the county superintendent shall be satisfied that there is good and sufficient cause for failure so to do. Any person who was in the military service of the United States during his minority shall be admitted into the schools in the subdistrict in which he may reside, on the same terms on which youths between the ages of five and twenty-one are admitted.

The constitution and statutes provide for the education of all the youths of the state, without distinction of color, and the board of directors have no discretionary power to require colored children to attend a separate school. They may exercise a uniform discretion, operative upon all, as to the residence or qualification of children to entitle them to admission to each particular school, but they cannot deny a youth admission to any particular school, merely because of his color, nationality, religion, or the like. *Clark v. The Board of Directors, etc.*, 24 Iowa, 286; *Smith v. The Independent District of Keokuk*, 43 Id., 518; *Dore v. Same*, 41 Id., 689.

Where in a subdistrict containing but five pupils, the board directed that no school should be taught during the winter in their district, and provided for the attendance of their pupils elsewhere, it was held that their action was not inconsistent with section 1727 of the code. *Potter v. District Township, etc.*, 40 Id., 369.

If a person who has attained the age of twenty-one years, *voluntarily* attends the public school, creating the relation of teacher and pupil, he thereby subjects himself to like discipline with pupils who are within the school age. *The State v. Mizner*, 45 Id., 248.

The pupil in such case may be punished for refractory conduct, and the teacher will not be liable therefor, if, under the circumstances, the punishment was reasonable. *Id.*

The board of directors may provide a school for less than twenty-four weeks in the year, with the consent of the county superintendent, and it is not necessary to the validity of their action that such consent shall first be obtained. *Herrington v. The District Township of Liston*, 47 Id., 11.

Children residing in one district may attend school in another with the consent of the directors of the latter, provided their own school is not in session; and also provided they have not had the privilege of attending school twenty-four weeks in the year in their own district and for such attendance their own district is liable to the district where they may attend. *The District Township of Horton v. The District Township of Ocheyeden et al.*, 49 Id., 231.

Where the directors of the district in which the children reside, upon being notified of their attendance elsewhere, determine they will not pay their tuition, no further demand upon them is necessary, and the account may then be filed with the auditor. *Id.*

SEC. 1728. [**Change of books.**]—The board of directors of any district township or independent district, shall not order, or direct, or make any change in the school books, or series of text books used in any school under their superintendence, direction, or control, more than once in every period of three years, except by a vote of the electors of the district township or independent district.

SEC. 1729. [**Contingent fund: use of.**]—They may use any unappropriated contingent fund in the treasury to purchase records, directories, maps, charts and apparatus for the use of the schools of their districts, but shall contract no debts for this purpose.

An independent school district may provide that music shall be taught in its schools, and the board has power to purchase a musical instrument, to be paid for out of any unappropriated funds of the district. *Bellinger v. The Independent District of Marshalltown*, 44 Iowa, 564.

In the absence of proof to the contrary, it will be presumed that there were unappropriated funds of the district on hand at the time of such purchase, and this presumption will not be rebutted by the fact that payment was to be made at a future time. *Id.*

SEC. 1730. [**Temporary officers.**—] They shall appoint a temporary president and secretary in case of the absence of the regular officers, and shall fill any vacancy that may occur in the office of president, treasurer, or secretary, or in the board of directors.

SEC. 1731. [**Bonds to be given.**—] They shall require the secretary and treasurer to give bonds to the district in such penalty and with such security as they may deem necessary to secure the district against loss, conditioned for the faithful performance of their official duties. The bond shall be filed with the president, and in the case of a breach of the conditions thereof, he shall bring suit thereon in the name of the district township or independent district.

It is the duty of the board of directors of a school district to require its treasurer to give bond in such a sum as will secure it against loss. *District Township of Grove v. Bowman*, 55 Iowa, 129.

SEC. 1732. [**Examine accounts of treasurer.**—] They shall, from time to time, examine the accounts of the treasurer and make settlement with him; and shall present at each regular meeting of the electors of the district township, a full statement of the receipts and expenditures of the district township, and such other information as may be deemed important.

SEC. 1733. [**Audit claims.**—] They shall audit and allow all just claims against the district, and fix the compensation of the secretary and treasurer, and no order shall be drawn on the treasury until the claim for which it is drawn has been audited and allowed.

SEC. 1734. [**Visit schools; make rules; discharge teachers.**—] They shall visit the schools in their district, and aid the teachers in establishing and enforcing the rules for the government of the schools; and see that they keep a correct list of the pupils, embracing the periods of time during which they have attended school, the branches taught, and such other matters as may be required by the county superintendent. In case a teacher employed in any of the schools of the district township is found to be incompetent, or is guilty of partiality or dereliction in the discharge of his duties, or for any other sufficient cause shown, the board of directors may, after a full and fair investigation of the facts of the case, at a meeting convened for the purpose, at which the teacher shall be permitted to be present and make his defense, discharge him.

The duties imposed upon school directors by section 1734 of the code respecting the discharge of teachers, are of a judicial character. "This discretion does not extend simply to the execution of a duty or the manner of the performance of an act required by law. It pertains to the determination of the question whether the law requires the act to be done—whether the facts of the case are of the character to call into action the authority conferred by law. *Smith v. the District Township of Knox*, 42 Iowa, 522.

The remedy of a teacher who is wrongfully discharged by the board of directors for incompetency is by appeal, and he cannot at once maintain an action in the courts to recover for a breach of contract, though the action of the board was irregular, and not in compliance with the provisions of section 1734 of the code. *Kirkpatrick v. The Independent School District, etc.*, 53 Id., 585.

SEC. 1735. [**Pupils in independent districts dismissed or suspended.**—] The majority of the board in independent districts shall have power, with the concurrence of the president of the board of directors, to dismiss or suspend any pupils from the school in their district for gross immorality or for a persistent violation of the regulations or rules of the school, and to readmit them if they deem proper so to do.

A board of school directors has no power to adopt and enforce a rule which shall deprive a child of school privileges except as a punishment for a breach of discipline or an offense against good morals. *Percins v. The Board of Directors of the Independent School District of Des Moines*, 56 Iowa, 476.

A rule adopted by the board of directors under which a pupil was expelled for having while engaged with other pupils of the school in playing ball, at a proper time, near the school-house, accidentally and unintentionally batted a ball through one of the windows of the school-house, breaking a glass of the value of about three dollars, which his parents refused to pay for, was held void, as beyond the power of the board to adopt. *Id.* See notes to section 1756.

The courts may by *mandamus* compel the reinstatement of a pupil in the public schools, who has been excluded under a rule which the board of directors had no authority to adopt. *Id.*

SEC. 1736. [**Certificate of election of officers filed.**—They shall, at their regular meeting in March of each year, require the secretary to file with the county superintendent, county auditor, and county treasurer, each, a certificate of the election, qualification and postoffice address of the president, treasurer, and secretary of the district township, and to advise them from time to time of any changes made in said offices by appointment.

SEC. 1737. [**Rules for government of subdirectors.**—They shall make such rules and regulations as may be necessary for the direction and restriction of subdirectors in the discharge of their official duties, and not inconsistent with law.

While a subdirector in a school district is authorized to make contracts for the employment of teachers for his subdistrict, his authority is subject to the rules and restrictions, not inconsistent with law, which may be prescribed by the board of directors. *Potter v. The District Township of Fredericksburg*, 40 Iowa, 369.

SEC. 1738. [**Quorum.**—A majority of the board of directors shall be a quorum to transact business, but a less number may adjourn from time to time, and no tax shall be levied by the board after the third Monday in May; nor shall the boundaries of subdistricts be changed except by a vote of a majority of the board, nor shall the members of the board, except its secretary and treasurer, receive pay out of any school funds for services rendered under this chapter.

The concurrence of a majority of the board of directors, when legally assembled, is essential to the performance of a valid act. The assent of the several members separately obtained is not enough, and any action based thereon will not be binding on the district. *Herrington v. The District Township of Lisbon*, 47 Iowa, 11.

The provision of section 1738, that "no tax shall be levied by the board after the third Monday in May," is mandatory, and a tax levied after that time is void. *Standard Coal Co. v. Independent Dist. of Angus*, 34 N. W. R., 870.

PRESIDENT.

SEC. 1739. [**Duties.**—[The president shall preside at all meetings of the board of directors of independent districts, and of the district townships; shall draw all drafts on the treasury for money apportioned to his district, sign all orders on the treasury, specifying in each order the fund on which it is drawn and the use for which the money is appropriated, and shall sign all contracts made by the board, and shall be empowered to administer the oath of office to the secretary, treasurer, and members of the board.]

A school order, drawn on the treasurer of a district township by the president and secretary thereof, is not a negotiable instrument, and the assignee thereof takes it subject to all the equities and defenses that it would have been subjected to in the hands of the payee. *Boardman v. Hayne et al.*, 29 Iowa, 339; *Shepherd v. Dist. Tp. of Richland*, 22 Id., 595.

If such paper be issued without authority it is void, and this defense may be made against the assignee thereof. *Id.*

All orders drawn on the treasury must specify the fund on which they are drawn. *The Dist. Tp. of Coon v. Board of Directors of the Dist. Tp., etc.*, 52 Id., 587, 590.

An action may be maintained against a school district on an order drawn by the proper officer on the treasurer thereof. The creditor of a corporation is not restricted to *mandamus* as his sole remedy. *Cross v. The Dist. Tp. of Dayton*, 14 Id., 28.

SEC. 1740. [**Represent district.**—He shall appear in behalf of his district in all suits brought by or against the same, but when he is individually a party this duty shall be performed by the secretary; and in all cases where suits may be instituted by or against any of the school officers to enforce any of the provisions herein contained, counsel may be employed by the board of directors.

The president of a school district township has no authority to employ counsel at the expense of the district, unless in a case brought by or against the district. *Templin & Son v. The District Tp. of Fremont*, 36 Iowa, 411.

SECRETARY.

SEC. 1741. [**Duties.**—The secretary shall record all the proceedings of the board and district meetings in separate books kept for that purpose; shall preserve copies of all reports made to the county superintendent; shall file all papers transmitted to him pertaining to the business of the district; shall countersign all drafts and orders drawn by the president, and shall keep a register of all orders drawn on the treasury, showing the number of the order, date, name of the person in whose favor drawn, the fund on which it is drawn, for what purpose, and the amount; and shall, from time to time, furnish the treasurer with a transcript of the same.

The books of the secretary of a school district, showing its indebtedness, are admissible in an action against the district upon its orders wherein it is pleaded that they were issued in excess of the legal limit of indebtedness. *Wormley v. The District Township of Carroll*, 45 Iowa, 666.

After proof of the loss of a record, its contents may be proved, like other documents, by secondary evidence. *Higgins v. Reed*, 8 Id., 298.

This section is but directory, and the failure of the secretary to record all the proceedings of the board, and of the district meetings, in separate books to be kept for that purpose, or a record of them upon loose sheets of paper, instead of a bound book, will not render the proceedings of the board or district void, nor make persons subsequently in office liable for the failure of their predecessors to comply with such directory statute. *Id.*

Records kept on loose sheets of paper are admissible in evidence as records. *Id.*

SEC. 1742. [**Give notice of meetings.**—He shall give ten days' previous notice of the district township meeting, by posting a written notice in five conspicuous places therein, one of which shall be at or near the last place of meeting, and shall furnish a copy of the same to the teacher of each school in session, to be read in the presence of the pupils thereof, and such notice shall in all cases state the hour of meeting.

SEC. 1743. [**Keep accounts.**—He shall keep an accurate account of all the expenses incurred by the district, and shall present the same to the board of directors, to be audited and paid as herein provided.

SEC. 1744. [**Notify county superintendent.**—He shall notify the county superintendent when each school of the district begins, and its length of term.

SEC. 1745. (*As amended by ch. 112, 16th g. a.*) [**Making report to: contents of.**—Between the fifteenth and twentieth days of September in each year, the secretary of each school district shall file with the county superintendent a report of the affairs of the district, which shall contain the following items:

1. The number of persons, male and female, each, in his district between the ages of five and twenty-one years;
2. The number of schools, and the branches taught;
3. The number of pupils, and the average attendance of the same in each school;
4. The number of teachers employed, and the average compensation paid per week, distinguishing males from females;
5. The length of school, in days, and the average cost of tuition per week for each pupil;

(Subdivisions 6, 7 and 8, stricken out by section 1, chapter 112, sixteenth general assembly.)

9. The text-books used, and the number of volumes in the district library, and the value of apparatus belonging to the district;

10. The number of school-houses, and their estimated value;

11. [**Subdivisions 6, 7, and 8, stricken out.**—The name, age, and post-office address of each deaf and dumb, and each blind person within his district between the ages of five and twenty-one, including all who are blind or deaf to such an extent as to be unable to obtain an education in the common schools.

[12. (*Added by ch. 23, 19th g. a.*) The number of trees set out and in thrifty condition on each school-house grounds.]

SEC. 1746. [**Penalty.**—Should the secretary fail to file his report as above directed, he shall forfeit the sum of twenty-five dollars, and shall make good all losses resulting from such failure, and suit shall be brought in both cases by the district on his official bond.

TREASURER.

SEC. 1747. [**Pay orders.**—The treasurer shall hold all moneys belonging to the district, and pay out the same on the order of the president, countersigned by the secretary, and shall keep a correct account of all expenses and receipts in a book provided for that purpose.

A public officer is not exoused from compliance with the terms of his bond by any events against which he could have provided therein. *The District Township of Union v. Smith et al.*, 39 Iowa, 9.

This case holds that the treasurer's liability, under the language of his bond and the law, covered a case where the money, which suit was brought to recover, was accidentally consumed by fire without his fault or negligence, by the burning of his residence, no safe having been furnished him by the district.

SEC. 1748. [**Different funds.**—The money collected by district tax for the erection of school-houses, and for the payment of debts contracted for the same, shall be called the "school-house fund;" that designed for rent, fuel, repairs, and all other contingent expenses necessary for keeping the schools in operation, the "contingent fund;" and that received for the payment of teachers, the "teachers' fund;" and the district treasurer shall keep with each fund a separate account, and shall pay no order which does not specify the fund on which it is drawn and the specific use to which it is applied. If he have not sufficient funds in his hands to pay in full the warrant drawn on the fund specified, he shall make a partial payment thereon, paying as near as may be an equal proportion of each warrant.

A school district may properly authorize steps to be taken to secure the location of a highway by its school-house, there being none, and may be made liable for expenses incurred in connection with an application for such highway. *Ind. Dist. of Flint River v. Kelley et al.*, 55 Iowa, 563.

SEC. 1749. [**Receive money.**—He shall receive all moneys apportioned to the district township by the county auditor, and also all money collected by the county treasurer on the district school tax levied for his district.

SEC. 1750. [**Register orders.**—He shall register all orders on the district treasury reported to him by the secretary, showing the number of the order, date, name of the person in whose favor drawn, the fund on which it is drawn, for what purpose, and the amount.

SEC. 1751. (*As amended by ch. 112, 16th g. a.*) [**Make statement to directors.**—He shall render a statement of the finances of the district from time to time, as may be required by the board of directors, and his books shall always be open for inspection.

(He shall make to the board, on the third Monday in September, a full and complete annual report, embracing:

1. The amount of teachers' fund held over, received, paid out, and on hand;
2. The amount of contingent fund held over, received, paid out, and on hand;
3. The amount of school-house fund held over, received, paid out, and on hand.

He shall immediately file a copy of his report with the county superintendent, and for failure to file said report he shall forfeit the sum of twenty-five dollars to be recovered by suit brought by the district on his official bond.)

SUBDIRECTOR.

SEC. 1752. [**Oath.**—Each subdirector shall, on or before the third Monday in March following his election, appear before some officer qualified to administer

oaths, and take an oath to support the constitution of the United States, and that of the state of Iowa, and that he will faithfully discharge the duties of his office; and in case of failure to qualify, his office shall be deemed vacant.

SEC. 1753. [**Employ teachers: make repairs: control house.**—The subdirector, under such rules and restrictions as the board of directors may prescribe, shall negotiate and make in his subdistrict all necessary contracts for providing fuel for schools, employing teachers, repairing and furnishing school-houses, and for making all other provisions necessary for the convenience and prosperity of the schools within his subdistrict, and he shall have the control and management of the school-house unless otherwise ordered by a vote of the district township meeting. All contracts made in conformity with the provisions of this section shall be approved by the president and reported to the board of directors, and said board, in their corporate capacity, shall be responsible for the performance of the same on the part of the district township.

The subdirectors of a district township are authorized to employ teachers, and to enter into contracts for that purpose, which, when approved by the president, and reported to the board of directors, are binding on the district. And the same rule applies, also, to the directors of independent districts. *Id.* And the contract, if executed by the directors while not acting in the capacity of a board, is binding on the district. *Id.*

Even where a contract for the employment of a teacher was executed without authority its subsequent ratification by the district in part performance, accepting its benefits and the like, would estop it from denying its validity. *Id.*

While a subdirector is authorized to make contracts for the employment of teachers in his subdistrict, he is to do so under such rules and restrictions as the board of directors may prescribe. *Thompson v. Linn*, 35 *Id.*, 361.

The board may restrict the subdirector as respects the class or qualifications of teachers, and where a feeling of dissatisfaction prevails among the people of the district as to a particular teacher, the board may properly direct that such person be not employed; and if in the face of such restriction the subdirector employ such person as a teacher, the contract will be regarded unauthorized. *Id.*

A contract of employment with a teacher becomes binding upon a district township only when made by a subdirector and approved by the president as provided in this section. The statute confers no authority on the board of directors to enter into such a contract. *Gambrell v. The Dist. Twp., etc.*, 54 *Id.*, 417.

No recovery can be had on a contract to teach school, made with a subdirector, but not approved by the president of the board, unless such approval has been waived, and the contract ratified by the district; the fact that the teacher proceeds thereunder, and completes the performance of the contract, is sufficient to constitute such ratification and authorize a recovery. *Place v. The District Township of Colfax*, 56 *Id.*, 573.

The omission of the officers of a school district to make a contract entered into by the directors and a third party a matter of record on its books constitutes no ground of defense in an action against the district upon such contract; and evidence of such omission is, therefore, inadmissible against the plaintiff. *Athearn v. The Ind. Dist. of Millersburg*, 33 *Id.*, 105.

A misnomer of the district in the contract, or a variance from its true name and style, will not operate to defeat the contract, if it appears that the corporation was intended to be described in and bound by the instrument. *Id.*

SEC. 1754. [**Make list of heads of families, etc.**—He shall, between the first and tenth days of September of each year, prepare a list of the names of the heads of families in his subdistrict, together with the number of children between the ages of five and twenty-one years, distinguishing males from females, and shall record the same in a book kept for that purpose.

SEC. 1755. [**Report to secretary.**—He shall, between the tenth and fifteenth days of September of each year, report to the secretary of the district township the number of persons in his subdistrict between the ages of five and twenty-one years, distinguishing males from females.

SEC. 1756. [**Dismiss pupils with concurrence of directors.**—He shall have power, with the concurrence of the president of the board of directors, to dismiss any pupil from the schools in his subdistrict for gross immorality, or for persistent violation of the regulations of the school, and to re-admit them, if he

deems proper so to do; and shall visit the schools in his subdistrict at least twice during each term of said school.

While the board of directors of a school district have power, under the statute, to dismiss a pupil for gross immorality, or for persistent violation of the regulations of the school, it has not power to dismiss or suspend for conduct short of this, as for acts done out of school, which, though having a tendency to incite ridicule of the directors, and insubordination in the school, are not immoral, or prohibited by any rule or regulation. *Murphy v. The Board of Directors, etc.*, 30 Iowa, 429.

Under the constitution and laws of this state, it is competent for the boards of school directors to provide by rule that pupils may be suspended from the schools in case they shall be absent or tardy, except for sickness or other unavoidable cause, a certain number of times within a fixed period. *Burdick v. Babcock et al.*; *Chandler v. Same*, 31 Id., 562. MILLER, J., dissenting, and holding, that the power under the constitution and statute, to provide rules and regulations for the government of the schools, is limited to the conduct of the pupils while at school, and cannot (except in cases of gross immorality), extend to the conduct of pupils out of school, or their failure to attend, or the like. These matters are within the rightful control of the parent or guardian.

TEACHERS.

SEC. 1757. (*As amended by ch. 60, 22d g. a.*) **All contracts with teachers** shall be in writing, specifying the length of time the school is to be taught, in weeks; the compensation per week, or per month of four weeks, and such other matters as may be agreed upon; and shall be signed by the subdirector or secretary and teacher, and be approved by and filed with the president before the teacher enters upon the discharge of his duties; (and a copy of all such contracts shall also be filed with the secretary of the board by the subdirector before the teacher enters upon the discharge of his duties.)

Where a teacher had made a parol contract with the directors of an independent school district to teach nine months, and had taught seven months, receiving pay therefor according to the contract, after which he was discharged; *held*, that although the contract was not in writing as required by the statute, nevertheless the acceptance and part performance was a ratification rendering the district liable on the contract. *Cook v. Independent School District of North McGregor*, 40 Iowa, 444; following *Athearn v. The Independent School District of Millersburg*, 33 Id., 105.

In an action by a teacher against a school district on a contract of employment entered into with the subdirector, it is no defense that the contract was not approved by nor filed with the president of the board of directors. *Conner v. The District Township of Ludlow*, 35 Id., 375.

SEC. 1758. [**Must obtain certificate from county superintendent.**—No person shall be employed to teach a common school which is to receive its distributive share of the school fund, unless he shall have a certificate of qualification signed by the county superintendent of the county in which the school is situated, or by some other officer duly authorized by law; and any teacher who commences teaching without such certificate shall forfeit all claim to compensation for the time during which he teaches without such certificate.

This section prohibits the employment of any one to teach a public school, which receives its distributive share of the school fund, unless he shall have a certificate. Per ROTHROCK, J., in *Bellinger v. The Independent District of Marshalltown*, 44 Iowa, 564.

SEC. 1759. [**Keep register.**—The teacher shall keep a correct daily register of the school, which shall exhibit the number or other designation thereof, township and county in which the school is kept; the day of the week, the month and year; the name, age and attendance of each pupil, and the branches taught. When scholars reside in different districts, a register shall be kept for each district.

SEC. 1760. [**File copy with secretary.**—The teacher shall, immediately after the close of his school, file in the office of the secretary of the board of directors, a certified copy of the register aforesaid.

GENERAL PROVISIONS.

SEC. 1761. [**School month.**—A school month shall consist of four weeks of five school days each.

SEC. 1762. [**Institute: school closed during.**—During the time of holding a teachers' institute in any county, any school that may be in session in such county shall be closed; and all teachers, and persons desiring a teacher's certificate, shall attend such institute, or present to the county superintendent satisfactory reasons for not so attending, before receiving such certificate.

SEC. 1763. [**Electors may direct what languages taught.**—The electors of any school district at any legally called school meeting, may, by a vote of a majority of the electors present, direct the German or other language to be taught as a branch in one or more of the schools of said district, to the scholars attending the same whose parents or guardians may so desire; and thereupon such board of directors shall provide that the same be done; *provided*, that all other branches taught in said school or schools shall be taught in the English language; *provided further*, that the person employed in teaching the said branches shall satisfy the county superintendent of his ability and qualifications, and receive from him a certificate to that effect.

SEC. 1764. **The bible shall not be excluded** from any school or institution in this state, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian.

Under this section it is a matter of individual option with school teachers as to whether they will use the bible in their schools or not, such option being restricted only by the provision that no pupil shall be required to read it contrary to the wishes of his parent or guardian; and said section is not in conflict with article 1, section 3 of the state constitution. *Moore v. Monroe et al.*, 64 Iowa, 367.

(CHAPTER 136, LAWS OF 1876.)

RELATING TO SCHOOL SUPERINTENDENTS AND DIRECTORS.

An Act to define who may hold the offices of county school superintendent and school director in the state of Iowa.

SECTION 1. [**Sex not to render any one ineligible.**—*Be it enacted by the general assembly of the state of Iowa:* That no person shall be deemed ineligible by reason of sex to any school office in the state of Iowa.

SEC. 2. [**Nor deprive one of office.**—No person who may have been or shall be elected or appointed to the office of county superintendent of common schools or school directors in the state of Iowa, shall be deprived of office by reason of sex.

(Took effect by publication in newspapers March 29, 1876.)

There is no constitutional inhibition upon the rights of a woman to hold the office of county superintendent of schools. *Huff v. Cook*, 44 Iowa, 639.

In the absence of a constitutional restriction, the general assembly may confer upon women the right to hold an elective office, or by retrospective statute confirm her election thereto. *Id.*

That such a retrospective statute was not passed until after a judgment was rendered in the inferior court, holding her to be ineligible, will not deprive her of its benefits upon appeal. *Id.*

So also she is entitled in such case to avail herself of the curative act in the supreme court notwithstanding an agreement that the cause should be there heard and determined upon the pleadings and agreed statement of facts on which the cause was tried below. *Id.*

COUNTY SUPERINTENDENT.

SEC. 1765. [**Cannot hold another office.**—The county superintendent shall not hold any office in, or be a member of the board of directors of a district town-

ship or independent district, or of the board of supervisors during the time of his incumbency.

SEC. 1766. (*As substituted by ch. 143, 17th g. a.*)—[**Meet and examine teachers.**]—(On the last Saturday of each month the county superintendent shall meet all person desirous of passing an examination, and for the transaction of other business within his jurisdiction, in some suitable room provided for that purpose by the board of supervisors at the county seat, at which time he shall examine all such applicants for examination as to their competency and ability to teach orthography, reading, writing, arithmetic, geography, English grammar, physiology and history of the United States; and in making such examination, he may, at his option, call to his aid one or more assistants. Teachers exclusively teaching music, drawing, penmanship, book-keeping, German or other language, shall not be required to be examined except in reference to such special branch, and in such case it shall not be lawful to employ them to teach any branch, except such as they shall be examined upon and which shall be stated in the certificate.)

An independent school district may provide that music shall be taught in its schools, and the board of directors have authority to contract on behalf of the district for the purchase of a musical instrument to be paid for out of the unappropriated funds of the district. *Bellinger v. The Independent District, etc.*, 44 Iowa, 504.

The county superintendent cannot recover from the county for services in examining teachers at any other time than as provided in section 1766 of the code. *Farrell v. Webster County*, 49 Id., 245

The action of *mandamus* will not be to compel the issuance of a teacher's certificate by the county superintendent, he being vested with a discretionary power. The court may compel him to act upon an application for a certificate, but cannot control his discretion. *Bailey v. Ewart*, 52 Id., 111.

The county superintendent, as such, has no power to sue an injunction to restrain a person from teaching a public school, or the school officers from paying for such services out of the school funds of the district, on the ground that the teacher is teaching without a certificate of qualification, in violation of the laws of the state, but it seems that any citizen or resident of the district may maintain such a proceeding. *Perkins v. Wolf et al.*, 17 Id., 223.

SEC. 1767. [**Give certificate.**]—If the examination is satisfactory, and the superintendent is satisfied that the respective applicants possess a good moral character, and the essential qualifications for governing and instructing children and youth, he shall give them a certificate to that effect, for a term not exceeding one year.

SEC. 1768. [**Examination: public record made.**]—Any school officer or other person shall be permitted to be present at the examination; and the superintendent shall make a record of the name, residence, age, and date of examination of all persons so examined, distinguishing between those to whom he issued certificates, and those rejected.

SEC. 1769. (*As amended by ch. 54, 17th g. a.*)—**County superintendent to hold institutes annually.**]—The county superintendent shall hold, annually, a normal institute for the instruction of teachers and those who may desire to teach, and, with the concurrence of the superintendent of public instruction, procure such assistance as may be necessary to conduct the same, at such times as the schools in the county are generally closed. To defray the expenses of said institute, he shall require the payment of a (registration fee of one dollar from each person attending the normal institutes, and shall require the payment, in all cases, of one dollar from every applicant for a certificate.)

SEC. 2. [**To transmit money.**]—He shall monthly, and at the close of each institute, transmit to the county treasurer all moneys so received, including the state appropriation for institutes, to be designated the "institute fund," together with a report of the name of each person so contributing, and the amount. The board of supervisors may appropriate such additional sum as may by them be deemed necessary for the further support of the institute. All disbursements of the institute fund shall be upon the order of the county superintendent, and no order shall

be drawn except for bills presented to the county superintendent and approved by him for services rendered, or expenses incurred, in connection with the normal institute.]

SEC. 1770. [**May appoint deputy.**]—If, for any cause, the county superintendent is unable to attend to his official duties, he shall appoint a deputy to perform them in his stead, except visiting schools and trying appeals.

SEC. 1771. [**May revoke certificate.**]—The superintendent may revoke the certificate of any teacher in the county which was given by the superintendent thereof, for any reason which would have justified the withholding thereof when the same was given, after an investigation of the facts in the case, of which investigation the teacher shall have personal notice, and he shall be permitted to be present and make his defense.

SEC. 1772. [**Make report to superintendent.**]—On the first Tuesday of October of each year, he shall make a report to the superintendent of public instruction, containing a full abstract of the reports made to him by the respective district secretaries, and such other matters as he shall be directed to report by said superintendent, and as he himself may deem essential in exhibiting the true condition of the schools under his charge; and he shall, at the same time, file with the county auditor a statement of the number of persons between the ages of five and twenty-one years in each school district in his county.

SEC. 1773. [**Penalty for failure.**]—Should he fail to make either of the reports required in the last section, he shall forfeit to the school fund of his county the sum of fifty dollars, and shall, besides, be liable for all damages caused by such neglect.

SEC. 1774. (*As amended by ch. 161, 19th g. a.*)—[**Must conform to instructions.**]—He shall at all times conform to the instructions of the superintendent of public instruction, as to matters within the jurisdiction of the said superintendent. He shall serve as the organ of communication between the superintendent and township or district authorities. He shall transmit to the townships, districts, or teachers, all blanks, circulars, and other communications which are to them directed; [he may at his discretion visit the different schools in his county, and shall at the request of a majority of the directors of a district, visit the school in said district at least once during each term.]

SEC. 1775. [**Report to colleges for the blind and deaf and dumb.**]—He shall report on the first Tuesday of October of each year to the superintendent of the Iowa college for the blind, the name, age, residence, and postoffice address of every person blind to such an extent as to be unable to acquire an education in the common schools, and who resides in the county in which he is superintendent, and also to the superintendent of the Iowa institution for the deaf and dumb, the name, age, and postoffice address of every deaf and dumb person between the ages of five and twenty-one who resides within his county, including all such persons as may be deaf to such an extent as to be unable to acquire an education in the common schools.

SEC. 1776. (*As amended by ch. 161, 19th g. a.*) [**Compensation.**]—The county superintendent shall receive from the county treasury the sum of (four) dollars per day for ever day necessarily engaged in the performance of official duties, and also the necessary stationery and postage for the use of his office, and he shall be entitled to such additional compensation as the board of supervisors may allow; *provided*, that he shall first file a sworn statement of the time he has been employed in his official duties with the county auditor.

The sworn statement of the superintendent, giving the time he has been occupied in the discharge of his official duties and his expenses, is not conclusive upon the board of supervisors, and they may refuse to allow the claim if they deem it unreasonable or unjust. *Bean v. The Board of Supervisors, etc.*, 51 Iowa, 53.

TAXES.

SEC. 1777. [Board to estimate amount, etc.]—The board of directors shall, at their regular meeting in March of each year, or at a special meeting convened for that purpose, between the time designated for such regular meeting and the third Monday in May, estimate the amount required for the contingent fund, and also such sum as may be required for the teachers' fund, in addition to the amount received from the semi-annual apportionment, as shown by the notice from the county auditor, to support the schools of the district for the time required by law for the current year; and shall cause the secretary to certify the same, together with the amount voted for school house purposes, within five days thereafter to the board of supervisors, who shall, at the time of levying taxes for county purposes, subject to the provisions of section seventeen hundred and eighty of this chapter, levy the per centum necessary to raise the sum thus certified upon the property of the district township, which shall be collected and paid over as are other district taxes.

The board of directors are alone authorized to fix the rates of tax to be levied for teachers and contingent funds, and where this function was assumed by the board of supervisors the tax was held illegal and void. *The C. R. & M. R. R. Co. et al. v. Carroll County*, 41 Iowa, 153, 179.

If the electors of the district shall neglect or refuse to vote the proper school house tax after it has been properly certified, it becomes then the duty of the board of directors to do so. *Id.*

This section provides that the board of supervisors shall levy the per centum necessary to raise the sum certified to them by the board of directors. *Held*, that the action of the supervisors depends solely upon that of the board of directors, and where that is invalid there is nothing upon which the supervisors can act. *Standard Coal Co. v. Ind. Dist. of Angus*, 34 N. W. R., 870.

SEC. 1778. [Apportion: school house tax.]—They shall apportion any tax voted by the district township meeting for school house fund among the several subdistricts in such a manner as justice and equity may require, taking as a basis of such apportionment the respective amounts previously levied upon said subdistricts for the use of such fund; *provided*, that if the electors of one or more subdistricts at their last annual meeting shall have voted to raise the sum for school house purposes greater than that granted by the electors at the last annual meeting of the district township, they shall estimate the amount of such excess on such subdistrict or subdistricts, and cause the secretary to certify the same within five days thereafter to the board of supervisors, who shall, at the time of levying taxes for county purposes, levy the per centum of such excess on the taxable property of the subdistrict asking the same, *provided* that not more than fifteen mills on the dollar shall be levied on the taxable property of any subdistrict for any one year for school house purposes.

This section, prescribing the time and manner in which a school tax shall be levied, is directory merely, and a failure of the board of supervisors to levy the tax in the time prescribed is not fatal thereto. *Perrin et al. v. Benson*, 49 Iowa, 325.

Under section 1778 of the code, a subdistrict in a district township has the power, at its annual meeting of electors, to vote a tax to be raised in the subdistrict for school-house purposes, in addition to the tax voted under section 1717, par. 3, of the code, by the electors of the whole district township at their annual meeting; and when such tax has been voted in a subdistrict, it is the duty of the directors of the district township to certify it to the board of supervisors, to the end that they may levy the same; and *mandamus* will lie to compel the directors to perform such duty. *Wood v. Farmer et al.*, 69 Id., 533.

SEC. 1779. [Board to levy tax.]—The board of supervisors of each county shall, at the time of levying the taxes for county purposes, levy a tax for the support of schools within the county of not less than one mill nor more than three mills on the dollar, on the assessed value of all the real and personal property within the county, which shall be collected by the county treasurer at the time and in the same manner as state and county taxes are collected, except that it shall be receivable only in cash.

SEC. 1730. [**Same: amount of levy limited.**]-They shall also levy at the same time, the district school tax certified to them from time to time by the respective district secretaries; *provided*, that the amount levied for school-house fund shall not exceed ten mills on the dollar on the property of any district, and the amount levied for contingent fund shall not exceed five dollars per pupil, and the amount raised for teachers' fund, including the amount received from the semi-annual apportionment, shall not exceed fifteen dollars per pupil for each pupil residing in the district, as shown by the last report of the county superintendent. And if the amount certified to the board of supervisors exceeds this limit, they shall levy only to the amount limited; *provided*, that they may levy seventy-five dollars for contingent fund, and two hundred and seventy dollars, including the amount received for the semi-annual apportionment, for the teachers' fund for each subdistrict.

By a division of the township of A the township of W was erected, the division to take effect for school purposes at the March election, 1872. The county superintendent made his return of the number of scholars of the old township in October, 1871, but made no return respecting the new township. The taxes for teachers' and contingent funds for the year 1872, in both townships, were not in excess of the statutory limitation; *held*, that the taxes in the township of W were collectible. *Milwaukee & St. P. R. R. Co. v. The County of Kossuth*, 41 Iowa, 57.

Where two independent districts were organized, embracing certain common territory, it was *held* that such territory would be included in the limits of the district whose organization was first commenced, and that it was the duty of the board of supervisors to levy the tax in its favor. *The Independent District of Sheldon v. The Board of Supervisors, etc.*, 51 Id., 658.

Courts will not consider whether certain territory included in an independent school district is "contiguous" thereto until the aid of the officers of the school district has first been invoked. *Id.*

The board of supervisors are not authorized to levy a tax for the payment of a judgment against the school-house fund of a district township, when the tax already levied for the use of that fund equals the maximum rate of ten mills on the dollar. *The Sterling S. F. Co. v. Harvey*, 45 Id., 466.

COUNTY AUDITOR.

SEC. 1731. [**To apportion taxes, etc.**]-The county auditor shall, on the first Monday in April and the fourth Monday in September of each year, apportion the county school tax, together with the interest of the permanent school fund to which his county is entitled, and all other money in the hands of the county treasurer belonging in common to the schools of his county and not included in any previous apportionment, among the several sub-districts therein, in proportion to the number of persons between five and twenty-one years of age, as shown by the report of the county superintendent filed with him for the year immediately preceding.

SEC. 1732. [**Notify president of school district.**]-He shall immediately notify the president of each school district of the sum to which his district is entitled by said apportionment, and shall issue his warrant for the same to accompany said notice, which warrant shall be also signed by the president and countersigned by the secretary of the district in whose favor the same is drawn; and shall authorize the district treasurer to draw the amount due said district from the county treasurer; and the secretary shall charge the treasurer of the district with all warrants drawn in his favor, and credit him with all warrants drawn on the funds in his hands, keeping separate accounts with each fund.

SEC. 1733. [**Forward certificate of election to auditor of state.**]-He shall forward to the superintendent of public instruction, a certificate of the election or appointment and qualification of the county superintendent; and shall, also, on the second Monday in February and August of each year, make out and transmit to the auditor of state, in accordance with such form as said auditor may prescribe, a report of the interest of the school fund then in the hands of the county

treasurer, and not included in any previous apportionment; and also the amount of said interest remaining unpaid.

COUNTY TREASURER.

SEC. 1784. [**To pay over taxes.**]—The county treasurer shall, on the first Monday in April of each year, pay over to the treasurer of the district the amount of all school district tax which shall have been collected, and shall render him a statement of the amount uncollected, and shall pay over the amount in his hands quarterly thereafter. He shall also keep the amount of tax levied for school-house purposes, separate in each subdistrict where such levy has been made directly upon the property of the subdistrict making the application, and shall pay over the same quarterly to the township treasurer for the benefit of such subdistrict. He shall, in all counties wherein independent districts are organized, keep a separate account with said independent districts, in which the receipts shall be daily entered, which books shall at all times be open to the inspection and examination of the district board of directors, and shall pay over to the said independent districts the amount of school taxes in his possession on the order of the board, on the first day of each and every month.

SEC. 1785. [**To notify president of school board.**]—On the first day of each quarter, the county treasurer shall give notice to the president of the school board of each township in his county of the amount collected for each fund; and the president of each board shall draw his warrant, countersigned by the secretary, upon the county treasurer for such amount, who shall pay the amount of such taxes to the treasurers of the several school boards only on such warrants.

The fact that a county treasurer paid the funds of a school district to a treasurer without any warrant drawn and countersigned by the officers of the district, as provided in this section, will not render him liable for a deficit in the accounts of the district which was not the proximate result of such irregular payment. *Dist. Tp. of Grove v. Bowman*, 55 Iowa, 129.

MISCELLANEOUS.

SEC. 1786. [**Fines and penalties.**]—All fines and penalties collected from a school district officer by virtue of any of the provisions of this chapter, shall inure to the benefit of that particular district. Those collected from any member of the board of directors shall belong to the district township, and those collected from county officers, to the county. In the two former cases, suit shall be brought in the name of the district township; in the latter, in the name of the county, and by the district attorney. The amount in each case shall be added to the fund next to be applied by the recipient for the use of common schools.

SEC. 1787. [**Judgments: how paid.**]—When a judgment has been obtained against a school district, the board of directors shall pay off and satisfy the same from the proper fund, by an order on the treasurer; and the district meeting at the time for voting a tax, for the payment of other liabilities of the district, shall provide for the payment of such order or orders.

The directors of a school district township, on their refusal to levy a tax to pay a judgment recovered against it, may be compelled by *mandamus* to do so, the electors of the district having failed and refused to provide therefor, by voting the necessary tax. *Boynton v. Dist. Tp. of Newton*, 34 Iowa, 510; *Dodge v. Same*; *Stevenson & Rice v. The Dist. Tp. of Summit*, 35 *Id.*, 462.

That the board of directors have issued an order on the treasury of the district for the amount of the judgment, does not change the rule above stated. The order thus issued does not amount to a satisfaction of the judgment until paid. *Id.*

It is the province of the board of directors of a school district township to designate the fund or funds upon which orders shall be drawn for the payment of judgments, and a creditor is not required to specify, in his demand for the issuance of such orders, the amount of his claim against each fund. *The Dist. Tp. of Coon v. The Board of Directors, etc.*, 52 *Id.*, 287.

A creditor who has obtained a judgment against a district township upon an order on the school-house fund, and to whom an order on the treasury has been issued for its payment in compliance with this section, is not entitled to payment out of the general fund to the exclusion of the holders of other orders on the school-house fund who have not obtained judgments. *Chase v. Morrison*, 40 *Id.*, 620.

The judgment in such case will enable the plaintiff to levy upon the property of the district, if any be found, or by *mandamus* compel the levy of a special tax, if the district has not levied the maximum allowed by law. *Id.*

SEC. 1788. [**Money borrowed of school fund: how paid.**—In case a school district has borrowed money of the school fund, the board of supervisors shall levy such tax, not exceeding five mills on the dollar in any one year, on the taxable property of the district as constituted at the time of making such loan, as may be necessary to pay the annual interest on said loan, and the principal when the same falls due, unless the board of supervisors shall see proper to extend the time of said loan.

SEC. 1789. (*As amended by ch. 51, 22d g. a.*) [**Hours of meeting and adjourning.**—No district township or subdistrict meeting shall organize earlier than nine o'clock A. M., nor adjourn before twelve o'clock M.; and in all independent districts having a population of three hundred and upward, [the polls shall remain open from twelve o'clock M. to seven o'clock P. M.]

At an election held to vote upon the organization of an independent school district, embracing contiguous territory lying in another township, the polls must be kept open from nine o'clock, A. M., to four o'clock, P. M. An election called for one o'clock, P. M., is, therefore, invalid. *The Dist. Tp of Hesper et al. v. The Ind. Dist. of Burr Oak*, 34 Iowa, 306.

SEC. 1790. [**Oath: administer to each other.**—Any school director, or director elect, is authorized to administer to any school director elect the official oath required by law, and said official oath may be taken on or before the third Monday in March following the election of directors.

SEC. 1791. [**Deliver money, books, etc., to successor: penalty for failure.**—When any school officer is superseded by election or otherwise, he shall immediately deliver to his successor in office, all books, papers and moneys pertaining to his office, taking a receipt therefor; and every such officer who shall refuse to do so, or who shall willfully mutilate or destroy any such books or papers, or any part thereof, or shall misapply any moneys entrusted to him by virtue of his office, shall be liable to the provisions of the general statutes for the punishment of such offense.

SEC. 1792. [**Jurisdiction.**—Nothing in this chapter shall be so construed as to give the board of directors of a district township jurisdiction over any territory included within the limits of any independent district.

SEC. 1793. (*As amended by ch. 41, 17th g. a., and ch. 64, 16th g. a.*) [**Attending school in adjoining district.**—[Children residing in one district may attend school in another in the same or adjoining county or township on such terms as may be agreed upon by the respective boards of directors, but in case no such agreement is made, they may attend school in any adjoining district with the consent of the county superintendent of the county where such pupil resides and the board of directors of said adjoining district, when they reside nearer the school in said district, and one and a half miles or more, by the nearest traveled highway, from any school in their own.] The board of directors of the township, in which such children reside, shall be notified in writing, and the district in which they reside shall pay to the district in which they attend school, the average tuition of said children per week, and an average proportion of the contingent expenses of said district where they attend school; and in case of refusal so to do, the secretary shall file the account of tuition and contingent expenses certified to by the president of the board, with the county auditor of the county in which such children reside, and the said county auditor at the time of making the next semi-annual apportionment thereafter, deduct the amount so certified from the sum appor-

tioned to the district in which said children reside, and cause it to be paid over to the district in which they have attended school.

See *District Township of Horton v. The District Township, etc.*, 49 Iowa, 231.

SEC. 1794. [**Residence of pupils.**—Pupils who are actual residents of a district shall be permitted to attend school in the same, regardless of the time when they acquired such residence, whether before or after the enumeration, or of the residence of their parents or guardians; but pupils who are sojourning temporarily in one district, while their actual residence is in another, and to whom the last preceding section is not applicable, may attend school upon such terms as the board of directors may deem just and equitable.

SEC. 1795. [**Pupils: where attend school.**—Pupils may attend school in any subdistrict of the district township in which they reside with the consent of the subdirector of such subdistrict, and of the subdirector of the subdistrict in which such pupils reside.

SEC. 1796. [**Divide townships.**—The board of directors shall at their regular meeting in September, or at any special meeting called thereafter for that purpose, divide their townships into subdistricts, such as justice, equity and the interests of the people require; and may make such alterations of the boundaries of subdistricts heretofore formed, as may be deemed necessary; and shall designate such subdistricts, and all subsequent alterations, in a distinct and legible manner, upon a plat of the district provided for that purpose; and shall cause a written description of the same to be recorded in the district records, a copy of which shall be delivered by the secretary to the county treasurer, and also to the county auditor, who shall record the same in his office; *provided*, that the boundaries of subdistricts shall conform to the lines of congressional divisions of land; and that the formation and alteration of subdistricts as contemplated in this section, shall not take effect until the next subdistrict election thereafter, at which election a subdirector shall be elected for the new subdistrict.

The boards of directors of independent school districts have no power to change the boundaries of their districts. Such change can only be made, if at all, by the county superintendent, under the joint provisions of sections 1796 and 1806 of the code. *Eason v. Douglass et al.*, 55 Iowa, 390.

See note to section 1718, *ante*.

Where there has been an agreement for the restoration to a district township of detached territory, in the absence of a stipulation to the contrary it will be held to take effect under this section, or, according to the general scope and intent of the school law, on the first Monday of March after the agreement has been entered into; and the taxes collected and moneys appropriated for the support of the attached territory up to the taking effect of the restoration, are payable to the district township, which supported the school, notwithstanding the warrants therefor are not presented and payment demanded until after the restoration has been perfected. *Dist. Tp. of Honey Creek v. Floete*, 59 Id., 109.

The board of directors of a district township have power in their discretion under this section, to re-district the township at any time they deem proper; an aggrieved party may appeal to the county superintendent, but he can not enjoin the board from exercising such power. *Morgan v. Wilfley et al.*, 70 Id., 338.

SEC. 1797. [**Where streams and other obstacles interfere.**—In cases where, by reason of streams or other natural obstacles, any portion of the inhabitants of any school district cannot, in the opinion of the county superintendent, with reasonable facility enjoy the advantages of any school in their township, the said county superintendent, with the consent of the board of directors of such district as may be affected thereby, may attach such part of said township to an adjoining township, and the order therefor shall be transmitted to the secretary of each district, and be by him recorded in his records, and the proper entry made on his plat of the district.

The school law of this state contemplates that school districts shall coincide in their boundaries with civil townships. Section 1797 of the code provides the only exception to this rule. *District Township of Union v. Independent District of Greene*, 41 Iowa, 30.

No such restriction rests upon the formation of independent districts, which may be created from two or more civil townships, or parts of the same, situated in adjoining counties. *Id.*

A county superintendent of schools has no authority to detach territory from one independent school district and attach it to another one, unless by reason of streams, or other natural obstacles, the inhabitants of the territory so detached cannot, with reasonable facility enjoy the advantages of the schools in the district from which the territory is sought to be detached, nor unless the directors of the district deprived of the territory consent thereto. *The Independent District of Union v. The Independent District of Cedar Rapids*, 62 Id., 616.

SEC. 1798. (*As substituted by ch. 111, 18th g. a., and amended by ch. 160, 19th g. a.,* [Restoration of territory].)—[That in all cases where territory has been, or may be set into an adjoining county or township, or attached to any independent school district in any adjoining county or township, for school purposes, such territory may be restored by the concurrence of the respective board [s] of directors; but on the written application of two-thirds of the electors residing upon the territory within such township or independent district in which the school-house is not situated, the said boards shall restore the territory to the district to which it geographically belongs.] [*Provided, however, that no such restoration shall be made unless there are fifteen or more pupils between the ages of five and twenty-one years actually residing upon said territory sought to be restored, and not until there has been a suitable school house erected and completed within the limits of said territory suitable for school purposes.*]

This section provides for detaching territory only when both townships are organized as district townships, and each is governed by a board of directors whose jurisdiction extends over the entire township. *The Independent District of Fairview v. Durland et al.*, 45 Iowa, 53.

An independent district, embracing territory lying within the limits of two district townships, cannot be deprived of its territory, save upon the concurrent action of the boards of directors of both the district townships; and when the organization of one of the townships has been abandoned, the territory lying within the limits of the other cannot be restored to it upon a vote to that effect by two-thirds of the voters residing within the township. *Id.*

Where a district township had been divided into independent districts, a vote of the electors redistricting the townships did not have the effect to destroy the legal existence of an independent district lying partly within the township and partly within another, notwithstanding the directors of the latter had ordered the territory belonging to it to be restored. *Id.*

See cases cited under section 1715, *ante*.

SEC. 1799. [Township lines cannot be so changed as to divide districts.]—The boundary lines of a civil township shall not be changed by the board of supervisors of any county so as to divide any school district by changing the boundary lines thereof, except when a majority of the voters of such district shall petition therefor; *provided, however, that this shall not prevent the change of the boundary lines of any civil township, when such change is made by adopting the lines of congressional townships.*

(CHAPTER 132, LAWS OF 1878.)

ISSUANCE OF BONDS BY SCHOOL DISTRICTS TO FUND JUDGMENT INDEBTEDNESS.

An Act to enable school districts to issue bonds for the purpose of funding judgment indebtedness now existing. [Additional to code, title XII, chapter 9, "Of the system of common schools."]

SECTION 1. [Judgment indebtedness now existing.]—*Be it enacted by the general assembly of the state of Iowa:* That any school district against which judgments have been rendered prior to the passage of this act, and which judgments remain unsatisfied, may, for the purpose of paying off such judgments and funding such judgment indebtedness, issue upon the resolution of the board of directors of the district, the negotiable bonds of such district, running not more than ten years, and bearing a rate of interest not exceeding ten per centum per annum, payable semi-annually, which bonds shall be signed by the president of the district and countersigned by the secretary, and shall not be disposed of for less than their

par value, nor for any other purpose than that provided for by this act, and such bonds shall be binding and obligatory upon the district.

SEC. 2. [**Payment of bonds.**]—It shall be the duty of the board of directors of any district which shall issue bonds under this act, to provide for the payment of the same by the levy of tax therefor, in addition to the other taxes provided by law, and they are hereby required to levy such an amount each year as shall be sufficient to meet the interest on such bonds promptly as it accrues.

SEC. 3. [**Form of bond, etc.**]—The bonds issued under this act shall be in the name of the district, and in substantially the same form as is by law provided for county bonds; shall be payable at the pleasure of the district; shall be registered in the office of the county auditor; shall be numbered consecutively and redeemed in the order of their issuance.

Approved March 25, 1878.

(CHAPTER 51, LAWS OF 1880.)

FUNDING JUDGMENT INDEBTEDNESS.

An Act to enable school districts or district townships to issue bonds for the purpose of funding judgment indebtedness now existing. [Additional to code, title XII, chapter 9: "Of the system of common schools."]

SECTION 1. [**As to issuance of bonds.**]—*Be it enacted by the general assembly of the state of Iowa:* That any school district or district township against which judgments have been rendered prior to the passage of this act, and which such judgments remain unsatisfied, may, for the purpose of paying off such judgment indebtedness, issue negotiable bonds of such district township, upon a resolution of the board of directors of the district township, running not more than ten years, and bearing a rate of interest not exceeding eight per cent per annum, payable semi-annually, which bonds shall be signed by the president of the district and countersigned by the secretary, and shall not be disposed of for less than their par value, nor for any other purpose than that provided by this act, and such bonds shall be binding and obligatory upon the district township.

SEC. 2. [**Shall provide for paying bonds.**]—It shall be the duty of the board of directors of any district township which issues bonds under this act, to provide for the payment of the same by the levy of tax therefor, in addition to the other taxes provided by law, and they are hereby required to levy such an amount each year as shall be sufficient to meet the interest on such bonds promptly as it accrues.

SEC. 3. [**How issued.**]—The bonds issued under this act shall be in the name of the district township, and in substantially the same form as is by law provided for county bonds; shall be payable at the pleasure of the district township; shall be registered in the office of the county auditor; shall be numbered consecutively and redeemed in the order of their issuance.

Approved March 16, 1880.

INDEPENDENT DISTRICTS.

SEC. 1800. (*As substituted by ch. 13918th g. a.*) [**Separate districts formed.**]—[Any city, town, or village containing not less than two hundred inhabitants within its limits, may be constituted a separate school district; and territory contiguous to such a city, town, or village may be included with it as a part of said separate district in the manner hereinafter provided. The village herein men-

tioned shall be understood to be a collection of inhabitants residing within the limits of a town plat and not organized into a city or incorporated town.]

The territory organized into an independent school district must contain not less than two hundred inhabitants; an organization with less than two hundred is unauthorized, and its legality may be inquired into by information in the nature of a *quo warranto*. *The State ex rel. v. The Ind. School Dist. of Carbondale*, 29 Iowa, 264.

Under this section, as amended, no village of less than two hundred inhabitants may be organized, with contiguous territory, into an independent school district. The inhabitants of contiguous territory are not to be added to the village proper to increase the number to two hundred. *Allen v. The Dist. Tp. of Bertram*, 70 Id., 434.

SEC. 1801. [Vote of people.]—At the written request of any ten legal voters residing in such city or town, the board of directors of the district township shall establish the boundaries of the contemplated school district, including such contiguous territory as may best subserve the convenience of the people for school purposes, and shall give at least ten days' previous notice of the time and place of meeting of the electors residing in said district, by posting written notices in at least five conspicuous places therein; at which meeting the said electors shall vote by ballot for or against a separate organization.

In the erection of an independent school district in a city, town, or the "contiguous territory" to be embraced in the new district need not be confined to the same township in which the city or town is situated, but may embrace territory in another township. Nor is it necessary that the boundaries should be fixed by the concurrent action of the two townships. *Independent School District of Granville v. Board of Supervisors, etc.*, 25 Iowa, 305. To the same effect is *District Township of Union v. Independent District of Greene*, 41 Id., 30.

The extension of the limits of a city or town does not have the effect to enlarge the school district existing in such city or town, previous to such extension of its boundaries. *The State v. Independent School District No. 6; The State v. Independent School District of Sunnyside et al.*, 46 Id., 425.

Where the notice of election to determine a proposition to annex territory to a school district under section 2098 of the revision, instead of providing for taking the vote of all qualified persons residing within the contemplated district, provided for a vote by only a portion thereof, it was held that the organization was invalid, and would not be valid though the votes in favor of the organization exceeded in number all the votes in the excluded territory. *Fort Dodge School District v. The Dist. Tp., etc.*, 17 Id., 85.

SEC. 1802. (As substituted by ch. 27, 15th g. a.) [Organization of independent districts.]—[Should a majority of votes be cast in favor of such separate organization, the board of directors of the district township shall give similar notice of a meeting of the electors for the election of six directors. Two of these directors shall hold their office until the first annual meeting after their election, and until their successors are elected and qualified, two until the second, and two until the third annual meeting thereafter, their respective terms of office to be determined by lot. The six directors shall constitute a board of directors for the district, and they shall, at their first regular meeting in each year, elect a president from their own number, and at their meeting on the third Monday of September in each year a secretary and treasurer, to be chosen outside of the board: *Provided*, that in all independent districts having a population of less than five hundred there shall be three directors elected, who shall organize by electing a president from their own number, also a secretary, [who may or may not, be a member of the board. and a treasurer, who shall not be a member of the board]: *And provided, further*, that in all independent districts already organized the terms of office of such directors as may have been chosen previous to the taking effect of this section for two or three years shall not be interfered with by its passage.]

SEC. 1803. [Meeting for.]—Said meeting for the first election of directors shall organize by appointing a president and secretary, who shall act as judges of the election and issue a certificate of election to the person elected.

SEC. 1804. [When organization of completed: disposition of taxes.]—The organization of such independent district shall be completed on or before the first day of August of the year in which said organization is attempted, and when

such organization is thus completed, all taxes levied by the board of directors of the district township of which the independent district formed a part in that year, shall be void so far as the property within the limits of the independent district is concerned; and the board of directors of such independent district shall levy all necessary taxes for school purposes as provided by law for that year at a meeting called for that purpose, at any time before the third Monday of August of that year, which shall be certified to the board of supervisors on or before the first Monday of September, and said board of supervisors shall levy said tax at the time and in the manner that school taxes are required to be levied in other districts.

SEC. 1805. [**When formed of parts of two townships.**—In case such district is formed of parts of two or more civil townships in the same or adjoining counties, the duty of giving the notice shall devolve upon the board of directors of the township in which a majority of the legal voters of the contemplated district reside.

SEC. 1806. [**Number of schools in.**—Said district may have as many schools, and be divided into such wards or other subdivisions for school purposes, as the board of directors may deem proper, and shall be governed by the laws enacted for the regulation of district townships, so far as the same may be applicable.

See note to section 1797, *ante*, from *The Independent District of Union v. The Independent District of Cedar Rapids*, 62 Iowa, 616.

SEC. 1807. [**School-house tax voted for by electors.**—It shall be lawful for the electors of any independent district, at the annual meeting of such district, to vote a tax, not exceeding ten mills on the dollar in any one year, on the taxable property of such district, as the meeting may deem sufficient, for the purchase of grounds and the construction of the necessary school-houses for the use of such independent district, and for the payment of any debts contracted for the erection of such school-houses, and for procuring a library and apparatus for the use of the schools of such independent district.

This section limits the amount of taxes to be levied, for the purposes mentioned therein, to one cent per annum; a tax in excess of this amount is void for such excess. *McPherson v. Foster Bros.*, 43 Iowa, 48.

This section, providing that the electors of an independent school district shall not vote a tax exceeding ten mills on the dollar for school-house purposes, applies only to districts in which no bonded debt has been created. *Richards, Trustee, v. Supervisors of Lyon County*, 69 Id., 612.

(CHAPTER 131, LAWS OF 1886.)

RELATING TO ELECTORS OF INDEPENDENT DISTRICTS.

An Act to amend section 1807 of the code of Iowa, relating to the power of the electors of independent districts at annual meetings, and legalizing acts heretofore done.

SECTION 1. (*Code, section 1807, amended.*) [**Sale of school property.**—*Be it enacted by the general assembly of the state of Iowa:* That section 1807 of the code of Iowa be amended by adding at the end thereof as part of said section, the following, to-wit: And said electors may direct the sale or other disposition to be made of any school-house or the site thereof, or any part of such site, and of such other property, real and personal, as may belong to the independent district, and direct the manner in which the proceeds arising therefrom shall be applied.

SEC. 2. [**Acts legalized.**—That all acts of independent districts heretofore done in authorizing or making sales of real estate, where done as provided in paragraph 2 of section 1717 of the code of Iowa, or submitted and carried under section 2 of chapter 8 of the laws of A. D. 1880, of Iowa, be and the same are hereby legalized and made valid in all respects as duly authorizing or making such sales

and conveyances thereunder, the same as though said paragraph 2 of section 1717 of the code had been incorporated in and made part of said section 1807.

Approved April 10, 1886.

SEC. 1808. (*As amended by § 2, ch. 7, 18th g. a.*)—[**Annual meeting.**]—The annual meeting of all independent districts shall be held on the second Monday in March for the transaction of the business of the district, and for the election by ballot of two directors, as the successors of the two whose term expires, who shall continue in office for three years; and the president, secretary, and one of the directors then in office shall act as judges of the election, and shall issue certificates of election to the persons elected for the ensuing term; *provided*, that in all independent districts having a population of less than five hundred, there shall be elected, annually, one director, who shall continue in office for three years. [In cases of a tie vote in the election of director, or directors, the secretary shall notify them to appear at the regular meeting of the board on the third Monday in March to determine their election by lot before one or more members of the board elected, and the certificate of election shall be given accordingly. Should either party fail to appear, or take part in the lot, the secretary shall draw for him.]

SEC. 1809. When an independent district has been formed out of a civil township, or townships, as herein contemplated, the remainder of such township, or of each of such townships, as the case may be, shall constitute a district township as provided in section seventeen hundred and thirteen of this chapter, and the boundaries between such district township and independent district may be changed, or the independent district abandoned at any time, with the concurrence of their respective boards of directors.

SEC. 1810. [**When independent district embraces whole township.**]—In case an independent district embraces a part or the whole of a civil township which has no separate district township organization, upon the written application of two-thirds of the electors residing upon the territory of such independent district and within such civil township to the board of directors, they shall set off such territory, whether provided with school-houses or not, to be organized as a district township in the manner provided for such organization when a new civil township is formed.

SEC. 1811. (*As amended by ch. 63, laws 1888.*)—[**Districts may unite: manner of.**]—Independent districts located contiguous to each other may unite and form one and the same independent district, in the manner following: At the written request of any ten legal voters residing in each of said independent districts, (or should there not be ten legal voters in one of such districts, then at the written request of the majority of such voters,) their respective boards of directors shall require their secretaries to give at least ten days' notice of the time and place for a meeting of the electors residing in such districts, by posting written notices in at least five public places in each of said districts, at which meetings the said electors shall vote by ballot for or against a consolidated organization of said independent districts; and if a majority of the votes cast at the election in each district shall be in favor of uniting said districts, then the secretaries shall give similar notice of a meeting of the electors as provided for by the law for the organization of independent districts. The independent district thus consolidated shall be completed, and its directors governed by the same provisions of the law which apply to other independent districts [that where from the courses of Iowa rivers, and the contour of the adjoining territory the proper school facilities cannot be given to the school children of such territory by forming school districts from the territory in any one county, independent school districts may be formed from the contiguous territory in adjoining counties.]

SEC. 1812. [**May be formed into independent district.**]—Where, under the school laws of the state heretofore in force for the convenience and accommodation of the people, school districts were formed of portions of two counties of territory lying contiguous to each other, at the written request of five legal voters residing in portions of said territory in each county, the board directors of the district township to which such territory belongs, having a majority of the legal voters, shall fix the boundaries of an independent district composed of such sections of land, or portions thereof, as may be described in the petition therefor, and shall give at least ten days' notice of the submission of the question of the formation of said independent district, at a special election for said purpose, specifying the boundaries of the district, the time and place of the meeting of the electors for such election, at which meeting the electors in the contemplated district shall vote by ballot for or against the separate organization. Should a majority of the votes be cast in favor of such separate organization, the said board of directors shall proceed by ballot to elect officers in the manner provided by law, and organize such independent district.

This section applies to the single case where under the laws heretofore in force, school districts were formed of portions of two counties, and provides that steps may be taken for the organization of an independent district, upon the written request of five legal voters residing in portions of the territory in each county. The only thing that can be inferred from this section is that when these conditions exist the independent district must be formed in the manner in this section prescribed. It contains no express or implied provision that no independent district shall be formed of parts of two counties except when these conditions exist. Per DAY, J., in *District Township of Union v. Independent District of Greene*, 41 Iowa, 30.

SEC. 1813. [**Statement to be published.**]—The boards of directors of the several independent school districts are hereby required to publish, two weeks before the annual school election in such district, by publication in one or more newspapers, if any are published in such district, or by posting up in writing in not less than three conspicuous places in such independent district, a detailed and specific statement of the receipts and disbursements of all funds expended for school and building purposes for the year preceding such annual election. And the said boards of directors shall also, at the same time, publish in detail an estimate of the several amounts which, in the judgment of such board, are necessary to maintain the schools in such district for the next succeeding school year; and failure to comply with the provisions of this section shall make each director liable to a penalty of ten dollars.

SEC. 1814. [**Independent Districts.**]—Township districts may be consolidated and organized as independent districts, in the following manner: Whenever the board of directors of any existing district township shall deem the same advisable, and also whenever requested to do so by a petition signed by one-third of the voters of the district township, the board shall submit to the voters of said district township, at a regular election, or one called for the purpose, the question of consolidation, at which election the voters of the district township shall vote for or against consolidation. If a majority of votes shall be in favor of such consolidated organization, such district township shall organize on the second Monday of March following as an independent district; *provided*, that in townships which have been divided into independent districts, the duties in this section devolving on the board of directors shall be performed by the trustees of the township to whom the petition shall in such cases be addressed; *and provided further*, that nothing in this section shall be construed to affect independent districts composed wholly or mainly of cities or incorporated towns. Independent districts may in like manner change their boundaries so as to form any number of districts less than the number of districts existing at the time such change is asked for, and such changes shall be specified in the notices for a vote thereon.

The object and purpose of section 1814 is two fold only. 1. To consolidate a district township

when it has been divided into subdistricts, and organize the whole township as an independent district. 2. Where a township has been organized into independent districts to consolidate the latter 'as an independent district' embracing the whole township. Per SEEVERS, CH. J., in *The Independent District of Fairview v. Durland*, 45 Iowa, 53.

SEC. 1815. (*As substituted by ch. 155, 16th g. a.*) [**Independent district may become district township.**]—(The independent districts of a civil township may be constituted a district township in the manner hereinafter provided.)

SEC. 1816. (*As amended by ch. 155, 16th g. a.*) [**Submitted to electors.**]—(At the written request of one-third of the legal voters residing in any civil township, which is divided into independent districts, the township trustees shall call a meeting of the qualified electors of such civil township at the usual place of holding the township election, by giving at least ten days' notice thereof, by posting three written notices in each independent district in the township, and by publication in a newspaper, if one be published in such township, at which meeting the said electors shall vote by ballot for or against a district township organization.)

SEC. 1817. (*As amended by ch. 155, 16th g. a.*) [**When district township organization is agreed to.**]—(If a majority of the votes cast at such election be in favor of such district township organization, each independent district shall become a subdistrict of the district township, and shall organize as such subdistrict, on the first Monday in March following, by the election of a subdirector.)

SEC. 1818. [**Election of subdirectors.**]—(Each subdistrict so formed shall hold a meeting on the first Monday in March for the election of a subdirector, five days' notice of which meeting shall be given by the secretary of the old independent district, by posting written notices in three public places in each district, which notices shall state the hour and place of meeting.)

SEC. 1819. [**Government of district townships.**]—(District townships organized under the provisions of the preceding four sections shall be governed and treated in all respects as other district townships; *provided*, that nothing in this act shall be construed to affect independent districts composed wholly or mainly of cities or incorporated towns.)

SEC. 1820. [**Meeting of board of directors.**]—(When any district township is organized under the provisions of the preceding five sections, the subdirectors shall organize as a board of directors, on the third Monday in March, and make an equitable settlement of the then existing assets and liabilities of the several independent districts.)

A school order was issued to a teacher for the payment of services in a subdistrict. Before its payment the several subdistricts of the township were organized into independent districts; *held*, that an action upon the order could not be maintained against the independent district formed out of the subdistrict in which the services were rendered; but that the whole district being liable all of the independent districts could be united as defendants, and they themselves should apportion their respective liabilities. *The Knoxville Nat'l. Bk. v. The Ind. Dist. of Washington*, 40 Iowa, 612; *The Dist. Tp. of White Oak et al. v. The Dist. Tp. of Oskaloosa et al.*, 52 Id., 73.

And in such case *mandamus* will lie to compel the directors to assemble and apportion the amount of the judgment among the several independent districts. *Certiorari* will not lie in such case to the court issuing the *mandamus* on the ground that it had exceeded its jurisdiction. *The Ind. Dist. of Asbury v. The Dist. Court of Dubuque County*, 48 Id., 182.

Where the several subdistricts of a school district township organize into independents, the district township ceases to exist, and cannot maintain an action to enforce an equitable division of assets among the independent districts. The right acquired by the independent districts under the division made by the old board may be enforced by each in its own name. *The Dist. Tp. of Knoxville v. The Ind. Dist. of Liberty et al.*, 36 Id., 220.

Neither section 1715 nor 1820 of the code has any application to the claim of one district township against another after the division of the debtor township into independent districts. *Id.*

(CHAPTER 63, LAWS OF 1888.)

An act to amend section 1811 of the code, relative to the contiguous territory in adjoining counties, to be formed into independent school districts in certain cases, and to legalize the consolidation of independent school districts heretofore effected, in certain cases.

SECTION 1. [**Amendment of § 1811.**]*—Be it enacted by the general assembly of the state of Iowa:* Section 1811 of the code is hereby amended by inserting after the word "district" in the fourth line thereof, the words "or, should there not be ten legal voters in one of such districts, then at the written request of the majority of such voters." That section 1811 be further amended by adding to the end thereof the words: "That where, from the courses of Iowa rivers, and the contour of the adjoining territory, the proper school facilities can not be given to the school children of each territory by forming school districts from the territory in any one county, independent school districts may be formed from the contiguous territory in adjoining counties."

SEC. 2. [**Legalization of independent districts.**]*—Any independent school districts heretofore forming under said section 1811, where there were less than ten legal voters residing therein at the time of the consolidation, is hereby legalized and made valid, provided, that two-thirds of the legal voters then residing in such independent district petitioned for such consolidation.*

Approved March 31, 1888.

(CHAPTER 61, LAWS OF 1888.)

INDEPENDENT SCHOOL DISTRICTS.

An Act to provide for the formation of independent school districts.

SECTION 1. [**Independent districts formed.**]*—Be it enacted by the general assembly of the state of Iowa:* The sub-districts of a district township may be constituted independent districts in the manner hereinafter provided.

SEC. 2. [**Meetings called on request of voters.**]*—At the written request of one-third of the legal voters in each sub-district of any district township the board of directors shall call a meeting of the qualified electors of each subdistrict by giving at least thirty (30) days' notice thereof by posting three (3) written notices in each subdistrict in the township, at which meeting the electors shall vote by ballot for or against independent district organization.*

SEC. 3. [**Majority vote.**]*—If a majority of the votes cast in each subdistrict shall be favorable to such independent organization, then each subdistrict shall become an independent district.*

SEC. 4. [**Election of directors.**]*—The board of directors of the old district township so voting shall then call a meeting in each independent district for the election of three (3) or more directors as may be required by law, and the organization of the said independent district shall be completed and governed in the same manner as other and similar independent districts.*

Approved April 6, 1888.

(CHAPTER 133, LAWS OF 1878.)

SUBDIVISION OF INDEPENDENT SCHOOL DISTRICTS.

An Act to provide for the subdivision of independent school districts. [Additional to code, title XII, chapter 9: "Of the system of common schools."]

SECTION 1. (*As substituted by ch. 131, 18th g. a.*) [**Districts may be divided, etc.**].—*Be it enacted by the general assembly of the state of Iowa:* [That any independent school district, organized under any of the laws of this state, may subdivide, for the purpose of forming two or more independent school districts, or have territory detached to be annexed with other territory in the formation of independent district or districts, and it shall be the duty of the board of directors of said independent district to establish the boundaries of the districts so formed, the districts so formed not to contain less than four government sections of land each. This limitation shall not apply when, by reason of a river, or other obstacle, a considerable number of pupils will be accommodated by the formation of a district containing less than four sections, or where there is a city, town, or village within said territory, of not less than one hundred inhabitants, and in such cases the independent districts so formed shall not contain less than two government sections of land, such subdivision to be *affected* [effected] in the manner provided for in sections 2, 3 and 4 of this chapter; *provided*, that where either of the districts so proposed to be formed contains less than four government sections, it shall require a majority of the votes of each of the proposed districts to authorize such subdivision.]

SEC. 2. [**Election.**].—At the written request of one-third of the legal voters residing in any independent school district, the board of directors of said independent district shall call a meeting of the qualified electors of the independent district, at the usual place of holding their meeting, by giving at least ten days' notice thereof by posting three notices in the independent district sought to be divided, and by publication in a newspaper, if one be published in the independent district, at which meeting the electors shall vote by ballot for or against such subdivision.

SEC. 3. [**Same.**].—Should a majority of the votes be cast in favor of such subdivision, the board or boards of directors shall call a meeting in each independent district so subdivided or formed as aforesaid, for the purpose of electing by ballot three directors, who shall hold their offices one, two and three years respectively, the length of their respective terms to be determined by lot; and but one director shall be chosen annually thereafter, who shall hold his office for three years.

SEC. 4. [**Naming of district.**].—At the meeting of the electors of each independent school district, as provided in the last section, they shall also determine by ballot the name to be given to their district, and each independent district, when so organized, shall be a body corporate, and the name so chosen shall be its corporate name; *provided*, that the board of directors of any district organized under the provisions of this act may change its name if any other district in the township shall have chosen the same name.

SEC. 5. [**How governed.**].—Independent districts organized under the provisions of this act shall be governed by the laws relating to independent districts.

Approved March 25, 1878.

(CHAPTER 59, LAWS OF 1888.)

An Act to amend chapter 150, laws of the eighteenth general assembly, relating to the publication and distribution of the school laws.

SECTION 1. [**Amendment.**]*—Be it enacted by the general assembly of the state of Iowa:* That section 1, chapter 150, laws of the eighteenth general assembly, is hereby amended by striking out after the words "school laws," in the fifteenth line of said section, the words, "the distribution of the laws in paper covers shall be made through the county auditors under the direction of secretary and auditor of state, who shall determine the price covering the cost to the state, at which they shall be sold to any party."

Approved April 13, 1888.

(CHAPTER 62, LAWS OF 1888.)

An Act authorizing boards of directors to change the boundaries of independent school districts within the same civil township.

SECTION 1. [**Change of boundaries.**]*—Be it enacted by the general assembly of the state of Iowa:* The boundary lines of contiguous independent districts within the same civil township, may be changed by concurrent action of the respective boards of directors at their regular meeting in September, or at special meetings thereafter called for that purpose; *provided*, that the district so formed, from which territory has been detached, shall not contain less than four (4) government sections of land; and *provided, further*, that the boundary lines of said districts shall conform to the lines of congressional divisions of land.

Approved April 9, 1888.

(CHAPTER 8, LAWS OF 1880.)

INDEPENDENT SCHOOL DISTRICTS.

An Act to amend the law governing the election of directors and the powers of boards of directors of independent school districts: (Amendatory of code, title XII, chapter 9.)

SECTION 1. [**Divide into election precincts.**]*—Be it enacted by the general assembly of the state of Iowa:* That in independent school districts having a population of not less than fifteen thousand inhabitants shall be divided into not less than three nor more than six election precincts, in each of which a poll shall be held at a convenient place, to be appointed by the board of directors for the reception of the ballots of the electors residing in such precinct at said election.

SEC. 2. [**Submission of questions to voters.**]*—The board of directors shall provide for the submission of all questions relating to the powers reserved to the electors under section 1807 of the code, which questions shall be decided by ballot, returns to be made on questions submitted as hereinafter provided.*

SEC. 3. [**Election register.**]*—A register of the electors residing in each precinct shall be prepared by the board of directors from the register of the electors for (of) any city, town, or township, which is in whole or in part included within such independent school district, and for that purpose a copy of such register of electors shall be furnished by the clerk of each such city, town, or township to the board of directors. Said board shall, in each year before the annual election for*

directors, revise and correct such school election registers by comparison thereof with the last register of elections for such cities, towns, and townships. And the register provided for by this section shall have the same force and effect at elections held under this act, and in respect to the reception of votes at said elections as the register of elections has by law at general elections.

SEC. 4. [Notices of elections.]—Notice of every election under this act shall be given in each district in which the same is to be held by the secretary thereof by posting up the same in three public places in said district and by publication in a newspaper published therein for two weeks preceding such election. Such notice shall also state the respective *elective* [election] precincts, and the polling place in each precinct.

SEC. 5. [Who to act as judges of election.]—The board of directors shall appoint one of their own number and another elector of the district to act as judges of election, and a clerk for each polling place who shall be sworn as provided by section 609 of the code in case of general elections. The polls shall be opened from 9 o'clock A. M. to 6 o'clock P. M. If either of the judges, or clerk, fail to attend, his place may be filled by the others, by appointing an elector attending in his place, and if all fail to attend in time, or refuse to serve or be sworn, the electors present shall choose two judges and a clerk from the electors attending. A ballot-box and the necessary poll-book shall be provided by the board of directors for each precinct, and the election shall be conducted in the same manner, and under the same rules and regulations, so far as applicable, as *or* [are] provided by chapter 3 of title 5, of the code for general elections.

SEC. 6. [Canvass of votes, and returns.]—The judges of election and clerk in each precinct shall canvass the vote therein, and shall as soon as possible make out, sign and return to the secretary of the district a certificate showing the whole number of votes cast in such precinct, and the number of votes in favor of each person voted for, and questions submitted. The board of directors shall meet on the next Monday after the election and canvass the returns, and ascertain the result of the election, the whole number of votes cast, and the number in favor of each person voted for shall be entered in their record, and the persons respectively receiving the highest two numbers of votes shall be declared elected, and all questions submitted receiving a majority of votes cast shall be recorded as carried. The secretary shall issue to each person so elected a certificate of his election.

SEC. 7. [Repealing clause.]—All acts and parts of acts inconsistent with this act are hereby repealed.

MAY ISSUE BONDS.

SEC. 1821. (*As amended by ch. 121, 16th g. a.*) [Power given to borrow money and issue bonds.]—Independent school districts shall have the power and authority to borrow money for the purpose of [redeeming outstanding bonds and,] erecting and completing school-houses, by issuing negotiable bonds of the independent district, to run any period not exceeding ten years, drawing a rate of interest not to exceed ten per centum per annum, which interest may be paid semi-annually; which said indebtedness shall be binding and obligatory on the independent district for the use of which said loan shall be made; but no district shall permit a greater outstanding indebtedness than an amount equal to five per centum of the last assessed value of the property of the district.

The powers of a municipal corporation (an independent school district being such), are created only by positive statute, and any act done in the exercise of a power not thus created is void. *McPherson v. Fister*, 43 Iowa, 48.

The attempted exercise of powers not conferred is equally illegal with the exercise of prohibited power. *Id.*

That part of the indebtedness contracted by a municipal corporation for a certain purpose is

within the constitutional limit, will not legalize that portion of it which is in excess of such limit. *Id.*

In the absence of the power to issue municipal bonds, no subsequent transfer of the bonds will give them effect, and they are void even in the hands of *bona fide* holders. *Id.*

That the tax payers of a municipal corporation have stood by in silence and permitted the bonds to be issued, does not estop them to object to their legality in the hands of an innocent holder, nor will the assent of all the people of such corporation thereto make the debt valid, the contract creating the debt being *ultra vires*. *Id.*

Purchasers of the bonds of a municipal corporation are charged with knowledge that the corporation has only express and limited powers, and are bound at their peril to ascertain whether the bonds have been issued in compliance with law. *Id.*

The constitutional restriction upon the creating of indebtedness does not operate upon the municipal authorities, as agents of the corporation, but upon the corporation itself, as principal, and therefore the latter cannot be bound by an act of its agents creating such indebtedness. *Id.*

That a municipal corporation has authority to issue negotiable paper will not authorize the presumption that bonds issued upon indebtedness in excess of the constitutional limitation were issued upon the requisite authority. *Id.*

The holder of such bonds takes them with notice of their informalities; and subsequent acts of the corporation will not estop it to deny their validity. *Id.*

Nor where bonds were issued in excess of constitutional authority and were therefore void, will the fact that the corporation received the value of such bonds entitle the holder to recover the amount paid therefor. *Id.*

Where the corporation has issued bonds to evidence an indebtedness in excess of the constitutional limit, the bonds are valid to the extent and within such limit, and invalid beyond such limit. *Id.*

So also, a tax levied to pay the principal and interest of municipal bonds is valid so far as it is within the municipal power, and beyond that is invalid. *Id.*

These rulings were made in a case where bonds were issued by an independent school district, many of which were found to have been issued without authority of law. [Ed.]

SEC. 1822. (*As amended by ch. 59, 18th g. a.*) [**Question to be submitted.**]

—The directors of any independent district may submit to the voters of their district at the annual or a special meeting, the question of issuing bonds as contemplated by the preceding section, giving the same notice of such meeting as is now required by law to be given for the election of officers of such districts, and the amount proposed to be raised by the sale of such bonds; which question shall be voted upon by the electors, and if a majority of all the votes cast on that question be in favor of such loan, then said board shall issue bonds to the amount voted, in denominations of not less than twenty-five dollars, nor exceeding one thousand dollars, due not more than ten years after date, and payable at the pleasure of the district at any time before due; which said bonds shall be given in the name of the independent district issuing them, and shall be signed by the president of the board [and attested by the secretary] and delivered to the treasurer, taking his receipt therefor, who shall negotiate said bonds at not less than their par value, and countersign the same when negotiated. The treasurer shall stand charged upon his official bond with all bonds that may be delivered to him; but any bond or bonds not negotiated that may be returned by him to the board.

SEC. 1823. [**Tax for voted.**]

—If the electors of an independent school district which has issued bonds, shall, at the annual meeting in March for any year, fail to vote sufficient school-house tax to raise a sum equal to the interest on the outstanding bonds which will accrue during the then coming year, and such proportionate portion of the principal as will liquidate and pay off said bonds at maturity, then it shall be lawful for the board of such district to vote a sufficient rate on the taxable property of the district to pay such interest, and such portion of the principal as will pay said bonds in full by the time of their maturity, and shall cause the same to be certified and collected the same as other school taxes.

Under this section the limitation of ten mills on the dollar as provided in section 1807, does not apply where a larger tax is required to meet the interest on outstanding bonds issued under section 1821 and 1822, and chapter 132 laws of 1880. *Richards v. Supervisors of Lyon Co.*, 69 *Id.*, 612.

SEC. 1824. [**Orders to bear lawful interest.**—All school orders shall draw lawful interest after having been presented to the treasurer of the district and not paid for want of funds, which fact shall be indorsed upon the order by the treasurer.

(CHAPTER 132, LAWS OF 1880.)

TO AUTHORIZE FUNDING OUTSTANDING BONDED INDEBTEDNESS OF SCHOOL DISTRICTS.

An Act to authorize independent school districts or district townships to fund their outstanding bonded indebtedness and to provide for the payment of the same.

SECTION 1. [**Refund indebtedness.**—*Be it enacted by the general assembly of the state of Iowa,* That any independent school district or district township now or hereafter having a bonded [or judgment] indebtedness outstanding is hereby authorized to issue negotiable bonds at any rate of interest not exceeding seven per cent per annum, payable semi-annually, for the purpose of funding said indebtedness; said bonds to be issued upon a resolution of the board of directors of said district; *provided,* that said resolution shall not be valid unless adopted by a two-thirds vote of said directors.

SEC. 2. (*As amended by ch. 95, 21st g. a.*) [**To sell bonds at par.**—The treasurer of such district is hereby authorized to sell the bonds provided for in this act, at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded [or judgment] indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par; but the bonds hereby authorized shall be issued for no other purpose than the funding of outstanding bonded [or judgment] indebtedness. The actual cost of the engraving and printing of such bonds to be paid for out of the contingent fund of such district.

SEC. 3. [**Bonds shall run not more than ten years.**—Said bonds shall run not more than ten years, and be payable at the pleasure of the district after five years from the date of their issue; *provided,* that in order to stop interest on them, the treasurer shall give the owner of said bonds ninety days written notice of the readiness of the district to pay, and the amount it desires to pay; said notice to be directed to the postoffice address of the owner of the bonds; *provided, further,* that the treasurer shall keep a record of the parties to whom he sells the bonds, and their postoffice address, and notice sent to the address as shown by said record shall be sufficient.

SEC. 4. [**Denomination of bonds, and how given.**—Said bonds shall be in denominations of not less than one hundred dollars, and not more than one thousand dollars; and said bonds shall be given in the name of the independent district or district township, and signed by the president and countersigned by the secretary thereof; and the principal and interest may be made payable wherever the board of directors may by resolution determine.

SEC. 5. [**President shall take receipt of treasurer.**—When said bonds are delivered to the treasurer to be negotiated, the president shall take his receipt therefor, and the treasurer shall stand charged on his official bond with the amount of the bonds so delivered to him.

SEC. 6. [**How paid.**—The tax for the payment of the principal and interest of said bonds shall be raised as provided in section 1823, chapter 9, title XII of the code; *provided,* that if the district shall fail or neglect to so levy said tax, the board of supervisors of the county in which said district is located shall, upon application of the owner of said bonds, levy said tax.

SEC. 7. [**Repealing clause.**]*—All acts and parts of acts in conflict with this act are hereby repealed.*

(Took effect by publication in newspapers April 4, 1880.)

(CHAPTER 64, LAWS OF 1874.)

INDUSTRIAL EXHIBITIONS IN SCHOOLS.

An Act to establish and maintain industrial exhibitions in public schools of the state. [Additional to code, title XII, chapter 9: "Of the system of common schools."]

SECTION 1. [**School directors may establish.**]*—Be it enacted by the general assembly of the state of Iowa, That it shall be the duty of the board of directors of independent school districts, and the subdirectors of each subdistrict, if they should deem it expedient, under the direction of the county superintendent, to introduce and maintain an industrial exposition in connection with each school under their control within this state.*

SEC. 2. [**To consist of articles made, etc.**]*—That these expositions shall consist of useful articles made by the pupils, such as samples of sewing, and cooking of all kinds, knitting, crocheting and drawing, iron and wood work of all kinds, from a plain box or horse-shoe to a house or steam engine in miniature; also, all other useful articles known to the industrial world, or that may be invented by the pupils in connection with farm and garden products in their season, that are the results of their own toil.*

SEC. 3. [**Pupils to explain.**]*—That the pupils be required to explain the use and method of their work, and kind and process of culture [of] farm and garden products.*

SEC. 4. That the **parents and friends** of the pupils be allowed and requested to be present at said exposition.

SEC. 5. That **ornamental work** shall be encouraged when accompanied by something useful made by the same pupil.

SEC. 6. [**To be held in school rooms: how often.**]*—That these expositions be held in the school-room upon a school-day as often as once a term, and not oftener than once a month.*

Approved March 21, 1874.

(CHAPTER 1, LAWS OF 1886.)

PROVIDING FOR TEACHING AND STUDY OF EFFECT OF ALCOHOL AND STIMULANTS UPON THE HUMAN SYSTEM.

An Act to provide for the teaching and study of physiology and hygiene with special reference to the effects of alcoholic drinks, stimulants and narcotics upon the human system, in the public schools and educational institutions of the state.

SECTION. 1. [**The effect of alcohol upon the human system, etc.**]*—Be it enacted by the general assembly of the state of Iowa: That physiology and hygiene, which must in each division of the subject thereof include special reference to the effects of alcoholic drinks, stimulants and narcotics upon the human system, shall be included in the branches of study now and hereafter required to be regularly taught to and studied by all pupils in common schools and in all normal institutes,*

and normal and industrial schools and the schools at the soldiers' orphans' home, and home for indigent children.

SEC. 2. [**To be observed by school boards and superintendents.**]—It shall be the duty of all boards of directors of schools and of boards of trustees, and of county superintendents in the case of normal institutes, to see to the observance of this statute and make provision therefor, and it is especially enjoined on the county superintendent of each county that he include in his report to the superintendent of public instruction the manner and extent to which the requirements of section one of this act are complied with in the schools and institutes under his charge, and the secretary of school boards in cities and towns is especially charged with the duty of reporting to the superintendent of public instruction as to the observance of said section one hereof, in their respective town and city schools, and only such schools and educational institutions reporting compliance, as above required, shall receive the proportion of school funds or allowance of public money to which they would be otherwise entitled.

SEC. 3. [**Certificate granted, etc.**] The county superintendent shall not, after the 1st day of July, 1887, issue a certificate to any person who has not passed a satisfactory examination in physiology and hygiene with especial reference to the effects of alcoholic drinks, stimulants and narcotics upon the human system, and it shall be the duty of the county superintendent, as provided by section 1771 to revoke the certificate of any teacher required by law to have a certificate of qualification from the county superintendent, if the said teacher shall fail or neglect to comply with section one of this act, and said teacher shall be qualified for teaching in any public school for one year after such revocation, and shall not be permitted to teach without compliance.

Approved February 17, 1886.

(CHAPTER 23, LAWS OF 1882.)

TREES ON SCHOOL GROUNDS.

An Act requiring boards of directors to set out trees on school grounds. [Additional to code, chapter 9, title XII, relating to the system of common schools.]

SECTION 1. [**Twelve or more trees on each school-house site, when.**]—*Be it enacted by the general assembly of the state of Iowa,* That the board of directors of each district township and independent district shall cause to be set out, and properly protected, twelve or more shade trees on each school-house site, belonging to the district, where such number of trees are not now growing, and such expense shall be paid from the contingent fund.

SEC. 2. [**Duty of county superintendent.**]—It shall be the duty of the county superintendent, in visiting the several schools in his county, to call the attention of any board of directors neglecting to comply with the requirements of this statute, and the required number of shade trees shall be planted as soon thereafter as the season will admit.

SEC. 3. [**§ 1745, code, amended.**]—That section 1745 of the code be amended by adding an additional item at the end of said section, as follows: "12. The number of trees set out and in thrifty condition on each school-house grounds."

(CHAPTER 118, LAWS OF 1882.)

An Act to include all the territory of an incorporated city or town, within the independent school district, or districts, now existing, or hereafter to be formed.

SECTION 1. [**Boundaries extended.**]*—Be it enacted by the general assembly of the state of Iowa,* That all the territory of an incorporated city or town, whether included within the original incorporation or afterwards attached thereto in accordance with the provisions of law, shall be or become a part of the independent district, or districts, of said city or town.

SEC. 2. [**Change of boundaries.**]*—When boundaries are changed by the taking effect of this act, the respective boards of directors shall make an equitable settlement of the then existing assets and liabilities of their districts, as provided for by section 1715 of the code.*

(CHAPTER 111, LAWS OF 1882.)

An Act to legalize contracts made by school officers for the insurance of school buildings, and to legalize warrants or orders issued therefor.

WHEREAS, Subdirectors and officers of school boards in various school districts and district townships within this state have insured their respective school-houses against loss by fire, and issued orders or warrants therefor, believing that they had the authority of law so to do: therefore,

SECTION 1. [**Contracts for insurance of school property made valid.**]*—Be it enacted by the general assembly of the state of Iowa,* That any and all contracts heretofore made by subdirectors, or any board of directors or officers of any district township or of any independent school district within this state for insuring school houses or school furniture against loss by fire within their respective districts, and all insurance policies issued in pursuance of such contracts, be and the same are hereby made as valid, legal, and binding as though such directors and school officers had been authorized by law to make such contracts for insurance.

SEC. 2. [**Warrants, orders, etc., issued for insurance of school property made valid.**]*—That all warrants, orders, or other evidences of indebtedness heretofore issued by the officers of any school districts within this state for the insurance of school houses and school furniture be and the same are hereby made as legal, binding, and valid as though the law had authorized the issue and making of the same by such officers.*

(Took effect March 24, 1882.)

This act legalized all contracts made by school officers for the insurance of school buildings, as well as all warrants, orders, and other evidence of indebtedness issued therefor, but it does not render a district liable on the personal obligation of its officers, such as a note which does not show by its terms that the contract was that of the district. The description, "*president*," "*secretary*," "*director*," added to the respective names of the makers, is not sufficient to show that it is not their individual obligation. *American Ins. Co. v. Stratton*, 59 Iowa, 656.

(CHAPTER 149, LAWS OF 1882.)

An Act to enable boards of directors of independent school districts to insure school property.

SECTION 1. (*As amended by ch. 107, 21st g. a.*) [**Board of directors may insure school property, how.**]*—Be it enacted by the general assembly of the state of Iowa:* That the board of directors of [all] school districts organized under

any of the laws of this state may use unappropriated contingent funds for the purpose of effecting an insurance on the school property of their districts, but they may contract no debts for this purpose.

(Took effect March 23, 1882.)

(CHAPTER 167, LAWS OF 1882.)

STATE EDUCATIONAL BOARD OF EXAMINERS.

An Act to create a state educational board of examiners and to encourage training in the science and art of teaching.

SECTION 1. [Board, how constituted.]—*Be it enacted by the general assembly of the state of Iowa:* The superintendent of public instruction, the president of the state university, the principal of the state normal school, and two persons, to be appointed by the executive council, one of whom shall be a woman, for terms of four years: *Provided*, that of the two first appointed, one shall be for two years; *and provided, further*, that no one shall be his own successor in said appointments: are hereby constituted a state board of examiners, with the superintendent of public instruction as *ex officio* its president.

SEC. 2. [Meetings: examinations of teachers: board select assistants.]—The board shall meet at such times and places as its president shall direct for the transaction of business, and shall hold annually at least two public examinations of teachers, at each of which examinations one member of the board shall preside, assisted by such well qualified teachers, not to exceed two in number, as the board of examiners may elect. Said board may adopt such rules, not inconsistent herewith and with the statutes of Iowa, as they may deem proper; and said board shall keep a full record of their proceedings, and a complete register of all persons to whom certificates and diplomas are issued.

SEC. 3. [State certificates and diplomas.]—Said board shall have power to issue state certificates and state diplomas to such teachers as are found, upon examination, to possess good moral character, thorough scholarship, clear and comprehensive knowledge of didactics, and successful experience in teaching.

SEC. 4. Examination for state certificate.]—Candidates for state certificates shall be examined upon the following branches: orthography, reading, writing, arithmetic, geography, English grammar, book-keeping, physiology, history of the United States, algebra, botany, natural philosophy, drawing, civil government, constitution and laws of Iowa, and didactics; and candidates for state diplomas shall pass examination upon all branches required by candidates for state certificates, and in addition thereto in geometry, trigonometry, chemistry, zoology, geology, astronomy, political economy, rhetoric, English literature and general history, and such other branches as the board of examiners may require.

SEC. 5. [Certificates good for five years.]—A state certificate shall authorize the person to whom it is issued to teach in any public school of the state for the term of five years from the date of its issue, and a state diploma shall be valid for the life of the person to whom it is issued: *Provided*, that any state certificate, and any state diploma, may be revoked by the board of examiners for any cause of disqualification, on well founded complaint entered by any county superintendent of schools.

SEC. 6. [Fee for certificate, \$3; for diploma, \$5.]—The fee for each state certificate shall be three dollars, and for each state diploma five dollars, which fee shall be paid before examination to such person as the board of examiners may designate from their own number, and the same shall be paid into the state treas-

ury when so collected: *Provided*, that if said applicant shall fail in said examination, one-half of the fee shall be returned.

SEC. 7. [**Certificates and diplomas to be registered.**—Every holder of a state certificate, or of a state diploma, shall have the same registered by the county superintendent of schools of the county in which he wishes to teach, before entering upon his work, and each county superintendent of schools is required to include in his annual report to the superintendent of public instruction, a full account of the registration of state certificates and diplomas.

SEC. 8. [**Expenses to be reimbursed.**—Each member of the state educational board of examiners, and each person appointed by said board to assist in conducting examinations as provided for in section 2 of this act, shall be entitled to receive for the time actually employed in such service his necessary expenses; and *provided further*, that each member of said board, not a salaried officer, shall, in addition to his necessary expenses, receive the sum of three dollars per day he or she is actually employed in said examination, which amounts shall be certified by the superintendent of public instruction; and the auditor of state is hereby authorized to audit and draw his warrant for the same upon the treasurer of state: *Provided*, the aggregate amount for any one year shall not exceed three hundred dollars.

SEC. 9. [**Account of funds.**—The board of examiners shall keep a detailed and accurate account of all moneys received and expended by them, which, with a list of the names of persons receiving certificates and diplomas, shall be published by the superintendent of public instruction in his annual report.

Approved March 24, 1882.

(CHAPTER 103, LAWS OF 1884.)

PROHIBITING BARB WIRE AROUND SCHOOL HOUSES.

An Act to prohibit the use of barb wire in enclosing public school grounds. [Additional to chapter 9, title XII, of the code.]

SECTION 1. [**To be removed.**—*Be it enacted by the general assembly of the state of Iowa:* It is hereby made the duty of the board of directors of every independent district and of every district township to remove before the first day of September, A. D. 1884, any barb wire fence enclosing in whole or in part any public school grounds in such district, and it is also made the duty of any person owning or controlling any barbed wire fence within ten feet of any public school grounds to remove the same within the time herein above named.

SEC. 2. [**Shall not be used within ten feet of school ground.**—Hereafter barb wire shall not be used in enclosing in whole or in part any public school building or the grounds upon which the same may stand; and no barbed wire shall be used for a fence or other purpose within ten feet of any public school ground.

SEC. 3. [**Penalty.**—For a failure or neglect on the part of any board of directors of any independent district or of any district township to carry out the provisions of this act, any member of such board shall be fined on conviction not exceeding twenty-five dollars; any person violating the provisions of this act shall on conviction thereof be fined not exceeding twenty-five dollars.

Approved March 29, 1884.

CHAPTER 10.

OF SCHOOL HOUSE SITES.

SECTION 1825. [**Districts may take real estate for.**—It shall be lawful for any district township, or independent district, to take and hold, under the provisions contained in this chapter, so much real estate as may be necessary for the location and construction of a school-house and convenient use of the school; *provided*, that the real estate so taken, otherwise than by the consent of the owner or owners, shall not exceed one acre.

SEC. 1826. [**Site of.**—The site so taken must be on some public highway, at least forty rods from any residence, the owner whereof objects to its being placed nearer, and not in any orchard, garden or public park. But this section shall not apply to any incorporated town.

SEC. 1827. [**May condemn.**—If the owner of any such real estate refuse or neglect to grant the site on his premises, or if such owner cannot be found, the county superintendent of the county in which said real estate may be situated shall, upon application of either party, appoint three disinterested persons of said county, unless a smaller number is agreed upon by the parties, who shall, after taking an oath to faithfully and impartially discharge the duties imposed on them by this chapter, inspect said real estate and assess the damages which said owner will sustain by appropriation of his land for the use of said house and school; said county superintendent giving to the owner of such real estate the same notice as is required for the commencement of a suit at law in the district court, of the time of such assessment of damage, and make a report in writing to the county superintendent of said county, giving the amount of damages, description of land, and exact location, who shall file and preserve the same in his office. If said board shall, at any time before they enter upon said land for the purpose of building said house, deposit with the county treasurer for the use of said owner the sum so assessed as aforesaid, they shall be thereby authorized to build said house, and maintain the right to said premises; *provided*, that either party may have the right to appeal from such assessment of damages to the circuit court of the county where such real estate is situated, within twenty days after receiving notice that such assessment is made, which appeal shall be final; but such appeal shall not delay the prosecution of work upon said house, if said board shall pay, or deposit with the county treasurer, the amount so assessed by such appraisers, and in no case shall said board be liable for costs on appeal, unless the owner of said real estate shall be adjudged a greater amount of damages than was awarded by said appraisers. The board shall in all cases pay costs of the first assessment.

The holder of a certificate of tax sale is entitled to notice of proceedings to condemn the land embraced in his certificate for a school-house site, and he cannot be deprived of his interest without compensation therefor; and a notice by publication to the holder of the legal title, and all other persons interested, is not sufficient to charge the holder of the tax certificate with notice. *Cochran v. The Independent District, etc.*, 50 Iowa, 663.

SEC. 1828. [**For school purposes only.**—The title acquired by said school districts in and to said real property, shall be for school purposes only, and in case the same should cease to be used for said purpose for the space of two years, then the title shall revert to the owner of the fee, upon the repayment by him of the principal amount paid for said land by said districts, without interest, together with the value of any improvements thereon erected by said districts; *provided*, that during the time said site is used for school purposes the owners of the fee shall not injure or remove the timber standing and growing thereon.

CHAPTER 11.

OF APPEALS.

SECTION 1829. [**To county superintendent.**]-Any person aggrieved by any decision or order of the district board of directors, in matter of law or of fact, may, within thirty days after the rendition of such decision, or the making of such order, appeal therefrom to the county superintendent of the proper county.

A district school board has the power to change the established site of a school-house and remove the building to the new site; and where the board, in ordering such change, does not exceed its jurisdiction, nor otherwise act illegally, a court of equity will not interfere with its action nor restrain its proceedings thereunder. The remedy for unwise or inexpedient action in such case is by appeal to the county superintendent. *Vance et al. v. The District Township of Wilton*, 23 Iowa, 408.

The remedy of a teacher who is wrongfully discharged by the board of school directors for incompetency is by appeal to the county superintendent, and he cannot at once maintain an action in the courts to recover for a breach of contract, though the action of the board was irregular and not in compliance with section 1734 of the code. *Kirkpatrick v. The Ind. District of Liberty*, 53 Id., 585.

See *District Tp. of Algona v. District Tp. of Lotts Creek*, 54 Id., 286, cited to notes in section 1715, *ante*.

A party aggrieved by the action of a board of school directors, having an adequate remedy by appeal to the county superintendent, and from thence to the state superintendent, is not entitled to the writ of *mandamus*. *Marshall v. Sloan et al.*, 35 Id., 445.

An appeal will lie from the decision of the board of directors to the county superintendent, whose decision, although not in the nature of a judgment upon which process could issue for the collection of the sum awarded, it would be a decision binding upon the parties and may be enforced by action. *Independent District of Lowell v. Independent District of Duser*, 45 Id., 391.

Right of any aggrieved party to appeal from an order of the board, recognized, in *Atkinson v. Hutchinson*, 68 Id., 161. See, also, *Barnet et al. v. Independent District of Earlham*, 34 N. W. R., 730.

From a decision by school directors an appeal lies to the county superintendent; but where the directors refuse to act, *mandamus*, and not appeal, is the proper remedy. *Case v. Blood et al.*, 71 Iowa, 632.

SEC. 1830. [**Basis of.**]-The basis of the proceeding shall be an affidavit filed by the party aggrieved with the county superintendent, within the time for taking the appeal.

SEC. 1831. [**Errors stated.**]-The affidavit shall set forth the errors complained of in a plain and concise manner.

SEC. 1832. [**Superintendent to notify secretary of district: duty of.**]-The county superintendent shall, within five days after the filing of such affidavit in his office, notify the secretary of the proper district, in writing, of the taking of such appeal. And the latter shall, within ten days after being thus notified, file in the office of the county superintendent a complete transcript of the record and proceedings relating to the decision complained of, which transcript shall be certified to be correct by the secretary.

SEC. 1833. [**Parties notified.**]-After the filing of the transcript aforesaid in his office, he shall notify in writing all persons adversely interested of the time and place where the matter of the appeal will be heard by him.

SEC. 1834. [**Hearing take testimony: administer oaths.**]-At the time thus fixed for hearing, he shall hear testimony for either party, and for that purpose may administer oaths if necessary, and he shall make such decision as may be just and equitable, which shall be final, unless appealed from as hereinafter provided.

SEC. 1835. [**Appeal to superintendent of public instruction: notice of.**]-An appeal may be taken from the decision of the county superintendent, to the superintendent of public instruction in the same manner as provided in this chap-

ter for taking appeals from the district board to the county superintendent, as nearly as applicable, except that he shall give thirty days' notice of the appeal to the county superintendent, and the like notice shall be given the adverse party. And the decision when made shall be final.

If a party who has appealed to the county superintendent is aggrieved by his decisions, the appellant may again appeal to the state superintendent of public instruction. *Marshall v. Sloan, et al.*, 35 Iowa, 445, 448.

The decision of the superintendent of public instruction on questions of fact arising on appeals tried before him is final. *Wood v. Farmer, et al.*, 69 Id., 533.

Under sections 1829 to 1835 of the code where the only relief asked for by a petition to the directors of a district township is the removal of a school-house, and the petition is granted by the state superintendent of public education on appeal, his decision is final and conclusive between the parties, and *mandamus* will lie to compel the directors to carry it into effect. *Nowly v. Free, et al.*, 72 Id.

SEC. 1836. [No money judgment rendered: postage.]—Nothing in this chapter shall be so construed as to authorize either the county or state superintendent to render a judgment for money, neither shall they be allowed any other compensation than is now allowed by law. All necessary postage must first be paid by the party aggrieved.

CHAPTER 12.

OF THE SCHOOL FUND.

SECTION 1837. [Permanent fund: what constitutes.]—The following are hereby declared to be and remain perpetual funds for common school purposes, the interest of which only can be appropriated:

1. The five per cent upon the net proceeds of the public lands in the state of Iowa;
2. The proceeds of the sales of the five hundred thousand acres of land which were granted to the state of Iowa under the the eighth section of the act of congress, passed September fourth, A. D., 1841, entitled, "an act to appropriate the proceeds of all sales of public lands, and to grant preemption rights";
3. The proceeds of all sales of interstate estates which escheat to the state;
4. The proceeds of the sales of the sixteenth section in each township, or lands selected in lieu thereof.

The perpetual school fund of the state consists of five per cent upon the net proceeds of the sale of lands, the proceeds of the five hundred thousand acre grant, the proceeds of the sales of escheated estates, and of the the sales of the sixteenth sections. The five per centum on the proceeds of the sales are appropriated among the several counties, and the funds arising from the other sources are payable to the county treasurer of the county in which the lands or escheated estates are. *Carter et al v. Sherman, Governor, etc.*, 63 Iowa, 693.

SEC. 1838. [Temporary: appropriated annually.]—The following are declared to be and remain temporary funds for common school purposes, to be received and appropriated annually in the same manner as the annual interest of the perpetual fund:

1. All forfeitures of ten per cent which are authorized to be made for the benefit of the school fund;
2. The proceeds of all fines collected for violations of the penal laws;
3. The proceeds of all fines collected for the non-performance of military duty;
4. The proceeds of the sales of lost goods and estrays.

SEC. 1839. [Five per cent fund payable to treasurer.]—The five per centum of the net proceeds of all sales of the public lands is hereby made payable to the state treasurer, and the state auditor shall apportion the same among the

several counties, taking into consideration the amount of the permanent school fund already in possession of and steadily loaned in said counties.

SEC. 1840. [**Part of permanent fund made payable to county treasurer.**]
—Those portions of the permanent school fund enumerated in the second and fourth subdivisions of section eighteen hundred and thirty-seven of this chapter, are hereby made payable to the county treasurer of the county in which the lands sold are situated, and the proceeds of subdivision third of said section to the treasurer of the county where said escheated estates are.

SEC. 1841. [**Same as temporary fund.**]
—The temporary funds enumerated in section eighteen hundred and thirty-eight of this chapter are hereby made payable to the county treasurers of the several counties in which they arise respectively, and shall be accounted for to the board of supervisors, who shall apportion the same among the several school districts of said county as provided by law.

SEC. 1842. [**Auditor to audit losses of.**]
—The auditor is required to audit all losses to the school fund as provided in section three of article seven of the constitution; and, for this purpose, he shall prescribe such regulations for the conduct of officers having such funds in charge as he shall deem necessary to ascertain such losses.

SEC. 1843. [**To issue bonds, etc.**]
—Whenever any amount, not less than one thousand dollars, is audited in favor of the permanent school fund for losses of the same, whereby the state becomes indebted to said fund, the state auditor shall issue the bond or bonds of the state in favor of said fund, bearing interest at the rate of eight per cent, payable semi-annually, on the first day of January and July after the issuing of the same, and the amount required to pay the interest on said bonds, as the same becomes due, is hereby appropriated out of any revenue in the state treasury.

SEC. 1844. [**To keep account with different funds.**]
—The state auditor shall keep the school fund accounts in books provided for that purpose, separate and distinct from the revenue books, and immediately after making the apportionment required by section sixty-six of chapter three, of title two, he shall notify the auditor of each county of the sum to which his county is entitled by said apportionment, and in those cases where the counties have less of such interest than they are entitled to by apportionment, he shall, by such notice, authorize the treasurer of each of such counties to transfer the amount of such deficiency from the state revenue in his hands to such interest fund, and said notice shall be filed by the treasurer and be his proper voucher to the state for the amount of said revenue so transferred. And in those cases where the counties have an excess of such interest over the amount apportioned to each, such notice shall authorize the county treasurer to transfer such excess from the interest fund to the state revenue, and such excess so transferred shall be paid into the state treasury as revenue.

SALE OF LANDS.

SEC. 1845. [**Sixteenth section may be sold.**]
—The board of supervisors may, at such time as they deem best, authorize the trustees of any township where the sixteenth section, or land selected in lieu thereof, has been sold, to lay out the same in such tracts as in their judgment will be for the best interests of the school fund, conforming, as far as the interests of said fund will permit, to the legal subdivisions of the United States surveys; and they shall appraise each tract at what they believe to be its true value, and certify to the said board of supervisors the divisions and appraisements made by them; said division and appraisements shall be approved or disapproved by said board at their first meeting after such report, and in case they disapprove the same, they may at once order another division and appraisement, should they deem it best. Where the board of supervisors approve,

the county auditor shall make and keep a record of such division, appraisement, and approval.

SEC. 1846. (*As amended by sec. 4, ch. 12, 18th g. a.*)—[**Sale of five hundred thousand acre grant.**]—Whenever the board of supervisors shall offer for sale the sixteenth section, or lands selected in lieu thereof, or any portion of the same, or any part of the five hundred thousand acre grant, the county auditor shall give at least forty days' notice by written or printed notices posted in five public places in the county, two of which shall be in the township in which the land to be sold is situated; and also to publish a notice of said sale for four weeks preceding the same, in a newspaper, should one be published in the county; if there is none published in said county, then in some newspaper authorized by the board of supervisors; and he shall describe the land to be sold, and state the time and place of sale; then at such time and place, or at such other time and place as the sale may be adjourned to, he shall offer to the highest bidder, subject to the provisions of this chapter, and shall sell either for cash, or one-third cash and the balance on a credit not exceeding ten years, with interest on the same at the rate of (eight) per cent per annum; said interest to be paid at the office of the county treasurer of said county, on the first day of January in each year; but in no case shall the land so offered be sold for less than its appraised value; nor shall any member of the board of supervisors or county auditor, township trustees, or any person who was engaged in the division and appraisement of said land, be, directly or indirectly, interested in the purchase thereof; and any sale made where such parties, or any of them, are so interested, shall be void and of no effect.

SEC. 1847. No school lands shall be sold for less than the minimum price of six dollars per acre, except as hereinafter provided, and in no case for less than the amount at which it has been appraised.

SEC. 1848. [**Prerequisites of sales.**]—No school lands of any kind shall be sold until there shall be at least twenty-five legal voters resident in the congressional township in which said school land is situated, and in a fractional township of less than than thirty-six sections, the number of voters residing therein, must have at least the same ratio to twenty-five as the number of sections, or parts of sections in said township has to thirty-six, which fact in all cases must be shown to the satisfaction of the board of supervisors.

SEC. 1849. [**When offered and there is no sale.**]—Where the board of supervisors of any county shall have once, at least, offered for sale any school lands in compliance with the requirements of section eighteen hundred and forty-five and eighteen hundred and forty-six of this chapter, and are unable to sell the same for the minimum price of six dollars per acre, and, if in the opinion of said board, it is for the best interests of the school fund that the same be sold for a less price, then said board may instruct the auditor of said county to transmit by mail or otherwise to the register of the state land office, a certified copy of the proceedings of said board of supervisors in relation to the order of sale of said land, and subsequent proceedings in relation thereto, including the action of the township trustees, and the price per acre at which said land shall have been appraised, which transcript the register of the state land office shall submit to the executive council; and if a majority of said council, including the register, shall approve of the sale of said land for less than the minimum price of six dollars per acre, then the register shall certify such approval to the auditor of the county from whence said transcript came, which certificate shall be transcribed in the minute book of the board of supervisors of said county, and, thereupon, said land may again be offered and sold to the highest bidder, as provided in section eighteen hundred and forty-six of this chapter, without being again appraised; but in no case under the provisions of this section, shall any school land be sold for less than one dollar and twenty-five cents per acre.

SEC. 1850. [**Sale of lands bid in on execution.**]—When any lands have been bid in by the state in behalf of the school fund, on execution founded on a judgment in favor of said fund, such lands shall be sold in the same manner as other school lands. Whenever any such lands shall have been conveyed to the counties in which the same are situated for the use of the school fund, instead of to the state as required by law, such conveyance shall be considered valid and binding, and on the proper certificates being made as hereinbefore provided, patents shall be issued to the purchasers of said lands in like manner as in cases where the conveyances were made to the state for the use of the school fund.

SEC. 1851. [**Patent to issue when payment made.**]—When any purchaser shall pay the full amount of his purchase money at the time of purchase, or, whenever full payment shall be made for lands previously purchased belonging to the school fund, the auditor shall forthwith issue a certificate of that fact, which shall be transmitted to the state land office and entitle the purchaser to a patent which shall be issued by the governor.

SEC. 1852. [**Contracts to be reduced to writing, etc.**]—In case the lands are purchased upon a partial credit as hereinbefore provided, the contracts shall at once be reduced to writing, signed by the parties, and recorded in the office of the recorder, after which it shall be filed in the office of the county auditor, and during the continuance of such contract, it shall be lawful for such purchaser, his heirs, or assignees, at any time to pay the principal and interest due upon such contract, and receive a certificate of purchase as mentioned in the preceding section.

SEC. 1853. [**Supervisors may refuse to sell on credit.**]—When in the judgment of the board of supervisors, any school lands are of such a character that a sale upon partial credit would be unsafe or incompatible with the interest of the school fund, and especially in the case of timbered lands, the board of supervisors may, in their discretion, exact the whole of the purchase money in advance; or, if they sell such land upon a partial credit as hereinbefore prescribed, they shall require good collateral security for the payment of the purchase money upon which credit is given.

SEC. 1854. [**When failure is made to pay principal or interest.**]—Whenever any purchaser of any school lands, sold under the provisions of this chapter upon a partial credit, or any person to whom a portion of the school fund has been loaned, fails to pay the interest upon the amount due the school fund from him on the first day of January, and such payment is not made within six months thereafter, then the entire amount, both of principal and interest, owing to the school fund from such person, shall be deemed to have become due, and the county auditor shall report the name of the delinquent, together with the sum total due from such delinquent, to the district attorney of his judicial district, who shall immediately commence suit for the collection of the amount thus reported. The provisions of this section, in so far as they provide for the principal owing for the purchase of school lands, or for money borrowed from the school fund becoming due and being collected at an earlier day than that stipulated in the contract upon failure to pay the interest, are hereby declared to be a part of every contract made under and by virtue of this chapter, whether expressed in such contract or not.

SEC. 1855. [**Same as to university funds.**]—The provisions of the last section shall be of force as far as applicable, to all cases where land is purchased or money borrowed from the university fund, and in case of delinquency as provided for in said section, the treasurer of the state university shall make the report therein required to the district attorney of the district where the party so purchasing or borrowing resides, or where the real estate given as security for said purchase or loan is situated.

The State University possesses the equitable rights which belong to other vendors of real prop-

erty, as connected with the forfeiture of contracts for laches on the part of the vendee. And the exercise of this right is not in conflict with sections (1975, 1979 of the revision) 1854 and 1855 of the code. *Henn, Administrator, v. The State University*, 22 Iowa, 185.

It was held in this case, further, that the repeal of section 1052 of the code of 1851, which provided that if any purchaser failed to pay the interest due upon any contract for the sale of university lands, the board of trustees might, at their discretion, consider the contract as forfeited and proceed to re-sell the land, etc., did not deprive the State University of the exercise of the general equitable right possessed by other vendors of real property, of rescinding contracts that have become forfeited for non-compliance on part of the vendee. *Id.*

SEC. 1856. [**Lands taxable from date of contract.**]—All school lands, the sale of which is provided for under this chapter, shall be subject to taxation from and after the execution and delivery of the contract to the purchaser.

SEC. 1857. [**Waste: punished.**]—All contracts relative to the sale of school lands provided for in this chapter shall be subject to such laws as now are, or may hereafter be in force relative to the prevention or punishment of waste.

SEC. 1858. [**Township trustees: duty as to waste.**]—The township trustees in each township, shall see that no waste be committed upon any school lands lying in their township and in case any such waste be attempted, they shall apply by petition to the district or circuit court, or to any judge thereof, for an injunction to stay waste, and the same, if granted, shall be without bond. The court may make such order in the premises as shall be equitable and calculated to secure the school lands from waste or destruction, and may adjudge damages against the party for injuries done in such cases; the costs shall abide the event of the suit, and the damages shall be paid to the county treasurer and constitute a part of the permanent school fund.

SEC. 1859. [**Supervisors may have survey made.**]—When, in the opinion of the board of supervisors, it may be necessary to have a portion of the school lands within their county surveyed, they may employ the county surveyor for the purpose, who shall be paid out of the county treasury upon proof made of the request and performance of the service.

FUNDS AND SECURITIES.

SEC. 1860. [**To manage school fund.**]—The several boards of supervisors shall hold and manage the securities given to the school fund in their respective counties, and also all judgments and lands therein belonging to said fund for the use of said fund; and to that end such counties shall have power to sue in their own name, for the use of said fund, either by the district attorney, or such other attorney as such board shall select, and to do all other acts in relation to the same necessary for the protection of said fund, and such counties shall be severally liable for all losses upon loans of such fund made in such county. But any county may discharge itself from any liability in any case wherein its liability is not made absolute by sections eighteen hundred and eighty-one and eighteen hundred and eighty-two of this chapter, by showing that the alleged loss was not incurred by reason of any default of its officers or by taking insufficient or imperfect securities. The state auditor shall examine and adjust any claim by a county for exemption from liability under the foregoing proviso, upon proof in writing submitted to him in behalf of the county, within three months after he shall notify the county auditor of his readiness to receive it. In the absence of such proof, or, if the same is insufficient, the state auditor shall charge the amount of such loss against the county as a final adjustment. If found sufficient, he shall present the facts thereof in his report to the general assembly next ensuing.

The principal and interest of loans from the school fund are payable to the county treasurer, and the payment of the proceeds of a judgment in its favor by the clerk to the county auditor is unauthorized; and if the auditor, in such case, fails to pay over to the county treasurer the amount

thus paid to him by the clerk, the latter is liable on his official bond for the amount. *Mahasko County v. Searle*, 44 Iowa, 492.

The statute of limitations will not operate to bar an action for the recovery of the money in such case, until after three years from the time when it was paid to the auditor. *Id.*

The board of supervisors may make such reasonable rules for the loaning of the school fund as to them shall seem proper, and, among others, may provide that the fund shall be loaned only to residents of the county. *Emmet County v. Skinner et al.*, 48 Id., 244.

The county authorities cannot for the use of the school fund buy in an outstanding tax title for the purpose of defeating the lien of a mortgage held by a third party, and which is junior to the one existing upon the same land in favor of the school fund. *Miller v. Gregg et al.*, 26 Id., 75.

A county auditor has no authority to release real estate from a mortgage executed thereon to the county for the use of the school fund. *Madison County v. Kriedler et al.*, 56 Id., 32.

By this section, the county is made liable for all losses upon loans of the school fund made in the county, and to recover such fund the county may maintain an action in its own name, as the trustee of an express trust. *Madison County v. Tullis et al.*, 69 Id., 720.

SEC. 1861. [Fund loaned: conditions and terms.]—The permanent school fund shall be loaned out as hereinafter provided, as the same may come into the hands of the county treasurer, but no loan to any one person or company shall exceed the sum of five hundred dollars, nor shall any loan of the school fund be made to the county auditor, treasurer, or to any member of the board of supervisors. Said loans shall not be made for shorter time than one year, nor for more than five years.

SEC. 1862. (As amended by ch. 174, 19th g. a.) [How secured: interest.]—The payment of the money thus borrowed, together with the interest thereon at the rate of [eight] per cent per annum, shall be secured by promissory notes executed by the party borrowing, and by mortgage on unincumbered real estate, which, exclusive of any buildings, is appraised by the appraisers hereinafter provided for at double the value of the amount of money loaned; which real estate must be situated in the county where such loan is made.

SEC. 1863. [Real estate offered as security appraised.]—The value of real estate offered as security for money loaned as herein provided, shall be fixed by three appraisers under oath, who shall be selected by the county auditor, and, in making the valuation provided for, the appraisers shall not take into consideration any buildings that may be on the land; said appraisers shall be allowed for their services the sum of fifty cents each, to be paid by the party borrowing, and the party borrowing shall pay for recording the mortgage given to secure such loan.

LOANS.

SEC. 1864. [Loan of permanent fund by county auditor.]—When any person desires to borrow from the permanent school fund, he shall apply to the county auditor, and if, in the opinion of said auditor, it would be to the interest of the school fund to grant such application, he shall order the necessary papers to be made out to secure the amount thus to be borrowed, as required by sections eighteen hundred and sixty-two and eighteen hundred and sixty-three of this chapter. When the same are made out, they shall be presented to said auditor, who shall, if he approves the same, indorse thereon, "accepted," and sign his name below the same, and he shall examine the title to any real estate offered as security, and make and preserve an abstract of such title, which shall be certified by him and submitted to the board of supervisors at the first meeting thereafter; he may charge a fee not to exceed two dollars for his services in making such abstract of title, to be paid by the party borrowing. He shall then give to the party borrowing a copy of the promissory note, certifying over his hand and official seal that it is a correct copy of the same, which together with a mortgage securing it, has been filed in his office, and upon the parties presenting said certificate to the treasurer, he shall pay the amount specified in said copy of note out of the permanent

school fund in his possession, and retain the said certified copy as his voucher. The said auditor shall file the original note in his office, and also the mortgage after having it recorded.

The auditor, under this section, is to file the original note in his office, and also the mortgage after it has been recorded, but he is not authorized to receive payment thereof. *Mahaska County v. Searle et al.*, 44 Iowa, 492; see also *The Same v. Ruan et al.*, 45 Id., 328.

(SEC. 1865. Repealed by chapter 174, laws of 1882.)

SEC. 1866. [**Auditor make report to supervisors of loans made.**]—At each meeting of the board of supervisors, the auditor shall make a full statement of all money received for and loaned out of the school fund under his control, and shall also submit for their examination all notes, mortgages, and abstracts of title connected with the school fund which have come into his possession since their last meeting. Said board, at the first meeting after such report and papers are submitted to them, shall either approve or disapprove of each loan made by said auditor. Should they disapprove of any loan or security thus reported, they may require the party borrowing to give additional security within thirty days; and in case of failure so to do, the entire amount, both of principal and interest, owing to the school fund, shall be deemed to have become due, and the district attorney shall be directed immediately to collect the same; and in such case, should it be found impossible to collect the entire amount due, and the security prove insufficient, then the county auditor and his bondsmen shall be liable for the deficiency. The provision herein contained with regard to principal and interest becoming due on the failure to give additional security when required for money borrowed from the school fund, is hereby declared to be a part of every contract made under and by virtue of this chapter, whether expressed in the contract or not.

SEC. 1867. [**How paid; auditor to certify amount due.**]—When any person desires to pay either principal or interest due the school fund, he shall obtain a certificate from the county auditor specifying the amount due from such person to the school fund, stating whether it is principal or interest, or both, and setting forth distinctly the amount of each. Upon the presentation of which certificate to the county treasurer, the treasurer shall receive the amount so specified from the person presenting the certificate, and shall indorse on said certificate the date and his name, and upon the return to the auditor of such certificate so indorsed, the party returning it shall have a receipt from him for the amount so paid.

The county auditor is not authorized to receive money collected upon judgments in favor of the school fund, and his sureties are not liable for an amount thus collected and paid by the clerk to the auditor. *Mahaska County v. Ruan et al.*, 45 Iowa, 328.

SEC. 1868. [**Supervisors may pay prior incumbrances.**]—Whenever any portion of the school fund has been loaned upon real estate security, upon which exists a prior incumbrance other than for taxes, the board of supervisors shall have authority, in their discretion, if they deem it necessary to remove said prior incumbrance in order that said fund may ultimately realize the money upon said loan, to appropriate so much money out of the school fund, if any there be within said county, as shall be necessary to remove said incumbrance; *provided*, said incumbrance shall not exceed one-half the actual cash value of said real estate.

(CHAPTER 12, LAWS OF 1880.)

LOANING THE PERMANENT SCHOOL FUND.

An Act in relation to loaning and management of the permanent school fund.

SECTION 1. [**Rate of interest on school funds 8 per cent.**]—*Be it enacted by the general assembly of the state of Iowa:* The rate of interest on all perma-

ment school funds loaned after January 1, A. D. 1880, shall not exceed eight per cent per annum from date of such loan.

SEC. 2. [**Interest to bear interest.**]—Interest not paid when due shall bear interest at the same rate as the principal.

SEC. 3. [**When six per cent charged.**]—After July 1, A. D. 1880, the counties having permanent school funds in control shall be charged only six per cent instead of eight per cent, as now provided by the code.

SEC. 4. [**Amendment of § 1846 of code.**]—Section 1846 of the code is hereby amended by striking out the words “ten per cent” in the sixteenth and seventeenth lines, and inserting in lieu thereof the words “eight per cent.”

SEC. 5. [**Amendment to § 1873 of code.**]—Section 1873 of the code is hereby amended by adding at the end of the section the following: “But in no case to exceed ten per cent on the amount for which judgment is rendered, and in no case to exceed the sum of twenty-five dollars.”

SEC. 6. [**Loans.**]—Loans may hereafter be made to one person, or one company, to the amount of one thousand dollars: *provided*, it is found impracticable to keep the whole amount of the funds loaned in sums of five hundred dollars or less.

SEC. 7. [**Repeal.**]—All laws inconsistent with this act are hereby repealed.

(Took effect by publication in newspapers March 5, 1880.)

GENERAL PROVISIONS.

SEC. 1869. [**Supervisors may assign claims due fund.**]—The board of supervisors may, by resolution, assign without recourse any school fund claim to any person having a subsequent lien on the premises affected by such claim, upon the full payment of the amount due the said fund, but not otherwise.

SEC. 1870. [**May employ agents to examine securities and make abstracts of titles.**]—Such board may, when deemed necessary, employ some competent person to examine the securities aforesaid, make abstracts of titles to the lands mortgaged, and make out complete statements thereof for such boards, and under the direction of said boards, or committee thereof, to procure the renewal of such notes and mortgages, when demanded by persons entitled thereto, upon such terms as to time and security in all respects as in making new loans. And such agent may, with the consent of said board or committee, take from any person responsible for any loan, any additional security by way of bond or mortgage, or both, in cases where the property mortgaged is inadequate security for the sum loaned, and the applicant shall pay up all interest and procure the written consent of the sureties on the note; but in all cases of the continuance of loans, as well as in cases of new loans, abstracts of title shall be presented and filed with the mortgage, which shall show that the title to the mortgaged premises is in the mortgagor, free and clear of any incumbrance or debt.

SEC. 1871. [**Upon payment of interest, principal reloaned.**]—Any person responsible to the school fund for any part of the principal thereof, who shall promptly pay all interests and costs, if any, thereon, whether the same may be rendered into a judgment or not, shall be permitted to borrow such principal upon complying in all respects with the requirements of law relating to new loans.

SEC. 1872. [**Auditor to publish notice when money is due.**]—Every county auditor in whose county there are outstanding contracts on the sale of school lands, which are due, shall immediately publish a notice requiring all persons holding any such lands, to at once pay up the amount due thereon, or otherwise make satisfactory arrangements for an extension of time. He shall also give a like notice to all mortgagors to said fund on whose notes either principal or interest is due. Such notices shall be printed for four weeks in a newspaper published in the county, if there be one; if there be none, then in such newspaper

published in this state as will be most likely, in the opinion of said auditor, to give notice to all concerned; and a copy of such notice shall be posted for the same time at the outer door of the building in which the last district court in said county was held.

SEC. 1873. (*As amended by sec. 5, ch. 12, 18th g. a.*) [**Suit brought to enforce collections.**]
—In case the person holding lands so contracted or mortgaged shall neglect to pay the sums due thereon, or make an arrangement for an extension of time within three months from the first publication of such notice, the board of supervisors may cause suit to be brought and prosecuted with the utmost diligence to secure said fund, and in any action in favor of a county for the use of the school fund, an injunction may issue without bond, and in any such action, where service is made by publication, default and judgment may be entered and enforced without the bond required of individuals. In all such suits the court shall give the plaintiff, as a part of the costs, such an amount as will be a sufficient compensation for the plaintiff's attorney in the case. [But in no case to exceed ten per cent on the amount for which judgment is rendered, and in no case to exceed the sum of twenty-five dollars.]

The limitation of twenty-five dollars as attorney's fees, to be taxed as part of the costs on the foreclosure of school fund mortgages, held to apply to mortgages executed prior to the enactment of the amendment of this section adding such limitation. *County of Kossuth v Wallace et al.*, 60 Iowa, 508.

SEC. 1874. [**Land bid off at sale for use of school fund.**]
—In case of sales of lands on execution founded on any such mortgage or contract, the attorney for said board, or other person authorized by said board, shall bid on behalf of the state or county, as the case may be, for the use of said fund, such sum as the interests of said fund may require, and if struck off to the state, the same shall be held and disposed of in all respects the same as other lands belonging to said fund, except as hereinafter provided.

SEC. 1875. [**Contracts: notes made payable to county.**]
—All contracts, notes and mortgages given to said fund shall be made payable to the county controlling them, but no such contracts, notes or mortgages shall be invalid because they are made payable to any other payee, but the same shall be deemed and taken to belong to said county for the use of said fund, and suits may be maintained thereon in the name of the said county, with the same effect as if they were drawn payable to the said county.

SEC. 1876. [**Treasurer to keep accounts, distinguishing between principal and interest.**]
—Each county treasurer shall immediately upon receiving or paying out any moneys belonging to the school fund, enter a correct account thereof on proper books kept by him for the purpose in all cases where money is received, distinguishing between principal and interest, and shall keep an account showing all money due the school fund, whether principal or interest, and designating the amount of each and from whom due, and his books shall at all times present a clear and intelligible statement of the school fund in his hands. Said books shall at all times be open to the inspection and examination of any householder or taxpayer in the county.

SEC. 1877. [**Auditor to keep accounts with fund and treasurer.**]
—Each county auditor shall keep in his office, in books provided for that purpose, an account to be known as the school fund account, in which he shall enter all notes, mortgages, bonds, and assets of every kind and description which may come into his hands, and he shall open accounts with the county treasurer in which he shall charge him with all money in his hands at the time such account is opened, and also with all money which may hereafter be paid to him, as shown by the certificates duly indorsed as hereinbefore provided for, distinguishing between principal and interest, which shall be kept in distinct accounts; and shall, on the third Mon-

day in May, the first Monday of October, and the third Monday of December, in each and every year, make a complete settlement of the school fund account with the county treasurer, from the time of the last settlement, and at each regular meeting of the board of supervisors he shall submit a full report of his last settlement with the county treasurer, and also of all notes, mortgages, bonds, and assets of every kind and description which have come into his hands since the last meeting of the board.

SEC. 1878. [Penalty for failure of duty by auditor or treasurer.]—Any county treasurer or auditor failing or neglecting to perform any of the duties which are required of him by the provisions of this chapter, shall be liable to a fine of not less than one hundred dollars nor more than five hundred dollars, to be recovered in an action brought in the district court by the board of supervisors, the judgment to be entered against the party and his bondsmen, and the proceeds to go to the school fund.

SEC. 1879. [Time to pay given.]—Whenever it shall be evident to the board of supervisors that the interest of the school fund will be endangered by the immediate prosecution of any mortgage, or the sale of mortgaged premises, they may give such reasonable time as they may deem for the best interests of the school fund.

SEC. 1880. [Lapse of time no bar to suit.]—Lapse of time shall in no case bar any action brought, or to be brought, on any contract for any part of the school fund, nor shall such lapse of time prevent the introduction of evidence in any such action, any provision of this code to the contrary notwithstanding.

COUNTIES RESPONSIBLE.

SEC. 1881. [Supervisors to control school fund: mortgages foreclosed at expense of county: losses made good by.]—On and after the first day of January, A. D. 1874, the board of supervisors of the several counties shall have sole control and management of all loans on mortgages then held or thereafter made, and shall, when necessary, have them foreclosed at the expense of the county; and any losses sustained or gains realized upon foreclosures and resales of mortgaged property, shall be made good by or inure to the benefit of the county, as the case may be; *provided, however*, that upon a foreclosure of contracts, when the land is bid in by the county, the auditor of state, as soon as notified by the county auditor that the foreclosure has been effected and the lands bid in, shall give the county credit for the original amount of the notes remaining unpaid; and on being notified by the county auditor that a resale has been effected, he shall charge the county with the full amount of resale; but when the land is purchased by a third party on the foreclosure for a less amount than due on the contract notes, the loss shall be sustained by the county. County auditors shall report annually on the first day of January, the amounts of all sales and resales of the sixteenth section, five hundred thousand acres grant, and escheated estates made the year previous; and the auditor of state shall charge up the same to said counties, and also charge interest on the same from the date of said sales or resales, at the rate of eight per cent per annum.

See notes to section 1860, *ante*.

SEC. 1882. [Auditor of state to charge counties interest at eight per cent.]—On and after the first day of January, A. D. 1874, the auditor of state shall charge up to each county having permanent school fund under its control, interest on the whole amount in said county, at the rate of eight per cent per annum, semi-annually, on the first day of January and July of each year, which amount so charged shall become due and payable on the first day of January and July of the year following, and be embraced in the semi-annual apportionment of

interest collected for the year eighteen hundred and seventy-five and each year thereafter, and shall be deemed the whole amount due from each county on account of interest accrued subsequent to the first day of January, eighteen hundred and seventy-four. Any surplus of interest collected over the eight per cent charged to the counties, shall be paid into the county treasury for the benefit of the county. If any county should fail to collect the full amount of interest due the state, the deficiency shall be advanced from the county treasury, and if any county becomes delinquent in the payment of the full amount of interest due the state, the auditor of state shall charge to and collect from such county a penalty of one per cent per month on the amount delinquent until paid.

SEC. 1883. [**Where funds cannot be loaned: transfer of made.**]—Whenever there are funds belonging to the permanent school fund in any county amounting to one thousand dollars that cannot be loaned according to law, the county auditor may certify the fact to the auditor of state, who shall order a transfer of said funds to some other county, or counties, where, in his opinion, it can be loaned readily. Upon such transfer being made, the auditor of state shall give the county making the transfer credit for the amount transferred, and shall charge the county or counties to which the transfer is made with the amount transferred, and shall afterwards charge interest on the actual amount in the possession of each county.

SEC. 1884. [**County auditors to report to auditor of state semi-annually.**]—The county auditors shall continue to report to the auditor of state, semi-annually as now required by law, the amount of interest collected and which accrued previous to the first day of January, A. D. 1874, until the amount of interest due up to that date has been collected. The amount collected from time to time shall be added to the semi-annual apportionment of interest heretofore provided for. The county auditor shall also embrace in said reports, in the year eighteen hundred and seventy-five and thereafter, the amount of interest collected and which accrued subsequent to the first day of January, eighteen hundred and seventy-four, in a separate item.

(CHAPTER 163, LAWS OF 1886.)

ACKNOWLEDGMENTS OF COUNTY AUDITORS AND THEIR DEPUTIES LEGALIZED.

An Act to legalize acknowledgments by county auditors and deputy county auditors in the state of Iowa.

WHEREAS, Certain county auditors and deputy county auditors have heretofore taken and certified acknowledgment of school fund mortgages and contracts, believing that they were acting in pursuance of law; therefore,

Be it enacted by the general assembly of the state of Iowa:

SECTION 1. [**Legalized.**]—That all acknowledgments of school fund mortgages and contracts heretofore taken and certified by any county auditor or deputy county auditor in this state be and the same is hereby legalized and declared to be as legal, valid and binding, as though such officer had been authorized to take such acknowledgment when taken.

Approved April 12, 1886.

CHAPTER 13.

OF THE STATE LIBRARY.

SECTION 1885. [**Trustees of.**]—The governor, judges of the supreme court, secretary of state, and superintendent of public instruction, shall, by virtue of their office, constitute a board of trustees of the state library, of which the governor shall be president.

SEC. 1886. [**Powers of.**]—The said trustees shall have full power to make and carry into effect such rules and regulations for the superintendence and care of the books, maps, charts, papers and furniture contained in the state library, and for the arrangement and safe keeping of the same as they may deem proper.

SEC. 1887. [**Who entitled to books: term limited.**]—The said trustees shall provide in their rules and regulations, that any member of the general assembly, any member or attorney of the supreme court, during the sessions of the same, the judges and attorneys of the courts of the United States, and the heads of departments of state, shall be permitted, under proper restrictions, penalties and forfeitures, to take from the library any books, excepting such as the trustees shall determine ought not to be removed therefrom; but none of such persons shall be allowed to take such books or property from the library without executing a receipt therefor, nor to retain the same more than ten days at a time.

SEC. 1888. (*As amended by ch. 69, 18th g. a.*) [**Prohibition.**]—[From and after the taking effect of this act (chapter 69, laws of 1880) no books, maps, charts or papers belonging to the state library shall be removed from the capitol building, except to remove the same from the old capitol building to the new capitol building, when such building shall have been prepared to receive the same.]

SEC. 1889. [**Kept open.**]—The state library shall be kept open every day during the sessions of the general assembly and the supreme court, and during such hours as shall be determined by the trustees.

SEC. 1890. [**Librarian to have custody of: bond of.**]—The state library shall be in custody of the state librarian, who shall be appointed by the governor, and who shall hold the office for the term of two years, commencing on the first day of May, and until his successor shall be appointed and qualified. Before entering upon the duties of his office he shall give a bond, with good and sufficient surety, in the penal sum of five hundred dollars, in such form as the governor shall approve, conditioned for the performance of all the duties required of him by law, and for the observance of all the rules prescribed by the trustees of the library.

SEC. 1891. [**Duties of.**]—The librarian shall give his personal attendance upon the library during the hours it shall be directed to be kept open, and shall perform such duties as shall be imposed on him by law or shall be prescribed by the rules and regulations of the trustees.

SEC. 1892. [**Prepare catalogue.**]—The librarian shall prepare a complete alphabetical catalogue of the library, number the books therein, and report the same to the governor, who shall cause the same to be published for the use of the library.

SEC. 1893. [**Books labeled and marked.**]—The librarian shall cause each book in the library to be labeled with a printed label, to be pasted on the inside of the cover, with the words, "Iowa state library," with the number of the volume in the catalogue of said library inscribed on said label, also to write the same words at the bottom of the thirtieth page of each volume. All books that may hereafter be added to the library shall be labeled in the same manner, and entered on the catalogue, immediately on their receipt, and before they can be taken therefrom.

SEC. 1894. [**Report to governor.**]—The librarian shall make report to the governor five days before the adjournment of any session of the general assembly, of the number of books that have been taken out of the library by the members, giving the names of all members that have any books at the date of such report, with the name and number of such book.

SEC. 1895. [**Fines and penalties.**]—All fines, penalties, and forfeitures imposed by the rules and regulations of the library for any violation of such rules and regulations, may be recovered in any proper action or proceeding in the name of the state, before any court of competent jurisdiction; and all such fines, penalties, forfeitures, and recoveries shall be applied to the use of the library, under the direction of the trustees.

SEC. 1896. [**Penalty for injuring or destroying books.**]—Any person injuring, defacing, destroying, or losing a book, shall pay to the librarian twice the value of the book, and, if it be one of a set, he shall be liable to pay the full amount of the value of the set, and the librarian shall prosecute such person on such liability; *provided*, that if such person shall within a reasonable time replace the book so injured or lost, he shall not be liable under this section.

SEC. 1897. (*As amended by ch. 82, 22d g. a.*) [**Report to governor and general assembly.**]—The librarian shall report to the governor, whenever required, a list of books and other property missing from the library, an account of fines and forfeitures imposed and collected, and the amount uncollected, a list of the accessions to the library since the last report, and all other information required by the governor. He shall also make a full and specific report to the (governor biennially).

(Section 1898, repealed by section 9, chapter 159, laws of 1876.)

SEC. 1899. (*As amended by ch. 13, 19th g. a., and ch. 191, 20th g. a.*)—[**Appropriation for state library.**]—There is hereby appropriated out of any funds in the state treasury, not otherwise appropriated, the sum of (three) thousand dollars annually, from and after the first day of January, 1882, to be expended by the board of trustees in the purchase of books for the library.

(CHAPTER 69, LAWS OF 1880.)

STATE LIBRARY.

An Act to amend chapter thirteen (13), title XII of the code, in relation to the state library.

SECTION 1. [**Forbidding the removal of books, etc., from capitol building.**]—*Be it enacted by the general assembly of the state of Iowa:* From and after the taking effect of this act, no books, maps, charts or papers belonging to the state library, shall be removed from the capitol building, except to remove the same from the old capitol building to the new capitol building, when such building shall have been prepared to receive the same.

SEC. 2. [**Repealing clause.**]—All acts or parts of acts inconsistent with this act are hereby repealed, so far as the same conflict with this act.

(Took effect by publication in newspapers, March 25, 1880.)

(CHAPTER 153, LAWS OF 1886.)

RELATING TO STATE LIBRARY.

An Act providing for the employment and payment of assistant librarian and messengers.

SECTION 1. [**Assistant librarians: salaries.**]*—Be it enacted by the general assembly of the state of Iowa:* That the state librarian be and is hereby authorized to employ to aid in the library one first assistant at a salary of six hundred dollars a year; one second assistant at a salary of five hundred dollars a year, and one messenger at a salary of three hundred dollars a year.

SEC. 2. [**Date salaries begin: how paid.**]*—*The salaries herein provided to commence on the 14th day of April, A. D. 1886, and to be paid monthly on warrants to be drawn by the auditor on the state treasury.

SEC. 3. [**Repealing clause.**]*—*That all acts inconsistent with this act are hereby repealed.

SEC. 4. [**Publication.**]*—*This act being deemed of immediate importance, shall take effect from and after its publication in the *Iowa State Register* and the *Des Moines Leader*, published at the city of Des Moines, Iowa.

Approved April 12, 1886.

(CHAPTER 191, LAWS OF 1884.)

STATE LIBRARY.

An Act making an appropriation for the state library, and providing assistants for the librarian, and for the compensation of the librarian and assistants. (Amendatory of section 1899, of the code, and section 1, chapter 138, of acts of the nineteenth general assembly.)

SECTION 1. [**\$6,000 appropriated.**]*—Be it enacted by the general assembly of the state of Iowa:* That there be and hereby is appropriated out of any money in the treasury not otherwise appropriated, the sum of six thousand dollars, to be expended by the board of trustees of the library in the purchase of miscellaneous books to improve the character and supply omissions in the miscellaneous divisions of the library; said amount to be drawn when and in such sums as said board of trustees may order, and paid upon warrants issued by the auditor upon the treasurer.

SEC. 2. [**\$1,500 per annum for assistants and messenger.**]*—*That the librarian be and is hereby authorized to employ the following aid and assistance and employes in the library, and at the compensation specified:

One first assistant at \$500 per annum.

One second assistant at \$500 per annum.

One messenger at \$300 per annum.

And that to meet and pay said salaries, also to provide for extra help and assistance in re-arranging the library when the upper galleries are completed, there is hereby appropriated out of any money not otherwise appropriated the further sum of \$1,500 per year for the next two years, to be drawn upon the order of the board of trustees of the library and paid upon warrants drawn by the auditor upon the treasurer.

SEC. 3. [**Part of code, § 1899, repealed.**]*—*That the provision in section 1899 of the code, allowing and appropriating \$500 per annum for an assistant to the librarian be and the same is hereby repealed.

SEC. 4. [**Salary of librarian.**—The salary of the state librarian shall be twelve hundred dollars per annum, payable as salaries of other state-officers, and there is hereby appropriated out of any money in the treasury not otherwise appropriated, the sum of twelve hundred dollars annually, for the payment of said salary.

Approved April 14, 1884.

(Took effect by publication in newspapers.)

CHAPTER 14.

OF THE STATE HISTORICAL SOCIETY.

SECTION 1900. (*As amended by ch. 71, 18th g. a.*)—[**Appropriation for.**—There is hereby annually appropriated, until the legislature shall, by law, otherwise direct, to the state historical society at Iowa City, in connection with and under the auspices of the the state university, the sum of (ten) hundred dollars, to be expended by that society in collecting, embodying, arranging, and preserving in authentic form, a library of books, pamphlets, maps, charts, manuscripts, papers, paintings, statuary, and other materials illustrative of the state of the history of Iowa, to rescue from oblivion the memory of its early pioneers, to obtain and preserve varieties of their exploits, perils and hardy adventures; to secure facts and statements relative to the history, genius and progress or decay of our Indian tribes; to exhibit faithfully the antiquities, past and present resources of Iowa; also to aid in the publication of such of the collections of the society as the society shall from time to time deem of value and interest; to aid in binding its books, pamphlets, manuscripts and papers, and in paying other necessary and incidental expenses of the society.

SEC. 1901. [**Board of curators: how appointed: annual meeting of.**—The board of curators of said society at Iowa City shall consist of eighteen persons, of whom nine shall be appointed by the governor of the state, and nine elected by the members of the society. The term of office of said curators shall be two years, except as provided in the next section, and they shall receive no compensation for their services. The curators appointed by the governor, shall be appointed on or before the last Wednesday in June in each even-numbered year, and their term of office shall commence on that day. And at the annual meeting of said historical society, held next before the last Wednesday in June in each odd-numbered year, there shall be elected by ballot from the members of the society nine curators for the term next ensuing.

SEC. 1902. [**Members admitted.**—The members of said society may be admitted at any time under the rules now in force, or such other rules as may hereafter be adopted by the board of curators.

SEC. 1903. [**Annual meeting: when and where held.**—The annual meeting of the society shall be held at Iowa City, on the Monday preceding the last Wednesday in June of each year.

SEC. 1904. [**Officers: term and duties.**—The board of curators shall choose, annually, or oftener if need be, a corresponding secretary, recording secretary, a treasurer, and a librarian, who shall be selected from the members of the historical society outside of their own number, and shall hold office for one year, unless sooner removed by a vote of the board. Said officers shall be officers of the society as well as of the board of curators, and their respective duties shall be determined by said board. No officer of the society or of the board shall receive any compensation from the state appropriation to the society.

SEC. 1905. [**President.**—The board of curators shall also choose from their own number a president, who shall be the executive head of the board, and shall hold his office for one year, and until his successor is elected.

SEC. 1906. (*As amended by ch. 82, 22d g. a.*) [**Residence of curators.**—The curators, a majority of whom shall reside in the vicinity of the state university, and five of whom shall constitute a quorum, shall be the executive department of the society, and shall have full power to manage its affairs. They shall keep a full and correct account of all their doings, and of the receipt and expenditure of all funds collected or granted for the purpose of the society, and shall report the same to the governor on or before the fifteenth day of (August.) as required by law of other state institutions.

SEC. 1907. [**Books delivered to.**—There shall be delivered to said society, twenty bound copies of the reports of the supreme court, and of all other books and documents published by the state, or at its order, for the purpose of effecting exchanges with similar societies in other states and countries, and for the preservation in its library, and the other purposes of the society.

(CHAPTER 70, LAWS OF 1884.)

FOR COMPENSATION WHERE DOMESTIC ANIMALS ARE KILLED BY DOGS.

An Act to provide a fund from which to pay for sheep or other domestic animals killed or injured by dogs.

SECTION 1. [**Assessors to list dogs.**—*Be it enacted by the general assembly of the state of Iowa:* If shall be the duty of every assessor of this state, at the time of listing the property of his district, to list each dog over three months of age in the name of the owner thereof, without affixing any value thereto. Any person keeping or harboring a dog or dogs shall be deemed the owner thereof within the meaning of this act.

SEC. 2. The board of supervisors of each county shall, at their September session each year, when levying other taxes, levy a tax of fifty cents on each male, and one dollar on each female dog listed by the assessor, which tax shall constitute a special fund, to be disposed of as provided for in this act.

SEC. 3. [**Duty of auditor.**—It shall be the duty of each county auditor to provide suitable columns, properly headed, in the assessor's book, to carry out the provisions of this act.

SEC. 4. [**Duty of treasurer.**—The treasurer of each county, on receiving the tax books for the collection of other taxes, shall collect the taxes herein provided for as other taxes are collected, and keep the same as a separate fund, to be known as the domestic animal fund.

SEC. 5. (*As amended by ch. 42, 22d g. a.*) [**Damages: how claimed.**—Any person damaged by the killing or injury of sheep, or any other domestic animal, by a dog or dogs, may present to the board of supervisors of the county in which such killing or injury occurred, a detailed account of such killing or injury, stating the amount of damage claimed therefor, and verified by affidavits, such claim to be filed with the county auditor at least ten days before some regular session of the board, and within (sixty) days from the time such killing or injury occurred. At the first regular session of the board of supervisors after such claim shall have been filed for ten days, as herein provided, the same may be established by proof before the board; and upon the hearing thereof, the claimant shall establish his claim for damages by (testimony satisfactory to said board.) It shall also be made to appear to the satisfaction of said board that such damage was not caused, in whole or in part, by a dog or dogs owned or controlled by the claimant, and that claimant does

not know whose dog or dogs caused the damage, and that said damage was caused by dogs; or, in case the owner of such dog or dogs is known to the claimant, and that such owner has no property subject to execution, out of which the claim can be made.

[Board of supervisors to allow 75 per cent.]—The board shall hear and determine said claims in the order in which they are filed, unless good cause is shown for continuance, and shall allow the same or such portions thereof as they may deem just, and shall authorize the auditor to issue warrants for the same not to exceed seventy-five per cent of the amount allowed to be paid out of the domestic animal fund.

SEC. 6. [Treasurer to pay: when.]—The treasurer shall, between the first and tenth days of January and the first and tenth days of July of each year, pay the said warrants issued by the auditor as provided for by section five of this act, out of the domestic animal fund. If said fund is insufficient to pay said warrants in full, he shall pay on each *pro rata*. If after paying all warrants at either period above named, there shall remain more than two hundred and fifty dollars of said fund in the treasury, the board of supervisors shall order the excess to be transferred to the county fund.

Approved March 27, 1884.

(CHAPTER 72, LAWS OF 1884.)

TO PROVIDE FOR DISPOSING OF AGRICULTURAL COLLEGE LANDS.

An Act to provide for selling, leasing and patenting the lands belonging to the Iowa state agricultural college and farm. [Amends chapter 117 acts tenth general assembly, and repeals chapter 71 acts fifteenth general assembly.]

SECTION 1. [Trustees authorized to sell.]—*Be it enacted by the general assembly of the state of Iowa:* That the trustees of the Iowa state agricultural college and farm be, and they are, hereby authorized to sell the lands granted to the state of Iowa by an act of congress entitled, "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and mechanic arts," approved July 2, 1862. Such sale shall be for cash, or upon a partial credit not exceeding ten years, at such appraised value as shall be fixed by said trustees. All deferred payments shall draw interest at the rate of eight per cent per annum, payable annually in advance.

[Failure to pay interest for 60 days a forfeiture.]—Upon a failure to pay the annual interest or principal within 60 days after it becomes due and within 60 days after notice thereof in writing by mail or otherwise from the trustees or land agent of said college to the holder of the lease shall have been given, the purchaser shall forfeit all claim to said land and the improvements made thereon and all sums paid on said contract, unless in the opinion of the trustees an extension should be allowed.

SEC. 2. [Trustees may lease for ten years at eight per cent.]—Said trustees are also authorized to lease the said lands for a term not exceeding ten years at an annual rent equal to eight per cent per annum upon the appraised value of the tract, payable annually in advance, and the said lessee, his heirs or assigns, shall have the privilege of purchasing said tract of land at the expiration of the lease at the appraised value stated in the lease. The lessee failing to pay the annual interest upon said lease within sixty days after the same becomes due and within sixty days after notice thereof in writing by mail or otherwise from the trustees or land agent of said college to the holders of the lease shall have

been given, shall forfeit his lease, together with the interest paid thereon and improvements made on said lands.

SEC. 3. [**Trustees may cause purchase price to be reviewed.**]-The said trustees are authorized at their option to cause to be *revived* [reviewed] the purchase price of the land so sold or leased, or which has been heretofore sold, or leased before the same comes due, upon such terms and conditions of payment as said trustees may deem for the best interest of the institution.

[**May renew leases: subject to taxation.**]-Said trustees may also renew leases as they expire, and when so renewed the leasehold estate shall be subject to taxation as provided in chapter 169 of the acts of the nineteenth general assembly entitled, "An act to provide for taxation of leasehold estates in agricultural college lands," approved March 25, 1882.

SEC. 4. [**All leases assignable.**]-Leases heretofore issued by said trustees under the authority of former acts of the general assembly of this state and all renewals of such leases shall be deemed assignable and all transfers of such leases or renewals heretofore made shall be valid, and the owner, whether holding one or more than one such lease or renewal who has made the annual payments therein required shall be entitled to all the benefits of such contract or contracts, and shall have the privilege of purchasing the tract or tracts of land so held by him as provided in the lease and upon payment of the purchase money shall be entitled to a patent for the land described in said lease or leases.

SEC. 5. [**Lands acquired by purchase subject to same conditions.**]-The said trustees be and they are hereby authorized in like manner to sell or lease the lands belonging to the said Iowa agricultural college acquired by purchase with accumulated interest fund.

SEC. 6. [**President and secretary to issue certificate to purchaser.**]-Whenever a sale shall be made of any of said lands as hereinbefore provided, the president of the said agricultural college shall issue to the purchaser a certificate, countersigned by the secretary of said board, stating the fact of purchase, the name of the purchaser, description of land and the appraised value thereof. Upon payment of such purchase price to the treasurer of state, the purchaser, or his assigns, shall be entitled to a patent or patents for such tract or tracts of land. And upon presentation of such certificate to the secretary of state, with the receipt of the treasurer of state, showing full payment of the purchase money and stating the amount thereof, said secretary of state shall issue to the purchaser, or to his assignee, a patent or patents for the tract or tracts of land therein described, which patents shall be signed by the governor and secretary of state, as other patents or deeds for lands conveyed by the state, and shall vest in the purchaser all the right, title and interest of the state and of said college in and to the lands therein described.

SEC. 7. [**Principal to be held by treasurer of state.**]-The principal of all moneys collected under the provisions of this act shall be paid to and held by the treasurer of state, and shall be drawn out for the purpose of investment on the order of the board of trustees, only when required to complete a loan. The interest collected shall be paid to the treasurer of the college upon the order of the board of trustees.

SEC. 8. [**Chapter 71, 15th g. a., repealed.**]-Chapter 71 of the acts of the fifteenth general assembly entitled, "An act to regulate the leasing of the lands belonging to the Iowa state agricultural college," approved March 19, 1874, and all acts and parts of acts conflicting with the provisions of this act are hereby repealed.

Approved, March 27, 1884.

(CHAPTER 189, LAWS OF 1884.)

VETERINARY SURGEON.

An Act for the appointment of a state veterinary surgeon and defining his duties.

SECTION 1. [**Governor to appoint.**]*—Be it enacted by the general assembly of the state of Iowa:* The governor shall appoint a state veterinary surgeon, who shall hold his office for the term of three years, unless sooner removed by the governor; he shall be a graduate of some regular and established veterinary college, and shall be skilled in veterinary science; he shall be a member of the state board of health, which membership shall be in addition to that now provided by law. When actually engaged in the discharge of his official duties he shall receive from the state treasury as his compensation the sum of five dollars per day and his actual expenses, which shall be presented under oath and covered by written vouchers, before receiving the same.

SEC. 2. [**Powers of.**]*—He shall have general supervision of all contagious and infectious diseases among domestic animals within or that may be in transit through the state, and he is empowered to establish quarantine against animals thus diseased or that have been exposed to others thus diseased, whether within or without the state, and may, with the concurrence of the state board of health, make rules and regulations such as he may deem necessary for the prevention against the spread, and for the suppression, of said disease or diseases, which rules and regulations, after the concurrence of the governor and executive council, shall be published and enforced, and in doing said things, or any of them, he shall have power to call on any one or more peace officers, whose duty it shall be to give him all assistance in their power.*

SEC. 3. [**Penalty for interfering with.**]*—Any person who willfully hinders, obstructs or resists said veterinary surgeon or his assistants, or any peace officer acting under him or them when engaged in the duties or exercising the powers herein conferred, shall be guilty of a misdemeanor and punished accordingly.*

SEC. 4. (*As amended by ch. 82, 22d g. a.*) [**Annual report.**]*—Said veterinary surgeon shall [biennially] make a full and detailed report of all and singular his doings since his last report to the governor, including his compensation and expenses, and the report shall not exceed one hundred and fifty pages of printed matter.*

SEC. 5. [**Persons who may demand his service.**]*—Whenever the majority of any board of supervisors, city council, trustees of an incorporated town, or township trustees, whether in session or not, shall, in writing, notify the governor of the prevalence of, or probable danger from, any of said diseases, he shall notify the state veterinary surgeon, who shall at once repair to the place designated in said notice and take such action as the exigencies may demand, and the governor may, in case of emergency, appoint a substitute or assistants, with equal powers and compensation.*

SEC. 6. [**May order the destruction of stock.**]*—Whenever in the opinion of the state veterinary surgeon the public safety demands the destruction of any stock under the provisions of this act he shall, unless the owner or owners consent to such destruction, notify the governor, who may appoint two competent veterinary surgeons as advisors, and no stock shall be destroyed except upon the written order of the state veterinary surgeon countersigned by them and approved by the governor, and the owners of all stock destroyed under the provisions of this act except as hereinafter provided shall be entitled to receive a reasonable compensation*

therefor, but not more than its actual value in its condition when condemned, which shall be ascertained and fixed by the state veterinary surgeon and the nearest justice of the peace, who, if unable to agree shall jointly select another justice of the peace as umpire, and their judgment shall be final when the value of the stock does not exceed one hundred dollars, but in all other cases either party shall have the right of appeal to the circuit court, but such appeal shall not delay the destruction of the diseased animals. The state veterinary surgeon shall, as soon thereafter as may be, file his written report thereof with the governor, who shall, if found correct, endorse his finding thereon, whereupon the auditor of state shall issue his warrant therefor upon the treasurer of state, who shall pay the same out of any moneys at his disposal under the provisions of this act; *provided*, that no compensation shall be allowed for any stock destroyed while in transit through or across this state, and that the word stock, as herein used, shall be held to include only neat cattle and horses.

SEC. 7. [**May co-operate with government of the United States.**]-The governor of the state with the state veterinary surgeon, may co-operate with the government of the United States for the objects of this act and the governor is hereby authorized to receive and receipt for any moneys receivable by this state under the provisions of any act of congress which may at any time be in force upon this subject, and to pay the same into the state treasury, to be used according to the act of congress and the provisions of this act, as nearly as may be.

SEC. 8. [**\$100,000 appropriated.**]-There is hereby appropriated out of any moneys not otherwise appropriated the sum of ten thousand dollars for use in 1884 and 1885, and three thousand dollars annually thereafter, or so much thereof as may be necessary, for the uses and purposes herein set forth.

SEC. 9. [**Compensation to others when called to act.**]-Any person, except a veterinary surgeon, called upon under the provisions of this act, shall be allowed and receive two dollars per day while actually employed.

Approved April 14, 1884.

(Took effect by publication in newspapers.)

PART SECOND.

PRIVATE LAW.

TITLE XIII.

OF RIGHTS OF PROPERTY.

CHAPTER 1.

OF RIGHTS OF ALIENS.

This chapter of the code was repealed by the following act of the twentieth general assembly:

(CHAPTER 85, LAWS OF 1888.)

RESTRICTING NON-RESIDENT ALIENS TO HOLD REAL ESTATE.

An Act restricting non-resident aliens in their right to acquire and hold real estate and replacing sections 1908 and 1909 of the code.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* **Non-resident aliens or corporations** incorporated under the laws of any foreign country, or corporations organized in this country, one-half of whose stock is owned or controlled by non-resident aliens, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time herein limited such lands so acquired have not been sold to a *bona fide* purchaser for value or such alien heirs have not become residents of this state, such lands shall revert and escheat of the state of Iowa, and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this act.

SEC. 2. **Any non-resident alien may acquire** and hold real property to the extent of three hundred and twenty (320) acres, or city property to the amount of \$10,000 in value, providing that within five years from the date of purchase of said property the same is placed in the actual possession of a relative of such purchaser, the occupant being related to such owner within the third degree of kindred, or the husband or wife of such relative, and further provided, that such occupant

become a naturalized citizen within ten years from the purchase of said property as aforesaid.

SEC. 3. It shall be the **duty of the county attorney** of the county in which such lands are situated to proceed by information in the name of the state of Iowa, against such alien in the district court of the county, and summons may issue or service to be had upon such alien by publication as provided by statute for equitable proceeding, and the court shall have power to hear and determine such information and declare such lands escheated to the state, and when such forfeiture is declared by the district court it shall be the duty of the clerk of the court to notify the governor of the state that the title to such lands is vested in the state by the decree of the said court, and the clerk of the court shall present the auditor of state with the bill of costs incurred by the county in prosecuting such case, and the auditor shall issue a warrant to the clerk of the court on the state treasury to repay the county for such costs incurred, and the lands shall be sold in the manner provided for the sale of school lands in chapter 12, title 12 of the code, and the proceeds of such sale shall become a part of the permanent school fund of the state.

SEC. 4. [**Limitation of time for bringing suit.**]-No suit for the recovery of property after the execution and recording of the patent or conveyance by the state shall lie, unless said suit shall have been commenced within five years after the title to such property became vested in the grantee of the state, and all persons who fail to bring their suits within the time limited are forever barred, saving, however, to infants and persons of unsound mind, the right to bring suit at any time within five years after disabilities cease or have been removed; providing, however, that the grantee of the state, immediate or remote, shall have the right to demand such restitution for improvements as provided by chapter 7, title 13, of the code of Iowa.

SEC. 5. [**Sale of lands by non-resident aliens.**]-Any non-resident alien who owns land in this state at the time this act takes effect may dispose of the same during his life to *bona fide* purchasers for value and may take security for the purchase money with the same rights as to securities as a citizen of the United States.

SEC. 6. [**Holders of liens.**]-This act shall not prevent the holders of liens upon or interest in real estate heretofore or hereafter acquired from holding or taking a valid title to the real estate in which he has such interest, or upon which he has such lien, nor shall it prevent any alien from enforcing any lien or judgment for any debt or liability which may hereafter be created, or which he may hereafter acquire, or which may hereafter be adjudged in his favor, or from becoming a purchaser at any sale by virtue of such lien or judgment, provided, however, that all lands so acquired shall be sold within ten years after the title shall be perfected in him under such sales, or in default thereof the same shall revert and escheat to the state as provided in this act.

SEC. 7. [**Law does not apply to resident aliens.**]-This act shall not apply to aliens who are residents of the state of Iowa, who shall have the same right to acquire, hold and dispose of property as natural born citizens of the United States.

SEC. 8. [**Sections 1908 and 1909 of code repealed.**]-Sections 1908 and 1909, chapter 1, title 13 of the code are hereby repealed, and all acts or parts of the acts in conflict with this act are hereby repealed

Approved April 9, 1888.

Under the act of March 15th, 1858 (revision, §§ 2488-2493), non-resident aliens could take property by will upon the condition that the devisee should, subsequently to the making of the bequest, become a resident of the state, but could not take property by descent. *Krogan v. Kinney*, 15 Iowa, 242; *Rheim et al. v. Robbins*, 20 Id., 45.

In *Percell v. Smidt*, 21 Id., 540, the court was equally divided as to the proper construction of

the provisions of the revision in respect to the rights of aliens, COLLE, J., and DILLON, J., holding a different view from that in *Krogan v. Kinney*, 15 Id., 242, and *Rheim et al. v. Robbins*, 20 Id., 45. LOWE, Ch. J., and WRIGHT, J., adhered to the construction there given.

In *Brown v. Pearson et al.*, 41 Id., it was held that under the provisions of the revision a non-resident alien had not the capacity to inherit real property. The law of the code is essentially different from that of the revision.

CHAPTER 2.

OF TITLE IN THE STATE OR COUNTY.

SECTION 1910. [When vested in state or county valid.]—Whenever, to secure the state or any county therein from loss, it shall become necessary to take real estate on account of a debt, either by bidding off the same at a sale on execution, or otherwise, the conveyance thereof to the state, or to any county, shall vest in such grantee as complete a title as if such grantee were an actual person.

SEC. 1911. [May purchase when sold on execution.]—The proper person to bid off such real estate shall be:

First—The attorney-general, or the proper district attorney, in case the judgment is in the name of the state, and the proceeds thereof are payable into the state treasury;

Second—In case the proceeds of the judgment are, by law, payable into the county treasury for the use of the county revenue, or the school or other fund of the county, the district attorney of the district, or the president of the board of supervisors of the county, or any attorney employed or authorized by the board of supervisors to prosecute such claim.

SEC. 1912. [To be appraised: amount of bid.]—In all cases where property is sold as above provided, it shall first be appraised in the manner provided by law for the appraisement of property levied on under execution, and the said officers shall bid upon and purchase said property for the lowest sum possible. If no other person shall bid therefor, they shall bid at least two-thirds of the appraised value thereof, or the full amount of the judgment and costs, if the same is less than two-thirds of such appraised value.

SEC. 1913. [Costs and expenses paid by state or county.]—In cases where the state becomes the purchaser of real estate, under execution issued upon judgments rendered in favor of the state, all costs and expenses attending the same shall be audited and allowed by the executive council, and paid out of any money in the state treasury not otherwise appropriated, whenever such costs and expenses cannot be collected out of the defendant in such judgments, and if the property is purchased by a county, the costs and expenses in like cases shall be paid by such county.

SEC. 1914. [Lands may be leased.]—Whenever the state or any county holds any such lands undisposed of, it may, by its proper agent, lease and control the use of the same, as shall, in the opinion of the executive council, if belonging to the state, and the board of supervisors, if belonging to the county, be for the best interest of such owner; and the proceeds of such use shall belong to the fund to which the debt on which the land was taken belongs.

SEC. 1915. [Buildings insured.]—The officers invested with the control and management thereof shall have full power, and shall keep any valuable buildings thereon insured against fire, for the benefit of the state or county, in some responsible insurance company or companies; and the expense of such insurance shall be paid out of the rents of such property or the proceeds thereof when sold.

SEC. 1916. [**When title invested in state: executive council to control.**]—In any case where the title to any real estate is vested in the state as above provided, the executive council shall have the care, custody, and management thereof, and may sell the same for such sum and upon such terms as to them seems best, and may take such adequate security for any deferred payments as they see proper; and the proceeds of such sale shall be paid to the proper officer and credited to the fund to which the debt on which such real estate was taken belonged. A patent shall be issued to the purchaser of such real estate.

SEC. 1917. [**When in county: supervisors to control.**]—In cases where the title to any real estate is vested in the county as above provided, it shall be competent for the board of supervisors to sell and dispose thereof, as in their judgment shall be for the best interest of their county; if the same is sold on time for any part of the purchase money, the board shall require adequate security for the payment thereof besides the responsibility of the purchaser; and the proceeds of sales of all such lands shall belong to the fund to which the debt on which the land was taken belonged.

SEC. 1918. [**How conveyed by supervisors.**]—In case of any such sale and conveyance by such board of supervisors, the resolution making the sale shall be entered on the minutes of the board, and the yeas and nays on the passage thereof shall be also there entered with the date; such resolution shall express the consideration paid for such land, and such description thereof as shall be necessary to make a deed therefor; and a transcript of such proceeding relating to said sales, the resolution and yeas and nays on its passage made and certified under the hand of the county auditor and the seal of the said board, shall be a sufficient deed of conveyance by said county, and shall be entitled to be recorded or received in evidence without further proof.

SEC. 1919. [**Contract of sale and securities taken valid.**]—The state, or county, on selling such lands, may, at the option of the officer making such sale, execute a contract of sale, or an absolute conveyance thereof, and may take notes, mortgages, contracts or other securities, payable to the grantor, which shall be as valid as if made to an actual person.

CHAPTER 3.

PERPETUITIES AND LAND IN MORTMAIN.

SECTION 1920. [**Disposition of property: when void.**]—Every disposition of property is void, which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for twenty-one years thereafter.

The lease of a railroad for 999 years, with an annual rent reserved from the gross earnings, which does not preclude the lessor from disposing of the fee title, nor prevent the lessee from selling or assigning the lease, nor prohibit the lessor and lessee, by uniting therein, from conveying both the fee and the leasehold estate, is not within the provisions of this section prohibiting perpetuities. *Todhunter & Williamson v. The D. M., I. & M. R. Co.*, 58 Iowa, 205.

SEC. 1921. [**Church organizations may lease: may be leased.**]—Church organizations occupying property granted to them by the territory or the state of Iowa, may lease the same for business purposes, and occupy other property with their church edifice; *provided*, that all of the income derived from such leased property shall be devoted to maintaining the religious exercises and ordinances of the church to which the grant was originally made, and to no other purpose; and such church and its affairs shall remain in the control of a board of trustees, regularly

chosen in accordance with its charter; but property so leased, shall, in all cases, be subject to taxation the same as property of individuals.

CHAPTER 4.

OF THE TRANSFER OF PERSONAL PROPERTY.

SECTION 1922. [Conditional sales: when invalid.]—No sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee, or lessee in actual possession obtained in pursuance thereof, without notice unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages.

Under a contract for a sale of a watch by the terms of which the vendee was to carry it thirty days, after which the sale should be consummated if the watch proved satisfactory; *held*, that the transaction was not a conditional sale, coming within the provisions of this section, and that until the thirty days expired the watch was not subject to seizure in the hands of the party intending to purchase on an execution against him. *Mowbray v. Cady*, 40 Iowa, 604.

Section 1922 of the code does not apply to sales made prior to the enactment of the statute. The intention of the legislature to make a statute retrospective in its operation, must be clearly expressed to justify such a construction. *Knowlton v. Redenbaugh*, Id., 114; *Moseley & Bro. v. Shattuck*, 43 Id., 540.

The possession of personal property is not conclusive evidence of ownership, nor does a change of possession estop the party who has surrendered it from asserting his title in the article surrendered. *Moseley & Bro. v. Shattuck*, *supra*.

Where there is a conditional sale of personal property, the title does not pass until the price is paid. *Id.*

The simple noting of personal property on a writ, or the taking of an inventory, where there is no removal of the property and no person is placed in charge thereof by the officer, does not constitute a valid levy as against one who claims never to have parted with the title to the judgment debtor. *Techmeyer v. Waltz*, 49 Id., 645.

Where goods were received by defendants under a contract with plaintiffs containing the following provision: "We agree to settle for all goods herewith and subsequently ordered, upon receipt of invoice and bill of lading, by forwarding our note or notes or acceptances, payable with exchange on New York or Chicago. * * * The title ownership and right of possession shall be and remain in J. J. Budlong & Co. until settled for as provided in this contract," *held*, that there was no sale, conditional or otherwise, of the goods, until settled for as provided in the contract, and that a mortgage of the goods by defendants before settlement conferred no rights upon the mortgagees which they could assert against plaintiffs. *Singer Sewing Machine Co. v. Holcomb*, 40 Id., 33, distinguished. *Budlong v. Cottrell et al.*, 64 Id., 234.

Before the enactment of the statute as embodied in this section, a conditional sale of personal property, without writing, was valid, not only between the parties, but as to all the world, because the title did not pass to the vendee until the price was paid. *Warner v. Jameson, et al.*, 52 Id., 72; *Bailey v. Harris*, 8 Id., 331; *Baker v. Hall*, 15 Id., 277; *Moseley & Bro. v. Shattuck*, 43 Id., 540.

But under this section, where personal property is sold, and possession given under an agreement that the title shall remain in the vendor until payment of the purchase money, the contract must be in writing, executed by the vendor, acknowledged and recorded, to be valid against a purchaser or creditor. *The Singer Sewing Machine Co. v. Holcomb*, 40 Id., 33.

Where personal property was sold, and possession given to the purchaser under an agreement that that the title should remain in the seller until payment of the purchase money, it was *held*, the assignee for the benefit of creditors of the purchaser, who took possession of the property with full knowledge of the agreement, held it subject thereto, although the contract of sale was not recorded. *Warner v. Jameson et al.*, 52 Id., 70.

A bill of sale executed and recorded by the seller two months after the actual sale and delivery of possession of the property described therein, was held not to impart constructive notice to a purchaser from the person having the possession, of the conditions upon which the sale was made. *Pash v. Weston*, Id., 675.

Where the sale and delivery of personal property is made with an agreement by the purchaser to give security for the purchase money, or to do some act as a part of the transaction, such sale

is conditional; and the title to the property does not pass until the thing so agreed upon is done by the purchaser, or is waived by the vendor. *Thorpe Bros. & Co. v. Fowler et al.*, 57 Id., 541.

Where one had possession of personal property under a conditional sale to him, whereby the title remained in the vendor until payment was made, and the contract under which he held was not acknowledged or recorded, and he mortgaged the property to a third party who had no actual notice of the condition of the title, the title of the mortgagee was held superior to that of the vendor. *The Moline P. Co. v. Braden*, 71 Id., 141.

So long as an article sold upon condition, and shipped to the vendee by rail, is in the hands of the carrier, subject to its charges for freight, and to the vendor's right of stoppage *in transitu*, it cannot be said to be in the "actual possession" of the vendee, as those words are used in this section of the code, and in such case, a third person who buys the article from the vendee, and obtains possession of it from the carrier, takes it subject to the condition on which it was first sold, even though the conditional sale was not made matter of record as provided in this section. *Warner v. Johnson & Hakeman*, 65 Id., 126.

SEC. 1923. [Mortgages of must be recorded.]—No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides.

The right of a pledgee will prevail over the lien of an execution levied upon the property pledged by an officer with notice of the contract pledging the same. *Reeves & Co. v. Sebern*, 16 Iowa, 234.

The fact that a bill of sale was acknowledged long after its date, is not alone sufficient to raise the presumption that it was antedated. *Herns v. Hillhouse*, 17 Id., 67.

When personal property at the time of the sale thereof was in possession of a lessee, and remained therein after the sale, it was *held*, that the vendor did not retain the actual possession thereof, within the meaning of this section. *Id.*

An attachment creditor cannot acquire, through his attachment, a higher or better right to the property or assets attached than the defendant had when the attachment was levied, unless he can show some fraud or collusion by which his rights have been impaired. *Id.*

When the execution defendants have, in the absence of any fraud, sold their interest in the property before seizure thereof under process, the purchaser's rights under such sale are paramount to those under the process, notwithstanding it is not shown that the execution plaintiff, or the officer serving the process, had no notice of such sale prior to the seizure of the property. *Id.*

A gift made in good faith by a father to his child, while he is solvent, if the possession of the property be taken by the child, and it is held as exclusively hers and under her sole and exclusive control, will not become liable to the father's debts subsequently contracted, by the simple fact that it was in his house with his other furniture. Section 2201 of the r. vision (§ 1923 of the code) has no application to this class of cases. *Pierson v. Hersey*, 19 Id., 114.

Fixtures so attached to the realty as to become a part thereof between vendor and vendee, pass to the vendee free of the lien of a prior mortgage of the same as personal property, of which the vendee had no notice. A purchaser, in searching the title to real property, is not required to examine the record of chattel mortgages for incumbrances. *Bringolf v. Munzenmaier*, 20 Id., 513.

A mortgage of personal property, duly executed, though not recorded, and though the mortgagor retains possession of the property, is valid against existing creditors, with notice of the mortgage. The words, "without notice," contained in the statute, apply to creditors as well as to purchasers. *Allen v. McCalla*, 25 Id., 464.

The notice contemplated by the statute is either *actual* or *constructive*. *Id.*

Notice is actual where the purchaser either knows of the existence of the adverse claim, or is conscious of having the means of knowledge, and does not use them, whether his knowledge is the result of a direct communication, or is gathered from facts and circumstances. And where a person designedly abstains from making inquiry for the purpose of avoiding knowledge he will not be regarded as a *bona fide* purchaser without notice, but as charged with the knowledge which his inquiries would have developed. *Id.*

An attaching creditor, who has notice that a mortgage exists, to some one, on the property upon which the levy is made, cannot defeat it by showing that at the time of the levy he believed that the mortgage was being withheld from record in order to delay and defraud creditors. *Id.*

Notice to the attorney is notice to the client. Whether the notice to the attorney must be in the course of the transaction in which he is acting for his client, not decided. *Id.*

This section does not apply to the transfer or sale of a chose in action, as an interest in promissory notes not in possession of the assignor. *How & Co. v. Jones*, 57 Id., 130.

A mortgagee of chattels takes the title thereto unaffected by any lien of the vendor for the purchase money of which he has no notice, unless such lien was evidenced by writing, acknowledged and recorded as required by the statute. *Manny & Co. v. Woods et al.*, 33 Id., 265.

A mortgagee of personal property is a purchaser within the meaning of the recording law. *Id.*

Where the title to personal property has once passed to the vendee absolutely, it cannot be so qualified by an unrecorded writing as to affect the right or title of a purchaser without notice from the vendee. *Id.*

The terms "existing creditors," in section 1923 of the code, are not limited to those who were creditors when the sale was made; they apply equally to those who became such before possession is changed, the bill of sale recorded, or notice given. *Fox v. Edwards*, 33 Id., 215.

The recording of a bill of sale or other instrument having an acknowledgment, defective, in not showing the county of the notary taking the same, does not impart constructive notice. *Willard v. Cramer*, 36 Id., 22.

A sale of personal property is of no validity against a subsequent purchaser or incumbrancer without notice, where the possession is retained by the vendor. *Hesser & Hale v. Wilson*, 36 Id., 152.

A manufactured a buggy for and on the order of B, furnishing the material therefor, except the top, which was furnished by B. B had paid A the price agreed upon. Under these circumstances, and while the buggy was yet in the possession of A, he executed a mortgage thereon to a creditor without notice of B's rights. *Held*, that the mortgagee's rights were not affected thereby. *Id.*

In an action to recover personal property claimed under an alleged sale, it was *held* proper to instruct the jury that if there was no change of possession of the property, and no record of the sale, it was invalid against existing creditors without notice. *Boothby & Co. v. Brown*, 40 Id., 104.

The sale of personal property without notice to creditors of the vendor, will not defeat the levy of an attachment. *Id.*

Possession is a fact which may be established by proof. It is competent to ask a witness who was in possession of property which is the subject of controversy. *Id.*

Where cattle, purchased while running at large, were separated from the other cattle of the vendor at the time of the sale, but were afterward allowed to run with them as before, under the charge of a son of the vendor, *held*, that there was not such a change of actual possession as to constitute a valid sale, under section 1923 of the code, as against a subsequent mortgagee without notice. *Sutton v. Ballou et al.*, 46 Id., 517.

Under such circumstances it was *held* not error to instruct the jury that, if there was an actual delivery of the cattle to the purchaser, he must have continued his possession to the time of the execution of the subsequent mortgage by the vendor, to render such mortgage invalid. *Id.*

An unrecorded chattel mortgage is not valid as against a mortgage subsequently executed, entered and filed of record. *Pitkin & Brooks v. Fletcher & Davis*, 47 Id., 53.

Where C., having a quantity of grain, sold it to E., receiving part payment therefor, and agreeing for future delivery, he subsequently stated to W. that he had made a sale, and agreed with W. that he should deliver it, it was *held*, that this did not constitute a valid sale of the grain as against an existing creditor of C without notice. *McKay v. Clapp et al.*, 47 Id., 418.

The provisions of section 1923 of the code do not apply to a case where personal property sold is not at the time of the sale, in the actual possession of the vendor, but in that of a third person who retains it after the sale, the same as before. *Case & Co. v. Burrows et al.*, 54 Id., 679.

In an action of replevin by the assignees of a lease to recover the landlord's share of the crop, which had been levied upon under an execution against the landlord, it was held that evidence of notice to the defendant and the officer who made the levy, of the assignment of the leases before the levy, was material and should have been admitted in evidence. *Lufkin & Wilson v. Preston*, 52 Id., 235.

Where standing corn was levied on, under an execution against the owner of the land, who raised the corn, it was held that the levy was good against a prior purchaser, there having been no visible change of possession under the sale, and no written instrument of sale recorded, and the officer making the levy not having actual notice thereof. *Nuckolls v. Pence*, Id., 581.

Where a person sells a field of corn standing on his farm, and the vendee does not commence to harvest it, nor otherwise to visibly take charge of the corn, or control of the field in which it stands, the actual possession is not changed, within the meaning of the statute, providing that "no sale of personal property, where the vendor retains actual possession, is valid against existing creditors or purchasers without notice," unless the instrument evincing the sale be recorded. *Smith v. Champney*, 50 Id., 174.

A bill of sale or mortgage of personal property, duly acknowledged and recorded, is notice to the same extent that conveyances of real property similarly acknowledged and recorded are.

Miller v. Bryan, 3 Id., 58; *Crawford v. Burton*, 6 Id., 476; *McCarvan v. Haupt*, 9 Id., 83; *J. & I. Kuhn v. Graves*, Id., 303.

The rule that a delivery of goods purchased, to a common carrier, by whom they are to be delivered to the vendee, amounts to a constructive delivery of the goods to the latter, does not apply, unless there is an actual purchase of the goods shipped or delivered to the carrier. *Alsberg, Jordan & Co. v. Latta et al.*, 30 Id., 442.

A chattel mortgage under which the mortgagor retains the possession and power to dispose of the property is not fraudulent in law. *Torbert v. Hauden*, 11 Id., 435; *Kuhn v. Graves*, 9 Id., 489; *Wilhelmi v. Leonard*, 13 Id., 330; *Frame v. Jones*, Id., 474.

The recording of a chattel mortgage is not essential when the possession of the mortgaged property passes to the mortgagee at the time of the execution of the mortgage. *Frame v. Jones*, 13 Id., 474.

The provisions of section 1923 of the code do not apply to a case where personal property sold is not, at the time of the sale, in the actual possession of the vendor, but in that of a third person who retains it after the sale, the same as before. *Case & Co. v. Burrows et al.*, 54 Id., 679.

The fact that the sale of personal property is evidenced by a bill of sale duly acknowledged and recorded, will not preclude an officer seizing the property under process sued out by creditors of the vendor, from attacking the sale as fraudulent in fact. *Singer et al. v. Sheldon*, 56 Id., 374.

The sale of personal property without a transfer of possession is void, as to creditors without notice, where no written instrument evidencing the same is executed and recorded. The absence of acts of control or ownership is not evidence that actual possession is transferred to the purchaser. *Hickok v. Buel et al.*, 51 Id., 655.

This section does not apply to the transfer or sale of a choice in action, as an interest in promissory notes not in possession of the assignor. *Howe & Co. v. Jones*, 57 Id., 130.

The fact that property sold by bill of sale, which is recorded, is allowed to remain in the possession of the vendor, and be used by him, is not evidence of fraud in the sale, being expressly authorized and provided for by this section. *Jordan v. Lendrum et al.*, 35 Id., 478.

A mortgage of all the property of the mortgagor to secure the payment of the debts of one creditor, if made in good faith, is not fraudulent even if the mortgagor is insolvent; neither is the mortgage void as an assignment for the benefit of a preferred creditor. *Id.*

Retention of possession by the mortgagor of personal property does not render the transaction fraudulent under our statute, where the mortgage is duly acknowledged and recorded. *Smith & Co. v. McLean*, 24 Id., 322.

The constructive notice imparted by the recording of a chattel mortgage is not confined to the county or state where the mortgage was executed and the property then was, but extends to wherever the property may be removed. *Id.*, and cases cited.

A sale of personal property where the vendor continues in the actual possession thereof, is invalid as against existing creditors, unless the instrument conveying the same be duly executed, acknowledged and filed for record. *Prathes et al. v. Parker*, 24 Id., 26. See, also, *Miller v. Bryan*, 3 Id., 58; *McGarvan v. Haupt*, 9 Id., 83; *Crawford v. Burton*, 6 Id., 476; *Cartright v. Leonard*, 11 Id., 32; *Day v. Griffith*, 15 Id., 101.

It was held under the code of 1851 that a chattel mortgage upon machinery which afterward becomes, with the knowledge and consent of the mortgagee, attached to the realty by being placed as fixtures on a mill, will not be affected by the lien of a mechanic having notice of the facts, for work done in the mill; and no person chargeable with such notice can, by purchase of the estate or otherwise, acquire, from or through the mortgagor, any title to such fixtures paramount to that of the mortgagee. *Sowden & Co. v. Craig*, 26 Id., 156.

A mortgage of personal property may be made to cover future acquisitions and the rights of the mortgagee therein will be enforced against all persons having notice. *Scarfenburg v. Bishop*, 35 Id., 60; *Brown v. Allen*, Id., 306, 319, and cases cited.

As to the description of the property in a chattel mortgage, it should be so explicit as to enable third persons, aided by the inquiries which the instrument itself suggests, to identify the property covered thereby, and a mortgage mis-describing property will not affect the purchase of the same by a third person by imparting notice to him of the incumbrance. *Smith v. McLean*, 24 Id., 322; *Ivins v. Hines*, 45 Id., 73; *Winter v. Lanáphere*, 42 Id., 471. See, also, *Rowley v. Bartholomew*, 37 Id., 374.

Where a bill of sale contained in the same instrument with a lease provided that the vendor was to have a lien on the property for the faithful performance of the obligations given for the chattels sold, and for the rent, it was held that the agreement should be construed as a mortgage and its lien sustained in favor of an assignee. *Whiting v. Eichelberger*, 16 Id., 422.

Where the mortgagor of chattels retains possession thereof, the mortgage, in order to be notice to third parties, and take precedence of a subsequent attachment, must be filed for record in the county in which the holder of the property resides. Filing for record in the county where the property is situated is not sufficient. But when the attending officer finds the property in the possession of the agent of the mortgagee, he is bound to take notice of this right of possession,

regardless of the filing of the mortgage. *Stewart & Brown v. Smith*, 60 Id., 375; *Bacon & Co. v. Thompson*, Id., 284. The words "without notice" in this section, apply to "existing creditors" as well as to "subsequent purchasers;" and therefore, attachments levied upon personal property after the execution of a mortgage thereon, but before the same is filed for record, by creditors who have no actual notice of the mortgage, create a valid lien superior to the mortgage. *Bacon & Co. v. Thompson et al.* Following *Boothby v. Brown*, 40 Id., 104, and *Hickok v. Bush*, 51 Id., 655, and overruling *Kessey v. McHenry*, 54 Id., 187.

A sale of personal property which, at the time of the sale, is in the actual possession of a third person, is valid as against the creditors of the vendor, without any change of possession, and without notice, actual or constructive, of the sale; this section of the code has no application to such case. *Campbell v. Hamilton*, 63 Id., 293.

A sale of personal property accompanied with delivery and possession, may be valid without the general public having any knowledge upon the subject, and without the sale being evidenced by written acknowledged and recorded instrument. All that the statute requires is that there shall be such a change of possession as shall give to parties dealing with the seller or buyer notice of the transaction. Accordingly, where one in good faith purchases chattels and takes possession thereof, he may afterwards loan or hire them to the seller without making them subject to attachment for the seller's debts. *Deere & Co. v. Needles et al.*, 65 Id., 101.

For a case deciding upon the facts shown as to change the possession of personal property as against creditors, without notice, in the absence of a written conveyance, see *Pope et al. v. Cheeny et al.*, 68 Id., 563.

The mortgagees of chattels, where the mortgage is invalid, and there has been no change of possession, cannot claim anything as against an execution creditor of the mortgagor, on the ground that the mortgagor's possession was that of an agent for the mortgagees under a contract between them. And in such case actual notice of the invalid mortgage is of no consequence. *Barr, Sheriff, v. Cannon & Gunn*, 69 Id., 20.

A description of property in a chattel mortgage, as follows: "All the grain, oats, wheat, flax and corn raised," on certain land, without stating the year when it was raised or to be raised, held insufficient to impart notice to execution creditors of the mortgagor.

SEC. 1924. [Recorder to keep entry book or index.]—The recorder must keep an entry book or index for instruments of the above description, having the pages thereof ruled, so as to show in parallel columns, in the manner hereinafter provided in case of deeds for real property:

1. The mortgagors or vendors;
2. The mortgagees or vendees;
3. The date of the filing of the instrument;
4. The date of the instrument itself;
5. Its nature;
6. The page and book where the record is to be found.

SEC. 1925. [To make note of day and hour of filing, etc.]—Whenever any written instrument of the character above contemplated is filed for record as aforesaid, the recorder shall note thereon the day and hour of filing the same, and forthwith enter in his entry book all the particulars required in the preceding section, except the sixth; and from the time of said entry, the sale or mortgage shall be deemed complete as to third persons, and have the same effect as though it had been accompanied by the actual delivery of the property sold or mortgaged.

The husband's possession of the personal property of the wife does not deprive her of the right to mortgage the property, and the record of the mortgage, by section 1925, is notice to the world of the rights of the mortgagee and mortgagor therein. *Root et al. v. Schaffner*, 39 Iowa, 375.

The fact that property sold by bill of sale, which is recorded, is allowed to remain in the possession of the vendor, and be used by him, is not evidence of fraud in the sale, being expressly authorized and provided for by this section. *Jordan v. Lendrum et al.*, 35 Id., 478.

SEC. 1926. [Must record.]—The recorder shall, as soon as practicable, record such instrument, and enter in his entry book, in its proper place, the page and book where the record may be found.

SEC. 1927. [Possession of mortgaged property.]—In the absence of stipulations to the contrary in the mortgage, the mortgagee of personal property is entitled to the possession thereof.

Under the statute, the mere retention of the possession by the mortgagor of personal property mortgaged when the instrument is recorded, is neither *per se* fraudulent, or a badge of fraud in

law. It may be a circumstance, with others, to prove fraud *in fact*. *Hughes v. Corey*, 20 Iowa, 399.

The mortgagor of chattels has an equity of redemption therein, even after the conditions of the mortgage have been broken, and a mortgagee who has taken possession of the property after such breach is liable to garnishment at the suit of a creditor of the mortgagor for any surplus remaining after the satisfaction of the mortgage. *Doane & Co. v. Garretson*, 24 Id., 351.

But a mortgagor of personal property has no interest therein which can be levied on and sold on execution. *Gordon v. Hardin*, 33 Id., 550.

The proper method of reaching mortgaged chattels is by garnishment of the mortgagee. *Thorbet v. Hayden*, 11 Id., 444; *Campbell v. Leonard*, Id., 489.

A mortgagor of exempt personal property is not for all purposes divested of his title thereto, and he can maintain an action for damages upon an indemnifying bond, where such property in his possession has been wrongfully seized and sold upon execution; but lest the defendants should be subjected to a double liability, the mortgagee should be joined with the mortgagor as plaintiff. *Evans v. The St. Paul Harvester Works*, 63 Id., 204.

The fact that specific personal property sought to be recovered from attaching creditors by an assignee of the debtor, is under mortgage by the debtor—the mortgage antedating both the assignment and the attachments—will not necessarily defeat a recovery, because, (1) in the absence of a showing to the contrary, the mortgage may provide for a right of possession by the mortgagor, which right the assignment would pass to the assignee; and (2) even if that is not the case, the mortgagor (and his assignee under him) is entitled as against all the world, except the mortgagee, to the possession of the property, and the right of possession is the essence of the action. *Goldsmith, Assignee, v. Willson et al.*, 67 Id., 662.

CHAPTER 5.

OF REAL PROPERTY.

SECTION 1928. [Who seized.]—All persons owning lands not held by an adverse possession, shall be deemed to be seized and possessed of the same.

Under our statute "all persons owning lands not held by an adverse possession shall be deemed to be seized and possessed of the same." *Fleming v. Maddox*, 30 Iowa, 239, 241.

This presumption of seizure continues until the owner is disseized. *Barrett v. Love*, 43 Id.

SEC. 1929. [Estate in fee simple.]—The term "heirs," or other technical words of inheritance, are not necessary to create and convey an estate in fee simple.

"Under the statute the word 'heirs' or other technical words of inheritance are not necessary to create and convey an estate. The grantee takes the title of his grantor, although no such words are used in the conveyance to the grantor. *Barlow v. C., R. I. & P. R'y Co.*, 29 Iowa, 276, 280; *Frederick v. Callanan*, 40 Id., 311; *Benkert v. Jacoby*, 36 Id., 273.

SEC. 1930. [Conveyance passes interest of grantor.]—Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used.

A deed in which the wife joins the husband in the granting clause and in the covenants, operates under our statutes (code § § 1930, 1935,) to pass all the estate of the wife in the property conveyed, including her right of dower. *Edwards v. Sullivan*, 20 Iowa, 502.

Where a person erects improvements on real estate under a parol contract for its purchase, he thereby acquires an interest in the land to the extent of such improvements, and this interest may, under our statute, be conveyed or mortgaged. *White v. Butt*, 32 Id., 335.

A right of redemption is an interest in lands that will pass by a conveyance. *Stout v. Merrill*, 35 Id., 47, 58. And see *Frederick v. Callanan*, 40 Id., 311, 313.

SEC. 1931. [After acquired interest.]—Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee.

A grantor conveying an estate in fee in real property, or with covenants of warranty, is thereby estopped from setting up against his grantee a title acquired by him subsequently to his conveyance. *Childs v. McChesney*, 29 Iowa, 431.

But the joinder of the wife with the husband in the conveyance with *his* real property, by a deed with general covenants of warranty, does not estop her from subsequently acquiring with her own

means, a title to the same property, and asserting the same against her grantee. *Id.*; *O'Neil v. Vanderburg*, 25 Id., 104.

Whether she would be thus estopped in case of a conveyance of *her own land*, *query. Id.*

Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of the grantor to the extent of that which his deed purports to convey, inures to the benefit of the grantee. *Van Orman v. McGregor*, 23 Id., 300.

This rule is subject to an exception, where the grantor executes to his grantee a mortgage to secure a part of the purchase money on the premises subsequently conveyed by the latter to the former. *Morgan v. Graham et al.*, 35 Id., 213.

It was accordingly *held*, where A executed a deed of conveyance for land, to which he then had no title, to B, and A afterwards purchased and received a deed for the premises from C, the owner, and executed back to him a mortgage for the unpaid purchase money, that the rights of C, under his mortgage were not affected by the prior conveyance from A to B. *Id.*

The doctrine of the rule of section 1931 applies to grants by the state. See *Bellows v. Todd*, 39 Id., 209, 217.

A mortgage of real property not owned by the mortgagor, will, under this section, attach and become a lien thereon, where there are no intervening equities, the moment the mortgagor acquires title to the mortgaged property, and it cannot be divested by, or rendered subordinate to the lien of subsequent judgments. *Price v. Kelso*, 57 Id., 115.

In order that a conveyance may operate so as to pass an after acquired title, it must have been so executed as to have passed the grantor's estate at the time of its execution, had he then held the title. *Heaton v. Fryberger*, 33 Id., 185. See, also, *Rogers v. Hersey et al.*, 36 Id., 664.

SEC. 1932. **Adverse possession** of real property does not prevent any person from selling his interest in the same.

SEC. 1933. [**Future estates.**].—Estates may be created to commence at a future day.

While this section provides that "estates may be created to commence at a future day," yet any language employed by the grantor which would be sufficient to create an estate to commence at a future day, would in the nature of the case, give a present interest in the property. *Leaver v. Gauss*, 62 Iowa, 314, 316.

Where a conveyance contained words purporting to convey real estate in the usual form, but also contained the following language: "To commence after the death of both of said grantors," and, "It is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the grantors or either of them shall live," *held*, that no present estate to commence at a future day was created, as contemplated by this section, and that the conveyance was of a testamentary character, and could be revoked by the grantors at their option, notwithstanding a valuable consideration may have been paid therefor. *Ibid.*

SEC. 1934. **Declarations, or creation of trusts** or powers, in relation to real estate, must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law.

The *bona fide* purchaser of real estate, of a vendor who holds title under a deed absolute on its face and duly recorded, is not charged with notice of a trust set out in a separate instrument not recorded. Declarations of trusts must be executed and recorded like deeds of conveyance. *Koons v. Grooves*, 20 Iowa, 373.

Where a husband purchased real property and caused the title thereof to be conveyed to his wife, under an express agreement that she would convey the same to her husband on request by him, *held*, that she had no such interest in the property as would in the event of her death, while holding the title, descend to her heirs, as against her husband. *Cotton v. Wood*, 25 Id., 43.

Nor would a transaction of this character be in the nature of an express trust which would, under section 1934, have to be evidenced by writing. The consent or agreement of the person to whom the conveyance of real property is made, to hold the title for the benefit of the person furnishing the consideration, does not change the character of the trust from resulting to an express one. *Id.*

The mere agent of the owner, appointed by parol to rent and care for property, is not a trustee of an express trust, and has no such interest in the property as will authorize him to maintain an action in his own name to recover possession of the property from a claimant under a tax deed. *McHenry v. Callanan*, 68 Iowa, 365.

While declarations of trust in regard to real estate must be in writing, by this section of the code, the rule does not apply where the subject of the trust is a debt secured by mortgage, and not the land mortgaged. *Patterson v. Mills*, 69 Id., 755.

Where N., who owned 120 acres of land, forty acres of which was his homestead. After contracting debts he conveyed the land to B. without consideration, his wife joining in the deed, for

the purpose of defrauding his creditors. Afterward B. reconveyed to N. by quitclaim, without consideration. N. had continued all the time to live upon the homestead portion of the land. *Held*—(1) That the conveyance of the homestead to B. was no fraud upon the creditors of it, because he had no right to appropriate it. (2) That N. could not be heard to assert any right, as by a resulting trust, based upon the character of his conveyance to B. (3) That under sections 1930, 1934 of the Code, the deed to B. carried to him all the interest of the grantors, in the absence of any declaration of trust. *Butler v. Nelson et al.*, 72 Id. 732.

SEC. 1935. [Married women may convey same as other persons.]—A married woman may convey or encumber any real estate or interest therein belonging to her, and may control the same, or contract with reference thereto, to the same extent and in the same manner as other persons.

A married woman may encumber or convey real property which she owns in her own right. *Sanborn & Follet v. Casady et al.*, 21 Iowa, 77.

She may convey to her husband without the intervention of a trustee, an interest she holds in lands. *Robertson v. Robertson*, 25 Id., 350. See, also, *Mussleman v. Galligher*, 32 Id., 383; *Blake v. Blake*, 7 Id., 46.

A conveyance by a wife to her husband executed under an agreement of separation, relinquishing her right of dower in his real estate, and releasing all claims upon him for future maintenance and support, will be upheld when supported by a consideration, and no fraud, deception or oppression was practiced upon her. *Id.*

A married woman is capable of acquiring and holding real property to her own separate use; and a purchase by a married woman on credit, relying upon her son's earnings with which to pay, was upheld. *Shields v. Keys*, 24 Id., 298, (1868).

But it was held in *McKee v. Reynolds*, 26 Id., 578, that the contingent right of dower of the wife in the husband's lands, or of his in hers, is not the subject of barter and sale between them. And aside from an agreement to separate, it is not competent for one to convey to the other his or her dower interest in real property. But such would be the holding under the present code.

Where the legal title to real estate is vested in a married woman, who joins with her husband in a deed by the granting clause of which they "grant, bargain, sell and convey" said property, and the concluding clause of which the wife "relinquishes all her right of dower in said premises." *Held*, 1. That the whole estate of the wife passed by the deed. 2. That the relinquishment of dower cannot be construed as limiting or qualifying the interest conveyed by the granting clause. *Grapengather v. Fejervary*, 9 Id., 163.

SEC. 1936. [When made by husband or wife: conveys title of both.]—Every conveyance made by a husband and wife shall be deemed sufficient to pass any and all right of either in the property conveyed, unless the contrary appears on the face of the conveyance.

Prior to the code of 1851, the acknowledgment of the wife was essential to the validity of her deed to her own property, but under the code of 1851, and the revision, section 2255, the conveyance of a married woman has had the same effect as a conveyance of a *feme sole*, or by a man, an acknowledgment being necessary to admit the deed to record as constructive notice to third persons, but not essential to its validity as between the parties thereto. *Simms v. Hervey*, 19 Iowa, 273.

SEC. 1937. [Covenants: when binding.]—In cases where either the husband or wife joins in a conveyance of real property owned by the other, the husband or wife so joining shall not be bound by the covenants of such conveyance, unless it is expressly so stated on the face thereof.

Where a married woman joins with her husband in the execution of a deed to lands, which are owned by the husband and another, the title to which is not in her name, the law exonerates her from all liability upon the covenants in the deed. *Thompson v. Merrill*, 58 Iowa, 419.

SEC. 1938. [Mortgagor retains possession.]—In the absence of stipulations to the contrary, the mortgagor of real property retains the legal title and right of possession thereto.

Under our statute, in the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession. Per *COLE, J.*, in *Chase v. Abbott*, 20 Iowa, 158. See, also, *Waters v. Waters & Jones*, Id., 366; *McHenry v. Cooper*, 27 Id., 137, 144; *Devon v. Hendershott*, 32 Id., 194.

Upon payment, or performance of the condition, the mortgagor or his assignee holds by virtue of the original title, and not by virtue of any title derived or acquired from the mortgagee. Per *DILLON, J. Id.*

Newman v. De Lorimer et al., 19 Id., 244; *White v. Rittenmeyer*, 30 Id., 268; *Meyton v. Davenport*, 51 Id., 585; *Mills v. Heaton*, 52 Id., 215.

The interest of a mortgagee under this section is not an estate, but is simply a specific lien or charge to secure a debt, which is the principal thing. *Newman v. De Lormer*, 19 Id., 244.

A mortgage does not operate as a conveyance of the title to the land. It creates a lien thereon, and nothing more. *Troubridge v. Sypher et al.*, 55 Id., 352, 359.

Where a married woman joins with her husband in the execution of a deed to lands, which are owned by the husband and another, the title to which is not in her name, the law exonerates her from all liability upon the covenants in the deed. *Thompson v. Merrill*, 58 Id., 419.

SEC. 1939. [Tenancy in common.]—Conveyances to two or more in their own right, create a tenancy in common, unless a contrary intent is expressed.

Under our law, joint tenancy and survivorship, are not favored, and a conveyance to two or more persons in their own right creates a tenancy in common, unless a contrary intent is expressed. *Hoffman et al. v. Stigers*, 28 Iowa, 302.

And this rule, under our statute, applies to a conveyance, whether by judgment or deed, vesting the estate in husband and wife jointly. And so it was held, where in an action of partition, certain shares of the real estate were set off and confirmed in a husband and wife, that a tenancy in common was created. *Id.*

While the seizin and possession of one tenant in common is the seizin and possession of both, still if a tenant in common assumes to convey the entire estate to a third person, such conveyance will operate as a disseizin of his co-tenant, and the grantee in such conveyance by going into and holding adverse possession under his deed for more than ten years, will have acquired a title barring the co-tenant of his grantor from asserting any right therein. *Kinney v. Slattery*, 51 Id., 353.

SEC. 1940. [Vendor's lien.]—No vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executor or assigns, to enforce such lien. But nothing herein shall be construed to deprive a vendor of any remedy now existing against conveyances procured through the fraud or collusion of the vendees therein, or persons purchasing of such vendees with notice of such fraud.

This section, which provides that no vendor's lien shall be enforced after a conveyance by the vendee, unless the lien is recorded, cannot apply to sales of land made before the enactment of the statute. *Jordan v. Wisner et al.*, 45 Iowa, 65; *Same v. Same*, 48 Id., 180.

The vendor of real estate has a lien upon the property sold for the unpaid purchase money, independent of the existence of a lien evidenced by title bond or mortgage. *Id.*

Prior to the present code, where the vendor of land, to which he retained the legal title, and for which he executed a bond to convey, assigned a promissory note, received in consideration of the sale of the land, and he agreed that his assignee should be substituted to the benefit of all the security held by him, the assignee of the note was held entitled to the same rights as the vendor himself, and he might bring an action in his own name against the vendee, and all persons claiming under him, with notice, for a foreclosure and sale of the premises. *Blair & Co. v. Marsh et al.*, 8 Id., 144.

The lien of a vendor of land for the unpaid purchase money passes as an equitable incident to the assignee of the notes made for such purchase money, but it can be made available only by proper proceedings to establish it. It can be made operative only against the realty. *Rakestraw v. Hamilton*, 14 Id., 147.

A vendor's lien is not based upon contract; nor is it properly an equitable mortgage, or a trust resulting from the vendee holding the estate with the purchase money unpaid. It is an equity raised and administered by courts of equity without any fixed rules and upon the peculiar circumstances of each case. *Porter v. The City of Dubuque*, 20 Id., 440.

Where a note given in consideration of a bond for the conveyance of land was transferred to a third party, and the bond was afterwards cancelled by the parties thereto, and the land conveyed to others, it was held that as against the latter, the transferee was not entitled to a vendor's lien upon the property. *McMillen v. Rose et al.*, Id., 522.

Where the vendor of real property took in part payment therefor the secured note of a third person, indorsed by the vendee, it was held that he had thereby waived his right to a vendor's lien, though the security taken afterward proved worthless, it being considered by all the parties good at the time it was taken. *Kendrick et al. v. Eggleston et al.*, 56 Id., 128.

A vendor who takes in payment of land sold a promissory note with a surety thereby waives his right to a lien on the land which is not reinstated by the fact that the surety becomes insolvent before the maturity of the note. *Akers v. Luse et al.*, 56 Id., 346.

A vendor's lien being a mere equity, cannot affect the rights of an attaching creditor of the vendee having no notice of the lien. *Allen v. Loring et al.*, 34 Id., 499.

The vendor has a lien as between himself and the vendee, upon the property sold until he has paid the agreed price, and the lien attaches equally whether the property be actually conveyed or only contracted to be conveyed. *Johnson v. McGrew*, 42 Id., 555.

As between the vendor and vendee the execution of a mortgage by the latter does not constitute a conveyance as contemplated in this section, which will deprive the vendor of a lien for the purchase money, and such lien attaches to the vendee's equity of redemption under the mortgage. *Tinsley v. Tinsley*, 52 Id., 14.

Under this section a vendor of land who does not reserve a lien for the unpaid purchase money, by conveyance or other recorded instrument, is not entitled to a lien after a conveyance by his vendee. *Botch v. Hussey et al.*, 52 Id., 694.

The execution by the vendee of land, of a contract for the sale of the land, is not a conveyance such as will defeat the lien of the vendor for the purchase money, under section 1940 of the code. *Noyes v. Kramer*, 54 Id., 22.

The dower interest of a widow in the lands of her deceased husband is subject to the lien of the vendor for unpaid purchase money. *Id.*

In an action to enforce a vendor's lien against a purchaser from the vendee, it appearing that the lien was not preserved by any recorded instrument, and that there was no fraud or collusion between the vendees, held that the lien could not be recognized or enforced. *Dean v. Scott et al.*, 67 Id., 233.

This section provides that "no vendor's lien for unpaid purchase money shall be recognized or enforced, in any court of law or equity, after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage or other instrument duly acknowledged and recorded." Held that an assignment for the benefit of creditors is a conveyance within the meaning of the statute, and defeats the vendor's unreserved lien, notwithstanding the fact that the assignee for the benefit of creditors stands only in the shoes of his assignor. *Prouty v. Clark et al.*, 34 N. W. R., 614.

CHAPTER 6.

THE CONVEYANCE OF REAL PROPERTY.

SECTION 1941. [Instrument affecting recorded.]—No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the office of the recorder of the county in which the land lies as hereinafter provided.

A mortgagee of real property is a purchaser within the meaning of the recording statute of this state. *Porter et al. v. Green et al.*, 4 Iowa, 571.

So, also, a purchaser of real property at sheriff's sale, without actual or constructive notice of a prior unrecorded deed, is a purchaser within the meaning of the statute. *Bell v. Evans*, 10 Id., 353.

An unrecorded deed is valid against all persons except subsequent purchasers for a valuable consideration without notice. *Id.*

The record of a deed defectively acknowledged will impart no notice of the contents to a subsequent purchaser. *Brinton v. SeEVERS*, 12 Id., 389; *Willard v. Cramer*, 36 Id., 22.

The provisions of section 2249 of the revision, intended to cure certain defects in the acknowledgment of deeds, was held not repugnant to the constitution as impairing the obligation of contracts, but invalid as to cases in which its application would interfere with rights vested at the date of its going into effect. *Id.*

The grantee of an unrecorded deed or mortgage has priority over a subsequent judgment creditor of the grantor. *Evans v. McGlasson*, 18 Id., 150; *Norton, Jewett & Busby v. Williams*, 9 Id., 529; *Bell v. Evans*, 10 Id., 353; *SeEVERS v. Delashmutt*, 11 Id., 174; *Welton v. Tizzard*, 15 Id., 495, 497; *Hayes v. Rhode*, 18 Id., 51.

But if there is a sale under a subsequent judgment to a third person, for value paid, without notice, the purchaser will take priority over the grantee in an unrecorded deed. *Evans v. McGlasson*, *supra*.

Where a note and mortgage were assigned to a bank as security for present and future loans, it was held, that the subsequent recording of a prior mortgage would not affect the bank's priority, even with respect to advances made after the recording of such mortgage. *Clasey v. Sigg et al.*, 51 Id., 371.

Actual or constructive notice, to a purchaser, of one lien, does not charge him with constructive notice of equities of which he has had no other notice. *Koons v. Grooves*, 20 Id., 373. See, also, *Bringolf v. Munzenmaier*, Id., 513.

The *constructive* notice arising from the record of a deed which is actually fraudulent, the grantor remaining in possession and claiming and selling the property as his own, to a purchaser for value, without notice, does not defeat the right of such subsequent purchaser to avoid an instrument that would otherwise work a fraud upon him. *Gardner v. Cole*, 21 Id., 205.

Seemle, that it would be different in case of a voluntary deed, fair and meritorious, as a reasonable provision for wife and children. *Id.*

The term "subsequent purchasers" in the recording law, includes purchasers from the heir as well as from the ancestor. It is accordingly *held*, that a deed of real estate from the heir to a purchaser, without notice, should prevail against an unrecorded deed from the ancestor. *McClure v. Tallman*, 30 Id., 515.

A judgment creditor who purchases real property, sold at execution sale, will be protected from an unrecorded deed or outstanding equities of which he had no notice at the time of his purchase. He stands upon the same footing, in this respect, as any other *bona fide* purchaser. *Gower v. Doheney et al.*, 33 Id., 36.

The "subsequent purchasers," who are protected by the recording statute against the grantees in prior unrecorded deeds, are those who claim from a common source of title with the latter. No protection is intended against an independent title, distinct from that on which the recorded deed is based. *Rankin v. Miller*, 43 Id., 11, 19, and cases cited.

Notwithstanding the provisions of this section that "no instrument affecting real estate is of any validity against *subsequent purchasers* for valuable consideration, without notice, unless recorded," etc., an assignment of land for the benefit of creditors, though unacknowledged and unrecorded, is paramount to the lien of an attachment levied after the execution of the assignment. *Munson v. Frazier et al.*, 34 N. W. R., 804.

The holder under a quitclaim deed is not entitled to protection against a prior unrecorded deed or outstanding equities as a *bona fide* purchaser, without notice, under the recording law. *Watson v. Phelps*, 40 Iowa, 482; *Smith v. Dunton*, 42 Id., 48; *Light v. West*, Id., 138, 141; *Besore v. Dosh*, 43 Id., 211, 212; *Springer v. Bartle*, 46 Id., 688.

Where the plaintiff in execution becomes the purchaser at sheriff's sale, he is protected against equities in other parties, unless such equities are so strong and persuasive as to prevent the application of the rule which indisputably obtains as to third parties or strangers to the suit; and if these are relied on, they must be alleged and established by evidence. *Butterfield v. Walsh*, 21 Id., 97.

A judgment does not take precedence of a prior unrecorded mortgage, and if the mortgage be recorded prior to the sheriff's sale on the judgment, the purchaser at such sale will be affected with notice of the mortgage. *Chapman v. Coats et al.*, 26 Id., 288. Nor would the assignee or purchaser of the judgment, prior to recording of the mortgage, stand in any better position than the original judgment creditor. *Id.*

The rule that the purchaser of the legal title of a judgment debtor at execution sale takes the land discharged from all equities of third persons therein, of which he has had no notice, does not apply to a case where the judgment debtor has only an equity in the land, and the purchaser buys with full knowledge that he is acquiring thereby only such estate as the debtor has. *Churchill v. Morris et al.*, 23 Id., 229.

A person taking property by descent does not occupy the position of a *bona fide* purchaser. *Morgan et al v. Corbin*, 21 Id., 117.

Where real property is ostensibly as much in the possession of the husband as the wife, there is no such actual possession of the wife as will impart notice of an equitable interest possessed by her in the land to a purchaser at execution sale under a judgment against the husband who was the apparent owner of the legal title when the judgment was rendered. *Thomas v. Kennedy et ux.*, 24 Id., 397.

The purchaser at judicial sale of the equity of the defendant in execution in real property, does not thereby acquire any superiority over prior equities of third parties of which he had no notice. *Wallace et al. v. Bartle et al.*, 21 Id., 346.

A judgment creditor, however, who purchases at sheriff's sale real property, the legal title to which is apparently in the judgment debtor, takes it discharged of equities arising under an unrecorded deed of which he had no notice, actual or constructive. *Walker v. Elston & Greene*, 21 Id., 529; *Evans v. McGlosson*, 18 Id., 150; *Vannice v. Berger*, 16 Id., 555; *Vannice v. Graer*, Id., 574; *Holloway v. Platner*, 20 Id., 121.

Where the acknowledgment of a deed conveying real property is fatally defective, the record of the deed will not operate to give constructive notice of its contents to third persons. *Dussaume v. Burnett*, 5 Id., 95.

In respect to ordinary conveyances of land, if third persons have *actual* notice of them, they operate as notice to the same extent as they would have done by the recording of the deed in all respects regular and perfect in the acknowledgment. *Id.* *Wilson v. Holcomb*, 13 Id., 110.

The lien of an attachment does not take precedence of a prior unrecorded deed. *Savery v. Browning*, 18 Id., 246; *Welton v. Tizzard*, 15 Id., 495; *Norton et al. v. Williams*, 9 Id., 328.

Where a creditor, without notice of a mistake in the description of land in a trust deed exe-

outed by his debtor, attached the interest of the latter in such land, recovered judgment, and at a sale of the land on special execution to satisfy such judgment became the purchaser, it was held that he received and held the property discharged of any equities in the defendant by reason of the mistake. *Holloway v. Plainer*, 20 Id., 121.

A purchaser of real property, with actual notice of an outstanding mortgage thereon, cannot complain of defects in the recording of the mortgage. *Cole v. Winters et al.*, 15 Id., 461.

Where a second mortgagee has actual notice of a prior mortgage, the fact that he procured his to be first recorded is not material and the first mortgage will have priority. *Bell & Co. v. Thomas*, 2 Id., 384; *Brewer's Estate v. Crow*, 4 G. Greene, 520; see, also, *Haynes, Hutt & Co. v. Seachrist*, 13 Id., 455.

A purchaser or incumbrancer will be charged with constructive notice of everything appearing in any part of the recorded deeds or instruments which prove and constitute the title purchased, "and is of such a nature that if brought directly to his knowledge it would amount to actual notice." *The State v. Shaw*, 28 Id., 67, and cases cited on page 71.

An erroneous description of real property in the deed to the grantor is constructive notice to his grantees. *Id. Clark v. Stout*, 32 Id., 213.

A junior mortgage recorded prior to a senior mortgage is entitled to priority, unless the junior mortgagee, and those claiming under him, had actual or constructive notice of the prior mortgage; or such notice as was sufficient to put them, as reasonable men, on inquiry, particularly if such inquiry would have led to a discovery of the rights of the senior mortgagee. And such notice is sufficient if imparted before the completion of a contract of purchase, or the payment of the purchase-money, though not until after the terms of the contract have been agreed upon. *English v. Waples et al.*, 13 Id., 57.

Actual payment of the purchase-money (or what is equivalent to payment) before notice of outstanding equities, is necessary to the protection of a subsequent purchaser. *Kitteridge v. Chapman*, 36 Id., 348, and cases cited on page 350; *Sillyman v. King*, Id., 207.

The execution of a bond or obligation which has not been negotiated is not equivalent to payment. *Id.*

Where there has been a partial payment of the purchase-money before notice, the purchaser will be entitled to protection to that extent, and to a lien on the land therefor. *Id.*

To charge a purchaser with notice of an outstanding equitable title, knowledge must be clearly brought home to him. Rumors, suspicions and assertions made by persons who are strangers to the title, and based upon hearsay, will not be sufficient; the facts must be such as would put him upon inquiry, which, if prosecuted, would lead him to the knowledge of those rights with which it is proposed to affect him. *Wilson v. Miller et al.*, 16 Id., 111.

A person who fraudulently and designedly abstains from making inquiry or obtaining knowledge is not a bona fide purchaser. *Id.*

Where a mortgage of real estate is given for the security of certain negotiable notes which are transferred by the mortgagee without any assignment of the mortgage, after which the mortgagor pays the amount of the notes to the mortgagee by the conveyance of the mortgaged property, and satisfaction of the mortgage is entered upon the record by the mortgagee in his own name, after which the mortgagee, and now, purchaser, borrowed money from the Artisans' Bank, of New York, and secured the same by a mortgage on the same property, the bank having had the title of record examined by a competent attorney, who reported the same clear of incumbrances, before making the loan: it was held that although the assignee of the first mortgage never consented to nor had any knowledge of the satisfaction of their mortgage, the Artisans' Bank had the superior equity. *The Bank of State of Indiana v. Anderson et al.*, 14 Id., 544.

The transfer of a promissory note carries with it the mortgage given to secure it, and the mortgagee after the transfer of the note has no such control over the security that he can discharge or impair it to the prejudice of the assignee or transferee of the note. *Vandercook v. Baker et al.*, 43 Id., 199.

A mortgage containing covenants of warranty does not take priority over one of earlier registration which contains no such covenants. *Id.*

Under this section notice is imparted by the indexing provided for. *Haverly v. Alcott*, 57 Id., 171.

The fact that the grantor in a deed delivered the same to the recorder for the purpose of having it recorded, may be a circumstance tending to show fraud in the transaction, but that fact alone will not, as a matter of law, render the deed fraudulent, nor would it sustain a verdict of a jury to that effect. *Ward v. Wehman*, 27 Id., 279.

The grantee, by a quitclaim deed, takes the property described therein subject to equities existing in favor of others, and this rule is not changed by the fact that such deed contains the words "bargain and sell." *Wightman v. Spofford et al.*, 56 Id., 145, and cases cited.

An unrecorded deed is prima facie valid as evidence of title, and its introduction in evidence casts upon one claiming title, through subsequent conveyance from the same grantor, the burden of proving that he was purchaser for a valuable consideration and without notice. *Nolan v. Grant*, 53 Id., 392. See, also, *Sillyman v. King*, 36 Id., 207.

The recording laws of the state do not apply to the disposition of lands belonging to the United States until the title has finally passed from it, and until conveyed by its grantee. Until then the rights of the parties will be governed by the regulations established by congress. *David v. Rickabaugh et al.*, 32 Id., 540. See, also, *Harmon v. Clayton et al.*, 51 Id., 36.

A conveyance by a purchaser of land from the United States, holding a certificate of entry or location before a patent is issued, will pass the title to his grantee. *Sillyman v. King*, 36 Id., 207.

SEC. 1942. It shall not be deemed lawfully recorded unless it has been previously acknowledged or proved in the manner herein prescribed.

An acknowledgment is not necessary to the validity of a deed or mortgage, as between the parties thereto. *Blain v. Stewart*, 2 Iowa, 378; *Sims v. Hervey*, 19 Id., 273; *Rankin v. Miller*, 43 Id., 18; *Goddard v. Beebe*, 4 G. Gr., 126.

Where the certificate of acknowledgment affixed to a deed failed to show that the grantors were personally known to the officer to be the identical persons who executed the deed, it was held, that the deed was defectively acknowledged and the recording of such deed did not impart notice to subsequent purchasers. *Brinton v. Severs*, 12 Id., 389; *Cavender v. Heirs of Smith*, 5 Id., 157; *Wickersham v. Reeves et al.*, 1 Id., 413; *Reynolds v. Kingsbury*, 15 Id., 238.

Where the record of a deed is duly referred to in the proper index, the index charges all persons with constructive notice of what appears of record, provided the deed is such as to be entitled to be recorded under the statute. *Greenwood v. Genswold et al.*, 69 Id., 53.

SEC. 1943. [Recorder to keep index of records.]—The recorder must keep an entry book or index, the pages of which are so divided as to show in parallel columns:

1. The grantors;
2. The grantees;
3. The time when the instrument was filed;
4. The date of the instrument;
5. The nature of the instrument;
6. The book and page where the record thereof may be found;
7. The description of the land conveyed.

The extent of notice imparted by the record of the mortgage is limited to the property described in the index of the record. *Stewart v. Huff*, 19 Iowa, 557; *Scoles v. Wilsey*, 11 Id., 261; *Noyes' Adm'r v. Horr*, 13 Id., 570; *Breed v. Conley*, 14 Id., 269; *Barney v. Little*, 15 Id., 527; *Bradford v. Miller*, 12 Id., 14. But see *White v. Hampton*, 13 Id., 259, following *Colvin v. Bowman*, 10 Id., 529; *Bostwick v. Powers*, 12 Id., 456.

A conveyance is valid and binding between the parties, though it be neither acknowledged nor recorded. *Lake et al. v. Gray et al.*, 30 Id., 415.

And this rule applies to a married woman's acknowledgment of a deed releasing her dower or conveying the estate. *Id*

SEC. 1944. [To make entries on instrument and in index.]—The recorder must indorse upon every instrument properly filed in his office for record, the time when it was so filed, and shall forthwith make the entries provided for in the preceding section, except that of the book and page where the record of the instrument may be found, and, from that time, such entries shall furnish constructive notice to all persons of the rights of the grantee conferred by such instrument.

Although this section provides that the record "shall furnish constructive notice to all persons of the rights of the grantee conferred by such instrument," the rights or title conferred by the conveyance, as to subsequent purchasers without notice, are to be determined by the instrument as recorded, and not by facts *in pais* or other instruments not recorded. *Miller v. Ware*, 31 Iowa, 524.

A trust deed filed for record but not entered in the proper index does not operate as constructive notice of its contents to a subsequent purchaser. *Gwynn v. Turner*, 18 Id., 1.

The record of a mortgage from which the name of the mortgagee is omitted, does not charge a subsequent purchaser with notice thereof. *Disque v. Wright et al.*, 49 Id., 538.

The grantee in a deed of trust is not affected by notice of an outstanding mortgage on the same premises, acquired after he has parted with the consideration for the deed, and before he has become vested with an absolute title at a sale under such deed of trust. *Barney v. McCarty et al.*, 15 Id., 510.

The purchaser of real estate is not bound to look beyond the record for incumbrances thereon, and if a mortgage be not of record, or being recorded, is not indexed so as to apprise the purchaser of the existence of the lien, in the absence of actual knowledge he takes the land free from the lien of the mortgage. *Howe v. Thayer*, 49 Id., 154.

Where the index of a mortgage, executed by husband and wife upon land belonging to the wife, described the husband instead of the wife as mortgagor, it was held that the index was sufficient to put a subsequent purchaser upon inquiry and that this defect did not destroy the constructive notice imparted by the record. *Jones v. Berkshire*, 15 Id., 243.

The rule is that when the index contains enough to put a careful examiner upon inquiry, and if upon inquiry an adverse title would have been ascertained, the party will be held to have had notice. *Id.*; *Scoles v. Wisley et al.*, 11 Id., 261; *Bostwick v. Powers et al.*, 12 Id., 456; *Calvin v. Bowman et al.*, 10 Id., 529.

It is no more necessary under our recording laws to enter the names of both husband and wife in the index of the conveyance of a homestead than of any other lands wherein both join. Nor is it necessary that the index shall contain a full description of the premises. *Hodgson v. Lovel*, 25 Id., 97. See, also, *Calvin v. Bowman et al.*, 10 Id., 529; *Bostwick v. Powers et al.*, 12 Id., 466; *White v. Hampton*, 13 Id., 271; *Barney v. Little*, 15 Id., 527.

Certain real property had been conveyed to a married woman by the name of "Almira J. Stringham." Her name prior to marriage was Almira Jane Ashley. After her marriage she wrote her name in two ways, sometimes as Almira J. Stringham and sometimes as Jane A., or J. A. Stringham. She was commonly called Jane Stringham when her christian name was used. A conveyance was executed by her in the name of J. A. Stringham, but which was indexed as A. J. Stringham, and there was a caption to the the instrument, as recorded, as from "Almira J. Stringham to," etc.: Held, that the record was sufficient to import constructive notice to a subsequent purchaser or incumbrancer. *Houston v. Seeley et al.*, 27 Id., 133.

Where a party testified that at the time of filing a mortgage for record no other incumbrances upon the property appeared of record, while the records testified that the entry of another mortgage, prior in date and appearing to be of prior record, had previously been made, and under his supervision: Held, that the presumption in favor of the record would prevail. *Vandercook v. Baker et al.*, 48 Id., 199.

The constructive notice arising from the recording of a deed which is actually fraudulent, the grantor remaining in possession and claiming and selling the property as his own to a purchaser for value, without actual notice, does not defeat the right of such subsequent purchaser to avoid an instrument that would otherwise operate as a fraud upon him. *Gardner v. Cole*, 21 Id., 205.

By this section notice is imparted by the indexing provided for. *Haverly v. Alcott*, 57 Id., 171.

Constructive notice, arising from the recording of instruments affecting property, is purely a matter of positive statutory regulation. When the requirements of the law are substantially complied with, the law raises a presumption of notice, which is conclusive and incontrovertible. *Barney v. Little et al.*, 15 Id., 527.

The notice runs from the time the proper entries are made in the index books, provided the subsequent steps necessary to perfect the record are taken. *Id.*

Where an instrument has not been acknowledged, its record will not impart constructive notice of the instrument. *Woods v. Banks et al.*, 34 Id., 599.

This section making the indexing of a deed or mortgage by the recorder, after it is filed for record, constructive notice of the rights of the grantee therein, contemplates that the instrument shall remain in the recorder's office and be recorded as soon as practicable thereafter. Where a mortgage, after being indexed for record, was withdrawn from the recorder's office and not recorded for two years, it was held that third parties acquiring rights in the mortgaged property in the meantime, in good faith, and without knowledge of the existence of the mortgage, were not charged with notice thereof by the records. *Yerger v. Barz et al.*, 56 Id., 77.

The filing of a deed under this section gives notice to the world of the rights of the grantee conferred by the deed. *Laird v. Kilbourne et al.*, 70 Id., 83, 86.

SEC. 1945. [Arranged alphabetically.]—The entries in such entry book, shall show the names of the respective grantors and grantees arranged in alphabetical order.

SEC. 1946. [Must be recorded.]—Every such instrument shall be recorded, as soon as practicable, in a suitable book to be kept by the recorder for that purpose; after which he shall complete the entries aforesaid, so as to show the book and page where the record is to be found.

SEC. 1947. [Deeds of town lots recorded in separate books.]—The recorder shall record all deeds, mortgages, and other instruments affecting town lots in cities or villages, the plats whereof are recorded in separate books from those in which other conveyances of real estate are recorded.

(CHAPTER 10, LAWS OF 1876.)

UNITED STATES AND STATE PATENTS.

An Act relating to the recording of United States and state patents for lands.

SECTION 1. [When deemed to be matters of record.]—*Be it enacted by the general assembly of the state of Iowa:* That United States and state patents for lands in this state, that have been or hereafter may be recorded in the recorder's office of the county in which the lands are situated, shall be deemed matters of record, and certified copies thereof, under the hand of the recorder, may be received and read in evidence in all the courts in this state, with like effect as other certified copies of original papers recorded in his office.

In order to entitle said patents to be recorded, no acknowledgment, as required by chapter six of the code, shall be necessary.

Approved February 16, 1876.

TRANSFER AND INDEX BOOKS.

SEC. 1948. [County auditors to keep.]—The county auditor shall keep in his office books for the transfer of real estate, which shall consist of a transfer book, index book, and book of plats.

See *Wilson v. Hathaway*, 42 Iowa, 173, and note of same cited to section 936, *ante*.

No deed of real property can be lawfully filed for record until the proper entries have been made in the transfer books. *Wilson v. Hathaway*, *supra*, page 175.

SEC. 1949. [Form of.]—Said transfer book shall be ruled, and headed substantially after the following form; and entries thereupon shall be in numerical order beginning with section one:

SECTION NO....., TOWNSHIP....., RANGE.....

Grantee.	Grantor.	Date of instrument.	Description.	Page of Plats.
.....
.....
.....
.....

THE INDEX BOOK THUS :

NAMES OF GRANTEEES.	PAGES OF TRANSFER BOOK.
.....
.....
.....
.....

SEC. 1950. [**Book of plats: how ruled and kept.**—The auditor shall so keep the book of plats as to show the number of lot and block, or township and range, divided into sections and subdivisions, as occasion may require, and shall designate thereon each piece of land or town lot, and mark in pencil the name of the owner thereon in a legible manner. Said plats shall be lettered or numbered so that they may be conveniently referred to by the memoranda of the transfer book, and shall be drawn on a scale of not less than four inches to the mile.

The county auditor's plat book, provided for in this section, is not competent evidence to aid the defective description in a deed, by identifying the description and showing that it was well known—it not being a published map or chart, within the meaning of section 3653 of the code, nor a certified copy of any record, entry or paper belonging to a public office, as contemplated in section 3702 of the code. *Hemrichs v. Terrell*, 65 Id., 25.

SEC. 1951. [**Entries by auditor in index and transfer book.**—Whenever a deed of unconditional conveyance of real estate is presented, the auditor shall enter in the index book, in alphabetical order, the name of the grantee, and opposite thereto the number of the page of the transfer book on which such transfer is made; and upon the transfer book he shall enter in the proper columns, the name of the grantee, the name of the grantor, date of instrument, the character of the instrument, the description of the property and the number or letter of the plat on which the same is marked.

The statute in relation to transfer books does not require that the names of occupiers of land should appear thereon; the names of owners are required so to appear. Per *BECK, J.*, in *Alcott v. Acheson*, 49 Id., 569, 570.

SEC. 1952. [**Indorse deed.**—After the auditor has made the entries contemplated in the preceding section, he shall indorse upon the deed the following words: "Entered for taxation this.....day of....A. D....." with the proper date inserted and sign his name thereto.

SEC. 1953. [**Cannot be filed for record until endorsed.**—The recorder shall not file for record any deed of real property, until the proper entries have been made upon the transfer books in the auditor's office and indorsed upon the deed.

SEC. 1954. [**Auditor correct.**—The auditor shall correct the transfer books from time to time, as he shall find them incorrect.

ACKNOWLEDGMENT OF DEEDS.

SEC. 1955. (*As amended by ch. 99, 22d g. a.*)—[**Manner of in the state.**—Any deed, conveyance, or other instrument in writing, by which real estate in this state shall be conveyed or encumbered, if acknowledged within this state, must be so before some court having a seal, or some judge or clerk thereof, or some justice of the peace or notary public [or before the county auditor or his deputy.]

A record copy of a deed, the acknowledgment of which was signed "John S. Dunlap, clerk of the district court of Des Moines county, by J. W. Webber, deputy, was held admissible in evidence, the deputy clerk having authority to take acknowledgments of deeds. *Abrams v. Ervin*, 9 Iowa, 87.

An acknowledgment of an instrument taken and certified by a person interested therein as grantee, should not be admitted to record; and a record thereof would not operate as constructive notice to a subsequent purchaser. *Wilson v. Traer & Co. et al.*, 20 Id., 231.

SEC. 1956. [**When out of, but in the U. S.**—When made or acknowledged out of this state but within the United States, it shall be acknowledged before some court of record or officer holding the seal thereof, or before some commissioner appointed by the governor of this state to take the acknowledgment of deeds, or before some notary public or justice of the peace; and, when made by a justice of the peace, a certificate under the official seal of the proper authority of the official character of said justice, and of his authority to take such acknowledgments and of the genuineness of his signature, shall accompany said certificate of acknowledgment.

A certificate of acknowledgment made in another state, and appended to a deed conveying lands in this state, to which there was no seal attached by the court or officer taking the same, nor any certificate, under competent authority, attesting the official character of such officer, was held, insufficient under sections 2245, 2246, of the revision. *Jones v. Berkshire*, 15 Iowa, 248.

SEC. 1957. [When out of the U. S.]—When made or acknowledged without the United States, it may be acknowledged before any ambassador, minister, secretary of legation, counsel, charge d'affaires, consular agent, or any other officer of the United States in a foreign country who is authorized to issue certificates under the seal of the United States. Said instruments may also be acknowledged or proven before any officer of a foreign country who is authorized by the laws thereof to certify to the acknowledgments of written documents; but the certificate of acknowledgment by a foreign officer must be authenticated by one of the above named officers of the United States, whose official written statement that full faith and credit is due to the certificate of such foreign officer, shall be deemed sufficient evidence of the qualification of said officer to take acknowledgments and to certify thereto, and of the genuineness of his signature or seal if he have any. All instruments in writing already executed in accordance with the provisions of this section, are hereby declared effectual and valid in law, and to be evidence in any court of this state.

SEC. 1958. [Certificate of acknowledgment.]—The court or officer taking the acknowledgment must indorse upon the deed or other instrument, a certificate setting forth the following particulars:

1. The title of the court or person before whom the acknowledgment was taken;

2. That the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer taking the acknowledgment, to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness, naming him;

3. That such person acknowledged the instrument to be his voluntary act and deed.

An acknowledgment of a deed by the grantor as his voluntary act, is a sufficient execution, though the signature may have been affixed thereto by another. *Morris v. Sargent*, 18 Iowa, 90.

While the certificate of acknowledgment to a deed is not conclusive, but may be rebutted, it is, nevertheless, very strong evidence that the conveyance was executed by the persons stated in the certificate of acknowledgment. *Van Orman v. McGregor*, 23 Iowa, 300; *Morris v. Sargent*, 18 Id., 90. This holding was based upon section 1230 of the code of 1851 which was retained in the revision of 1860 as section 2238, and is section 3662 of the code of 1873.

The certificate establishes a *prima facie* case that the signature to the deed is genuine, but may be rebutted by evidence to the contrary. *Boland v. Walrath et al.*, 33 Id., 130.

The certificate of acknowledgment should show the following acts of the grantor:

1. That he personally appeared before the officer. 2. That he acknowledged the signing of the deed. 3. That such signing was his voluntary act and deed.

It should also show certain conclusions of the officer:

1. That the party thus appearing was personally known to him. 2. That he is the same party who signed the deed as grantor. 3. That he acknowledged the signing of the deed to be his voluntary act. *Bell v. Evans*, 10 Id., 353.

The certificate of acknowledgment to a deed of conveyance read as follows: "This day personally appeared before me, etc., who are to me known to be the identical persons whose names," etc. Held, that the omission of the word "personally" before the word "known" did not render the acknowledgment ineffectual, as the words used necessarily implied personal knowledge, unless negated by a further statement that such knowledge came from information. *Todd v. Jones & Jones*, 22 Id., 146, followed in *Rosenthal et al. v. Griffin*, 23 Id., 263.

The omission of the word "voluntary" or its equivalent, in a certificate of acknowledgment of an instrument conveying real property, is a fatal defect; and the record of an instrument with a certificate thus defective does not impart constructive notice to a subsequent purchaser, though the defect was corrected by the recorder in the recorded copy. *Newman v. Samuels*, 17 Id., 528; *Bell v. Evans*, 10 Id., 353; *Wickersham v. Miller*, Id., 413; *Dickerson v. Davis*, 12 Id., 353.

Where the certificate of acknowledgment of a deed is defective, it cannot be shown *aliunde* that everything required by the statute was done in fact, and that the officer, through mistake,

omitted to certify a part; nor can the certificate be amended upon such evidence. *O'Farrall v. Simplot*, 4 Id., 381.

A very strong presumption exists in favor of the correctness of a deed as to the date of its execution recited therein, and shown by the certificate of the notary public taking the acknowledgment. *Bird v. Adams et al.*, 56 Id., 292.

A certificate of acknowledgment which fails to show the county of the notary making it, is fatally defective. *Willard v. Cramer*, 36 Id., 22.

Where a certificate of acknowledgment by a husband and wife failed to show, either in form or substance, that the wife was "personally known" to the officer taking the same "to be the identical person whose name was affixed to the deed as grantor," it was held, that the certificate was insufficient and that the record of the deed did not impart constructive notice to subsequent purchasers. *Reynolds v. Kingsbury*, 15 Id., 238.

The same degree of particularity is not required in the acknowledgment of the execution of a submission to arbitrators as in the acknowledgment of a deed of conveyance. *McKnight v. McCullough*, 21 Id., 111.

It is worthy of note that the statute, in terms, does not require that the certificate shall set forth that the person making the acknowledgment did personally appear before the officer. * * Of course the fact would be necessary in order to take the acknowledgment, but the statute does not require that such fact be set forth in the certificate. Per *COLE, J.*, in *Schafenburg v. Bishop*, 35 Id., 60, 62.

There is no provision of the statute which requires the name of the officer who certifies to the acknowledgment to be set out in the body of the certificate. If it embraces and states the facts required by this section and is signed by the certifying officer, it is sufficient. *Fogg v. Holcomb*, 64 Id., 621.

Where the title of an officer taking an acknowledgment appears in the body of a certificate, this is sufficient under this section, and such title need not be again written after the officer's signature. *Colby v. Macomber et al.*, 71 Id., 469.

SEC. 1959. [**Proof of execution and delivery: how done.**].—Proof of the due execution and delivery of the deed or other instrument made before the court, or officer authorized to take acknowledgments, by one competent person other than the vendee or other person to whom the instrument is executed in the following cases:

1. If the grantor die before making the acknowledgment;
2. Or, if his attendance cannot be procured;
3. Or, if having appeared, he refuses to acknowledge the instrument.

SEC. 1960. [**Certificate: what must state.**].—The certificate indorsed by them upon the deeds thus proved must state:

1. The title of the court or officer taking the proof;
2. That it was satisfactorily proved that the grantor was dead, or that for some other reason his attendance could not be procured in order to make the acknowledgment, or that having appeared he refused to acknowledge the deed or other instrument;

3. The names of the witnesses by whom proof was made, and that it was proved by them that the instrument was executed and delivered by the person whose name is thereunto subscribed as a party.

SEC. 1961. [**Same.**].—The certificate of proof or acknowledgment as aforesaid, may be given under seal or otherwise, according to the mode by which the courts or officers granting the same, usually authenticate their solemn and formal acts.

SEC. 1962. [**Acknowledgment by attorney in fact.**].—The execution of any deed, mortgage, or other instrument in writing, executed by an attorney in fact, may be acknowledged by the attorney executing the same.

A certificate of acknowledgment executed by an agent prior to the enactment of this section (act of February 24, 1858), in the following form was held sufficient: "STATE OF IOWA, DES MOINES COUNTY.—Before the undersigned, a notary public for said county, came J. M. B., agent of N. M. B. and R. S. C., who are personally known to me to be the identical persons whose names are affixed to the foregoing bill of sale as grantors, and they acknowledged the same to be their voluntary act and deed," etc. *Snowden & Co. v. Craig*, 26 Iowa, 156.

SEC. 1963. [**Certificate of.**].—The court or person taking the acknowledgment, must indorse upon such instrument a certificate setting forth the following particulars:

1. The title of the court or person before whom the acknowledgment was taken;
2. That the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer taking the acknowledgment, to be the identical person whose name is subscribed to the instrument as attorney for the grantor or grantors therein named, or that such identity was proved to him by at least one credible witness to him personally known and therein named;
3. That such person acknowledged said instrument to be the act and deed of the grantor or grantors therein named by him as his or their attorney thereunto appointed, voluntarily done and executed.

It seems that an acknowledgment of a deed by an attorney in fact, as such, purporting to be the voluntary act and deed of his principal, is in conformity with section 2252 of the revision (code section 1963). *Clark v. Conner*, 28 Iowa, 311.

SEC. 1964. [**Penalty for making false certificate.**]—Any officer, who knowingly misstates a material fact in either of the certificates above contemplated, shall be liable for all damages caused thereby, and may be indicted and fined any sum not exceeding the value of the property conveyed or otherwise affected by the instrument on which such certificate is indorsed.

In an action under this section against a justice of the peace, who took an acknowledgment of the assignment of a mortgage in the usual form, stating that the assignor was to him "personally known to be the identical person" whose name was signed to the instrument, the assignment being in fact forged, it was held that the defendant was not liable on his official bond to one who had purchased the notes and mortgage, relying on the validity of the assignment. *Wyllis v. Hann*, 37 Iowa, 614.

In an action on bond of a notary public for damages resulting from false certificate of acknowledgment, where the evidence failed to show that the name of the person was not what the notary certified it to be, and failed to show that the notary knowingly misstated any material fact in the certificate, it was held that no recovery could be had. *Browne v. Dolan et al.*, 68 Id., 645.

SEC. 1965. [**Subpœnas.**]—Any court or officer having power to take the proof above contemplated, may issue the necessary subpœnas, and compel the attendance of witnesses residing within the county by attachment if necessary.

CONVEYANCES LEGALIZED.

SEC. 1966. [**When acknowledged in accordance with the laws of other states.**]—All deeds and conveyances of lands lying and being within this state heretofore executed, and which said deeds have been acknowledged or proved according to and in compliance with the laws and usages of the state, territory or country in which said deeds or conveyances were acknowledged and proved, are hereby declared effectual and valid in law to all intents and purposes as though the same acknowledgments had been taken or proof of execution made within this state and in pursuance to the acts and laws thereof; and such deed so acknowledged or proved as aforesaid, may be admitted to be recorded in the respective counties in which such lands may be, anything in the acts and laws of this state to the contrary thereof notwithstanding; and all deeds and conveyances of lands situated within this state, which have been acknowledged or proved in any other state, territory or country, according to and in compliance with the laws and usages of such state, territory or country, and which deeds or conveyances have been recorded within this state, be and the same are hereby confirmed and declared effectual and valid in law to all intents and purposes as though the said deeds or conveyances, so acknowledged or proved and recorded, had, prior to being recorded, been acknowledged or proved within this state.

Section 2248 of the revision, which is substantially the same as section 1966 of the code, was held to be retrospective only, and that it did not cure defective certificates of acknowledgments made after taking effect of the act, which was chapter 30, laws of 1858. *Reynolds v. Kingsbury*, 15 Iowa, 238; *Jones v. Berkshire*, Id., 248.

This section does not cure an acknowledgment which is defective under the laws of this state, unless it is shown that it was made according to the laws of the state where made. Nor does the

record of a defectively acknowledged deed cure the defect under section 1967 of the code, where it appears either that the grantors did not sign the deed or else the deed has not been duly recorded. *Greenwood v. Jewold et al.*, 69 Id., 53.

SEC. 1967. [When recorded prior to 30th April, 1872.]—That the acknowledgments of all deeds, mortgages, or other instruments in writing, taken and certified previous to the thirtieth day of April, A. D. 1872, and which have been duly recorded in the proper counties in this state, be and the same are hereby declared to be legal and valid in all courts of law and equity in this state or elsewhere, anything in the laws of the territory or state of Iowa in regard to acknowledgments to the contrary notwithstanding.

Section 2249, revision, substantially the same as section 1967 above, was held not to be repugnant to the constitution as impairing the obligation of contracts; but that it was valid as to cases in which its application would interfere with rights vested at the time it took effect. *Brinton v. Severs*, 12 Iowa, 389.

This provision of the statute is not in conflict with the constitution where it does not impair vested rights. *Ferguson v. Williams*, 58 Id., 717.

Defectively acknowledged deeds certified prior to April 30, 1872, and duly recorded, are cured by this section and may be received in evidence the same as if properly acknowledged. *Buckley v. Early et al.*, 72 Id., 289.

SEC. 1968. [When no seal affixed to certificate.]—All deeds, mortgages, or other instruments in writing, for the conveyance of lands which have heretofore been made and executed, and the officer taking the acknowledgment has not affixed his seal to the acknowledgment, such acknowledgment shall, nevertheless, be good and valid in law and equity, anything in any law heretofore passed to the contrary notwithstanding.

(CHAPTER 203, LAWS OF 1884.)

LEGALIZING CONVEYANCES.

An Act legalizing conveyances.

SECTION 1. [Acknowledgments legalized, when.]—*Be it enacted by the general assembly of the state of Iowa:* That all deeds and conveyances of lands lying and being within this state heretofore executed and which said deeds have been acknowledged or proved according to and in compliance with the laws and usages of the state, territory or country in which said deeds or conveyances were acknowledged and proved, are hereby declared effectual and valid in law to all intents and purposes as though the same acknowledgments had been taken or proof of execution made within this state and in pursuance of the acts and laws thereof, and such deeds so acknowledged or proved as aforesaid shall be admitted to be legally recorded in the respective counties in which such lands may be, anything in acts and laws of this state to the contrary notwithstanding, and all deeds and conveyances of lands situated within this state which have been acknowledged or proved in any other state, territory or country to and in compliance with the laws and usages of such state, territory or country, and which deeds and conveyances have been recorded within this state, be and the same are hereby confirmed and declared effectual and valid in law to all intents and purposes as though the said deeds or conveyances so acknowledged or proved and recorded had, prior to being recorded, been acknowledged or proved within this state.

SEC. 2. [Applies to deeds, mortgages and conveyances.]—This act shall apply to all deeds, mortgages and conveyances made, filed, recorded and proved as contemplated in section one (1) of this act prior to the first day of January, 1884.

Approved, April 26, 1884.

(CHAPTER 164, LAWS OF 1878.)

ACKNOWLEDGMENTS OF DEEDS BY CERTAIN OFFICERS.

An Act to legalize the acknowledgments of deeds by deputy clerks of court, county auditors and deputy county auditors.

SECTION 1. [**Acknowledgments legalized.**]*—Be it enacted by the general assembly of the state of Iowa:* That all acknowledgments of deeds, heretofore taken and certified by any deputy clerk of court, county auditor or deputy county auditor within this state, be and the same are hereby declared to be legal and valid in law and equity.

Approved March 26, 1878.

SEC. 1969. [**Revocation of power of attorney: how done.**]*—All instruments containing a power to convey, or in any manner to affect real estate, shall be held to be instruments affecting real estate; and no such instrument, when certified and recorded as above prescribed, can be revoked as to third parties by an act of the parties by whom it was executed, until the instrument containing such revocation is acknowledged and filed for record in the same office in which the instrument containing such power is recorded.*

SEC. 1970. [**Forms of conveyances.**]*—The following or other equivalent forms, varied to suit circumstances, are sufficient for the purposes therein contemplated:*

FOR A QUIT CLAIM DEED.

For the consideration ofdollars I hereby quitclaim to A B all my interest in the following tracts of land (describing it).

FOR A DEED IN FEE-SIMPLE, WITHOUT WARRANTY.

For the consideration ofdollars I hereby convey to A B the following tract of land (describing it).

FOR A DEED IN FEE WITH WARRANTY.

The same as the last preceding form, adding the words "and I warrant the title against all persons whomsoever" (or other words of warranty as the party may desire).

FOR A MORTGAGE.

The same as deed of conveyance, adding the following: "To be void upon conditions that I pay," etc.

Under the statute, a covenant, in a deed conveying real property, "to warrant the title to the same against all persons whomsoever," implies all the usual covenants in deeds of conveyance in fee simple, including seizin, freedom from incumbrances, and right to convey. *Funk v. Creswell*, 5 Iowa, 62; *Van Wagner v. Van Nostrand*, 19 Iowa, 422. See also *Frederick v. Callahan*, 40 Id., 313.

Under our statute, as at the common law, a grantor, a grantee and a thing to be granted, must all be described in a deed; and an instrument in which any of these are omitted is not legally executed, and can convey no title. *Sims v. Harvey et ux.*, 19 Id., 274.

Where a person owning land, and desiring to sell the same by agent, sent to an agent a deed therefor signed by the grantor, with the name of the grantee, and the amount of the consideration left blank, accompanying said deed with a letter of instructions directing the agent to nego-

tiate a sale and deliver the deed to the purchaser, the agent, so far as third persons, without knowledge of the circumstances were concerned, was held to have power to fill the blanks in the deed, and the deed was *held* valid. *Owen v. Perry*, 25 Id., 412.

Where the grantor in a deed omitted the name of the grantee, not knowing his full name, and left a blank therefor, and the deed in this condition was delivered by him to the grantee, who, thereafter, by his attorney, filled the blank with his name, and the grantor afterward ratified the transaction by bringing suit for the consideration agreed to be paid for the land, it was *held*, that this was a sufficient execution and delivery of the deed. *Devin v. Himer*, 29 Id., 297. See also *Clark v. Allen*, 34 Id., 180.

RECORDS TRANSCRIBED.

SEC. 1971. (*As amended by ch. 142, 18th g. a.*) [**Supervisors may have same done.**]
—The board of supervisors of any county, whenever they shall deem it necessary and expedient, may have transcribed, indexed, and arranged, any deed, probate, mortgage, court, or county record or government survey belonging to said county, and have made a complete index thereof as contemplated by section nineteen hundred and forty-three of this chapter; and may have correctly transcribed or copied any index of deeds, mortgages, or other records, and may have the said transcripts or copies compared and certified by [the officer to whose office the original record belongs;] but the provisions of this section shall not apply to any county which has been specially authorized to have such transcribing done.

SEC. 1972. [**By new counties.**]
—Whenever any new county shall have been formed from other original and organized counties, or shall have been attached to another county for judicial or other purposes, and shall afterwards be fully organized and detached, and when any records of the kind mentioned in the preceding section are in the original county or counties which properly belong to such new county, the board of supervisors of such new or attached county shall have authority to have transcribed, indexed, and arranged, such records, or any of them, for the use of such new county.

SEC. 1973. [**Compensation for.**]
—The board of supervisors may employ any suitable person to perform the labor contemplated in the two preceding sections; the amount of compensation therefor to be previously fixed by them, not exceeding six cents for each one hundred words of the records proper, and twelve and one-half cents for each one hundred words of indexing; such compensation to be paid out of the treasury of the county for which the records are transcribed and to be audited as other claims.

SEC. 1974. (*As amended by ch. 142, 18th g. a.*) [**County auditor to certify.**]
—When any such records as are contemplated in section nineteen hundred and seventy-two are so transcribed [the officer to whose office] the original records belong, shall compare the copy so transcribed with the original; and, upon the same being found to be correctly transcribed, shall make a written certificate in each volume or book of such transcribed records, certifying that such transcribed records have been compared with the original by him, and are true and correct copies of the original records.

SEC. 1975. [**Force and effect of.**]
—Such transcribed records so certified, shall have the same force and effect in all respects as the original records, and be admissible as evidence in all cases, and of equal validity with the original records.

(CHAPTER 103, LAWS OF 1880.)

ACKNOWLEDGMENTS BY COUNTY AUDITORS, DEPUTY AUDITORS, AND DEPUTY CLERKS
LEGALIZED.

An Act to legalize acknowledgments by county auditors, deputy county auditors, and deputy clerks of the district court.

[**Preamble.**]—WHEREAS, Certain county auditors, deputy county auditors and deputy clerks of the district court have heretofore taken and certified acknowledgments of deeds, mortgages and contracts, believing that they were acting in pursuance of law; therefore,

SECTION 1. [**Acknowledgments of deeds, mortgages and contracts legalized.**]*—Be it enacted by the general assembly of the state of Iowa:* That all acknowledgments of deeds, mortgages, and contracts heretofore taken and certified by any county auditor, deputy county auditor, or deputy clerk of the district court within this state, be and the same are hereby declared to be as legal and valid as though the law had authorized such acknowledgments at the time they were made.

(Took effect by publication in newspapers, March 28, 1880.)

CHAPTER 7.

OF OCCUPYING CLAIMANTS.

SECTION 1976. [**Proceedings.**]*—When an occupant of land has color of title thereto, and in good faith has made any valuable improvements thereon, and is afterwards in a proper action found not to be the rightful owner thereof, no execution shall issue to put the plaintiff in possession of the property after filing the petition hereinafter mentioned, until the provisions of this chapter have been complied with.*

At the common law there is no liability on the part of the owner of real estate for improvements made thereon in good faith by an occupying claimant. The right to recover therefor is based upon the statute, and the claimant must bring himself within its provisions. *Lunquest v. Ten Eyck*, 40 Iowa, 213.

Two facts are essential to the occupant's right of recovery for improvements: *First*, that the claimant have color of title; *second*, that in good faith he has made valuable improvements upon the land. *Id.*

A person out of possession of real property cannot maintain an action under this chapter against the holder of the legal title to recover the value of improvements made by him upon such real property. *Webster v. Stewart*, 6 Id., 401; *Claussen et al. v. Rayburn*, 14 Id., 136.

But the *personal* possession of the land by the claimant is not essential to constitute him an occupant within the meaning of the statute; the occupancy of the tenant is the occupancy of the landlord. *Parsons v. Moses*, 16 Id., 440.

An occupying claimant of lands situated upon the "half breed tract," who acquired his claim or color of title adversely to the decree of partition, and who has, ever since the acquisition of his claim, resisted such decree, believing it to be fraudulent and void, is entitled to compensation for improvements made upon the land. *Craton v. Wright*, 16 Id., 133.

The right of an occupying claimant to compensation for improvements made in good faith, with color of title, may be assigned; and the assignee is invested with all the rights of his assignor. *Id.* See, also, *Parsons v. Moses*, Id., 440.

An occupying claimant is not entitled to compensation for improvements made after he has, in a proper action, been found not to be the rightful owner. *Id.*

Nor can the purchaser of real estate holding it under a bond for a deed, conditioned upon the

payment of the purchase money, recover against his vendor or his grantee, under the occupying claimant statute for improvements made on the land. *Jones v. Graves*, 21 Id., 474.

In order to establish a right to recover for improvements under the occupying claimant statute, it is essential that the possession under and during which the improvements are made shall be adverse to the holder of the paramount title. *Willse v. Hurley*, 11 Id., 473; *Parsons v. Moses*, 15 Id., 440; *Jones v. Graves*, 21 Id., 474; *Keas v. Burns*, 23 Id., 235.

Where after judgment in favor of the plaintiff in an action to recover land under a congressional grant, and while an action is still pending in the United States supreme court on a writ of error to the supreme court of Iowa, sued out by the defendant, he filed a petition for improvements under the statute of this state, it was held that the court properly refused to grant a writ of possession to the plaintiff, until the defendant's petition was disposed of. *The C., R. I. & P. R. Co. v. Harnish*, 54 Id., 690.

A claim for improvements cannot be pleaded in an action of right, but only after the question of title has been settled in such action adverse to the claimant. *Walton v. Gray*, 29 Id., 440.

Where one holds a sheriff's deed to lands, and, relying in good faith upon his title under such deed, he pays the taxes on the land, but the title is afterwards adjudged to be in another, he may have a lien established upon the land, against such other person's grantee with notice, for the amount of the taxes so paid, and may have a personal judgment against such grantee for such portion of the taxes as were paid after he became the owner of the land; and one who takes the land by mere quitclaim is charged with notice of the equities of the person so paying the taxes. *Bradley v. Cole*, 67 Id., 650.

SEC. 1977. [Petition.]—Such petition must set forth the grounds on which the defendant seeks relief, stating with other things, as accurately as practicable, the value of the improvements upon the lands, as well as the value of the lands aside from the improvements.

SEC. 1978. [Issues.]—All issues joined thereon must be tried as in ordinary actions, and if the value of the land or improvements is in controversy, such value must be ascertained on the trial.

These proceedings were designed to enable the occupying claimant of land, under color of title, who has in good faith, made valuable improvements thereon, and who afterward, in the proper action, is found not to be the rightful owner thereof, to have his improvements appraised, that he may obtain payment therefor, or in default of such payment being made, within the time fixed by the court, to enable the claimant to acquire the title to the land, by paying the appraised value, exclusive of the improvements. *Dungan v. Van Phuhl*, 8 Iowa, 263.

The value of the lands and the value of the improvements must be separately ascertained by the jury, unless the parties agree upon such values. *Id.*

The owner of land is entitled to rents and profits from the occupying claimant according to the value of the land for the purpose to which it is devoted by the occupant. He cannot claim rent on improvements made by the occupant, but he is entitled to compensation for the increased adaptation of the land to the occupant's uses, even though brought about by the occupant's own labor. *Walcott v. Townsend*, 49 Id., 456.

Where by a judgment of the circuit court of the United States, W was awarded the ownership of land, and R subsequently recovered a judgment in the same court against W for improvements under the occupying claimant laws of Iowa, allowing W three years in which to pay it, but neglected to pay for some time afterwards, it was held that R was lawfully in possession until his judgment was paid, and entitled to the crops which he might raise on the land. *Reilly v. Ringland*, 39 Id., 106.

No *personal* judgment can be rendered for the improvements against the owner of the land. *Id.*

The rendition of a *personal* judgment, without question by the owner of the land is not a waiver of objections thereto. The court has no *power* to render such judgment, and the objection may be made for the first time in the appellate court. *Id.*

The court possesses no power to order a sale of the land to satisfy a judgment for the value of improvements. *Id.*

In a proceeding under this chapter, the owner is entitled to the rents and profits according to the value of the land for the purpose to which it has been devoted by the occupant. But he is not to be charged with rent on the improvements made by himself. *Id.*

SEC. 1979. [Plaintiff may elect.]—The plaintiff in the main action may thereupon pay the appraised value of the improvements, and take the property.

SEC. 1980. [Same.]—Should he fail to do this after a reasonable time, to be fixed by the court, the defendant may take the property upon paying the value of the land aside from the improvements.

SEC. 1981. [**Tenants in common.**]—If this be not done within a reasonable time, to be fixed by the court, the parties will be held to be tenants in common of all the land, including the improvements, each holding an interest proportionate to the value of his property as ascertained by the appraisal above contemplated.

SEC. 1982. [**Color of title.**]—The purchaser in good faith at any judicial or tax sale made by the proper person or officer, has color of title within the meaning of this chapter, whether such person or officer had sufficient authority to sell or not, unless such want of authority was known to such purchaser at the time of the sale. And the rights of such purchaser shall pass to his assignees or representatives.

A grantee is an "assignee," within the meaning of this section. *Childs v. Shower*, 18 Iowa, 261.

A party claiming title under a tax deed, although defective in the description, has *color of title* within the meaning of this section. *Id.*

In such case, where the tax deed is given in evidence to show *color of title*, it is competent to show by evidence *aliunde* that the parcels were not sold for one gross sum. *Id.*

The lessee of real property, holding under a lessor who has but a life estate therein, has not color of title within the meaning of this provision of the statute, and cannot recover for improvements placed upon such premises. *Wiltse v. Hurley*, 11 Id., 473.

A tax deed void upon its face will constitute color of title, under which adverse possession may be taken and held for the period under which the statute of limitations will operate as a bar. *Colvin v. McCune*, 39 Id., 502.

The owner of land is entitled to rents and profits from the occupying claimant, according to the value of the land for the purpose to which it is devoted by the occupant. He cannot claim rent on improvements made by the occupant, but he is entitled to compensation for the increased adaptation of the land to the occupant's uses, even though brought about by the occupant's own labor. *Walcott v. Townsend*, 49 Id., 456.

The vendee of real property holding it under a bond for a deed conditioned upon the payment of the purchase money, cannot recover against the vendor or his grantee under the occupying claimant law for improvements made thereon. *Jones v. Graves*, 21 Id., 474.

SEC. 1983. [**Same.**]—Any person has also such color of title, who has occupied a tract of land by himself, or by those under whom he claims, for the term of five years, or who has thus occupied the land for a less term than five years, if he, or those under whom he claims have, at any time during such occupancy, with the knowledge and consent, express or implied, of the real owner, made any valuable improvements thereon, or if he, or those under whom he claims have, at any time during such occupancy, paid the ordinary county taxes thereon for any one year, and two years thereafter have elapsed without a repayment or proffer of repayment of the same by the owner of the land, and such occupancy is continued up to the time at which the suit is brought by which the recovery of the land is obtained as above contemplated; but nothing in this chapter shall be construed to give tenants color of title against their landlords.

Under section 2269, revision, section 1983, code, possession in good faith for a period of five years, in the claimant's own right and for his own benefit, is sufficient to constitute color of title. *Lunquest v. Ten Eyck*, 40 Iowa, 213.

SEC. 1984. [**Same.**]—When any person shall have settled upon any lands within this state, and shall have occupied the same for three years under or by virtue of any law of said state, or any contract with its proper officers for the purchase of said land, or under any law of, or by virtue of any purchase from the United States, and shall have made valuable improvements thereon, and shall have been, or shall hereafter be found not to be the true owner thereof, or not to have acquired a right to purchase the same from the state or United States, such person shall be deemed an occupying claimant within the meaning of this chapter.

SEC. 1985. [**Waste by claimant.**]—In the cases above provided for, if the occupying claimant has committed any injury to the land by cutting timber or otherwise, the plaintiff may set the same off against any claim for improvements made by such claimant.

SEC. 1986. [**Execution.**]—The plaintiff is entitled to an execution to put him-

self in possession of his property in accordance with the provisions of this chapter, but not otherwise.

SEC. 1987. [Removal of improvements.]—Any person having improvements on any land heretofore granted to the state in aid of any work of internal improvement, including what is known as the Des Moines river lands, whose title to such land is questioned by another, shall be entitled to remove such improvements owned by him, without injury otherwise to the land, at any time before he is evicted therefrom, or he may claim and have the benefit of this chapter by proceeding as herein directed.

CHAPTER 8.

THE HOMESTEAD.

SECTION 1988. [Exempt.]—Where there is no special declaration of the statute to the contrary, the homestead of every family, whether owned by the husband or wife, is exempt from judicial sale.

Where homestead premises, acquired previous to the creation of a debt, was sold by the owner, who transferred his homestead for other property of less value than the former homestead, which last homestead was acquired after the contraction of the debt, all of which was before judgment on the debt was rendered, it was held, that the new homestead was exempt from judicial sale upon such judgment. *Pearson v. Minturn*, 18 Iowa, 36.

The homestead character does not attach to property until it is actually occupied as a home. A mere intention to occupy, although subsequently carried out is not sufficient. *Charless et al. v. Lamberson*, 1 Id., 435; *Williams v. Swetland*, 10 Id., 51; *Christy v. Dyer*, 14 Id., 438.

The fact that the vendor retains the legal title as security for the unpaid purchase money will not operate to defeat the vendee's claim of homestead in the property. *Stinson v. Richardson*, 44 Id., 373.

A bond executed by the husband to convey the homestead is of no validity unless the wife joins in its execution. *Yost v. Devault*, 9 Id., 60.

The homestead character does not attach to the property until it is actually used and occupied as a home. The reservation of a piece of land with the purpose of erecting a dwelling-house thereon to be used as a home does not protect it from the lien of a judgment. *Givens v. Dewey*, 47 Id., 414; *Christy v. Dyer*, 14 Id., 438.

A tenant in common may claim and hold a homestead in his interest in the undivided premises. *Thorn v. Thorn*, 14 Id., 49.

Property owned by the head of a family is not invested with the character of a homestead before it is actually occupied as a home. *Charless & Blow v. Lamberson*, 1 Id., 438; *Christy v. Dyer*, 14 Id., 438; *Cole v. Gill*, Id., 527; *Hale v. Heaslip et al.*, 16 Id., 451; *Page v. Ewbank*, 18 Id., 580.

Occupancy of the premises, the use of the house thereon by the family, as a home, is essential to invest the property with the homestead character. A mere intention to thus occupy it is not sufficient, though subsequently carried out; and it may therefore, be subjected to a judgment rendered on a debt contracted prior to such occupancy, though not until after the purchase of the land upon which the improvements are subsequently made. *Elston & Green v. Robinson*, 23 Id., 208.

A tenant in common holding by an equitable title, may have a homestead in land which he occupies as a home. *Hewitt v. Rankin et al.*, 41 Id., 35.

A building erected and occupied by the family as a home upon land leased for a term of years, becomes a homestead and the possession thereof cannot be assigned by the husband without the concurrence of the wife. *Pelan v. DeBevard et al.*, 13 Id., 53.

SEC. 1989. [Head of family defined.]—A widow or widower, though without children, shall be deemed a family while continuing to occupy the house used as such at the time of the death of the husband or wife.

The title to the homestead, upon the death of the owner leaving a widow, vests in the heirs, the right of the widow being limited to that of occupancy. *Johnson v. Gaylord*, 41 Iowa, 362.

The abandonment of the homestead by the widow, when there are surviving heirs, does not subject it to liability for debts other than those which would bind the estate before the death of the owner. *Id.*

Occupation of the homestead by the heirs is not essential to protect it from the debts of the decedent. *Id.*

The right of the wife in the homestead owned by the husband before marriage, vests in her at the time of the marriage. It is of a higher character, and more in the nature of a vested interest or title than the dower right of the wife in the other real property of her husband. *Chase v. Abbott*, 20 Id., 154.

The right of a mortgagee of a homestead is not affected by the subsequent marriage of the mortgagor, but the wife in such case cannot be ousted from the possession by any proceeding to which she is not made a party. *Id.*

Where a widower, without children, acquired real property which he occupied as a homestead for himself and his mother who was the only other member of his family, it was held that he was the head of a family within the meaning of the statute, and that the premises thus occupied was exempt from execution for debts contracted thereafter. *Parsons v. Lirington et al.*, 11 Id., 104.

The granting of a divorce to a wife and the giving her the custody of the children, does not render the homestead remaining in the possession of the husband, liable for his debts. The provisions of the homestead law are to be construed liberally. *Woods v. Davis*, 34 Id., 264.

A widow is not entitled to enjoy at the same time both dower and homestead in her deceased husband's real property. *Meyers v. Meyers et al.*, 23 Id., 359; *Butterfield v. Wicks*, 44 Id., 310.

After the death of the wife the husband has the right to occupy and possess the whole homestead, and this right exists without reference to which of them held the legal title thereto, or whether or not there was issue. *Burns v. Keas et al.*, 21 Id., 257.

A widower, with whom lived his son and son's wife, and who employed a household servant, was held to be the head of a family within the meaning of section 3072 of the code. *Tyson v. Reynolds*, 52 Id., 431.

SEC. 1990. [Conveyance of.]—A conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument.

An agreement of the husband to convey the homestead, not concurred in by the wife, is absolutely void, and specific performance cannot be enforced. *Williams v. Swetland*, 10 Iowa, 51; *Larson v. Reynolds*, 13 Id., 579; *Burnap v. Cook*, 16 Id., 149; *Barnett v. Mendenhall*, 42 Id., 296.

A conveyance of the homestead, or an incumbrance thereof, can only be effected when husband and wife concur in and sign the same joint instrument. *Barnett v. Mendenhall*, 42 Id., 296.

No damages are recoverable for the breach of a contract made by the husband alone to convey the homestead. *Id.*

Prior to the code of 1873, it was held, that no conveyance of the homestead, whether by deed or mortgage, was of any validity unless both husband and wife concur therein, and sign the same. *Alley v. Bay*, 9 Id., 509; *Yost v. Devault*, Id., 60; *Williams v. Swetland*, 10 Id., 51; *Larson v. Reynolds et al.*, 13 Id., 579; *Burnap v. Cook*, 16 Id., 149; *Eli et al. v. Gridley*, 27 Id., 266.

But whether a conveyance of the homestead by the husband and wife in separate deeds by each in which the other did not join was left undecided in *Luther v. Drake*, 21 Id., 92. This question is now settled, however, under the code of 1873, in *Burnett v. Mendenhall*, 42 Id., 376.

The assignment of a bond for a deed of the property claimed as a homestead is of no validity unless the wife, if the owner is married, concur in and sign the instrument of assignment. *Stinson v. Richardson*, 44 Id., 373.

Abandonment of the homestead will not affect the wife's rights, except to render it liable for the debts of the husband. *Id.*

An assignee of a bond, who took possession under an assignment in which the wife did not join, was held, to account for the rents and profits, the proceeds to be applied upon a judgment which was a lien on the homestead, and which had been discharged by the assignee. *Id.*

And the assignee in such case was held entitled to compensation for improvements made in good faith. *Id.*

A mortgage upon the homestead is of no validity unless both husband and wife unite in the execution, and the record of it, therefore, imparted no notice to a subsequent purchaser. *Higley & Co. v. Millard et al.*, 45 Id., 586.

A parol contract, by husband and wife, to convey their homestead in consideration of their maintenance during life, is void. And the fact that the wife, who survived her husband four weeks, being all the time in feeble health, continued to enjoy the benefits of the contract until her death, was held, not to place her in the position of a sole owner who made a parol contract for the sale of the homestead. *Clark et al. v. Everts et al.*, 46 Id., 248.

The homestead right is subservient to that of the vendor for the unpaid purchase money. *Christy v. Dyer*, 14 Id., 438; *Cole v. Gill*, Id., 527; *Burnap v. Cook et al.*, 16 Id., 149.

The husband may make a valid conveyance of a right of way over the homestead without the concurrence and signature of the wife to the deed, the husband being the owner, when such conveyance will not defeat the substantial enjoyment of the homestead as such. *The C. & S. W. R'y Co. v. Swinney et al.*, 38 Id., 182.

A judgment does not attach as a lien upon the homestead of the judgment debtor; and a conveyance of the homestead while used and occupied as such, invests the grantee with the title thereto free from the lien of any judgments against the grantor. *Lamb v. Shays*, 14 Id., 567. Nor does the lien of a judgment attach upon the surrender of the possession of the homestead to the purchaser in pursuance of such conveyance. *Cummings v. Long*, 16 Id., 41.

A contract for the conveyance of a homestead by a married man is void unless signed by the wife, and cannot be enforced though the consideration has been paid and accepted. *Anderson v. Culbert*, 55 Id., 233.

A sale of the homestead at auction is not valid unless the husband and wife, if the owner is married, both join in making the sale; and specific performance of the contract will not be enforced. *Garlock v. Baker*, Id., 334.

After the husband has attempted to sell the homestead, without the wife's consent, another party may become a good faith purchaser, even though he has notice of the husband's previous contract. *Id.*

A conveyance of the homestead by the husband, for which he receives the consideration, in which the wife does not join, or to which her name is signed by a person having no authority to do so, is void, and will be set aside at the suit of the wife in which the husband is joined as co-plaintiff. *Eli v. Gridley*, 27 Id., 376.

Where one leased a lot for a term of five years for an annual rent agreed upon, and it was stipulated in the lease that if the lessee should erect a building suitable for a family, and a stable on the premises, the lessor should pay to the lessee the value of the same at the expiration of the term. The lessee made the proposed improvements and occupied the house as a home, and it was held: 1. That an assignment of the possession of the premises without the concurrence of the wife was void. 2. That an assignment by the husband alone would give the assignee the right to recover from the lessor the value of the improvements. *Pelan v. De Bevard*, 13 Id., 53.

A license to remove mineral from land occupied as a homestead, when its enjoyment for the uses of a homestead is not thereby impaired, may be given by the husband, when he is the owner, without the assent of the wife. *Harkness v. Burton*, 39 Id., 101.

The wife may ratify a void conveyance of her homestead, in all cases where her husband could ratify such act. And a void deed of the homestead may be ratified, in all cases where a similar deed of other property could be ratified, by the assent of the parties expressed or implied from their acts. *Spafford v. Warren*, 47 Id., 47.

Where a conveyance of the homestead by the wife was void, but she surrendered possession of the property voluntarily, made no objection to the grantee's title when he offered in her presence to sell it, and permitted him to remain in quiet possession for more than three years, and to make improvements without protest; held, that her conduct amounted to a ratification of the deed. *Id.*

A parol agreement of the wife, who holds the legal title to the homestead occupied by husband and wife, to execute a mortgage thereon, cannot be enforced as a lien on the homestead. No encumbrance of the homestead is of any validity unless it be by a written instrument executed by both husband and wife. *Clay v. Richardson*, 59 Id., 484.

Where a husband and wife are occupying as a homestead more land than the law exempts as such, and the homestead has not been selected and platted as required by law, a mortgage executed by the husband alone on any part of the land so occupied is invalid; but a judgment rendered upon the debt intended to be secured may be enforced against the excess of land so occupied, provided the officer holding the execution first causes the homestead to be marked off as provided in section 1993 of the code. *Goodrich v. Brown*, 63 Id., 247. *Helpenstein v. Cave*, 3 Id., 287, and 6 Id., 374, were decided under a different statute.

Although part of the land through which defendant agreed to convey the right of way for a railroad was his homestead, and his wife did not sign the contract, yet, since a right of way is but an easement, and since the right of way in the particular case did not destroy the homestead or defeat its occupancy as such, held, that the homestead character of the premises would not defeat a specific performance. *The O., C. F. & St. P. R'y Co. v. McWilliams et al.*, 71 Id., 164.

A written assignment of a title bond for the homestead, signed and concurred in by both husband and wife, is a valid disposition of the homestead under this section of the code. *Rubleman v. Rummel et al.*, 72 Id., 40.

This section does not apply to the case of a conveyance by the husband to his wife. *Harsh, Guardian, v. Griffin*, Id., 603.

A mortgage of a homestead by the husband is of no validity, unless the wife concur in and sign the same joint instrument; and such a mortgage is not validated by the subsequent abandonment of the homestead. *Bruner v. Bateman et al.*, and *Heath v. Bruner et al.*, 66 Id., 488. See, also, *Cowgill v. Warrington*, Id., 666.

The plaintiffs occupied a homestead which was owned by the wife under a bond for a deed. The wife assigned the bond without the concurrence of the husband; held, that the assignment was invalid, and did not become valid upon the subsequent abandonment of the homestead; but where, after such abandonment, another, who had no notice of the facts rendering the assignment invalid, and no knowledge that plaintiffs claimed any interest in the property, purchased it

from one in possession, who appeared to have a perfect title of record; *held*, that his title was superior in equity to the homestead rights of the plaintiffs. *Lunt et al. v. Neely et al.*, 67 Id., 97. Citing *Stinson v. Richardson*, 44 Id., 373; *Bruner v. Bateman*, 66 Id., 488.

A conveyance of the homestead by the husband to the wife is not within the meaning of this section, and is valid, although the wife does not join therein. *Harsh v. Griffin*, 34 N. W. R., 441.

SEC. 1991. [Liable for taxes.]—The homestead is liable for taxes accruing thereon, and, if platted as hereinafter directed, is liable only for such taxes, and subject to mechanic's liens for work, labor, or material, done or furnished exclusively for the improvement of the same, and the whole or a sufficient portion thereof may be sold to pay the same.

Where under the law in force at the date of the levy of a tax, the homestead was exempt from sale for any taxes except those levied thereon, though not separately listed, a subsequent change in the law would not affect the right of the owner. At a sale made for such taxes it could not be sold in connection with other lands, in such manner as to compel the owner to pay the taxes assessed upon such other lands in order to save his homestead from absolute loss. *Penn v. Clemans*, 19 Iowa, 372.

A sale of a tract of land of which the homestead constitutes a part, for delinquent taxes on the whole tract, is void *in toto*. *Stewart v. Corbin*, 25 Id., 144. See, also, *Burmeister v. Dewey et al.*, 27 Id., 468.

SEC. 1992. [For debts contracted previous to purchase.]—The homestead may be sold on execution for debts contracted prior to the purchase thereof, but it shall not in such case be sold except to supply the deficiency remaining after exhausting the other property of the debtor liable to execution.

A debt for the purchase money of a homestead is not a debt arising after the purchase thereof, and it may, therefore, be sold in satisfaction of the same. And a mortgage executed by the husband alone to secure the purchase money was *held* not invalid because of the non-concurrence of the wife. *Christy v. Dyer*, 14 Iowa, 438; *Barnes v. Gay*, 7 Id., 26; *Cole v. Gill*, 14 Id., 527; *Burnap v. Cook*, 16 Id., 149.

The homestead can be sold only to supply a deficiency existing after exhausting the other property of the debtor liable to execution, whether the debt existed before the purchase of the homestead, or was contracted after and secured by mortgage on the homestead. *Higley & Co. v. Millard*, 45 Id., 586. See, also, as holding the same doctrine, *Dickson et al. v. Chorn et al.*, 6 Id., 19, 30.

When the owner of a homestead, or his mortgagee, seeks to restrain the sale of the homestead, to satisfy a judgment on a debt for which it is liable, on the ground that the debtor has other property which is not exempt, and which should be first exhausted, he must make the fact appear affirmatively. *Hale v. Heaslip*, 16 Id., 451.

The interest of a defendant in the assets of a partnership of which he is a member, being liable to be taken in execution or reached by proceedings thereunder, must be first exhausted before resort can be had to the homestead of the defendant. *Lambert v. Powers*, 36 Id., 18.

The homestead is liable for debts contracted prior to its acquisition, and such liability attaches at the date of the creation of the indebtedness, and not at the date of the rendition of a judgment thereon; and the lien of the judgment also relates back to the time when the debt was contracted, and may be enforced by general execution. *Bills v. Mason*, 42 Id., 329.

In case of an exchange of homesteads, the new homestead will be liable for an existing debt for the purchase money of the old one, the liability to the latter being transferred by operation of law of the former. *Id.*

Where P recovered a judgment against Q for the purchase money of the latter's homestead, and bought in the property at execution sale for less than the amount of his judgment, and F also recovered judgment against Q, after the date of P's judgment, upon a claim alleged to ante-date the purchase of the homestead, it was *held*. 1. That F might show *aliunde* that the debt was contracted prior to the acquisition of the homestead. 2. That he was entitled to redeem from P, upon payment of the amount of his bid. *Phelps v. Finn*, 45 Id., 447.

The liability of a person who obtained money from another by means of false and fraudulent representations in the sale of a patent right, is a "debt" within the meaning of that word as used in the homestead exemption statute, and that under an execution on a judgment for such debt the homestead may be sold. *Warner v. Cammack*, 37 Id., 642.

The homestead is liable to be sold on execution for debts contracted in another state prior to its acquisition, after the exhaustion of the other property of the debtor liable to execution. *Brainard v. Van Huron*, and *Same v. Smith et al.*, 22 Id., 261; *Luig v. Cuninghame*, 17 Id., 510.

A sale of a homestead by a trustee, under a deed of trust, will not be enjoined on the ground that the other property of the owners subject to execution has not been exhausted, when it is not alleged in the petition asking the injunction that the owners have such other property. *Stevens v. Myers*, 11 Id., 183.

A sheriff's sale in the foreclosure of a mortgage embracing the homestead, will not be set aside where the sheriff first offers the land in forty acre tracts, according to the government subdivisions, and, receiving no bids, then offers and sells the whole of the land including the homestead. *Brumbaugh v. Shoemaker*, 51 Id., 148.

The homestead descends to the issue of the owner charged with the debts of the latter, which, in his lifetime, could have been enforced against it, but free from such debts as could not, in his lifetime, have been so enforced. *Moninger et al. v. Ramsey*, 43 Id., 368.

A judgment against a surviving husband is not a lien upon his homestead right in the lands of his wife, unless he shall have abandoned the same, nor can he create a valid lien thereon by the execution of a mortgage. *Smith v. Eaton et al.*, 50 Id., 488.

A homestead may be sold to satisfy a debt of the owner contracted before the enactment of the homestead law, after the other property of the debtor, not exempt from execution, is exhausted; and a delay by the creditor in the enforcement of his claim, during which all the other property belonging to the debtor and subject to execution is alienated, either voluntary or by judicial sale, for the satisfaction of other debts, does not affect his right to subject the homestead to judicial sale to satisfy the same. *Denegree v. Haun*, 14 Id., 240.

The defense that the mortgaged premises are the homestead, and for that reason the mortgage is void, must, to be available, be pleaded in the action to foreclose the mortgage, and cannot be interposed in an action to recover the possession by the purchaser at the sale made on the execution under the decree of foreclosure. *Haynes, Hutt & Co. v. Meek et al.*, 14 Id., 320.

The entry of land under the homestead laws of the United States constitutes a purchase of the homestead as contemplated in section 1992 of the code. *Green v. Farrar & Wheeler*, 52 Id., 426.

The conveyance of the homestead by the husband to the wife does not render it liable to debts of the wife contracted prior to such conveyance. Such transfer did not divest the property of its homestead character which it had prior to the conveyance. *Id.*

A judgment recovered against the wife after the death of the husband, is not a lien on the homestead which was occupied as such before and after his death. *Nye v. Walliker*, 46 Id., 306. And a failure to plat the premises or have the same recorded will not render them liable for debts incurred by the wife after her husband's death. *Id.*; *Briggs v. Briggs*, 45 Id., 318.

The homestead is liable to be taken in execution for debts contracted before it became a homestead. *Barhydt & Co. v. Bonny et al.*, 55 Id., 717.

SEC. 1993. [When contract stipulates it may be sold.]—The homestead may be sold for debts created by written contract, executed by the persons having the power to convey and expressly stipulating that the homestead is liable therefor, but it shall not in such case be sold except to supply the deficiency remaining after exhausting the other property pledged for the payment of the debt in the same written contract.

It is not essential to the validity of a mortgage of property occupied as a homestead, in the execution of which both concur, to expressly describe the property as a homestead, and to state that it is to that fact that the conveyance is made. *Babcock v. Hoeye et al.*, 11 Iowa, 375.

Where a mortgage embraces several distinct tracts of land, one of which is the homestead of the mortgagor, the homestead should be sold in the foreclosure, only to supply the deficiency remaining after exhausting the other property mortgaged. *Lay v. Gibbons*, 14 Id., 377.

The homestead cannot be subjected to liability for debt upon mere oral agreement. *Rutt v. Howell*, 50 Id., 535.

An agreement in a confession of judgment to waive the protection of exemption laws, and to permit execution to issue against any property of the judgment debtor, homestead included, is not such a written contract as will subject the homestead to liability. *Id.*

Where a deed of trust was substantially as follows: "For the purpose of securing to S. L. S. the sum of, etc., etc., I, J. C. B., of Polk county, Iowa, do hereby sell and convey, etc., etc., and if said sums of money, to-wit, etc., are not promptly paid, etc., then I hereby authorize, etc., etc. In witness whereof the said J. C. B., with _____, his wife, have hereunto set their hands, this 22d day of June, 1857," which deed was duly signed by both the husband and wife, it was held that there was not such a concurrence of the wife as would make it operative as a conveyance of the homestead interest, and that it could be construed only as a relinquishment of dower. *Sharp v. Bailey*, 14 Id., 387; See, also *Grapengather v. Fejervary*, 9 Id., 163, *Shaffner v. Grutzmacher*, 6 Id., 137; *Westfall v. Lee*, 7 Id., 12; *Larson v. Reynolds et al.*, 13 Id., 579.

Where a mortgage of the homestead and other lands was made and delivered as a completed instrument by the husband alone, with the understanding that the wife was not to join therein, but her signature and acknowledgment were subsequently fraudulently obtained by the mortgagee, who thereupon so altered the mortgage and acknowledgment as to make it appear a mortgage by the husband and wife jointly, and thereby giving it the force of a lien upon the homestead, as well as upon other lands covered by the mortgage, it was held, that the alteration was material and rendered the mortgage void. *Cutler v. Rose*, 35 Id., 456; *Lay v. Gibbons*, 14 Id., 377.

A subsequent promise by the husband, in such case, to pay additional interest in consideration

of an extension of time, would not of itself amount to a ratification of the alteration. Nothing short of full knowledge of the alteration and a manifest intent to ratify the instrument as altered will be sufficient for that purpose. *Id.*

A mortgage upon a homestead of which the legal title is in the wife, executed by both husband and wife to secure a note given for an existing debt of their son, in consideration of an extension of time, is a valid one, under sections 1990 and 1993 of the code, and may be enforced. *Low Bros. & Co. v. Anderson et al.*, 41 Id., 476.

The homestead may be sold on execution where the debt upon which the judgment was rendered was created by written contract, executed by those having the power to convey the homestead, and expressly stipulating that it shall be liable for the debt. *Foley v. Cooper*, 431 d., 376.

The parties possessing the homestead may, however, insist that the other property of the debtor shall be exhausted before the homestead is sold. *Id.*

If they have notice of the sale of the homestead and make no objection thereto, they are estopped to afterwards claim that other property should have been first exhausted. *Id.*

Section 2281 of the revision (§§ 1992, 1993 of the code) does not apply to a third person who purchases the property after the execution of a mortgage thereon, nor afford it, in his hands, any exemption from sale in satisfaction of a mortgage in the first instance. *Parker v. Rollins*, 30 Id., 412.

A judgment recovered against the widow, after the death of her husband, is not a lien on the homestead, which was occupied as such before and after his death. *Nye v. Walliker*, 46 Id., 306.

When a widow elects to take her distributive share of her deceased husband's real estate, under the law, and when such share embraces a part or all the homestead, she does not surrender her right to have the property, other than that set apart to her, first exhausted in the payment of a mortgage lien upon the whole premises. *Wilson v. Hardesty*, 48 Id., 515.

A sale on special execution of two hundred and forty acres of land in gross, part of which was a homestead, will not be held invalid where it appears that the land was first offered in forty acre tracts, by the sheriff, and no bids received for any portion as thus offered. *Burmeister v. Dewey et al.*, 27 Iowa, 468.

The offering by the sheriff in separate tracts, and his endeavoring thus to sell before offering and selling in a body, was held to be an exhausting of the other property within the meaning of this section. *Id.* To the same effect is *Brumbaugh v. Shoemaker*, 51 Id., 148.

A mortgage upon the homestead in the ordinary form and signed by the husband and wife is valid, although the property is not designated as the homestead of the mortgagors. *Reynolds v. Morse et al.*, 52 Cd., 155.

Where a decree was entered divorcing husband and wife, and giving the wife a general judgment for alimony, leaving the husband the head of a family consisting of himself and several children, it was held that the homestead acquired and occupied as such, prior to the rendition of the decree, was not liable to sale for the satisfaction of the decree for alimony. *Byers v. Byers et al.*, 21 Id., 268; *Whitcomb v. Whitcomb et al.*, 42 Id., 715.

This section does not apply to a third person who purchases a homestead after the execution of a mortgage thereon, nor offer, in his hands, any exemption from sale in the first instance. *Barker v. Rollins*, 30 Id., 412.

The right of exemption, under this section, when available, is in no sense a cause for a cross-action, but may be claimed in the answer in the foreclosure proceedings, or obtained upon a summary proceeding upon a summary showing, supplemental to the decision of the main case. *Id.*

A temporary absence of several months, during which the homestead was in the possession of a tenant, was held not to work an abandonment thereof. *Robb v. McBride*, 28 Id., 386; see, also, *Pearson v. Minturn*, 18 Id., 36; *Sargent v. Chubbuck*, 19 Id., 39.

Where a mortgage is executed by husband wife on the homestead or other real estate, and prior to foreclosure the mortgagors sell and convey the other real estate and a part of the homestead to other parties, they cannot, under this section, insist in a foreclosure proceeding, that the property so sold and conveyed by them shall be first exhausted, before that part of the homestead which they retain shall be sold. The words "other property" in this section must be limited to property which belongs to the mortgagor at the time of foreclosure. (BECK, J., dissenting.) *Dilger v. Palmer*, 60 Iowa, 117.

Where plaintiff commenced an action to foreclose her senior mortgage on two hundred and forty acres of land, of which forty acres were the homestead, a junior mortgagee, whose mortgage covered all the land except the forty acres homestead, was made defendant, and he brought into court the money to pay off the senior mortgage, and demanded an assignment thereof to himself under section 3323 of the code. *Held*, that he was entitled to an assignment of the senior mortgage only as to the land not included in the homestead. Since the homestead could be sold under the senior mortgage only after exhausting the other land, and could in no case be subjected to the satisfaction of the junior mortgage, an assignment of the senior mortgage as to the homestead could be of no avail in effectuating the purpose of section 3323. *Grant v. Parsons et al.*, 67 Id., 31.

It is not essential under this section that the homestead shall be specially described as such in a conveyance, or that the deed should in express terms contain a stipulation that the homestead is covered or should be sold. It is sufficient that the parcel of land constituting the homestead is included in the conveyance or mortgage containing the usual provisions. *Waterman et al. v. Baldwin, Trustee, et al.*, 63 Id., 255.

Where a mortgage covering a homestead and other land was foreclosed, and all the land sold thereunder as one tract, a judgment creditor whose claim accrued while the homestead right existed had no lien thereon, but he had a lien on the other portion of the mortgaged premises, and a right to redeem it by paying the amount due on the mortgage, less the value of the homestead. *Sutherland v. Tynes*, 33 N. W. R., 645.

SEC. 1994. [**Extent of homestead.**]—The homestead must embrace the house used as a home by the owner thereof, and if he has two or more houses thus used by him at different times and places, he may select which he will retain as his homestead.

An actual removal from the homestead with no intention of returning will be a waiver or forfeiture of the right as against purchasers or creditors, even though no new homestead be gained. *Fyffe v. Beers et al.*, 18 Iowa, 4.

If the removal, however, is but temporary, and the *animus revertendi* is established, and third persons have not been led to believe that it was not a homestead by the owner out of possession, and to act upon this belief by purchasing or specifically altering their condition upon the faith that it was not exempt as a homestead, the law will treat the homestead right as still subsisting. *Id.*

Stronger and clearer proof of the abandonment of a homestead is required where the lien sought to be enforced arose during actual occupancy, than where it arose when the owner was not in actual possession. *Davis, Moody & Co. v. Kelley*, 14 Id., 523; *Dunton v. Woodbury*, 24 Id., 74.

While the length of absence from the homestead is not conclusive of its abandonment, yet where there are no circumstances or acts of the party manifesting an intention to return and occupy it as such, the length of absence becomes an important fact in determining that question. *Id.*

Absence from the homestead for about three years without there being manifested, by any circumstances, an intention to return; repeated offers to sell or trade it during that time, and the expression of an intention not to return to it; the creation of the debt sought to be enforced during such absence, and the giving of an order to the creditor authorizing him to collect of the tenant to whom the homestead was rented, sufficient rent to satisfy it, were held, sufficient evidence of abandonment, and to render the property claimed as a homestead liable to the creditor's claim. *Id.*

In order that the homestead should be exempt from execution sale under the act of January, 1849, entitled "An act to exempt a homestead from forced sale," it must have been owned and actually occupied as a homestead by the owner, while that act was in force; mere constructive possession was not sufficient, nor an intention to occupy together with preparation to that end, and a subsequent actual occupancy will not avail. *Charless et al. v. Lamberson*, 1 Id., 435.

A homestead law, in force at the date of a contract, becomes part of it, and a repeal of the law does not impair the right of exemption. *Bridgman v. Wilcut*, 4 G. Greene, 563; *Coriell v. Ham*, Id., 455.

The homestead character does not attach until the property is actually occupied as a home; a mere intention to occupy, though subsequently carried into effect, is not sufficient. *Christy v. Dyer*, 14 Iowa, 438; *Elliston & Green v. Robinson*, 23 Id., 208; but if actually occupied the premises do not lose their homestead character when left merely for a temporary purpose. *Davis, Moody & Co. v. Kelley*, 14 Id., 523; *Fyffe v. Beers*, 18 Id., 4.

In order to constitute a homestead, there must be a house, situated on real estate, which is used as a home. *Windle v. Brandt*, 55 Id., 221, 222.

SEC. 1995. [**Same.**]—It may contain one or more lots or tracts of land, with the buildings thereon and other appurtenances, subject to the limitations contained in the next section, but must in no case embrace different lots and tracts unless they are contiguous, or unless they are habitually and in good faith used as part of the same homestead.

The homestead embraces the lot and buildings appurtenant to the house, including those used and occupied by the owner in the prosecution of his ordinary business, but does not include buildings which are rented to others and yield a revenue to the owner. *Hurz v. Brusch*, 13 Iowa, 371.

Where the owner of a building uses the same as a home, the whole of such building, in case of a controversy, will be presumed to constitute the homestead, until it is shown by the adverse party that some specific portion is not of the homestead character, and therefore not exempt. *Rhodes, Pegram & Co. v. McCormick*, 4 Id., 368.

And, if, under the same roof with the homestead as defined by the statute, there be a floor or

floors, room or rooms, which are not used by the family as a part of the home, they are no more exempt than if under another and different roof. *Id.*

The occupation of a building as a homestead after the execution of a deed of trust conveying the same, in which the wife did not join, cannot change the *status* of the parties. *Hurz v. Brusck*, 13 Id., 371.

SEC. 1996. [Same.]—If within a town plat it must not exceed one-half an acre in extent, and if not within a town plat it must not embrace in the aggregate more than forty acres. But, if when thus limited in either case its value is less than five hundred dollars, it may be enlarged till its value reaches that amount.

The homestead when not within a town or city plat, is limited to forty acres, unless its value is less than five hundred dollars, in which case it may be enlarged until its value reaches that sum. *Thorn v. Thorn*, 14 Iowa, 49.

So long as the building occupied as a home shall come within the meaning of a homestead as defined by the statute, the value thereof is not limited, though the extent of the ground is: but when not within this definition, it is liable without reference to the value. *Rhodes, Pegram & Co. v. McCormick*, 4 Id., 368.

The extent of a homestead situated within a town, will not be limited to half an acre unless the territory embracing it has been platted. *McDaniel et al. v. Mace et al.*, 47 Id., 509.

The extent of a homestead is to be determined from the fee-simple value of the land and not from the value of the tenant's estate therein. So where the plaintiff's home was upon a forty acre tract worth more than \$500, but her interest in it and an adjoining forty acre tract was only a life estate, worth less than \$500, she was not entitled to have more than the forty acres as her homestead. *Yates v. McKibben*, 65 Id., 357.

Where the home homestead in controversy was an acre in extent, and in a town plat, but the evidence showed that the claimant had offered to sell it for \$450, *held* that under this section of the code the claimant was entitled to hold the whole tract. *Boot v. Brewster et al.*, 36 N. W. R., 649.

SEC. 1997. [Same.]—It must not embrace more than one dwelling-house, or any other buildings except such as are properly appurtenant to the homestead as such; but a shop or other building situated thereon, and really used and occupied by the owner in the prosecution of his own ordinary business, and not exceeding three hundred dollars in value, may be deemed appurtenant to such homestead.

While a tract of land not connected with the dwelling may be held as part of a homestead, it must to this end be shown that "they are habitually and in good faith used as a part of the same homestead." *Reynolds v. Hull*, 36 Iowa, 394.

Where the owner of a homestead took possession of a tract of land, under a parol contract of purchase, and improved the same as a part of the homestead, it was *held* to be exempt from judicial sale to satisfy a debt contracted after such purchase but before an actual conveyance of the property to the debtor. *Fyffe v. Beers*, 18 Id., 12.

A barn or stable used for ordinary purposes, in connection with a homestead, is property appurtenant to such homestead, within the meaning of this section, and is exempt, without regard to its value. *Wright & Co. v. Ditzler*, 54 Id., 620.

Where the head of a family for a while occupied both floors of a building as his dwelling, but afterwards used the lower floor for the purposes of a grocery store, carried on by himself, while the family occupied the second floor as a dwelling, *held*, that the first floor being worth less than \$300, was all the time exempt as a part of the homestead, within the meaning and spirit of section 1997 of the code, and the fact that, after he went out of the grocery business, he did not for a while actually use the first floor for any purpose, though it was his intention to occupy it again with his family, did not make it liable for his debts. *Smith v. Quiggans*, 65 Id., 637.

Where the buildings on a city lot were used in part as the dwelling of the owner and his family, and in part for business purposes, and the portions used for business exceeded \$300 in value, *held* that the portions used for business were not exempt as appurtenant to the homestead, under section 1997 of the code, and that such portions might be sold under execution against the owner, together with such easements as were necessary to their proper use and enjoyment. *Johnson v. Moser*, 66 Id., 536. See also *Rhodes v. McCormack*, 4 Id., 368, and *Mayfield v. Maasden*, 50 Id., 517.

SEC. 1998. [Who may select and have platted and recorded.]—The owner, or the husband or wife, may select the homestead and cause it to be marked out, platted, and recorded, as provided in the next section. A failure in this respect does not leave the homestead liable, but the officer having an execution against the property of such a defendant, may cause the homestead to be marked off, platted, and recorded, and may add the expense thence arising to the amount embraced in his execution.

The property occupied by the parties will be regarded and treated as the homestead when both husband and wife failed to select the property they wish to have set apart as such. *Alley v. Bay*, 9 Iowa, 509.

A failure to plat or have recorded the premises occupied as a homestead will not render them liable for debts incurred by the wife after the death of her husband. *Nye v. Walliker*, 46 Id. 306.

The plat of a homestead must be recorded to constitute a valid selection under the statute. *White v. Rowley et al.*, 46 Id., 680.

Where an officer holds an execution against a homestead and other lands, and the occupants have failed to select and plat the homestead, it is the duty of the officer to select and plat the same as provided in this section, and to exhaust the other property liable to sale before offering the homestead; and a failure so to do will render the sale void. In such case, the owners of the homestead are not estopped from maintaining an action to set aside the sale on the ground that they had notice thereof and made no objection thereto at the time. As the execution itself notified the officer that there were other lands liable, besides the homestead, the owners had a right to rely upon his doing his duty without notice or request from them. But the rule is otherwise where the officer cannot be charged with notice of other property, unless the same is pointed out by the execution defendants. *Owens et al., v. Hart*, 62 Id., 620.

The failure of the owners of a homestead and of the sheriff to select and plat it, as prescribed in sections 1998 and 1999 of the code, does not render an execution sale of it void, but only voidable. *Newman, Trustee, v. Franklin et al.*, 69 Id., 244.

Where the dwelling was situated on the land of the wife, lying contiguous to that owned by the husband, and both tracts were occupied as a homestead, and the husband had disappeared, the wife was held entitled to claim as against his creditors, a homestead carved in part out of her own and part of her husband's land. *Lowell v. Shannon et al.*, 60 Id., 713.

SEC. 1999. The homestead shall be marked off by fixed and visible monuments, and in giving the description thereof, the direction and distance of the starting point from some corner of the dwelling-house shall be stated. The description and plat shall then be recorded by the recorder in a book to be called the "homestead book," which shall be provided with a proper index.

When the judgment debtor has failed to select and plat his homestead, it is the duty of the officer holding an execution against him, to cause the same to be done before selling any portion of the premises of which the homestead is a part, and a failure to do so will render the sale invalid, even though the government subdivision of forty acres on which the house is situated be not sold. *Id.*

SEC. 2000. [May be changed.]—The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or may change it entirely, but such changes shall not prejudice conveyances or liens made or created previously thereto, and no such change of the entire homestead, made without the concurrence of the husband or wife, shall affect his or her right or those of the children.

Where homestead premises, acquired before a debt was contracted by the owner, was sold by him and he transferred his homestead to other property of less value than the former homestead, the new homestead having been acquired after the creation of a debt, but the same was acquired and used as a home before the rendition of judgment on the debt, the new homestead was held exempt from judicial sale for the satisfaction of the debt. *Pearson v. Minturn*, 18 Iowa, 36.

In *Elston & Green v. Robinson*, 21 Id., 531, it was held that a change of homestead by a judgment debtor from one parcel of land to another, cannot displace or affect the liens of judgments rendered before such change. But in *Farman v. Dewell*, 35 Id., 170, it was held, that where the judgment debtor changed his homestead from premises on a lot in a town to a tract of land, not exceeding forty acres, and of no greater value than the former, that the new homestead was exempt; the lien of the judgment thereon being transferred to the old homestead, which being of equal value to that of the new one, the judgment creditor could not be prejudiced by such transfer.

In case of the purchase of a homestead, with means derived partly from the sale of a former one and partly from other sources, where the new homestead did not exceed the value of the old one, the owner is entitled to hold the new homestead exempt from debts contracted during and subsequent to the occupancy of the old one. *Benham v. Chamberlain & Co*, 39 Id., 358.

The sale of a homestead, with the intention of purchasing another, entitles a party to a sufficient time in which to carry out his intention, and if there be no unreasonable delay, he will hold the new homestead exempt from debts contracted after the sale of the old one. *Id.* See, also, *The State v. Geddis*, 44 Id., 537, where the same doctrine is held.

A new homestead, acquired with the proceeds arising from the sale of the old one, is exempt

from judicial sale in all cases in which the former homestead would have been exempt. *Sargent v. Chubbuck*, 19 Id., 37.

When the homestead is sold and the proceeds invested in a new one, or when the homestead is exchanged for another, the new homestead in each instance, to the extent in value of the old, is exempt from debts existing at the time the change is made, but to that extent only. *Thompson et ux. v. Rogers et al.*, 51 Id., 333.

The money arising from the sale of a homestead is not exempt from execution, unless the sale was made in pursuance of a design to purchase another homestead; and the burden of proof of such design is on him who claims the exemption. *Huskins, Bryson & Co. v. Hanlon et al.*, 72 Id., 37.

SEC. 2001. The new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former homestead would have been exempt, but in no other, nor in any greater degree.

Under the provisions of our statute the owner may change his homestead, and the new homestead, to the extent in value of the old one, will be exempt in all cases in which that would have been exempt. *Furman v. Dewell*, 35 Iowa, 170. See, also, *Sargent v. Chubbuck*, 19 Id., 37; *Pearson v. Minturn*, 18 Id., 36.

Although, under this and the preceding sections, a party may change his homestead, and the new one acquired with the proceeds of the old one will be exempt from judicial sale in all cases in which the former homestead would have been exempt, yet where the proceeds of an Iowa homestead are invested in a new homestead in another state, and afterwards this new homestead is sold and the proceeds invested in a third homestead in Iowa, this last homestead will not be exempt from execution for a debt which was contracted before it was purchased. The homestead fund loses its distinctive character upon being carried and invested in another state. *Rogers v. Raisor*, 60 Id., 355.

A new homestead of no greater value than the old one, though purchased in part with proceeds of the old one and part with other funds, is exempt from the debts of the owner, contracted subsequently to the occupancy of the old homestead. *Lay v. Templeton et al.*, 59 Id., 684.

SEC. 2002. [Disagreement: how settled.]—When a disagreement takes place between the owner and any person adversely interested, as to whether any land or buildings are properly a part of the homestead the sheriff shall, at the request of either party, summon nine disinterested persons having the qualification of jurors. The parties then, commencing with the owner of the homestead, shall in turn strike off one juror each and shall continue to do so until only three of the number remain. These shall then proceed as referees to examine and ascertain all the facts of the case, and shall report the same with their opinion thereon to the next term of the court from which the execution or other process may have issued.

The object of a reference under this section is, not to make a selection of the homestead, but to enable the court to determine whether certain land claimed to be exempt really is so. *White v. Rowley*, 46 Id., 680.

Where it was properly determined, under the provisions of this and the following section, that the whole of the farm of an execution defendant, consisting of one hundred and sixty acres was exempt as a homestead, being of less value than five hundred dollars, it was held, that the fact that it had not been platted as a homestead prior to the levy of the execution upon a portion thereof, did not render it liable to sale under such levy. *Green v. Farrar & Wheeler*, 53 Id., 426.

When a question arises between an execution creditor and debtor as to what lands are included in a homestead, it may be determined by proceedings under this section of the code, but the question as to whether the debtor has any homestead rights at all is one to be determined by a court, in a proper action for that purpose. *McCrackin v. Weitzell*, 70 Id., 723.

SEC. 2003. If either party fail to strike off jurors in the manner directed in the last section, the sheriff may strike off such jurors.

SEC. 2004. The court may also, in its discretion, refer the whole matter, or any part of it, back to the same referees, or to others to be selected in the same manner, or as the parties otherwise agree, giving them directions as to the report that is required of them.

SEC. 2005. When the court is sufficiently possessed of the facts of the case, it shall make its decision, and may, if expedient, direct the homestead to be marked off anew, or a new plat and description to be made and recorded, and may take any further step in the premises which, in its discretion, it may deem proper

for attaining the objects of this statute. It shall also award costs as nearly as may be in accordance with the practice observed in other cases.

SEC. 2006. [Change of circumstances.]—The extent or appurtenances of the homestead as thus established, are liable to be called in question in like manner, whenever a change in value or circumstances will justify such new proceeding.

SEC. 2007. [Survivor to occupy.]—Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law.

Upon the death of the husband, the wife is entitled to continue in the occupancy of the homestead. It, however, she permanently abandons it as a homestead, it will cease to have that character, and she thereby forfeits her right thereto, and becomes a tenant in common with the other heirs. *Orman v. Orman*, 26 Id., 361.

The granting of a divorce to a wife and giving her the custody of the children, does not render the homestead remaining in the possession of the husband, liable for his debts. The homestead law is to be liberally construed. *Woods v. Davis*, 34 Id., 264.

The title to the homestead, upon the death of the owner leaving a widow and heirs, vests in the heirs, the right of the widow being limited to that of occupancy. *Johnson v. Gaylord*, 41 Id., 362.

The abandonment of the homestead by the widow does not subject it to liability for debts where there are surviving heirs, except as to debts which would bind the estate before the death of the husband. And occupation of the premises as a homestead by the heirs, is not essential to protect it from the debts of the decedent. *Id.*

The surviving widow is, as to the homestead, as much the head of the family and entitled to control the rents and profits of the same, as was the husband while living. *Floyd v. Moser*, 1 Id., 512.

A judgment against the surviving husband is not a lien upon his homestead right in the real property of his deceased wife, unless he shall have abandoned the same, nor can he create any valid lien thereon by the execution of a mortgage. *Smith v. Eaton et al.*, 50 Id. 488. See also *Meyer v. Meyer*, 23 Id., 359; *Butterfield v. Wicks*, 44 Id., 310.

The surviving husband or wife cannot enjoy at the same time both the homestead right and dower in the same real property of the deceased. *Meyer v. Meyer*, 23 Id., 359; *Butterfield v. Wicks*, 44 Id., 310; *Stevens v. Stevens*, 50 Id., 491.

The survivor in such case must elect which of the rights he or she will retain. *Id.*

Where the wife survives she may occupy the homestead, and the marriage with a second husband does not deprive her of that right or entitle the heirs at law of the first husband to partition. *Nicholas v. Purzell*, 21 Id., 265; *Burns v. Keas*, Id., 257; *Dodds v. Dodds*, 26 Id., 311.

Where the husband in whom the title to the homestead is vested dies, his widow does not take the fee thereof as his survivor, and she cannot, after a second marriage, abandon, sell, and convey the same with a view of investing the proceeds in another homestead. In case of such sale and abandonment, the heirs are entitled to a partition of the homestead. *Size v. Size*, 24 Id., 580. See, also, *Butterfield v. Wicks*, 44 Id., 310.

The right of occupancy and possession by the survivor confers no title to the property, and he cannot execute a valid mortgage thereon. *Butterfield v. Wicks*, 44 Id., 310.

A judgment against the wife, after her homestead rights have accrued, is not a lien upon the distributive share in the estate of her husband which she elects to have set apart to her in lieu of the homestead after the death of her husband. *Riggs v. Riggs*, 45 Id., 318.

Where a husband continued to occupy the homestead of his deceased wife until his death, although he had elected to take his distributive share of the same, and proceedings were pending for the admeasurement of his interest, at the time of his death, it was held that the homestead character of the property was not lost, and that the devisees of the wife were entitled to the entire homestead, free from the husband's debts. *Burdick v. Kent et al.*, 53 Id., 583.

The granting a divorce to the wife and giving her the custody of the children does not render the homestead remaining in the possession of the husband liable for his debts. The provisions of the homestead statute are to be construed liberally. *Woods v. Davis*, 34 Id., 264.

Where the title to the land including the homestead, is in the wife, the surviving husband has right to elect to retain the homestead for life, or to take, in lieu thereof, one-third of the whole property in fee simple. In such case the continued occupancy of the homestead, in the absence of an election to take a distributive share, will be deemed an election to occupy as survivor; and a court has no authority in such a case to make an election for the survivor, and assign to him a distributive share, even though such share is more valuable than the right of the occupancy of the homestead; and much less has it authority to subject such share, so set apart, to the payment of his debts. *Holbrook v. Perry et al.*, 66 Id., 286. See, also, *Butterfield v. Wicks*, 44 Id., 310.

Upon the death of either husband or wife, there cannot be thereafter an abandonment of the homestead by the survivor, if the title was in the deceased, except by setting off the distributive

share of such survivor's share in the real estate of the deceased. *Darrak, Adm'r, v. Cunningham et al.*, 72 Id., 123.

Where the owner of a homestead left the same temporarily, and went to the state of Kansas with her husband, and kept house for him and abode there, but without any intention of permanently residing in Kansas, her husband, however, going into business and becoming a citizen of that state, and about a year later she died in Kansas, and in a few months thereafter her husband also died there, it was held that the wife's homestead right continued notwithstanding the temporary abandonment, and that as her husband's distributive share in her estate had not been set off to him during his life time, the homestead was not liable for his debts, but descended to the children exempt from any antecedent debts of their parents or their own. *Bradshaw v. Hurst*, 57 Id., 745.

The right of the widow to continue in possession and occupancy of the homestead, after the death of her husband, is not a right or interest in his estate which she takes by inheritance, but is entirely distinct from the interests which she takes by virtue of that right. It is a mere personal right to occupy and possess the premises, but is unaccompanied by any title or interest therein. It does not accrue with the death of the husband, nor is it enlarged or otherwise affected thereby. She had the right to the same during his life and the statute simply continues it after his death. *Mahaffy v. Mahaffy*, 63 Id., 64.

SEC. 2008. [**Disposal of: what deemed descent.**]—The setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is contemplated in the preceding section. But the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased; but if there be no such survivor, the homestead descends to the issue of either husband or wife according to the rules of descent, unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debts of their parents or their own.

The surviving husband or wife cannot enjoy at the same time both dower and the homestead in the real property of her deceased husband, but must elect which he or she will take. *Butterfield v. Wicks*, 44 Iowa, 310.

The continued occupancy of the homestead by the husband after the death of the wife who was the owner, will be regarded as an election to hold it as such. *Id.*

On the death of the husband or wife, the survivor may continue to occupy the homestead until it is disposed of according to law. If there is no such survivor, it descends to the issue of the deceased, according to the rules of descent, unless otherwise directed by will. *Lorieu v. Keller*, 5 Id., 196. See, also, *Parsons v. Livingston et al.*, 11 Id., 104.

Under this section the homestead descends to the heirs at law of either husband or wife, which ever may have held the legal title. *Burnes v. Keys et al.*, 21 Id., 257.

Upon the death of the husband the widow is entitled, at her election, to retain the homestead in lieu of so much of her distributive share, or to have her distributive share so assigned as to include the homestead; but she is not entitled to the homestead and dower in the remainder of the estate. *Whitehead v. Conklin et al.*, 48 Id., 478. See, also, *Moninger et al. v. Ramsey*, Id., 368.

The distributive share of a widow in lands owned by her deceased husband, aside from the homestead, should bear its proportionate share of a mortgage indebtedness thereon, made by her husband in which she joined. *Trowbridge v. Sypher*, 55 Id., 552.

Where the wife died without issue seized of a homestead, which the husband elected to retain and occupy during life instead of his distributive share, it was held that the share thus relinquished was one-third interest only, and that upon his abandonment of the homestead he was entitled to one-sixth of the estate as heir at law. Having relinquished the homestead, his distributive share therein was relinquished. He could not have both. *Smith v. Zuckmyer*, 53 Id., 14; and see *Butterfield v. Wicks*, 44 Id., 310; *Meyer v. Meyer*, 23 Id., 359; *Burdick v. Kent et al.*, 52 Id., 583.

A husband and wife joined in a conveyance of their homestead, owned by the wife, to their son, subject to the right of either grantor to occupy during life. The conveyance was without actual consideration, and was designed to take the place of a will. The wife died, and the husband left the homestead and dwelt until his death with his son. There were other heirs who would have inherited an estate in the property, had the conveyance not been made and the wife died intestate. Held, that the son could not hold the property exempt from his prior debts under this section of the code. *Reifenstahl v. Osborne & Co.*, 66 Id., 567.

SEC. 2009. [**When sold.**]—If there is no such survivor or issue, the homestead is liable to be sold for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead.

SEC. 2010. [**Devise of.**]—Subject to the rights of the surviving husband or

wife, as declared by law, the homestead may be devised like other real estate of the testators.

Under this section the homestead may be disposed of by will by the husband or wife owning the same, subject to the right of the survivor to continue in the occupancy of the same after the death of the testator. *Stewart v. Brand*, 23 Iowa, 477; *Lamb v. Shays*, 14 Id., 571.

The right of occupancy and possession of the homestead by the survivor, confers no title to the property, and he cannot make a valid mortgage thereon. *Butterfield v. Wicks et al.*, 44 Id., 310.

CHAPTER 9.

OF LANDLORD AND TENANT.

SEC. 2011. [Apportionment of rent.]—The executor of a tenant for life, who demises real property so held, and dies on or before the day on which the rent is payable, and a person entitled to rent dependent on the life of another, may recover the proportion of rent which had accrued at the time of the death.

SEC. 2012. [Holding over.]—A tenant giving notice of his intention to quit the demised premises at a time named, and afterwards holding over, and a tenant or his assignee willfully holding over the premises after the term, and after a notice to quit, shall pay to the person entitled thereto double the rental value of the premises during the time he holds over.

SEC. 2013. [Attornment: when void.]—The attornment of a tenant to a stranger is void, unless made with the consent of the landlord, or pursuant to or in consequence of a judgment at law or in equity, or to a mortgagee after the mortgage has been forfeited.

An attornment to the mortgagee, even after forfeiture by non-payment, is not valid until the mortgage has been foreclosed, and, when the property is sold subject to redemption, the period of redemption has expired. *Mills et al. v. Hamilton*, 49 Iowa, 105.

The attornment of a tenant to a mortgagee before the expiration of the mortgagor's right of redemption under a foreclosure sale is invalid. *Mills v. Heaton*, 52 Id., 215.

SEC. 2014. [Tenant at will.]—Any person in the possession of real property with the assent of the owner, is presumed to be a tenant at will until the contrary is shown.

Where an action is brought to recover possession of premises on the ground that the defendant entered into possession with the consent of the owner, and holds over after the termination of his lease, the plaintiff must prove these facts, and cannot (without amendment) recover upon proof of fraud. *Goldsmith v. Boersch*, 28 Iowa, 351.

A parol license of mining land is valid, and can only be terminated by compensation to the licensee or the notice necessary to terminate a tenancy at will. *Harkness v. Burton*, 39 Id., 101. See, also, *Beatty v. Gregory*, 17 Id., 109.

When the duration of a tenancy is not shown, it will be presumed to be a tenancy at will. *Cotes & Patchin v. The City of Davenport*, 9 Id., 227.

When a person is in possession of real property with the assent of the owner, and nothing is shown to the contrary, he will be regarded as a tenant at will. *Abercrombie v. Redpath*, 1 Id., 110.

Where a tenant at will erected buildings upon unoccupied lots, after which the notice required by the statute to terminate the tenancy was served, but the tenant continued in possession for a series of years, by the sufferance of, and without any interference by, the landlord, it was held, that the service of notice to quit did not change the relations of the parties, that the party in possession continued to be a tenant at will. *Newell v. Sanford*, 13 Id., 191.

Where a tenant takes possession of premises under an agreement that he is to occupy them only so long as he shall continue in the employment of the landlord, he will not be regarded as a tenant at will, but as one holding under a definite lease; and if, after quitting the service of the landlord, he refuses to yield up possession of the premises, he will be regarded as one holding over after the termination of his lease, and subject to an action of forcible detainer on the part of the landlord, upon three days' notice to quit. *Grosvenor v. Henry*, 27 Id., 269.

Where the defendant held and occupied a stall in a public market as the tenant of a city, for the term of one year, and at the expiration of the term he retained possession, and entered into an agreement to lease for another year, but refused to pay the rent according to the terms of the

agreement, it was held that he was a tenant at will, and not from year to year. *The City of Dubuque v. Miller*, 11 Iowa, 583.

At the expiration of the term of the lease the tenancy ceases, and a lessee holding over, unless after the termination of the lease he has been allowed to plant a crop, is entitled to only the three days' notice to quit, provided by section 3611 of the code. *Kellogg v. Graves et al.*, 53 Id., 395.

Upon the passage of the title to real property by a sale upon execution, the execution defendant in possession becomes the tenant at will of the purchaser, and such tenancy is only terminated by a legal demand of possession. Where property was sold on execution without redemption, in November, but no demand of possession was made until the following June, it was held that the purchaser was not entitled to the crop planted by the former owner in possession. *Dobbins v. Lush et al.*, Id., 304.

Where one becomes a tenant at will he takes the premises in their then condition, and is entitled to the growing crops thereon. *Martin v. Knapp*, 57 Id., 336.

Possession with the assent of the owner, raises merely a presumption of a tenancy at will, which may be rebutted; as, where it is shown that the person in possession does not recognize the owner as landlord, but holds adversely, either adversely or as tenant of another, this will rebut the presumption of a tenancy at will. *Id.*

One in possession of real property with the assent of the owner, is at least a tenant at will; and the absence of a showing that he is restrained by his lease, he will be presumed to have the right to sub-let the premises. *Goldsmith v. Wilson, Sheriff*, 68 Id., 685.

SEC. 2015. [Notice to quit.]—Thirty days' notice in writing is necessary to be given by either party, before he can terminate a tenancy at will; but when, in any case, a rent is reserved payable at intervals of less than thirty days, the length of notice need not be greater than such intervals between the days of payment. In case of tenants occupying and cultivating farms, the notice must fix the termination of the tenancy to take place on the first day of March; except in cases of field tenants or croppers, whose leases shall be held to expire when the crop is harvested; provided, that in a case of a crop of corn it shall not be later than the first day of December, unless otherwise agreed upon. But where an express agreement is made, whether the same has been reduced to writing or not, the tenancy shall cease at the time agreed upon, without notice.

The service of notice to quit, given by a landlord to his tenant, cannot be proved by a written return of service and affidavit thereof, by a person not an officer, and the proof in such case must be by the person making the service as a witness on the trial and subject to the right of cross-examination. *Hollingsworth v. Snyder*, 2 Iowa, 435.

In March, 1882, the plaintiff leased to the defendant, as a "field tenant or cropper," certain land to be planted in corn, he to have delivered to him as rent one-third of the corn raised. No time was fixed when the lease should terminate, nor when the corn should be delivered. On the fourth day of the following December the plaintiff sued the defendant for a money judgment on account of the corn not delivered, without having made any previous demand for the corn. Held, that, although the lease ceased terminated by operation of law on the first day of December, that provision of the law did not amount to an agreement between the parties that the corn should then be delivered; and in the absence of a stipulation on that point, plaintiff could not recover a money judgment without first demanding the corn. *Johnson v. Shank*, 67 Id., 115.

SEC. 2016. [How served.]—When such tenant cannot be found in the county, the notice above required may be given to any sub-tenant or other person in possession of the premises, or if the premises be vacant, by affixing the notice to the principal door of the building, or in some conspicuous position on the land if there be no building.

SEC. 2017. [Lien of landlord.]—A landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used upon the premises during the term, and not exempt from execution, for the period of one year after a year's rent or the rent of a shorter period claimed falls due; but such lien shall not in any case continue more than six months after the expiration of the term.

The lien of a landlord for rent may be asserted in an action of replevin, in which the tenant's goods have been seized by an alleged owner. *Edwards et al. v. Cottrell et al.*, 43 Iowa, 194.

The lien of a mortgage of chattels duly recorded is prior to that of a landlord upon whose premises they may be afterward used by the mortgagor as his tenant, although the mortgagee may

have actual knowledge that such chattels were being so used upon the leased premises, *Garchow & Sons v. Pickens*, 51 Id., 331.

Where land is leased upon condition that the third of the crop shall be delivered to the owner in payment of rent, the owner acquires no title to the part of the crop reserved for the rent until it is set apart for him by the tenant. *Townsend et al. v. Osenberger et al.*, 45 Id., 670.

But a creditor of a tenant who is cultivating land upon shares cannot by a levy of an attachment upon the growing crop of the tenant, deprive the landlord of his lien thereon. *Atkins v. Womeldorf*, 53 Id., 159.

Under this section a landlord has a lien upon all property of the tenant not exempt from execution, used upon the leased premises, for the rent of the entire term of the lease, and such lien attaches to the property as soon as the same is brought upon the premises. *Martin v. Stearns et al.*, 55 Id., 345.

Under the statute the landlord's lien for rent for the entire term of the lease attaches to property used on the leased premises at the time such property is brought thereon, although it may not be enforceable as to rent not due, so long as the business of the tenant is conducted in the usual manner and as contemplated by the lease. *Gilbert, Hedge & Co. v. Greenbaum et al.*, 56 Id., 211.

Where during the term of the lease another was made between the same parties and covering the same property, it was held that while the execution of the second lease operated as a cancellation of the first, as between the parties, the landlord's lien for rent under the second lease, upon property kept upon the premises at the time of the change, would not be postponed by reason thereof to that of a chattel mortgage made by the lessee prior to such change, and of which the lessor had no knowledge at the time. *Rollins v. Proctor*, Id., 326.

Not only farms and agricultural lands are within the statute, but houses and store rooms in towns and cities; and the landlord has a lien upon property kept upon the premises for the purpose of sale to customers, although not used thereon for any other purpose. *Grant v. Whitehall*, Id., 152.

The lien attaches at the commencement of the term upon all personal property kept by the tenant upon the leased premises in the prosecution of the business for which the tenancy was created, for the rent to become due or that will accrue during the entire term. *Garner v. Cutting*, 32 Id., 547; *Grant v. Whitehall*, 9 Id., 152; *Carpenter v. Gillespie*, 10 Id., 592.

The landlord may have an injunction to restrain a sale and removal of the personal property, on which the lien exists, from the demised premises, by the tenant or his assignee. *Garner v. Cutting*, 32 Id., 547.

The lien attaches only to property used and incident to the business for the prosecution of which the premises were leased. *Grant v. Whitehall*, 9 Id., 152.

Seemingly, that the lien does not attach to goods sold before the lien is enforced, when selling goods was the business for which the premises under the lease were used. *Id.* See, also, *Nesbit v. Bartlett*, 14 Id., 485.

A mortgagee of chattels may, after being garnished by a creditor of the mortgagor, pay over out of the surplus in his hands, after satisfying the mortgage debt, to the landlord, rents accrued upon the building in which the goods were kept, and which were in arrears when the mortgagee took possession. *Doane & Co. v. Garretson*, 24 Id., 351.

Where land is rented on the shares, the landlord has a lien therefor on the crops grown on the demised premises the same as if the rent had been payable in money; and where, by the terms of the lease, the lessee is to gather and deliver to the landlord the share to which he is entitled, but fails therein, so that the landlord is obliged to gather it himself, he has a lien for the value of such labor as a part of the rent which the tenant agreed to pay. *Secrist v. Stivers et al.*, 35 Id., 580.

This section gives a landlord a lien for rent upon crops raised on the demised premises; and this lien is not divested by a sale of the crops by the tenant; but the landlord may follow the crops into the hands of the purchaser, and if he has consumed them, he will be liable to the landlord in damages. *Holden v. Cox*, 60 Id., 449.

Where a promissory note, executed in part for rent due and unpaid, was negotiated by the landlord, and upon non-payment by the maker, was paid by him and again became his property, his lien for rent is not lost by the negotiation of the note. Whether or not the lien passed as an incident of the assignment, *quere*. *Farwell v. Grier et al.*, 38 Id., 83.

Where a farm tenant, the head of a family, kept and used a span of horses on the leased premises, and which were kept for such use and not for sale, and were the only horses owned or used by him; and the lease was not recorded, nor was there any lien or incumbrance on the horses, of record, and prior to the maturity of any rent the tenant traded the horses for another span to a person who had no actual knowledge of the lease, or where the horses were kept, and subsequently absconded with all his property leaving the rent unpaid, it was held: 1. That the horses were subject to the landlord's lien for rent; 2. That the sale of the horses did not have the effect to defeat the lien, the sale being subject to the lien thereon; 3. As the statute creating the lien provides for no protection in favor of persons having no notice thereof, the property subject to the lien

cannot be transferred free from the lien on the ground of the want of such notice. *Richardson Bros. v. Peterson et al.*, 58 Id., 724.

Querie.—Were the horses not exempt from execution, and, therefore, not subject to the lien?—*Ed.*

The lien of a mortgagee of chattels, whose mortgage is duly recorded, is prior to that of a landlord upon whose premises they may be afterward used by the mortgagor as his tenant, although the mortgagee may have knowledge that such chattels were being so used upon the leased premises. *Jarchow & Sons v. Pickens*, 51 Id., 381.

The lessor of a hotel has no lien for rent on property owned by the lessee's wife, though it be used in furnishing the hotel during the term of the lease; and where the wife had mortgaged such property to secure a debt, and the mortgage was recorded, and the lessee afterward sold his lease to F., and the wife also sold the mortgaged property to F., subject to the mortgage, and F. took possession under such purchases, it was held, that the lessor had a lien on the property to secure the rent accruing after F. took possession, but that such lien was inferior to the lien of the mortgage with which the wife of the original lessee had placed on the property. *Perry v. Waggoner*, 68 Id., 403.

A landlord's lien attaches to "all crops grown upon the demised premises," and thus extends to crops grown by a sub-tenant. *Houghton v. Bauer et al.*, 70 Id., 314.

One who purchases from a tenant, and converts to his own use, crops on which the landlord has a lien for rent, is liable to the landlord in damages to the amount of the lien, but the action for such damages must be brought within six months after the expiration of the term of the lease, or it will be too late. *Nickelson v. Negley & Sherwin*, 71 Id., 546.

Sec. 2018. [How affected: attachment.]—The lien may be effected by the commencement of an action within the period above prescribed for the rent alone, in which action the landlord will be entitled to a writ of attachment, upon filing with the proper clerk, or the justice, an affidavit that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the affidavit.

The attachment of the property of a lessee does not give the court jurisdiction of the interest of an assignee in the property before such assignee has been notified, or his interest is levied upon by regular process. *Wells, Pettit & Co. v. Sequin & Johnson*, 14 Iowa, 143.

The remedy by landlord's attachment is purely statutory, and will be strictly construed. *Meritt v. Fisher*, 19 Id., 354.

Rent is a certain profit, either in money, provisions, chattels or labor issuing out of *lands and tenements* as retributive or return for their use. *Id.*

A landlord's attachment will not lie for damages for a failure to till land, or by reason of the breaches of covenants in the agreement of lease not connected with the demise of the land; it can only lie for rent due. *Id.*

An action to recover rent commenced by ordinary attachment before the rent was due, cannot be deemed an action to affect a landlord's lien, and gives the plaintiff only such lien as an ordinary attachment gives. *Clark v. Haynes*, 57 Id., 96.

A landlord has a lien for rent upon growing crops, which may be enforced by attachment, if the rent is due and unpaid; and, therefore, an injunction will not issue to restrain the tenant from their removal from the leased premises. *Rotzler v. Rotzler et ux*, 46 Id., 189.

The landlord may maintain an action for rent due without asking for an attachment in his petition. And if he desires the issuance of the writ, he is to make the affidavit provided for in the statute. *Bartlett v. Gaines*, 11 Id., 95.

By taking a mortgage which, by a failure to have it recorded, cannot be enforced, a landlord does not lose his lien upon his property of his tenant. *Pitkin & Brooks v. Fletcher et al*, 47 Id., 53.

The lien of a landlord for rent may be asserted in an action of replevin, in which the tenant's goods have been taken by an alleged owner. *Edwards et al. v. Cottrel et al.*, 43 Id., 194.

The crops of a sub-tenant can be appropriated under a landlord's attachment in an ordinary action against the original tenant for the rent. *Houghton v. Bauer et al.*, 70 Id., 314.

CHAPTER 10.

OF WALLS IN COMMON.

SECTION 2019. [When built on the land of another.]—In cities, towns, and other places surveyed into building lots, the plats whereof are recorded, he who is about to build contiguous to the land of his neighbor, may, if there be no wall on the line between them, build a brick or stone wall at least as high as the first story, if the whole thickness of such wall above the cellar wall does not exceed eighteen inches, exclusive of the plastering, and rest the one-half of the same on his neighbor's land; but the latter shall not be compelled to contribute to the expense of said wall.

The right to that portion of a party-wall which rests upon the lot of an adjoining proprietor is, under the statute, a right not personal to the owner of the lot on which the building is erected, but one running with the land; and a conveyance of the lot upon which the building is situated passes to the grantee the right to recover of the adjoining owner the value of one-half the wall when used by him. *Thompson et al. v. Curtis et al.*, 28 Iowa, 229.

Where half of the wall of a building rests upon a vacant lot, the presumption is, that it belongs to the owner of the lot on which the building is situated; but this presumption changes when the owner of the vacant lot builds thereon and uses the half-wall resting on his lot. It will then be presumed to belong to him. *Bertram v. Curtis*, 31 Id., 46.

Where the owner of a vacant lot, having the half of a neighbor's wall resting thereon, sells and conveys the same with covenants, he is not liable thereon as for an incumbrance. *Id.*

While under the statute a person erecting a brick or stone building may rest one-half of the wall thereof on the land of his neighbor, and use the same as a party wall, he cannot subject it to a servitude foreign to its uses as a wall in common, nor injure its capacity by making openings therein. *Sullivan v. Graffort*, 35 Id., 531.

While it is the duty of a person erecting a party wall to make it of sufficient strength to support another building similar to the one of which it forms a part, yet he is not bound to make it strong enough to support any kind of a building which may be erected by the adjoining proprietor. *Gilbert v. Woodruff*, 40 Id., 320.

SEC. 2020. [Contribution by owners.]—If his neighbor be willing, and does contribute one-half of the expense of building such wall, then it is a wall in common between them; and if he even refuses to contribute to the building of such wall, he shall yet retain the right of making it a wall in common, by paying to the person who built it one-half of the appraised value of said wall at the time of using it.

Where a party wall is erected, and the owner of the adjoining lot puts the wall in use by erecting an adjacent building, and afterwards conveys to a party, who has notice that his grantor has not paid for his share of such wall, the grantee is liable to the person who erected the wall or to his grantee for his proportion of the value thereof under this section of the code. *Pew et al. v. Buchanan*, 72 Id., 637.

SEC. 2021. [Openings in: presumption.]—No wall shall be built by any person partly on the land of another with any openings therein, and every wall being a separation between buildings, shall, as high as the upper part of the first story, be presumed to be a wall in common, if there be no titles, proof, or mark to the contrary; and if any wall is erected, which under the provisions of this chapter, becomes, or may become at the option of another, a wall in common, such person shall not be compelled to contribute to the expense of any openings therein, but the same shall be closed at the expense of the owner of such wall.

SEC. 2022. [Repairs: expense apportioned.]—The repairs and rebuilding of walls in common are to be made at the expense of all who have the right to the same, and in proportion to the interest of each therein; nevertheless, every co-proprietor of a wall in common may be exonerated from contributing to the repairs or building, by giving up his right in common if no building belonging to him be actually supported by the wall thus held in common.

SEC. 2023. [**Beams, joists and flues.**—Every co-proprietor may build against a wall held in common, and cause beams and joists to be placed therein, and any person building such a wall, shall, on being requested by his co-proprietor, make the necessary flues, and leave the necessary bearings for the joists or beams, at such height and distance apart, as shall be specified by his co-proprietor.

SEC. 2024. [**Height of wall.**—Every co-proprietor is at liberty to increase the height of the wall in common; but he alone is to be at the expense of raising it, and of repairing and keeping in repair that part of the wall above the part so held in common.

SEC. 2025. [**Rebuilding expenses.**—If the wall so held in common cannot support the wall to be raised upon it, he who wishes to have it made higher, is bound to rebuild it anew entirely and at his own expense, and the additional thickness of the wall must be placed entirely on his own land.

SEC. 2026. [**Same.**—The person who did not contribute to the heightening of the wall held in common, may cause the raised part to become common by paying one-half of the appraised value of such raising, and one-half of the value of the grounds occupied by the additional thickness of the wall, if any ground was so occupied.

SEC. 2027. [**Same.**—Every proprietor joining a wall, has, in like manner, the right of making it a wall in common, in whole or in part, by repaying to the owner of the wall one half of its value, or the one-half of the part which he wishes to hold in common, and one-half of the value of the ground on which it is built, if the person who has built the wall has laid the foundation entirely upon his own ground.

SEC. 2028. [**Cavities: fixtures.**—Neither of the two neighbors can make any cavity within the body of the wall held by them in common; nor can either affix to it any work without the consent of the other, or without having, on his refusal, caused the necessary precautions to be used so that the new work be not an injury to the rights of the other, to be ascertained by a person skilled in building.

SEC. 2029. [**Disputes: delay bonds.**—No dispute between neighbors, as to the amount to be paid by one or the other, by reason of any of the matters treated of in this chapter, shall delay the execution of the provisions of the same, if the party on whom the claim is made shall enter into bonds, with security, to the satisfaction of the clerk of the district court of the proper county, conditioned that he shall pay to the claimant whatever may be found to be his due on the settlement of the matter between them, either in a court of justice or elsewhere; and the said clerk of the district court is hereby required to endorse his approval on said bond when the same is approved by him, and retain the same in his custody until demanded by the opposite party.

SEC. 2030. [**Agreements.**—This chapter shall not prevent adjoining proprietors from entering into special agreement about walls on the lines between them; but no evidence of such agreement shall be competent unless it be in writing, signed by the parties thereto, or their lawfully authorized agents, and whenever such proprietor is a minor, the guardian of his estate shall have full authority to act in all matters relating to walls in common.

CHAPTER 11.

OF EASEMENTS IN REAL ESTATE.

SECTION 2031. [**Adverse possession.**]—In all suits hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession of the same for the period of ten years or by prescription, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be proved by evidence distinct from and independent of the use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims.

This section of the code does not apply in any case of a highway which had been used as such by the public for more than ten years prior to the enactment of the code. *Baldwin v. Herbst*, 54 Iowa, 163.

A highway cannot be established by user alone, although the owner of the land had knowledge of such use, unless the owner also had express notice that a highway was claimed independent of the mere use. *The State v. Mitchell*, 58 Id., 567. *Zigefoose v. Zigefoose*, 69 Id., 391; *State v. K. C. St. J. & C. R. R'y Co.*, 45 Id., 139.

On an indictment for obstructing a highway the fact that the public used the road is competent evidence of the acceptance of the right of way, where a dedication is alleged to have been made by the owner, providing only that the use shall not be competent evidence to establish title to an easement claimed by adverse possession. *State v. Birmingham*, 38 N. W. Rep., 121.

SEC. 2032. [**Light and air.**]—Whoever has erected, or may erect, any house or other building near the land of another person with windows overlooking such land, shall not, by mere continuance of such windows, acquire any easement of light or air, so as to prevent the erection of any building thereon.

SEC. 2033. [**Foot way.**]—No right of foot way, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time.

Under this section of the code, no right of foot way, except when claimed in connection with the right to pass with carriages, can be acquired by prescription or adverse use for any length of time. *Willard v. Cathoun et al.*, 70 Id., 650.

SEC. 2034. [**Use may be terminated by notice.**]—When any person is in the use of a way or other easement, or privilege in the land of another, the owner of the land in such case may give notice in writing to the person claiming or using the way, easement, or privilege, of his intention to dispute any right arising from such claim or use, and such notice served and recorded as hereinafter provided shall be deemed an interruption of such use, and prevent the acquiring of any right thereto by the continuance of such use for any length of time thereafter. Such notice, signed by the owner of the land, his guardian, or agent, may be served like a notice in a civil action, on the party, his agent, or guardian if within this state, otherwise on the tenant or occupant, if there be any; such notice, with the return thereon, shall be recorded within three months thereafter in the recorder's office of the county in which the land is situated, and a copy of such record, certified by the recorder to be a true copy of said notice, and the officer's return thereon, shall be evidence of the notice and the service of the same.

SEC. 2035. [**Effect of.**]—When notice is given to prevent the acquisition of a right to a way or other easement as aforesaid, such notice shall be considered so far a disturbance of such right or claim, as to enable the party claiming to bring an action for disturbing the same in order to try such right, and if the plaintiff in such a suit prevails he shall recover full costs.

SEC. 2036. [**No application.**]—The provisions of this chapter shall not apply to easements already acquired.

TITLE XIV.

OF TRADE AND COMMERCE.

CHAPTER 1.

OF WEIGHTS, MEASURES, AND INSPECTION.

SECTION 2037. [**Standard of.**]-The standard weights and measures now in charge of the secretary of state, being the same that were furnished to this state by the government of the United States, shall be the standard of weights and measures throughout the state.

SEC. 2038. [**Yard.**]-The unit or standard measure of length and surface from which all other measures of extension, whether they be lineal, superficial, or solid, shall be derived and ascertained, shall be the standard yard now in possession of the secretary of state and furnished by the government of the United States.

SEC. 2039. [**Division of.**]-The yard shall be divided into three equal parts called feet, and each foot into twelve equal parts called inches. For the measure of cloths and other commodities commonly sold by the yard, it may be divided in halves, quarters, eighths and sixteenths.

SEC. 2040. [**Rod, pole or perch.**]-The rod, pole or perch, shall contain five and a half such yards, and the mile, one thousand seven hundred and sixty such yards; the chain for measuring land shall be twenty-two yards long, and shall be divided into one hundred equal parts called links.

SEC. 2041. [**Land measure.**]-The acre for land measure shall be measured horizontally, and contain ten square chain, and shall be equivalent in area to a rectangle sixteen rods in length and ten in breadth; six hundred and forty such acres being contained in a square mile.

SEC. 2042. [**Avoirdupois and troy.**]-The units or standard of weight from which all other weights shall be derived and ascertained, shall be the standard avoirdupois and troy weights as furnished this state by the United States.

SEC. 2043. [**How divided.**]-The avoirdupois pound, which bears to the troy pound the ratio of seven thousand to five thousand seven hundred and sixty, shall be divided into sixteen equal parts called ounces; the hundred weight shall consist of one hundred avoirdupois pounds, and twenty hundred weight shall constitute a ton. The troy ounce shall be equal to the twelfth part of a troy pound.

SEC. 2044. [**Liquids: measure of.**]-The unit or standard measure of capacity for liquids from which all other measures of liquids shall be derived and ascertained, shall be the standard gallon and its parts, as furnished this state by the government of the United States.

SEC. 2045. [**Barrel: hogshead.**]-The barrel shall be equal to thirty-one and a half gallons, and two barrels shall constitute a hogshead.

SEC. 2046. [**Substances other than liquids.**]-The unit or standard measure of capacity for substances not being liquids, from which all other measures of such substances shall be derived and ascertained, shall be the standard half-bushel furnished this state by the United States.

SEC. 2947. [**Peck: divisions of.**]—The peck, half-peck, quarter-peck, quart, and pint measures for measuring commodities which are not liquids, shall be derived from the half-bushel by successively dividing that measure by two.

SEC. 2048. [**Contracts: construction.**]—All contracts hereafter made within this state for work to be done, or for anything to be sold or delivered by weight or measure, shall be taken and construed according to the standards of weight and measure hereby adopted as the standard of this state.

SEC. 2049. [**Bushel: what constitutes.**]—A bushel of the respective articles hereinafter mentioned will mean the amount of weight in this section specified; that is to say:

Of wheat, sixty pounds.

Of shelled corn, fifty-six pounds;

Of corn in the cob, seventy pounds;

Of rye, fifty-six pounds.

(*As amended by ch. 89, 16th g. a.*) [Of oats, thirty-[two] pounds;

Of barley, forty-eight pounds;

Of potatoes, sixty pounds;

Of beans, sixty pounds;

Of bran, twenty pounds;

Of clover seed, sixty pounds;

Of timothy seed, forty-five pounds;

Of flax seed, fifty-six pounds;

Of hemp seed, forty-four pounds;

Of buckwheat, fifty-two pounds;

Of blue grass seed, fourteen pounds;

Of castor beans, forty-six pounds;

Of dried peaches, thirty-three pounds;

Of dried apples, twenty-four pounds;

Of onions, fifty-seven pounds;

Of salt, fifty pounds;

Of stone coal, eighty pounds;

Of sweet potatoes, forty-six pounds;

Of lime, eighty pounds;

Of sand, one hundred and thirty pounds;

(*As amended by ch. 21, 18th g. a.*) [Of Hungarian grass seed, forty-[eight] pounds;]

Of millet seed, forty-[eight] pounds;

Of Osage orange seed, thirty-two pounds;

Of sorghum saccharatum seed, thirty pounds;

Of broom corn seed, thirty pounds;

Of apples, peaches, or quinces, forty-eight pounds;

Of cherries, grapes, currants, or gooseberries, forty pounds;

Of strawberries, raspberries, or blackberries, thirty-two pounds;

(*As amended by ch. 52, 16th g. a.*) [Of coke, thirty-eight pounds;]

(*As amended by § 1, ch. 42, 17th g. a.*) [Of charcoal, twenty pounds.]

(*As amended by ch. 50, 21st g. a.*) The gauge or inch of cream is two standard quarts, wine measure, 115½ cubic inches.

SEC. 2050. The perch of mason work or stone, is hereby declared to consist of twenty-five feet cubic measure.

Under the statute, twenty-five cubic feet constitute a perch of mason or stone work, and where a contract on its face does not show that it is made with reference to some custom, the provision of the statute will govern in determining the right of the parties thereunder. *Harris v. Rutledge*, 19, Iowa, 388.

SEC. 2051. [**Hops: boxes for.**]-The standard size for all boxes used in packing hops, shall be thirty-six inches long, eighteen inches wide, and twenty-three and one-fourth inches deep, inside measure.

(CHAPTER 50, LAWS OF 1886.)

ESTABLISH UNIFORM GAUGE OF CREAM.

An Act to establish a uniform inch or gauge of cream.

SECTION 1. [**Cream gauge: two quarts.**]-*Be it enacted by the general assembly of the state of Iowa:* That an inch or gauge of cream shall be two standard quarts, wine measure, $115\frac{1}{2}$ cubic inches.

Approved March 26, 1886.

SUPERINTENDENT OF WEIGHTS AND MEASURES.

SEC. 2052. [**Superintendent.**]-A superintendent of weights and measures for this state, who shall be a scientific man, of sufficient learning and mechanical tact to perform the duties of his office, shall be appointed by the governor from the board of professors of the Iowa state university, and shall hold his office during the pleasure of the governor, and shall give a bond in the penal sum of five thousand dollars for the faithful discharge of his duties.

SEC. 2053. [**Duty of.**]-The superintendent shall take charge of the standards adopted hereby, and see that they are deposited in the building built for this purpose now belonging to the state, from which they shall in no case be removed, and take all necessary precautions for their safekeeping. He shall provide the several counties with such standards, balances and other means of adjustment, as may be ordered by them, and as often as once in ten years, and compare the same with those in his possession. He shall, moreover, have a general supervision of the weights and measures of the state.

SEC. 2054. [**Procure copies of standards.**]-He shall procure and keep for the state a complete set of copies of the original standard of weights and measures adopted hereby, which shall be used for adjusting the county standards and in no case shall the original standards be used for any other purpose than the adjustment of this set of copies. He shall also procure and keep such apparatus and fixtures as are necessary in the comparison and adjustment of county and town standards.

SEC. 2055. [**Impressions on weights furnished by him.**]-The state superintendent of weights and measures, shall cause to be impressed upon all standards of weights and measures furnished by him, the word "Iowa," and such other devices as he shall direct for the particular county, city or incorporated town, and the county sealers shall see that, in addition to the above device, there is impressed on the town and city standards such other device as the board of supervisors shall direct for the several cities and incorporated towns.

SEC. 2056. [**Resignations: duty of successors.**]-Whenever the state superintendent of weights and measures shall resign, be removed from office, or remove from Iowa City, or whenever any city, county or incorporated town sealer shall resign, be removed from office, or remove from the city, county or town in which he shall have been appointed or elected, the person so resigning, removed or removing, shall deliver to his successor in office all the standard beams, weights and measures in his possession.

SEALER.

SEC. 2057. [**Weights and measures procured: county sealer appointed.**]-The board of supervisors of any county may, at any regular meeting, provide for obtaining from the state superintendent of weights and measures such standards of weights and measures as they may deem necessary for their county, and in case they order such standards, they shall appoint a county sealer of weights and measures, who shall hold his office during the pleasure of the board.

SEC. 2058. [**Duty of sealer.**]-The county sealer shall take charge of the county standards and standard balances, and provide for their safe keeping; shall provide cities and incorporated towns with such standard weights and measures, and standard balances, as may be wanting, and shall compare the cities and incorporated towns standards and incorporated towns standards with those in possession as often as once every five years.

SEC. 2059. [**Sealer appointed.**]-A sealer of weights and measures may be appointed in every city and incorporated town by the town council thereof, and shall hold his office during their pleasure, and said council may obtain from the sealers of weights and measures of their respective counties, such standards of weights and measures as they may deem necessary for their respective cities or incorporated towns; and in case the board of supervisors of any county in which any city or town may be situated shall not have obtained such standards, then said council may obtain the same from the state superintendent of weights and measures.

SEC. 2060. [**Duty of.**]-Each sealer in cities and incorporated towns shall take charge and provide for the safe keeping of the town or city standards, and see that the weights, measures, and all apparatus used for determining the quantity of commodities used throughout the town or city, which shall be brought to him for that purpose, agree with those standards in his possession.

SEC. 2061. [**Expenses.**]-All expenses directly incurred in furnishing the several counties, cities, and incorporated towns, with standards, or in comparing those that may be in their possession, shall be borne by the respective counties, cities, and incorporated towns for which such expenses shall have been incurred.

SEC. 2062. [**Death of sealer.**]-In case of the death of any such sealer of weights and measures, his representatives shall, in like manner, deliver to his successor in office such beams, weights, and measures.

SEC. 2063. [**Penalty.**]-In case of refusal or neglect to deliver such standards entire and complete, the successor in office may maintain an action against the person or persons so refusing or neglecting, and recover for the use of such county, city, or incorporated town, double the value of such standards as shall not have been delivered. And in every such action in which judgment shall be rendered for the plaintiff, he shall recover double costs.

SEC. 2064. [**Penalty.**]-If any person or persons shall hereafter use any weights, measures, beams, or other apparatus, for determining quantity of commodities, which shall not be conformable to the standards of this state, in any counties whose standards have been obtained by the board of supervisors, or in any city or incorporated town after such standards have been obtained therein, whereby any person shall be injured or defrauded, he shall be subject to a fine not exceeding five dollars for each offense, to be sued for and collected by the city, county, or town sealer. He shall also be subject to an action at law, in which the defrauded person shall recover treble damages and costs, and every person keeping any store, grocery, or other place, for the sale or purchase of such commodities as are usually sold by weight or measure, shall, once in each year, procure the weights and measures used by him to be compared with the standard herein pro-

vided; and he shall be subject to a fine of five dollars for every neglect to comply with this provision, to be recovered by any one who shall prosecute therefor.

WEIGHMASTERS OF PUBLIC SCALES.

SEC. 2065. [**Oath: definition of public scales.**]—All persons keeping public scales, before entering upon their duties as weighmasters, shall be sworn before some person having authority to administer an oath, to keep their scales correctly balanced; to make true weights; and to render a correct account to the person or persons having weighing done. Every scale shall be deemed a public one, for use of which a charge is made.

SEC. 2066. [**Make correct weights: keep register: give certificate.**]—All weighmasters are required to make true weights and to keep a correct register of all weighing done by them, giving the amount of each weight, date of weighing, and the name of the person or persons for whom such weighing was done, and to give, upon demand, to any person or persons having weighing done, a certificate, showing the weight, date of weighing, and for whom weighed.

SEC. 2067. [**For weighing stock or grain: standard procured.**]—Weighmasters, or keepers of public scales kept for the purpose of weighing stock or grain, shall provide and keep a standard of weight not less than fifty pounds avoirdupois for the purpose of testing such scales, and they shall at least once a month, or oftener if required, make a satisfactory test of the correctness of such scales.

SEC. 2068. [**Penalty.**]—Any weighmaster, or keeper of public scales, violating any of the provisions of the two preceding sections, upon complaint made before any justice of the peace having jurisdiction of the offense, may, upon conviction thereof, be fined in any sum not more than twenty dollars and not less than five dollars for each offense, and shall be liable to the person or persons injured, for the full amount of damages by them sustained.

OF THE INSPECTION OF SHINGLES AND LUMBER.

SEC. 2069. [**Inspector appointed.**]—The board of supervisors of each county, as often as may be necessary, shall appoint one inspector of lumber and shingles, who shall have the power to appoint one or more deputies to act under him. For the conduct of the deputies, the principal shall be liable.

SEC. 2070. [**Oath: bond of.**]—Before any inspector or deputy inspector shall enter upon the duties of his office, he shall take an oath or affirmation that he will faithfully and impartially execute the duties required of him by law, and each inspector shall, moreover, enter into a bond with sufficient security to be approved by the county auditor, in such sum as the board of supervisors may require, made payable to the state of Iowa, which bond shall be deposited with the treasurer of the county, conditioned for the faithful and impartial performance of his duties, as required by law.

SEC. 2071. [**Suit on bond.**]—Any person who may think himself aggrieved by the incapacity, neglect, or misconduct of such inspector or his deputy, may institute a suit on a copy of the bond certified by the treasurer, in his own name. And in case the person suing shall obtain judgment, he may have execution as in other cases; but the suit shall be commenced within one year after the cause of action accrues.

SEC. 2072. [**Duties of inspector.**]—The inspectors or their deputies, within their respective counties, shall inspect all lumber, boards and shingles, on application made to them for that purpose; and when inspected, stamp on the lumber, boards and shingles, with branding irons made for that purpose, the name of the state and county where inspected, and the kind and quality of the articles inspected,

which branding-iron shall be made and lettered as directed by the board of supervisors. And every inspector shall make, in a book for that purpose, fair and distinct entries of articles inspected by him or his deputies, with the names of the persons for whom said articles were inspected.

SEC. 2073. [**Penalty for counterfeiting.**]-If any person shall counterfeit the aforesaid brands or marks, or either of them, upon conviction thereof, he shall be deemed guilty of forgery, and shall be punished accordingly.

SEC. 2074. [**Size of shingles: how branded: division of lumber.**]-A lawful shingle shall be sixteen inches in length, four inches wide, and half an inch thick at the butt end; and all lumber shall be divided into four qualities, and shall be designated clear, first common, second common, and refusal. Shingles shall be clear of sap, and designated as first and second quality. The shingles to be branded on each bundle with the quality and the name of the inspector.

CHAPTER 2.

MONEY OF ACCOUNT AND INTEREST.

SECTION 2075. [**How expressed.**]-The money of account of this state is the dollar, cent, mill, and all public accounts and the proceedings of all courts in relation to money, shall be kept and expressed in money of the above denomination.

SEC. 2076. The above provisions shall not in any manner affect any demand expressed in money of another denomination, but such demand, in any suit or proceeding affecting the same, shall be reduced to the above denomination.

SEC. 2077. [**Interest: rate of.**]-The rule of interest shall be six cents on the hundred by the year, on:

1. Money due by express contract;
2. Money after the same becomes due;
3. Money lent;
4. Money received to the use of another, and retained beyond a reasonable time without the owners's consent, express or implied;
5. Money due on settlement of matured accounts from the day the balance is ascertained;
6. Money due upon open accounts after six months from the date of the last item;
7. Money due, or to become due, where there is a contract to pay interest, and no rate is stipulated. In all of the cases above contemplated parties may agree in writing for the payment of interest not exceeding ten cents on the hundred by the year.

Where an agreement in writing is silent as to the rate of interest, the plaintiff is entitled to interest at six per cent per annum from maturity. *Myers v. Smith*, 15 Iowa, 181; *Vennum v. Gregory*, 21 Id., 326.

When by the terms of a note the interest is payable annually, the interest after it becomes due and remains unpaid is an indebtedness to the payee of the note upon which he is entitled to interest, in the absence of any agreement as to the rate, at six per cent per annum. *Mann v. Cross*, 9 Id., 327.

But, while interest may be recovered upon an installment of interest due by express contract, upon interest falling due and not paid at the maturity of the principal, the interest, in such case, is a mere incident to the principal, and the general rule is not changed by the statute. *Aspinwall v. Blake*, 25 Id., 319.

Where a note is made payable at a specified time "with interest at ten per cent per annum," the payee is entitled to interest thereon *after* as well as *before* maturity at the rate of ten per cent per annum. *Hand v. Armstrong*, 18 Id., 324.

It is not competent for the court to allow, as *damages* for the non-payment of money, more than the legal rate of interest. *Vennum v. Gregory*, 21 Id., 326.

Where a note, secured by a mortgage, provided for interest at ten per cent per annum, and the mortgage stipulated for interest at the same rate, "payable annually, according to the terms of the promissory note," it was held that the mortgage provided for something respecting which the note was silent, and would govern. *Dobbins v. Parker et ux*, 46 Id., 357.

Where the plaintiff set up a parol contract to pay interest at the rate of ten per centum, but only claimed six per centum, it was held that since ten per centum included six per centum, that plaintiff might recover six per centum upon the allegation of an express oral promise to pay ten. *Brockway v. Haller*, 57 Id., 368.

A contract which provides for interest at the rate of ten per cent, payable semi-annually, and for interest at the rate of ten per cent on the semi-annual installments of interest after they become due, is not usurious. Following *Ryan v. Day*, 46 Id., 239. *Hawley v. Howell*, 60 Id., 79.

Where money is paid for the use of another under circumstances creating an obligation to reimburse the party paying, interest on the money from the date of payment may be recovered. *Goodnow v. Litchfield*, 63 Id., 275.

A provision in a note requiring the interest to be paid quarterly, and stipulating that the interest if not paid when due should bear interest at the rate of ten per cent, does not render the contract usurious. *Ragan v. Day et al.*, 46 Id., 239.

A married woman cannot be charged with attorney's fees and interest at ten per cent on a debt for which she is charged as a family expense, because her husband has given a note stipulating therefor. *Fitzgerald v. McCarty et al.*, 55 Id., 702.

The legal rate of interest cannot exceed ten per centum per annum on the sum actually loaned, by the provisions of sections 2077 and 2078 of the code. Building associations are not authorized by section 1186 of the code to receive more than such sum as interest on their loans actually made. Where a note, bearing interest, was made and delivered by the borrower to such an association including not only the amount actually received by him, but also the premium paid the association for the loan, and the interest contracted to be paid being more than ten per centum on the sum actually loaned, held, that the note was usurious. *Hawkeye Benefit Loan Association v. Blackburn*, 48 Id., 385.

SEC. 2078. [On judgments and decrees.]—Interest shall be allowed on all moneys due on judgments and decrees of any competent court or tribunal, at the rate of six cents on the hundred by the year, unless a different rate is fixed by the contract on which the judgment or decree is rendered; in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding ten cents on the hundred by the year, which rate must be expressed in the judgment or decree.

A decree or judgment will draw only the rate of interest of the debt, and if a part of the debts draw one rate of interest and a part another, the decree or judgment will in like manner draw different rates of interest. *Burrows v. Stryker et al.*, 47 Iowa, 477.

Chattels mortgaged to secure notes bearing interest at the rate of ten per cent, were seized and converted under execution, and the mortgagees brought suits and obtained judgments on account thereof upon an indemnifying bond given by the plaintiffs in execution to the sheriff. Held that the judgments should draw the same interest as the notes secured by the mortgage. *Rand, Ex'r, v. Barrett et al.*, 66 Id., 732.

In order that a judgment on a contract drawing more than six per cent interest may draw the same interest, it must be so expressed in the judgment itself. So where the plaintiff was entitled to have his judgment bear interest at ten per cent, but by oversight the rate of interest was not expressed in the judgment, held that he could not, without first having the error corrected by proper proceedings, enforce the judgment for more than its face and six per cent interest. *Rice v. Hurlbert*, 67 Id., 724.

SEC. 2079. [Prohibition.]—No person shall, directly or indirectly, receive in money, goods, or things in action, or in any other manner, any greater sum of value for the loan of money, or upon contract founded upon any bargain, sale, or loan of real or personal property, than is in this chapter prescribed.

The extension of time of payment of a loan is a loan of money within the meaning of the statute, and where the sureties upon a note executed a new note in consideration for the extension of time upon the original undertaking, the transaction was held, usurious. *Kendig v. Linn et al.*, 47 Iowa, 62.

SEC. 2080. [Usury: penalty for taking.]—If it shall be ascertained in any suit brought on any contract, that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money or property, the same shall work a forfeiture of ten cents on the hundred by the year

upon the amount of such contract, to the school fund of the county in which the suit is brought, and the plaintiff shall have judgment for the principal sum without either interest or cost. The court in which said suit is prosecuted shall render judgment for the amount of interest forfeited as aforesaid against the defendant, in favor of the state of Iowa for the use of the school fund of said county, whether the said suit is contested or not; and in no case where unlawful interest is contracted for, shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not.

One man may lawfully ask and take from another to whom he sells property on time, a larger sum than he is willing to take for it in case the price is paid down; and the fact that the increased price, payable at a future day, or in installments, is greater than the legal interest at the cash price, will not render the contract usurious. But if it appeared that this form of contract was resorted to as a cover for usury, or for the purpose of evading the usury law, it would be held, usurious. *Gilmore & Smith v. Ferguson & Cassell*, 28 Iowa, 220.

The statute does not declare the whole contract, when tainted with usury, void, but allows the plaintiff to recover his principal, without interest or costs, and requires the defendant to pay ten per cent to the school fund. And where usurious interest has been once paid, it cannot be recovered back. *Smith, Twogood & Co. v. Coopers & Clark*, 9 Id., 376; *Bacon v. Teel et al.*, 4 Id., 490.

The "contract" contemplated in section 2080 refers to the original agreement or contract in which the debtor stipulated to pay more than lawful interest; it is not limited to the note or written evidence of that contract. When the note is sued on the law permits the maker, by his own oath, to go behind it and show the consideration, if usurious. And if in a suit thus brought, it shall appear that a rate of interest greater than that allowed by the statute has been contracted for, either directly or indirectly, the same works a forfeiture of ten per cent per annum upon the amount of such contract. *Smith et al. v. Coopers & Clark*, 9 Id., 376.

When payments have been made upon an usurious contract, and the creditor brings an action to enforce the collection of the balance, such payments will be applied as credits upon the amount legally due, excluding the usury from the amount originally contracted to be paid. *Id.*

In computing interest where partial payments have been made, such payments are applied, in the first place, to the discharge of interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest should be computed on the principal then remaining due. If the payment be less than the amount of interest due, the balance of interest, remaining unpaid, will not be taken to augment the principal, but interest will continue on the principal until the payments, taken together, exceed the interest due, when the surplus, if any, will be applied to the discharge of the principal; whereupon interest will be computed on the balance of principal due as before. *Smith, Twogood & Co. v. Coopers & Clark*, 9 Id., 376; *Campbell v. McHarg*, Id., 354; *Drake v. Lowrey*, 14 Id., 125.

In rendering judgment upon an usurious contract for money loaned, in favor of the school fund, the court should compute interest at the rate of ten per cent from the date at which the money was borrowed. *Id.*

Where not otherwise agreed by the parties, interest on money due on an open account should be allowed at the rate of six per cent per annum, after six months from the date of the last item in the account. *Isett & Brewster v. Oglevie & Co.*, 9 Id., 313.

Where the defendants kept an account with the plaintiffs as bankers, and at the end of each month a balance of account was ascertained and entered in the books of both parties, and interest reckoned thereon, and it was proved that such was the custom of bankers, known to the defendants, and they never interposed any objection thereto, it was held, that plaintiffs were entitled to recover interest computed on their account by monthly rests according to the custom. *Id.*

An agreement to pay a sum of money by a day certain, with ten per cent interest, and more than legal interest after maturity, by way of penalty, if the debt is not punctually paid, is not usurious, but a promise to pay any further sum in excess of legal interest, for such delinquency, cannot be enforced. *Gower & Holt v. Carter & Shattuck*, 3 Id., 244; *Conrad v. Gibbon*, 29 Id., 120.

No damages for the non-payment of money can ever be so liquidated between the parties as to waive the statute which fixes the rate of interest. *Id.*

Where the maker of a promissory note delivered the same to the payee without consideration, with the design of avoiding the statute against usury, and it was so assigned without recourse, by the payee, to such party, who delivered the consideration to the assignor, by whom it was delivered to the maker, it was held usurious. *Nicholas v. Levins et al.*, 15 Id., 362.

In an action on a promissory note, it appeared, on the trial, that the transaction was usurious, that the defendant had already paid the principal and about twenty per cent interest thereon, and that the note sued on was for additional usurious interest, it was held, error to render judgment against the defendant for interest on the sum loaned in favor of the school fund. *Easley v. Brand et al.*, 18 Id., 132.

To constitute usury there must be a contract and intent to take, directly or indirectly, usurious interest. The incorporation into a note for balance previously due on contract, an additional sum as compensation to the payee for his expenses and loss of time occasioned by the default of the maker in paying him the money first agreed upon, was held not usurious. *Jones v. Berryhill*, 25 Id., 290.

From the taking effect of the code of 1851, until the taking effect of the law of 1853, in regard to interest on money, which has been incorporated into the code of 1873, the taking of a rate of interest as high as twenty-four per cent was held, in the absence of fraud or undue influence by the creditor, not to be in violation of any law of the state, and enforceable in the courts. *Palmer v. Leffler*, 18 Id., 125.

When the maker of an usurious note, which was secured by a deed of trust, borrowed money of a third party to pay on the same, and instead of making a new note for the money borrowed, caused the note paid thereby to be transferred by the payee to the lender, as evidence of the new debt, held, that the note was not tainted with usury in the hands of the second holder. *Wendlebone v. Parks et al.*, Id., 546.

The cancellation of a note tainted with usury and the execution of a new one for the balance remaining after deducting the payments made from the amount of the principal and usurious interest does not purge the transaction of usury. *Smith, Twogood & Co. v. Coopers & Clark*, 9 Id., 376; *Campbell v. McHarg*, Id., 254; *Garth v. Cooper & Smith*, 12 Id., 364.

However usury may be covered by changes and substitutions, if it be found to exist, either directly or indirectly, its taint continues and affects all the parts through which it runs; the substitution of one contract for another, the taking of a new note for an old one will not purge it. *Id.*

A statement for judgment by confession does not estop the defendant, before judgment is entered thereon, to set up the defense of usury in the debt which is the basis of the statement for judgment. *Lyon v. Welsh et al.*, 20 Id., 578.

A confession of judgment in consideration of a renewal of a note, made to evade the law against usury, will be regarded as invalid. *Ohm v. Dickerman*, 50 Id., 671.

Usury may be pleaded in an action brought on an usurious contract in the name of an indorsee, or innocent bona fide holder. *Bacon v. Lee & Gray*, 4 Id., 490.

The defense of usury cannot be pleaded by a party who is not privy to the contract involved in the action. *Drake v. Lowry*, 14 Id., 125.

Where the payees of one, and the indorsers of another promissory note, both of which were made by a firm for a consideration tainted with usury, before taking the same, called at the business place of the makers thereof, and asked one of the partners if the debt represented by the note was "all right, and would be paid," to which it was replied, that "it was, and would be promptly paid," after which the parties making the inquiry took the notes by assignment without any knowledge of the usury, in payment of a debt due them from the assignors, it was held, that the makers of the notes were estopped by this representation from setting up usury as a defense in an action on the notes. *French & Davies v. Rowe & Hyde*, 15 Id., 563. This would be otherwise if the assignees had knowledge of the usury. *Nichols v. Levins*, Id., 362.

The bona fide purchaser of an accommodation note, by a person ignorant of the character of the paper, for a less sum than its face, or at a greater rate of discount than legal interest, is not an usurious transaction; and the defense of usury is not available by the maker in an action against him on the note by such holder. *Dickerman v. Day*, 31 Id., 444.

Where money is borrowed at usurious interest, and a part thereof is paid, and a new note given for the balance bearing a legal rate of interest, the contract is tainted with usury. *Callanan v. Shaw*, 24 Id., 441.

If the maker of an usurious note represents to a person about to purchase the same that there was no usury in it, and such person purchases the note on the faith of such representations, without knowledge of it being usurious, the maker is estopped from afterwards setting up the defense of usury; *aliter*, if the representations were not relied on, or the assignee had knowledge of the usury. *Id.*

In an action by the payee upon an usurious note against the maker and his surety, the state is entitled to a judgment for the amount of interest forfeited against the surety as well as against the principal. *McIntosh v. Likins*, 25 Id., 555.

An agreement on the part of a purchaser of a lot of sheep, to pay therefor, in addition to a certain sum of money agreed upon, "two pounds of wool per year for such sheep so sold," is not necessarily usurious. *First National Bank of Marshalltown v. Owen*, 23 Id., 185.

A contract for the sale of land on a credit of one year, for a sum equal to the amount of the original purchase money, paid to the government, and forty per cent thereon, is not usurious. *Id.*, 93.

To constitute the receiving of more than legal interest, usury, so as to work the forfeiture prescribed in the statute, it must have been received in pursuance of a contract of loan. But while the receiving of more than legal interest, if not in pursuance of such contract, would not work the

forfeiture provided by the statute, it will be held as payment to be first applied in discharge of the interest due, and after that on the principal. *Seaton v. Murdock*, 36 Id., 516.

Where an agent for the loaning of money made loans at usurious rates, *held*, that he would not be presumed to have had authority to make the loans at such rates, and that his act would not effect his principal. *Gokey v. Knapp*, 44 Id., 32.

Usury may not only be pleaded as a defense, but also may be made the ground of original and affirmative relief, and in the latter case it is not necessary for the party seeking equitable relief from a usurious contract to allege and prove that he has tendered legal interest in addition to the principal. *Morrison v. Miller*, 46 Id., 84. In New York the rule is different. *Fanning v. Dunham*, 5 John. Ch., 122. See, also, I. G. Greene, 121.

An attorney's fee stipulated for in a note in case suit be brought thereon, where in such suit the note is found usurious, cannot be recovered in an action thereon. No more than the principal sum, without interest or costs can be recovered. *Miller v. Gardner*, 49 Id., 234.

A defendant who was not a party to the usurious contract cannot set up the defense of usury. *Frost v. Shaw*, 10 Id., 491; *Hollingsworth v. Swickard*, Id., 385; *Powell v. Hunt*, 11 Id., 430; *Perry v. Kearns*, 13 Id., 174; *Drake v. Lowry*, 14 Id., 125; *Sternburg v. Callanan et al.*, Id., 251; *Greicher v. Alexander*, 15 Id., 470; *Allison & Crane v. King*, 25 Id., 56.

Where a surety has given his own note in part payment of his principal's usurious note, he cannot maintain the plea of usury against the holder of the note so given by him. *Culver v. Wilbern Bros.*, 48 Id., 26.

The fact that the agent of a borrower, who is paid a commission in excess of legal interest by the latter for procuring the loan, divides such commission with the agents of the lender, will not render the loan usurious. *Dickey et al. v. Brown*, 56 Id., 426.

Where an agent for loaning money takes a commission beyond the legal rate of interest, without the knowledge or consent of his principal, his action does not affect with usury the loan of the principal, and this rule is not modified or varied by the fact that the agent and principal occupy the relation to each of husband and wife. *Bringham v. Myers*, 51 Id., 397. To the same effect are *Gokey v. Knapp*, 44 Id., 32; *Wyllis v. Ault et al.*, 46 Id., 46.

It was held in *Rinehart v. Buckingham et al.*, 34 Iowa, 409, that section 1791 of the revision (now § 2080 of the code), which made the defendant a competent witness to prove the usurious character of the contract, was not affected by section 3982, which provided that a party was not competent to prove facts transpiring before the death of a person, when the opposite party is his executor or administrator.

Where money has been loaned on a usurious contract, and payment has been made upon the loan, in rendering judgment against the borrower in favor of the school fund, the amount upon which interest is to be computed should be ascertained by deducting the payments from the whole sum loaned. *Sheldon v. Mickell & Head*, 40 Id., 19, *Smith, Twogood & Co. v. Coopers & Clark*, 9 Id., 388.

A note and mortgage executed to secure a loan of gold at a higher rate of premium than the market value of the gold, *held* usurious. *Walker v. Austin et al.*, 45 Id., 527.

The extension of the time of payment of a loan is a loan of money within the meaning of the statute, and where the sureties upon a note executed a new note for forty dollars for the consideration of the extension of time on the original obligation, the transaction was held to be usurious. *Kendig v. Linn and Hanson*, 47 Id., 62.

Where in the progress of an action on a promissory note it appears that there should be a judgment for the school fund on account of usury, under this section, it is competent for the court to ascertain by evidence, in addition to that introduced on the trial, the amount of the forfeiture for which the judgment should be rendered. *Seekel v. Norman et al.*, 71 Id., 264.

SEC. 2081. [Assignee may recover of usurer.]—Nothing in this chapter shall be so construed as to prevent the proper assignee, in good faith and without notice, of any usurious contract, recovering against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money, but the same may be recovered of the usurer in the proper action before any court having competent jurisdiction.

The indorsee of a promissory note who takes it with knowledge that it is tainted with usury, is not a *bona fide* assignee within the meaning of section 1792 of the revision, (section 2081 of the code), and cannot recover the consideration paid for the same, from the indorser. *Brown v. Wilcox and Sawyer*, 15 Iowa, 414. *LOWE, J., dissenting.*

If a surety has made and given his own note for his principal's usurious debt, he cannot maintain the defense of usury in an action on the note so given. *Culver v. Wilbern Bros.*, 48 Id., 26.

CHAPTER 3.

OF NOTES AND BILLS.

SECTION 2082. [Negotiable.]—Notes in writing, made and signed by any person, promising to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery in the same manner as inland bills of exchange, according to the custom of merchants.

A promissory note payable in property is not negotiable in the sense of the law merchant, and the maker is not under the laws of Iowa entitled to days of grace. *McCartney v. Smalley's Adm'r*, 11 Iowa, 85.

The holder of a promissory note, without indorsement, where it is payable to the order of the payee, may maintain an action thereon in his own name, but without prejudice to the maker's right of set-off or equities existing before notice of the transfer. *Yunker v. Martin*, 18 Id., 142.

A presentment to only one of the makers of a joint note is not sufficient to charge an indorser, unless some legal excuse be shown for the failure to make presentment to the other. *Blake v. McMillan*, 22 Id., 358.

A note or other written evidence of indebtedness payable in *current funds* is not to be regarded upon its face as negotiable. *Haddock v. Woods*, 46 Id., 433; *Huse v. Hamblin*, 29 Id., 501; *Rindskoff Bros. & Co. v. Barrett*, 11 Id., 172.

But it may be shown by parol evidence, what was the peculiar meaning of the term *current funds*, and that the parties to the paper knew that it meant *money*. *Pilmerv. The Br. State Bank*, 16 Id., 321; *Huse v. Hamblin*, 29 Id., 501; *Haddock v. Woods*, 46 Id., 433.

A blank indorsement creates the same liability from the indorser to the indorsee, as if it were in full, giving the holder power to demand payment, or to make it payable to himself, or to any other person on his order. *Id.*

A stipulation in a promissory note that is negotiable and payable at place therein designated, has no effect upon the negotiability of the note, and does not restrain or limit its negotiability elsewhere. *The Schokairie County Ne. Bank v. Bevard et al.*, 51 Id., 257.

An instrument in the following form: "Certificate, Illinois Phoenix Bank, Chicago, Sept. 22, 1854. Briggs & Felthouser have deposited in this bank \$462.50, to the order of themselves, payable two months after date, payable to their order on the return of this certificate, at interest at six per cent. M. Roe & Co., Cashier," is a negotiable instrument. And when it is transferred by the payees by a blank indorsement, they are liable thereon. *Bean v. Briggs & Felthouser*, 1 Id., 488.

A promissory note in the ordinary form contained the following clause immediately preceding the signature: "If this agent does not sell enough in one year, one more is granted." *Held*, that this provision rendered the note non-negotiable. *Miller v. Poage*, 56 Id., 96. DAY, J., and ADAMS, CH. J., dissenting.

An assignment of the monthly royalties, payable as rent under a coal lease, is not the assignment of an open account, but of a right under a contract; and the assignor is bound only by equities which the lessees had against the assignor before notice of the assignment, and not by equities arising before *suit brought* upon the assignment. *Steele et al. v. Mills et al.*, 63 Id., 406.

SEC. 2083. [Action.]—The person to whom such sum of money is made payable may maintain an action against the maker, and to any person to whom such note is so endorsed or delivered, may maintain his action in his own name against the maker or the endorser, or both of them.

In an action on a promissory note which is payable to the payee "or bearer" it is sufficient to allege that it is the property of the plaintiff, without showing whether it passed by delivery or assignment. *Dabney v. Reed*, 12 Iowa, 315.

But when the note is payable to "order" an averment that the plaintiff is the owner thereof, without showing by what right he claims the same, is insufficient to enable him to maintain the action. The facts which show ownership should be pleaded. *Montague v. Reineger*, 11 Id., 503; *Thompson v. Cook*, 21, Id., 472.

SEC. 2084. [Assignment of non-negotiable instruments.]—Bonds, due bills, and all instruments in writing, by which the maker promises to pay to another, without words of negotiability, a sum of money, or by which he promises to pay a sum of money in property or labor, to deliver any property or labor, or acknowledges any money or labor or property to be due, are assignable by endorsement thereon or by other writing, and the assignee shall have a right of action

in his own name, subject to any defense or counter claim which the maker or debtor has against any assignor thereof before notice of his assignment.

A promissory note payable in property is not negotiable in the sense of the law merchant. *McCartney v. Smalley's Adm'rs*, 11 Iowa, 85.

A judgment recovered in the district or circuit court may be assigned; and such assignment, if made without fraud, is valid as to the assignor from the day of its execution. *Weir v. City of Davenport et al.*, 11 Id., 49.

A liability for a tort may be assigned so as to give the assignee a priority over an attaching creditor of the assignor. *Id.*

A judgment is a chose in an action, and is assignable, but the assignee takes it charged with all the equities which could be asserted against it in the hands of the assignor. *Burtis v. Cook & Sargent*, 16 Id., 194.

While a non-negotiable note is assignable under the statute, it is subject in the hands of the assignee to any defense or set off which the maker had against any assignor thereof before notice of the assignment. *Sayre v. Wheeler*, 31 Id., 112.

All instruments are under our statute assignable, and the assignee may maintain an action in his own name. *Moorman & Greene v. Collier*, 32 Id., 138; *Fredereck v. Callanan*, 40 Id., 311.

The rule of common law that a guaranty is not assignable does not prevail in this state. Under our statute, this and every other kind of contract is assignable. *The First National Bank of Dubuque v. Carpenter, Stibbs & Co.*, 41 Id., 518; see also, *Merchants' & Mechanics' Bank of Chicago v. Hewitt*, 3 Id., 93.

While a bill of lading is not negotiable, it is assignable, and possesses attributes not common to the ordinary non-negotiable instruments enumerated in this section. It stands for and represents the property, and an assignment of it passes the title to the property. When issued, it can be altered or changed only upon the surrender of the original, and a collateral oral understanding between the shipper and the carrier, by which the property is to be delivered to one not the assignee and holder of the bill, does not follow it into the hands of the assignee without notice, and cannot defeat his rights under the terms of the bill. *The Garden Grove Bank v. The H. & S. Ry Co.*, 67 Id., 526.

The assignee of a promissory note secured by mortgage, taken after maturity, takes it exempt from any equities residing in a third party to which it might have been subject in the hands of the assignor, and of which the assignee had no notice. *Crosby v. Tanner et al.*, 40 Id., 136.

The indorsee of a promissory note who receives it without notice of any equities against the payee, before maturity, and in consideration of his becoming surety for the payee upon another note, which he was subsequently compelled to pay, is a holder for value in the ordinary course of business, and is discharged of such equities. *Stotts v. Byers*, 17 Id., 303.

The indorser of a non-negotiable note is liable to a suit by the holder thereof without demand of the maker, and notice of non-payment. *Wilson v. Ralph et al.*, 3 Id., 450; *Long v. Smyzer*, Id., 266; *Peddicord & Wyman v. Whittam*, 9 Id., 471.

It was held in *Stannus v. Stannus*, 30 Iowa, 448, that while a note transferred after maturity is subject, in the hands of indorsee or assignee, to any defense thereto arising out of any equities between the original parties, and attaching to the note, it is not subject to a mere off-set of the maker, though existing at the time the note was negotiated; and this holding is supported by *Shipman v. Robbins*, 10 Id., 208; *Lewis v. Denton*, 13 Id., 441; *Ryan v. Chew*, Id., 589; *Way v. Lamb*, 15 Id., 79; *Richards v. Daily*, 34 Id., 427.

The assignee of a promissory note under a transfer made in the body of a separate instrument, executed for an independent purpose, is not the holder of the *legal title*, discharge of prior equities, within the meaning of the law merchant. *Franklin v. Twogood*, 18 Id., 515.

Under this section of the code all claims and rights are assignable, and a covenant of seizing runs with the land. *Frederick v. Callahan*, 40 Id., 311, 314.

A mortgage is not a negotiable instrument, and an assignee thereof, although purchasing before maturity, takes it subject to all defenses existing against it in the hands of the mortgagee. *Tabor v. Foy* 56 Id., 539.

SEC. 2085. [Are negotiable.]—Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor or acknowledges property or labor or money to be due to another, are negotiable instruments with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words "order" or "bearer" alone will not manifest such intent.

An instrument wherein one promises to pay a certain sum or deliver certain property, without defalcation, is negotiable; and when transferred by indorsement before maturity, is not subject to defense or set-off for want of consideration in the hands of the transferee. *The Council Bluffs Iron Works v. Cuppy*, 41 Iowa, 104.

A note payable in *currency* is not negotiable, under the law merchant; and is not under our

statute unless it is manifest from its terms that such was the intent of the maker. *Rindskoff Bros. & Co. v. Barrett*, 11 Id., 172; *Huse v. Hamblin and others*, 28 Id., 501; *McCartney v. Smalley*, 11 Id., 85; *Peddicord & Wyman v. Whittam et al.*, 9 Id., 471.

The fact that such note was made payable at a banking house, in the absence of custom, is not sufficient to show such an intent. When such custom is relied on it must be averred and proved. *Id.*

The use of the words, "to be delivered to his order," in a note payable in property does not manifest an intention on the part of the maker, to make it negotiable. *Merchants and Mechanics Bank of Chicago v. Hewitt*, 3 Id., 93.

Where a lessee of real estate, who was entitled to compensation from the lessor for improvements made upon the leased premises, assigned his claim for such compensation to a third party who sued the lessor therefor, it was held, that the latter could set-off the rent due from the lessee at the time when the claim for improvements matured. *Zugg v. Turner*, 8 Id., 223.

See *Haddock v. Woods*, 46 Iowa, 435.

SEC. 2086. [Assignment prohibited.]—When by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid, but the maker may avail himself of any defense or counter claim against the assignee which he may have against any assignor thereof before suit is commenced thereon. [Notice of the assignment thereof is given in writing to the maker of such instrument.] (*As amended by ch. 183, 20th g. a.*)

SEC. 2087. An open account of sums of money due on contract may be assigned, and the assignee will have the right of action in his own name, but subject to the same defenses and counter claims as the instruments mentioned in the preceding section. [Before notice of such assignment is given in writing by the assignee to the debtor.] (*As amended by ch. 183, 20th g. a.*)

A demand against a steamboat for supplies furnished is assignable; and an assignment of such demand carries with it to the assignee, the statutory lien upon the boat, etc. *Strother v. The Steamboat Hamburg*, 11 Iowa, 59.

An assignee of an open account may maintain an action thereon in his own name. *Knadler v. Sharp*, 36 Id., 232; *Farwell v. Tyler*, 5 Id., 535; *Conyngnam v. Smith*, 16 Id., 471; *Cottle v. Cole*, 20 Id., 481; *Rice v. Savery*, 22 Id., 470.

A condition in a policy of insurance to the effect that if the policy shall be assigned, either before or after the loss, without the consent of the company, the assured shall not be entitled to recover for any loss occurring, will not preclude the assignee of the policy after loss, from recovering. *Mershon v. The National Ins. Co.*, 34 Id., 87.

To constitute an assignment no particular form is necessary. It is sufficient if the intent of the parties to effect an assignment be clearly established. It may be verbal or in writing. If in writing it may be in the form of an order, agreement, or other instrument, and if the intent and contract of the parties do not fully appear in the writing, it may be shown by evidence *alunde*. *Moore et al. v. Lowrey*, 25 Id., 336.

An order drawn on the whole of a particular fund amounts to an equitable assignment thereof, and, after notice to the drawee, binds the fund in his hands in favor of the payee, as against an attaching creditor of the drawer. *McWilliams v. Webb & Son*, 32 Id., 577.

The maker of an open book account may avail himself of any defense or counter-claim against the assignee which he might have had against the assignor, before suit was commenced thereon in the name of the assignee. *Reynolds v. Martin*, 51 Id., 324.

Where the defendant has issued to one F. a commutation mileage ticket, upon which was printed the following, among other conditions: "This ticket is positively not transferable, and, if presented by any other than the person whose name appears inside of the cover, and whose signature is attached below, it is forfeited to the company," and the conditions were accepted by F., but the plaintiff's intestate procured the ticket, and was riding upon it on one of defendant's trains, leaving the conductor to whom he presented it to infer that he was F., held that the relation of passenger and carrier did not exist between him and the defendant, and that the defendant was not bound, so far as he was concerned, to exercise that measure of diligence and care which the law requires of railroads towards those who are in good faith traveling upon their trains. (See authorities cited in opinion.) Such ticket was not an "instrument," assignable notwithstanding its terms, under section 2086 of the code, nor could plaintiff profit by the claim that its issuance by the defendant was in violation of section 11, chapter 77, laws of 1878, nor that the only right which the defendant could insist upon as against one fraudulently riding upon it was to declare it forfeited. *Way v. The C., R. I. & P. R'y Co.*, 64 Id., 48.

Where one had an open account against defendant, which he assigned to plaintiff, of which assignment plaintiff gave the defendant notice, whereupon defendant wrote to plaintiff that he was ready to settle, but afterwards, and before suit brought by plaintiff, defendant settled with

and paid plaintiff's assignor, *held* that such settlement and payment was a defense to plaintiff's action under these sections of the code, and that the question of notice was not material. *Wing v. Page*, 62 Id., 87. Following *Grey v. Farner*, 8 Id., 223; and *Reynolds v. Martin*, 51 Id., 324.

While the payment of an open account to the assignor of an open account, after notice of the assignment, is a good defense in action thereon by the assignee, yet the assignor could not, after assignment, compel payment to him. *Bailey v. The Union Pacific R'y Co., Garmishee*, 62 Id., 354.

SEC. 2088. [Assignor of: how charged.]—The assignor of any of the above instruments, not negotiable, shall be liable to the action of his assignee without notice.

The right of an assignee of a negotiable instrument to maintain an action against any or all of the assignors or indorsers thereof, is not limited by this section. *Huse v. Hamblin*, 29 Iowa, 501.

Indorsers of non-negotiable paper are liable to the holders thereof, without demand upon the maker and notice of non-payment. *Id.*

GUARANTEE.

SEC. 2089. [Definition of.]—The blank indorsement of an instrument for the payment of money, property, or labor, by a person not a payee, indorsee, or assignee thereof, shall be deemed a guaranty of the performance of the contract.

The indorsement of a non-negotiable instrument is a promise to pay and not a conditional contract to pay on demand of, and refusal by, the maker. *Peddicord & Wyman v. Whittam et al.*, 9 Iowa, 471.

One who writes on the back of a note, as follows: "I hereby indorse the within note," and signs his name, is a guarantor under this section of the code, the same as if he had indorsed in blank, and as a guarantor he may set up as a defense to an action on the note, usury in its inception. *Conger et al. v. Babbitt et al.*, 67 Id., 13.

SEC. 2090. [Guarantor: how charged.]—To charge such guarantor, notice of non-payment by the principal must be given within a reasonable time; but the guarantor is chargeable without notice, if the holder show affirmatively that the guarantor has received no detriment from the want of notice.

SEC. 2091. [Same.]—A guarantor, as contemplated in the preceding sections, is also liable to the action of an indorsee, assignee, or payee, if due diligence in the institution and prosecution of suit against the maker or his representative has been used.

Where the guaranty is in express terms in writing for the payment of a county warrant, and not a blank indorsement, the liability of the guarantor is not conditional, but absolute. *Griffin v. Seymour*, 15 Iowa, 30, 33; *Knight v. Dinsmore & Chambers*, 12 Id., 35; *Sabin & Moon v. Harris*, Id., 87.

Under the statute, a guarantor of a note, who is not an original party thereto, is rendered liable on his contract of guaranty by notice of non-payment within a reasonable time. A demand upon the maker is not necessary to charge such guarantor. *Knight v. Dinsmore & Chambers*, 12 Id., 35.

What constitutes a reasonable time, must be determined from the circumstances of each case. *Id.*

A guarantor of a promissory note who is not an original party thereto, and whose indorsement is not in blank, is liable on his guaranty, without demand of the maker and notice of non-payment, and in the absence of due diligence against the maker, unless it is shown affirmatively by the guarantor, by way of defense, that he has sustained damages from the want of such notice or diligence. *Sabin & Moon v. Harris*, Id., 87; *Mount Pleasant Bank v. McLeran*, 26 Id., 306.

Such a showing will constitute a defense *pro tanto* in such an action. *Sabin & Moon v. Harris*, 12 Id., 87.

A guarantor of a promissory note under the statute, for the accommodation of the holder, is liable the same as an accommodation indorser to a third person to whom the note has in good faith and for value been transferred, though at the time of taking the note, such person had knowledge of the fact that the indorsement or guaranty was without consideration. *Jones v. Berryhill*, 25 Id., 290.

The obligations of a guarantor of a promissory note are that he will pay the same if the maker fails to pay at maturity, and the holder will use due diligence by suit to collect the same. *Voorhies v. Ailee et al.*, 29 Id., 49.

Due diligence, in the absence of special circumstances, would, upon failure of the maker to pay, require suit to be brought against the latter at the first regular term of court, in the defendant's name, after maturity. It was accordingly *held*, that a failure to bring such action until after two terms had passed, *showed* such a want of diligence as that the guarantor was released. *Id.*

In order to hold a guarantor of a promissory note under the rules of the common law, he must,

within a reasonable time, have been notified of demand upon, and non-payment by the maker. *Greene & Co. v. Thompson*, 33 Id., 293.

Such guarantor is not entitled to the same notice as an indorser. It was accordingly held that he cannot urge, as a defense, that he was not notified in time to enable him to hold prior indorsers from or under whom he acquired the note. *Id.*

As to what is reasonable notice depends upon the facts of each case; and if it appears that the guarantor, as to his remedy against the maker, suffered no injury from delay in giving notice, he will not be absolved from liability. *Id.*

An express guarantor of a promissory note will not be discharged from liability by mere failure on the part of the holder to give him notice of non-payment, unless the delay in giving notice has been so long as to raise a presumption of waiver or payment, or unless he can show that he has suffered injury in consequence of the delay. *The Second Nat. Bank of Rockford v. Gaylord*, 34 Id., 246; See also *Howard v. Clark*, 36 Id., 114, 116.

In an action against a guarantor, who was the payee or assignee of a negotiable note, neither demand nor notice of non-payment need be alleged or proved; nor a want of diligence in bringing suit; nor that the defendant has suffered no detriment by a failure in these respects. *Peddlicord & Wyman v. Whittam*, 9 Id., 471.

A guarantor may by parol waive the use of due diligence on the part of the holder, in the enforcement of the obligation guaranteed, and a failure to use due diligence in accordance with a promise or request of the guarantors will not discharge him from liability. *Goodwin v. Buchman*, 11 Id., 308.

Where a guarantor under the statute at the maturity of the note made the following indorsement thereon: "I will extend my name on the within note to March 27, 1861," it was held, that under his first guaranty he could not be charged without reasonable notice of demand and non-payment, unless it was shown affirmatively that he received no detriment for want of notice, and that his second indorsement did not increase his prior liability. *Picket v. Hawes*, 14 Id., 460.

Section 954 of the code of 1851, as to guarantors, was not changed or repealed by the provisions of "an act relating to evidence," which took effect February 9, 1854. *Sibley v. Van Horn*, 13 Id., 209.

A "waiver of notice," by an indorser will not be construed to extend beyond the import of the terms used, and hence will not excuse a want of due presentment of the note to the maker for payment. *Voorhies v. Atlee*, 29 Id., 49.

A guarantor of a note undertakes to pay the same upon conditions that certain steps are taken, while a surety contracts to pay the note, and consequently, any writing upon the note which would render a guarantor a surety is a material alteration, and will defeat recovery against the guarantor. *Robinson v. Reed, et al.*, 46 Id., 219.

GRACE—PROTEST.

SEC. 2092. Grace shall be allowed upon negotiable bills or notes payable within this state, according to the principles of the law merchant; and notice of non-acceptance or non-payment, or both, of said instruments shall be required according to the rules and principles of the commercial law.

A promissory note payable in property is not negotiable in the sense of the law merchant, and the maker is not under laws of this state entitled to the three days grace. *McCartney v. Smalley's Administrators*, 11 Iowa, 85. See *Peddlicord & Wyman v. Whittam et al.*, 9 Id., 471; *Billingham v. Bryan*, 19 Id., 371; *Mor.*, 490.

A draft in which no time for payment is mentioned is payable on demand, and is not entitled to grace. This rule of the law merchant is not changed by chapter 81 of the laws of 1876. *First National Bank of Davenport v. Price et al.*, 52 Id., 570.

The provisions of the statute allowing grace on notes and bills payable within the state, apply only to such notes notice of non-payment of which was required to be given by the holder by the rules and practices of the law merchant. *Wilson v. Ralph et al.*, 3 Id., 450.

A note payable on demand does not entitle the maker to days of grace. *Id.*

An action on a promissory note commenced before the expiration of the days of grace, without alleging cause for commencing proceedings before the maturity of the note, cannot be maintained. *Whitney et al v. Bird et al.*, 11 Id., 407.

The transmission of notices of the protest of commercial paper under one cover to one of the indorsers in the town where they all reside, for distribution and delivery to his co-indorsers, is sufficient to charge them all with notice if the party to whom they are sent again mails them to the proper parties. *Van Brunt & Sons v. Vaughn*, 47 Id., 145.

Where the maker of a negotiable promissory note removes from the state before the maturity of the note, leaving no one to represent him, no demand of payment is necessary to bind the indorser. *Whitely v. Allen*, 56 Id., 224.

(CHAPTER 81, LAWS OF 1876.)

BILLS OF EXCHANGE.

An Act to establish uniformity throughout the state in regard to grace upon sight bills of exchange.

SECTION 1. [Days of grace.]—*Be it enacted by the general assembly of the state of Iowa:* That all bills of exchange, drafts and orders payable within this state, except those drawn payable on demand, shall be entitled to grace.

Approved March 11, 1876.

SEC. 2093. [Demand.]—A demand at any time during the days of grace will be sufficient for the purpose of charging the indorser.

Under section 957 of the code of 1851, as modified by section 3 of chapter 108 of the laws of 1853, it was *held*, that the presentment of a bill or note, for payment, before the last day of grace was premature, the instrument not being due until then. *Edgar v. Greer*, 8 Iowa, 354.

The presentment of a bill of exchange by the cashier of a bank at whose counter it is payable, to the acting teller thereof, though after business hours, is sufficient. *First Nat. Bank of Marshalltown v. Owen*, 23 Id., 185.

SEC. 2094. [Holidays: protests made.]—The first day of the week, called Sunday; the first day of January; [thirtieth day of May;] the fourth day of July; the twenty-fifth day of December; and any day appointed or recommended by the governor of this state, or by the president of the United States, as a day of fasting or of thanksgiving, shall be regarded as holidays for all purposes relating to the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes; and any bank or mercantile paper falling due on any of the days above named, shall be considered as falling due on the preceding day.

SEC. 2095. [Notice of protest.]—In case of a demand of payment of any promissory note, bill of exchange, or other commercial paper, by a notary public, and a refusal by the maker, drawer or acceptor, as the case may be, the notary making said demand may inform the indorser or any party to be charged, if in the same town or township, by notice deposited in the nearest postoffice to the parties to be charged on the day of demand, and no other notice shall be necessary to charge said party.

Where the certificate of a notary public expressly stated that he notified the indorser of a promissory note by depositing a written and printed copy thereof in the mail, directed to the indorser at a certain place, it was *held*, that such certificate established a *prima facie* case against the indorser, and that the *onus* was upon him to show that the place named was not his postoffice address, and that the notice did not accomplish the result certified to. *Wamsley v. Rivers*, 34 Iowa, 463.

The indorser of a promissory note payable at a banking house in C, resided in the same place. On the 21st of November, 1859 (the date of the maturity of the note), it was protested for non-payment at said banking house by a notary residing at L, two miles distant. Instead of notifying the indorser personally, or by notice deposited in the postoffice at C, the notary returned to L, where he made out the notice, and deposited it in the postoffice at that place, when it would not be received by the indorser at C, by due course of mail, before the third day after protest, the notice was *held* insufficient to charge the indorser. *Fannestock v. Smith*, 14 Id., 561.

The drawer of a bill resided five miles from R, and six miles from I. The cashier of the bank where the bill was payable, directed by mail, notice of dishonor to him at the former place, which had been his nearest postoffice address, but it afterward appeared that at this time the postoffice there had been discontinued, and its business transferred to I, the nearest postoffice, where letters were received and distributed that had been directed to R: *Held*, that the notice was sufficient to charge the drawer. *First Nat Bank of Marshalltown v. Owen*, 23 Id., 185.

SEC. 2096. The rate of damages to be allowed and paid upon the non-acceptance or non-payment of bills of exchange, drawn or indorsed in this state, when

damage is recoverable, shall be as follows: If the bill be drawn upon a person at a place out of the United States, or in California, Oregon, Nevada, or any of the territories, five per cent upon the principal specified in the bill, with interest on the same from the time of the protest; if drawn upon a person at any other place in the United States other than in this state, three per cent with interest.

This section of the code, providing for the rate of damages to be allowed upon the non-payment or non-acceptance of bills of exchange, relates to foreign and not to inland bills. *First National Bank, etc., v. Owen et al.*, 23 Iowa, 185.

CONTRACT—PAYABLE IN PROPERTY.

SEC. 2097. [**Payable in property: demand.**]—No contract for labor, or for the payment or delivery of property other than money, in which the time of performance is not fixed, can be converted into a money demand, until a demand of performance has been made and the maker refuses, or a reasonable time is allowed for performance.

In contracts for the payment of labor or property, in which no time is fixed for performance, the claim will not become a money demand, until performance has been demanded and the maker has refused, or a reasonable time has elapsed without performance. *Hambel v. Tower*, 14 Iowa, 530.

When the time and place of performance is fixed in the contract, a tender by the debtor, by setting apart, at the time and place, the property specified, the title to the property passes to the creditor and the debt is discharged, though he is not present to receive it, or if present, refuses to do so. *Id.*

A tender of the property must be kept good, and a failure by the debtor to deliver it when subsequently demanded by the creditor, places the *onus* of showing why it was not delivered, upon the debtor. *Id.*

See note to section 2015, *ante*, from *Johnson v. Shank*, 67 Id., 115.

SEC. 2098. [**Tender of.**]—When a contract for labor, or for the payment or delivery of property other than money, does not fix a place of payment, the maker may tender the labor or property at the place where the payee resided at the time of making the contract, or at the residence of the payee at the performance of the contract, or where the assignee of the contract resides when it becomes due.

SEC. 2099. [**Exception.**]—But if the property in such case be too ponderous to be conveniently transported, or if the payee had no known place of residence within the state at the making of the contract, or if the assignee of a written contract has no known place of residence within the state at the time of performance, the maker may tender the property at the place where he resided at the time of making the contract.

Where the maker of a note, payable in personal property at the option of the maker, indicates to the payee his election to deliver the property according to the tenor of the note, and the payee refuses to receive the property, the maker of the note is so far relieved from the duty of tendering the property, or setting it apart for the payee, that the obligation cannot be converted into a money demand, nor its payment as such enforced, without a further demand for the property upon the maker. *Williams v. Triplett*, 3 Iowa, 518.

SEC. 2100. [**When contract has been assigned.**]—When the contract is contained in a written instrument which is assigned before due; and the maker has notice thereof, he shall make the tender at the residence of the holder if he resides in the state, and no farther from the maker than did the payee at the making thereof.

SEC. 2101. [**Effect of tender.**]—A tender of the property as above provided, discharges the maker from the contract, and the property becomes vested in the payee or his assignee, and he may maintain an action thereto as in other cases.

SEC. 2102. [**Perishable property taken care of.**]—But if the property tendered be perishable, or require feeding or other care, and no person be found to receive it when tendered, the person making the tender shall preserve, feed, or otherwise take care of the same, and he has a lien on the property for his reasonable expenses and trouble in so doing.

SEC. 2103. [Holder absent from state: money paid clerk of district court.]—When the holder of an instrument for the payment of money is absent from the state when it becomes due, and when the indorsee or assignee of such an instrument has not notified the maker of such indorsement or assignment, the maker may tender payment at the last residence or place of business of the payee before the instrument became due, and if there be no person authorized to receive payment and give the proper credit therefor, the maker may deposit the amount due with the clerk of the district court in the county where the payee resided at the time it became due, paying the clerk one per cent on the amount deposited, and the maker shall be liable for no interest from that time.

By this section the clerk is required to receive money deposited by a debtor, where the holder of the instrument is absent from the state. Per *WRIGHT, J.*, in *Morgan v. Long*, 29 Iowa, 434.

CHAPTER 4.

OF TENDER.

SECTION 2104. [When not accepted.]—When a tender of money or property is not accepted by the party to whom it is made, the party making it may, if he sees fit, retain in his own possession the money or property tendered; but if afterwards the party to whom the tender was made see proper to accept it and give notice thereof to the other party, and the subject of tender be not delivered to him within a reasonable time, the tender shall be of no effect.

An offer to pay a note in bank notes is not a legal tender. Nor will a mere *offer* to pay, entitle the debtor to receive the note. *Jones v. Mullnix*, 25 Iowa, 198.

A tender by the maker of a promissory note to the payee, will not discharge the former from interest accruing after such tender, unless it be shown that he was always ready and willing to pay. *Id.*

The tender will not be effectual unless the money is paid into court ready to be paid to the party entitled to receive it. An offer to pay and a refusal to receive are not sufficient; but to make the tender good the money must be paid into court immediately upon filing the plea. *Freeman v. Fleming*, 5 Id., 460; *Mohn v. Stoner*, 14 Id., 115; *Hambel v. Tower*, 14 Id., 530; *Warrington v. Pollard*, 24 Id., 281; *Johnson v. Griggs*, 4 G. Greene, 97; *Eastman v. The District Township*, 21 Id., 599; *Hayward v. Munger*, 14 Id., 517; *Hayden v. Adams*, 17 Id., 158; *Sugart v. Pattee*, 37 Id., 422; *Phelps v. Hatton*, 30 Id., 230; *Long v. Howard*, 35 Id., 148.

A tender is an admission that the amount tendered is due, and the plaintiff is entitled to recover at least that sum. *Fisher v. Moore*, 19 Id., 84; *Sheriff v. Hull*, 37 Id., 174; *Johnson v. Griggs*, 4 G. Greene 97; *Fink & Co. v. Coe*, Id., 555; *Brayton v. Delaware Co.*, 16 Id., 44; *Fisher v. Moore*, 19 Id., 84; *Phelps v. Kathron*, 30 Id., 231; *Gray v. Graham*, 34 Id., 425; *Wright v. Howell*, 35 Id., 238; *Babcock v. Harris*, 37 Id., 409.

A tender, made after suit brought must, to be available, include the costs already accrued in the case. *Barns v. Greene*, 30 Id., 114; *Freeman v. Fleming*, 5 Id., 460; *Warrington v. Pollard*, 24 Id., 281.

If a party tender less than is due he does so at his peril, though he may honestly believe the amount tendered to be all that is due. *Helphrey v. The C. & R. I. R. Co.*, 29 Id., 480.

That the maker of a note had money in bank where the note was payable, but which was not set apart by him for the purpose of paying the note will not support the plea of tender. *Myers v. Byington*, 24 Id., 205.

A tender to a trustee who holds the notes of the debtor for collection, and is proceeding to sell the property of the debtor conveyed to him in trust to secure the payment of the debt, is a tender to the agent of the beneficiary and binds him. *Hayward v. Munger*, 14 Id., 516.

In an action in equity where a willingness to pay whatever shall be found due is averred, an actual tender is not necessary. *Hayward v. Munger*, 14 Id., 516; *Binford v. Boardman et al.*, 44 Id., 53.

In an action at law upon a promissory note made for the whole or part of the purchase price of land, which the payee covenants to convey upon its payment, the plaintiff cannot recover without showing performance on his part, either by tender of a deed or an offer to convey. *Zebley v. Sears*, 38 Id., 507; *School District v. Rogers*, 8 Id., 316; *Berryhill v. Byington*, 10 Id., 223.

The failure of a justice of the peace to pay over to the clerk of the court the sum tendered in a

case appealed from the justice to the circuit court, will not cause the tender to fail, at least not until the party making the tender shall have had reasonable time after receiving notice of the non-payment to procure an order on the justice for payment. *Waide v. Joy et al.*, 45 Id., 282.

SEC. 2105. [**Offer in writing: effect of.**—An offer in writing to pay a particular sum of money, or to deliver a written instrument, or specific personal property, if not accepted, is equivalent to the actual tender of the money, instrument, or property, subject, however, to the condition contained the preceding section; but if the party to whom the tender is made, desire an inspection of the instrument or property tendered, other than money, before making his determination, it shall be given him on request.

Under the statute an offer to pay, made in writing, is equivalent to a tender, and where the plaintiff knows the residence and post office address of the defendant he can make a legal and proper tender to him, although he resides out of the state. *Crawford v. Paine*, 19 Iowa, 172, 178.

A tender to pay a particular sum without producing the money, under this section, must be in writing. *Casady v. Bosler*, 11 Id., 242.

“The failure to make a good tender, while it may justly be considered as sufficient to induce a court of equity to withhold the exercise of its extraordinary powers of injunction, yet the right to a specific performance, is one so much governed by the sound discretion of the court, as that a mere failure to make a good legal tender, would not necessarily defeat a claim for such specific performance.” Per COLE J., in *Crawford v. Paine*, 19 Id., 172, 179.

Where the party attacking the validity of a tax title avers that he is ready and willing and offers to pay to the opposite party the amount paid by him at the tax sale, together with the subsequent taxes, interest and costs, it is error for the court to render judgment setting aside the tax sale, without requiring the payment of the sum so offered. *Corbin v. Woodbine et al.*, 33 Id., 297.

Under a contract for the sale of personal property for future delivery, an offer in writing expressing a readiness to deliver, made on the part of the seller, is sufficient under this section to bind the buyer, in a case where the buyer denies his obligation to accept the goods under the contract; and it is immaterial in such a case whether the seller has or has not the goods ready for delivery at the time the offer is made; nor is he compelled to retain the goods, if of a perishable nature, beyond a reasonable time, in order to have them ready for delivery whenever the buyer may choose to accept them. *Holt v. Brown & Co.*, 63 Id., 319.

An offer in writing to pay a particular sum of money is equivalent to an actual tender of the money. But this statute only dispenses with the actual production of the money. In other respects the rule of the common law prevails, which requires that a tender, to be good, must be unconditional. And so, where the defendant made a written offer which was in effect: “I am willing to pay you the named sum to avoid litigation; it is not due you, but I am willing to pay,” held, not sufficient to make the offer equivalent to a tender. *Kuhns v. C., M. & St. P. R’y Co.*, 65 Id., 528.

SEC. 2106. [**Receipt.**—The person making a tender may demand a receipt in writing, duly signed, for the money or article tendered, as a condition precedent to the delivery thereof.

SEC. 2107. [**Objection.**—The person to whom a tender is made must, at the time, make any objection which he may have to the money, instrument, or property tendered, or he will be deemed to have waived it.

Where the creditor, at the time a tender is made, makes no objection to the amount tendered, it will be held sufficient to discharge the debtor from costs and interest, even if upon the trial it is shown to be less than the amount actually due. *Hayward v. Munger*, 14 Iowa, 516; *Guengerich v. Smith*, 36 Id., 587; *Sheriff v. Hull*, 37 Id., 174.

But such tender of less than is due does not preclude the plaintiff from recovering whatever sum may be found to be due him. *Guengerich v. Smith*, Id., 587; *Sheriff v. Hull*, 37 Id., 174.

The failure to object to the amount of money tendered, at the time tender is made, will not preclude the party from denying its sufficiency on the trial. The phrase, “objection which he may have to the money * * * tendered,” has reference to the character of the money. *The Chicago & N. W. R’y Co. v. The N. W. Union Packet Co.*, 38 Id., 377.

CHAPTER 5.

OF SURETIES.

SECTION 2108. [**May require creditor to sue.**]—When any person bound as surety for another, for the payment of money or the performance of any other contract in writing, apprehends that his principal is about to become insolvent, or to remove permanently from the state without discharging the contract, if a right of action has accrued on the contract, he may, by writing, require the creditor to sue upon the same, or to permit the surety to commence suit in such creditor's name and at the surety's cost.

SEC. 2109. [**Refusal of.**]—If the creditor refuse to bring suit, or neglect so to do for ten days after the request, and does not permit the surety so to do, and furnish him with a true copy of the contract or other writing therefor, and enable him to have the use of the original when requisite in such suit, the surety shall be discharged.

A surety seeking to be discharged from liability on a promissory note, in the manner provided in the statute, must comply fully with its provisions. *Hill v. Sherman*, 15 Iowa, 365; *Thornburg v. Madren*, 33 Id., 380.

The payee or holder of a note may, when he receives the notice prescribed in the statute, from the surety, elect to either sue on the note himself, or permit the surety to do so in his name. *Id.*

Where the surety notifies the creditor to sue or permit the surety to do so in the creditor's name upon the contract, nothing more is required of the surety, and the creditor is left to act in response to such notice; and if he fails to bring the suit within ten days thereafter, or notify the surety of his permission to do so, the latter will be discharged. *First National Bank of Newton v. Smith*, 25 Id., 210.

It is not necessary in such case for the surety, in order to be entitled to be discharged by the laches of the creditor, to show that he did, in fact, apprehend that the principal was about to become insolvent or remove from the state. The fact of such apprehensions cannot be put in issue. *Id.*

Neither will the fact, where the plaintiff is a bank, that the surety and stockholder therein, affect his right to be discharged upon the failure of the bank to comply with the notice from the surety. *Id.*

The holder of a promissory note, who has been served with a statutory notice by the surety thereon, must not only direct the institution of a suit on the note, but must see that suit is actually commenced within the time fixed by the statute, or the surety will be discharged. *The German Am. Bank v. Denmire*, 58 Id., 137.

The notice which a surety may give to a creditor to sue, contemplated by this section of the code, is a notice to sue upon the contract, and not notice to sue the principal debtor only; and a failure by the creditor to comply with a notice requiring suit to be begun against the principal debtor alone will not discharge the surety. The statute, being in derogation of the common law, must be strictly complied with. *Harriman v. Egbert*, 36 Id., 270, followed; *Moore et al. v. Peterson et al.*, 64 Id., 423.

It may be shown by evidence, *aliunde*, that one who is nominally a joint maker of a promissory note is in fact but a surety. And a surety of this character is entitled to all the benefits of sections 1819 and 1820 of the revision. (Sections 2108 and 2109 of the code.) *Piper v. Neucomer et al.*, 25 Id., 221.

Where a person upon leaving the state placed notes, payable to him, in the hands of his son for collection, it was held, that this constituted the latter his agent respecting all matters properly connected with the purpose of the agency; that notice to such agent, by a surety on one of the notes to proceed against the maker, was equivalent to notice to the principal, and that a statement by such agent to the surety that the debt was paid, and that he need give himself no further trouble respecting it, estopped the principal from afterwards proceeding on the note against the surety. *Thornburgh v. Madren et al.*, 33 Id., 380.

A notice by a surety to the creditor to bring suit upon the obligation, should demand that suit be instituted against all the parties to the instrument, surety as well as principal, and not simply against the principal; otherwise a failure of the creditor to sue will not discharge the surety. *Harriman v. Egbert et al.*, 36 Id., 270; *Hill v. Sherman*, 15 Id., 365.

A request by the attorney of a grantor that a copy of the obligation be sent to him with the authority to sue both principal and guarantor, is not such a compliance with the requirements of section

2108 of the code as will discharge the guarantor if the creditor does not bring the suit within ten days thereafter. There should have been a request for *the creditor to bring suit* or permit the surety to do so. *The Davis S. M. Co. v. McGinnis et al.*, 45 Id., 538.

The notice required to be given by the surety to the holder of a promissory note to proceed by suit on the note or permit the surety to do so, must be given in writing. *Stevens v. Campbell*, 6 Id., 438.

SEC. 2110. [Surety may sue.]—When the surety commences such suit, he shall file his undertaking to pay such costs as may be adjudged against the creditor, and the suit shall be brought against all the obligors, but those joining in the request to the creditor shall make no defense to the action, but may be heard on the assessment of the damages.

SEC. 2111. [No application to official bonds.]—The provisions of this chapter extend to the executor of a deceased surety and holder of the contract, but they do not extend to the official bonds of public officers, executors, or guardians.

CHAPTER 6.

OF PRIVATE SEALS.

SECTION 2112. [Abolished.]—The use of private seals in written contracts, except the seals of corporations, is abolished; and the addition of a private seal to an instrument in writing, shall not affect its character in any respect.

The common law distinction between sealed and unsealed instruments is abolished by our statute, and want or failure of consideration in whole or in part may be shown in an action upon any instrument made after the statute took effect. *Williams v. Haines*, 27 Iowa, 251.

SEC. 2113. [Consideration implied.]—All contracts in writing, signed by the party to be bound, or his authorized agent or attorney, shall import a consideration.

Under the statutes, all contracts in writing signed by the party to be bound, import a consideration the same as sealed instruments at common law; and this rule applies to an indorsement of a promissory note by a guarantor. *Jones v. Berryhill*, 25 Iowa, 289; *Henderson v. Booth*, 11 Id., 212; *Sabin v. Harris*, 12 Id., 87.

A deed to real property imports a consideration. Per MILLER, J., *arguendo*, in *Wolverton v. Collins*, 34 Id., 238.

It is not necessary, in an action on a written contract of guaranty, to allege in the petition a sufficient consideration. Every contract in writing imports a consideration. *Henderson v. Booth*, 11 Id., 212; *Linder v. Lake*, 6 Id., 154; *Towsley v. Olds*, Id., 526; *Blake v. Blake*, 7 Id., 46.

Fraud may vitiate an assignment made for the benefit of creditors, though the assignee was not a party to, and had no knowledge of, the fraud. *Ruble v. McDonald*, 18 Id., 493.

A written contract is presumed to be founded upon a consideration, but the presumption may be rebutted by evidence. *Byers v. Harris et al.*, 67 Id., 685.

SEC. 2114. (As amended by ch. 90, 22d g. a.) [Failure of.]—The want or failure, in whole or in part, of the consideration of a written contract, may be shown as a defense total or partial, as the case may be, except to negotiable paper transferred in good faith and for a valuable consideration before maturity. [Provided, that if said paper shall have been procured by fraud from the maker thereof, no holder of such paper shall recover thereon of the maker, a greater sum than he paid therefor with interest and costs.]

If a debtor is unable to pay his debts according to the usage of trade, or unable to proceed in business without some general arrangement with his creditors, or some indulgence by way of extension of the time of payment, he is insolvent in contemplation of law. *Byers v. Harris*, 67 Id., 685.

The fact that some of the agents or servants of the assignee, after the making of the assignment, sold some of the assigned property on credit, will not vitiate the assignment. *Id.*

Nor will the fact that the assignor was engaged in the store as a clerk, after the execution of the assignment, be of itself, evidence of fraud in making assignment. *Id.*

CHAPTER 7.

OF ASSIGNMENT FOR CREDITORS.

SECTION 2115. [General only valid.]—No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims.

A creditor a under general assignment, who has special security, may be required by other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid, after exhausting his special security. *Wurtz, Austin & McVeigh v. Hart*, 13 Iowa, 515.

The execution of a mortgage to one or more creditors is not rendered void by the fact that the mortgagor made the same in contemplation of insolvency, and immediately thereafter executed a general assignment, hence a mortgage upon lands in this state is not rendered invalid by the execution, on the same day, in another state, of a general assignment, with preference of property in the latter state. *Lyon v. McIlvaine*, 24 Id., 9; *Lampson & Powers v. Arnold*, 19 Id., 479.

Under our statute a general assignment with a preference to creditors is void. 24 Id., 9.

A debtor in insolvent circumstances may mortgage or sell all of his property to pay or secure the debt of a single creditor; and a transfer of this kind, if free from fraud, is not void as being in contravention of our statute in relation to general assignments. *Farwell & Co. v. Howard & Co.*, 26 Id., 381.

When a general assignment is made for the purpose of hindering, delaying or defrauding creditors, it will be declared void. *Wooster, Templin & Co. v. Stanfield*, 11 Id., 128.

A debtor in insolvent circumstances may pay or secure the claims of part of his creditors to the exclusion of others. All of his property may be given in payment or security to one, and the transaction will not be considered fraudulent or void, as being in contravention of the statute. *Davis & Co. v. Gibbon*, 24 Id., 257.

It is not necessary that an instrument be denominated an assignment to justify a court in holding it to be such. It may be held an assignment though denominated a mortgage. But a mortgage though executed by an insolvent debtor and covering all of his property, is not necessarily an assignment, unless so intended. If the purpose of a mortgage made to a creditor is, what it purports to be, made in good faith as a security, even on all of the property of an insolvent debtor, it will not be held to be an assignment nor invalid under this section. And, even if such mortgage was made by the debtor for the purpose of hindering and delaying other creditors, it will not be fraudulent and void where there is no evidence to show that the mortgagee had any intention or purpose of aiding in the fraudulent plans of the mortgagor. *Kohn Bros. et al. v. Clement et al.*, 58 Iowa, 589.

A clause in a deed of assignment, directing the sale of the assigned property "when convenient, and as soon as can be done without material sacrifice," is not a badge of fraud, and does not render the assignment void. *Id.*

A creditor or joint-debtor of the assignor may act as assignee. *Id.*

Where lands situated in this state were conveyed, in contemplation of insolvency, by deeds of general assignment for the benefit of creditors, which deeds were executed out of the state, at the grantor's domicile, and by the terms of which certain creditors are preferred, it was held, that such deeds were invalid, and could not operate even as assignments in favor of all creditors *pro rata*. *Loving v. Pario et al.*, 10 Id., 282.

So where a debtor, contemplating insolvency, on his own motion, executes to certain creditors, at the same time, without consultation with them, several mortgages and deeds of trust, of all his property not exempt from execution, each instrument covering the same property, and reciting that it is subject to the prior conveyance—and causes the same to be filed of record on the same day, five minutes intervening between the filing of each, the transaction was held, to be in legal effect, a general assignment and not being made for all the creditors alike, without preferences, was invalid. *Burrows v. Lehdorff*, 8 Id., 96.

Where a debtor at the time of making a general assignment for the benefit of his creditors acts under the belief that he is insolvent, though he may not be so in fact, the assignment will not be invalid for the reason that he was not insolvent. *Savery v. Spalting*, 8 Id., 239.

If such debtor is unable to pay his debts according to the usage of trade, or unable to proceed in business, without some general arrangement with his creditors, or some indulgence by way of extension of the time of payment, he is insolvent in contemplation of law. *Id.*

The fact that some of the agents or servants of the assignee, after the making of the assignment, sold some of the assigned property on credit, will not vitiate the assignment. *Id.*

Nor will the fact that the assignor was engaged in the store as clerk, after the execution of the assignment, be of itself, evidence of fraud in making the assignment. *Id.*

Where M and H, with no intention of making a general assignment at the time of making certain mortgages and a partial assignment but made those instruments in good faith for the purpose of the mortgagee and indemnifying the partial assignee, those instruments did not in legal effect constitute any part of the general assignment for the benefit of creditors, and that they, as well as the general assignment, were valid under this section of the code. *Gage & Co., et al. v. Parry, Assignee, et al.*, 69 Id., 695.

Whether or not a disposition of property is to be regarded as an assignment for the benefit of creditors, or as a mortgage to secure particular creditors, is to be determined from the intention of the parties. If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it, if it is intended as an absolute conveyance of all his property, and is made for the purpose of securing a distribution of its proceeds among his creditors or a portion of them,—in legal effect it is an assignment for the benefit of creditors no matter what name or designation the parties may give it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more creditor, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all his property, and but a portion of his debts are secured by it. *Cadwell's Bank v. Chittenden, Garnishee*, 66 Id., 237.

A chattel mortgage made by partners, which does not include all the firm property, and which is not intended by any of the parties to operate as an assignment for the benefit of creditors, cannot be construed as an assignment. *Carson, Pirie, Scott & Co., v. Byers & Eggers et al.*, 67 Id., 606.

An assignment for benefit of creditors, whether contained in one or more deeds embracing the whole of the property of the debtor, will be held a general assignment and when it does not provide for the payment of all his creditors in proportion to their respective claims, it will be void. *Moore v. Church et al.*, 70 Id., 208.

The transfer by an insolvent debtor of all his property in parcels, by deeds and mortgages, to several of his creditors in satisfaction of security of their claims, does not constitute an assignment for the benefit of creditors, though all done at one time and as one transaction; and such conveyance cannot be set aside as being in violation of this section of the code. *Aulman v. Aulman et al.*, 71 Id., 124.

An assignment for the benefit of creditors is not void for the reason that it does not convey all the assignor's property where it reserves only such as the law exempts from execution. *Perry v. Vezina et al.*, 63 Id., 25.

Where an assignor for the benefit of creditors, three hours prior to making the assignment, executed a mortgage on certain property, but at the time of executing the same he had no intention of making an assignment, held that the assignment was not rendered void because of the execution of the mortgage. *Id.* See, also, *Farwell v. Jones, Id.*, 316.

SEC. 2116. [Assent of creditors presumed.]—In the case of an assignment of property for the benefit of all the creditors of the assignor, the assent of the creditors shall be presumed.

A general assignment made for the benefit of creditors will not be rendered invalid for a failure to make an inventory of the assets and liabilities of the assignor. *Wooster, Templin & Co. v. Stanfield et al.*, 11 Iowa, 128; *Price v. Parker, Id.*, 144.

An imperfect or defective inventory of property, conveyed by an assignment for the benefit of creditors, cannot be treated as an absolute nullity. *Drain v. Michel*, 8 Id., 438.

The assent of creditors to a general and unconditional assignment of property is presumed. *American & Co. v. Frank et al.*, 62 Id., 202, 204.

SEC. 2117. [Inventory to be annexed by debtor.]—The debtor shall annex to such assignment an inventory, under oath, of his estate, real and personal, according to the best of his knowledge, and also a list of his creditors and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debtor's estate; and such assignment shall vest in the assignee the title to any property belonging to the debtor at the time of making the assignment. Every assignment shall be duly acknowledged in the same manner as conveyances of real estate, and recorded in the county where the person making the same resides, or where the business in respect of which the same is made has been carried on.

The assent of creditors to a general and unconditional assignment of the property of the debtor is presumed. *Price v. Parker*, 11 Id., 144.

SEC. 2118. (*As amended by ch. 115, 21st g. a.*) [**Assignee to file inventory and appraisement.**]-The assignee shall also forthwith file with the clerk of the district or circuit court of the county where such assignment shall be recorded, a true and full inventory and valuation of said estate, under oath, so far as the same has come to his knowledge, and shall then and there, enter into bonds to said clerk, for the use of the creditors, in double the amount of the inventory and valuation, with one or more sufficient sureties, to be approved by said clerk, for the faithful performance of said trust, and the assignee may thereupon proceed to perform any duty necessary to carry into effect the intention of said assignment. (*Provided, however,* that on application of two-thirds of the creditors, in number and amount, the court shall remove the assignee and appoint in his stead a person as assignee approved by the creditors in number and amount as aforesaid; and when any assignee is removed, he shall immediately turn over to the clerk of the district court, or any person appointed by the court, all money and property of the estate in his hands.)

SEC. 2119. [**To give notice.**]-The assignee shall forthwith give notice of such assignment by publication in some newspaper in the county, if any, and if none, then in the nearest county thereto, which publication shall be continued at least six weeks; and shall also forthwith send a notice by mail to each creditor of whom he shall be informed, directed to their usual place of residence, and notify the creditors to present their claims, under oath, to him within three months thereafter.

A creditor who fails to file his claim with the assignee within three months after the first publication of the notice of assignment, is not entitled to share *pro rata* in the dividends of the estate. *In the Matter of the Assignment of Holt*, 45 Iowa, 301.

SEC. 2120. [**To report and file list of creditors.**]-At the expiration of three months from the time of first publishing notice, the assignee shall report and file with the clerk of the court a true and full list, under oath, of all such creditors of the assignor as shall have claimed to be such, with a statement of their claims, and also an affidavit of the publication of notice, and a list of the creditors, with their places of residence, to whom notice has been sent by mail, and the date of mailing, duly verified.

An order of the court that a *pro rata* dividend be paid by an assignee for the benefit of creditors, where the prior proceedings have been in all respects regular, and no exceptions have been filed to any of the claims presented, constitutes an adjudication as between the creditors which cannot be collaterally attacked. *Perry v. Murray et al.*, 55 Iowa, 416

Where the assignee's report, made under this section, shows that a claim was filed after the expiration of the three months prescribed in the statute, it is the duty of the assignee to resist the allowance of said claim, as if filed within the time, though no obligation was made at the time it was filed. *Conlee Lumber Co. v. Meyer*, 38 N. W. R., 117.

The report of the assignee under this section becomes a part of the record in the assignment proceedings without a formal tender of the report in evidence. *Id.*

SEC. 2121. [**Objections to claims filed: proceedings.**]-Any person interested may appear within three months after filing such report, and file with said clerk any exceptions to the claim or demand of any creditor; and the clerk shall forthwith cause notice thereof to be given to the creditor, which shall be served as in case of an original notice, returnable at the next term; and the said court shall at such term, proceed to hear the proofs and allegations of the parties in the premises, and shall render such judgment thereon as shall be just, and may allow a trial by jury thereon.

This section provides a method for excepting to the genuineness or correctness of a claim or demand, but does not afford any plain, speedy and adequate remedy, whereby creditors holding securities may be compelled to exhaust them before taking dividends under the assignment. *Wertz et al. v. Hart*, 13 Iowa, 515.

In a proceeding under this section, for the trial of exceptions by a party in interest to a claim or demand filed against the estate of an insolvent, the plaintiff, though a non-resident, cannot be required to give bond for security for costs. *Meyer v. Evans et al.*, 66 Id., 179.

The report of an assignee showed that the claim of A was secured by mortgage. To this item of the report B, a creditor, objected on the ground that the mortgage was invalid, and created no lien. A answered, setting the note of the assignor to him, and the mortgage made to secure it, and, claiming by virtue thereof, priority over the other creditors. *Held*, that these pleadings sufficiently presented for trial the issue as to A's right to priority, under this section of the code. *In re Assignment of Guyer*, 69 Id., 585.

SEC. 2122. [**Dividends ordered.**]—If no exception be made to the claim of any creditor, or if the same have been adjudicated, the court shall order the assignee to make, from time to time, fair and equal dividends among the creditors of the assets in his hands, in proportion to their claims, and as soon as may be, to render a final account of said trust to said court, who may allow such commissions to said assignee in the final settlement as may be considered just and right.

(CHAPTER 14, LAWS OF 1876.)

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

An Act to amend chapter 7, of title XIV, of the code, in relation to assignments for the benefit of creditors.

SECTION 1. [**Taxes to be first paid.**]—*Be it enacted by the general assembly of the state of Iowa:* That hereafter in all assignments of property for the benefit of creditors, whether under chapter 7, of title XIV of the code, or at common law, assessments or taxes levied under the laws of this state, including municipal corporations, shall be entitled to priority or preference to be first paid in full.

(Took effect by publication in newspapers February 27, 1876.)

As between an assignee for the benefit of creditors and the holder of a mortgage upon the real estate of the assignor, taxes levied after the making of the assignment upon property not covered by the mortgage should be paid by the assignee from the funds in his hands. *Brooks v. Eighmey*, 53 Iowa, 276.

In a case where the mortgagee of the assignor had foreclosed and bought in, and had gone into possession under a quit-claim deed from the mortgagor and his assignee, the statute did not apply, the consideration of the quit-claim being, on the part of the purchaser, to take the property subject to the taxes, and on the part of the assignee the release of the right to redeem. *Brown et al. v. Keene, Jr.*, 33 N. W. R., 651.

Where the county has acquired no lien for taxes upon personal property which has passed into the hands of a receiver, pending litigation concerning the priority of liens which have already attached to absorb the property, *held*, that the county has no claim on the property, or its proceeds in the hands of a receiver, for the taxes on the property. *Howard County v. Strother*, 71 Iowa, 683.

SEC. 2123. (*As amended by ch. 125, 21st g. a.*) **The assignee shall at all times be subject** to the order and supervision of the court or judge, and the said court or judge may, by citation and attachment, compel the assignee, from time to time, to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by this chapter. [The assignee shall dispose of all personal property, and divide the proceeds of the same among the creditors as they may be entitled thereto, within six months of the date of assignment, and shall dispose of real estate within one year from the date of assignment, and make full settlement at that date unless the court or judge, for good reason shown, shall extend the time within which such disposition shall be made.]

SEC. 2124. [**Not void: citation to debtor.**]—No assignment shall be declared fraudulent or void, for want of any list or inventory as provided in this chapter. The court or judge may, upon application of the assignee or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, or at the next term, to answer under oath such matters as may then and there be inquired of him, and such debtor may then and there be fully examined under oath

as to the amount and situation of his estate, and the names of the creditors and the amount due to each, with their places of residence; and may compel the delivery to the assignee of any property or estate embraced in the assignment.

SEC. 2125. [Additional inventory.]—The assignee shall, from time to time, file with the clerk of the court, an inventory and valuation of any additional property which may come into his hands under said assignment after the filing of the first inventory, and the clerk may thereupon require him to give additional security.

SEC. 2126. [Claims not due.]—Any creditor may claim debts to become due as well as debts due, but on debts not due a reasonable abatement shall be made when the same are not drawing interest, and all creditors who shall not exhibit their claim within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the court.

A creditor of an insolvent, who does not exhibit his claim within three months from the time of giving notice of assessment as required by section 2119 of the code, cannot participate in the dividends until after the payment in full of all claims presented within that time and allowed by the court. *McKinley, Gilchrist & Co. v. Nourse, Assignee, et al.*, 67 Iowa, 118.

This section, providing that claims filed and allowed within three months after notice by publication, shall be paid in full before the payment of any claims filed thereafter, the fact that a creditor did not have actual notice of the assignment until two days before the expiration of the time allowed, and thereby failed to present his claim, will not be entitled to equitable relief; the statute being a complete bar to recovery. *Conlee Lumber Co. v. Meyer*, 38 N. W. Rep., 117.

SEC. 2127. [Sale of property.]—Any assignee as aforesaid shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover in the name of such assignee everything belong or appertaining to said estate, and generally do whatsoever the debtor might have done in the premises; but no sale of real estate belonging to said trust shall be made without notice, published as in the case of sales of real estate on execution, unless the court shall order and direct otherwise.

By entering into possession of the property assigned, the assignee accepts the trust; after which time he may bring an action of replevin for the property, although no inventory or bond has yet been filed. *Price v. Parker*, 11 Iowa, 144.

The assignee in a general assignment for the benefit of creditors takes the assigned property subject to all the equities existing against it in favor of third parties. He merely stands in the shoes, and succeeds only to the rights of, his assignor. *Roberts v. Austin, Corbin & Co.*, 26 Id., 315.

SEC. 2128. [Death or failure of assignee: court may appoint another.]—In case any assignee shall die before the closing of his trust, or in case any assignee shall fail or neglect for the period of twenty days after the making of any assignment, to file an inventory and valuation, and give bonds as required by this chapter, the district or circuit court, or any judge thereof, of the county where such assignment may be recorded, on the application of any person interested, shall appoint some person to execute the trust embraced in such assignment; and such person, on giving bond with sureties as required above of the assignee, shall possess all the powers conferred upon such assignee, and shall be subject to all the duties hereby imposed, as fully as though named in the assignment; and in case any security shall be discovered to be insufficient, or on complaint before the court or judge, it should be made appear that any assignee is guilty of wasting or misapplying the trust estate, said court or judge may direct and require additional security, and may remove such assignee and may appoint others instead; and such person so appointed, on giving bond, shall have full power to execute such duties and to demand and sue for all estate in the hands of the person removed, and to demand and recover the amount and value of all moneys and property or estate so wasted and misapplied which he may neglect or refuse to make satisfaction for, from such person and his sureties.

(CHAPTER 124, LAWS OF 1884.)

FUNDS OF INSOLVENTS.

An Act to provide for the distribution of funds by the assignees of insolvents.

SECTION 1. [**Personal service, a preferred claim.**]*—Be it enacted by the general assembly of the state of Iowa:* That upon making order for the distribution of the assets in the hands of the assignee, of an insolvent, as provided in section 2122 of the code, the court shall order to be paid in full, as a preferred claim, the earnings of any creditor for his personal services rendered to the assignor at any time within ninety days next preceding the execution of the assignment.

SEC. 2. [**When unable to find creditor: distribution of unclaimed dividend.**]*—That if upon the making of the final dividend to the creditors of the estate of an insolvent by the assignee, he shall be unable after proper efforts, to ascertain the place of residence of any creditor, or any person who is authorized to receive the dividend due such creditor, he shall report the same to the court, with evidence showing diligent attempt to find the creditor, or person authorized to receive the dividend. Whereupon the court may in its discretion, order the distribution of the unclaimed dividend among the other creditors.*

Approved April 1, 1884.

CHAPTER 8.

RELATING TO MECHANICS' LIENS.

Chapter 8 of code, of mechanics' liens, repealed and substituted by the following:

(CHAPTER 100, LAWS OF 1876.)

An Act repealing chapter 8, of title XIV of the code, and providing for mechanics' liens.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* Chapter eight of title XIV of the code, entitled, "of mechanics' liens," is hereby repealed; *provided*, that this repeal shall not affect any contract already made, executed or executory, or impair any right whatever, arising under the law hereby repealed.

Chapter 44 of the acts of 1874 made a mechanic's lien "transferable and assignable" and when for labor alone was made exempt from execution.

Query.—Was that act repealed by section 1, of chapter 100, laws of 1876, above.

Under chapter 14 of the code, as amended by chapter 44, acts of 1874, the assignment of an installment due a mechanic for work, before the completion of his contract, did not carry with it the right to a mechanic's lien upon the property. *Merchant v. Ottumwa W. P. Co.*, 54 Iowa, 451.

SEC. 2129 (2). [**Collateral security: prevents a lien.**]*—No person shall be entitled to a mechanic's lien, who, at the time of executing or making the contract for furnishing material or performing labor, as hereinafter provided, or during the progress of the work, erection, building or other improvement, shall take any collateral security on such contract. But after the completion of such work, and when the contractor or other person shall have become entitled to claim, or have a lien, the taking collateral or other security shall not affect the right to such mechanic's lien, unless such new security shall be by express agreement given and received in lieu of the mechanics' lien.*

The taking of a promissory note for the amount due for work done or materials furnished, in the erection of a house, will not divest the right of a party to a mechanic's lien, and the note may be properly taken as the amount due, and the time of payment under the contract. *Logan & Cook v. Attix*, 7 Iowa, 77; *Bonsall v. Taylor*, 5 Id., 546.

A mere promise by a subsequent purchaser of property subject to a mechanics' lien, in consideration of forbearance to pay the claim secured by the lien, is not collateral security within the meaning of section 1009 of the code of 1851. *Mervin v. Sherman*, 9 Id., 331.

The taking a mortgage by the person claiming a mechanic's lien, upon the same property on which the lien is claimed is not to be considered as collateral security. *Gilchrist v. Gotschall*, 39 Id., 311.

Although the right to a mechanic's lien has been forfeited by taking collateral security, such security may be surrendered and the lien, by agreement of parties, restored; and when so restored it becomes as valid and effective between the parties, or those subsequently acquiring rights in the property, as though no security had been taken. *Getcheil & Sons v. Musgrove*, 54 Id., 744.

The fact that a husband, who as agent for his wife, contracts for material to be used in the erection of a building on her land, also binds himself by such contract to pay therefor, will not constitute the taking of collateral security by the material man so as to defeat his right to a mechanic's lien. *Bissell v. Lewis et al.*, 56 Id., 231.

SEC. 2130 (3). [Who may have a lien.]—Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery, or fixtures for, any building, erection or other improvement, upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor, or sub-contractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished.

The law contemplates a contract or agreement more specific than the mere purchase of the materials in the ordinary course of trade to entitle a party to a mechanic's lien. It is not sufficient to show that he furnished the materials, without proof to establish the further fact that they were furnished especially to be used in or about a building. *Cotes & Davies v. Shorey*, 9 Iowa, 416; *Jones v. Swan*, 21 Id., 181; *Stockwell v. Carpenter*, 27 Id., 119; *Miller v. Hollingsworth*, 33 Id., 224.

It is not necessary that the contract be in writing, nor need it be proved by direct and positive testimony, but the jury should be satisfied that such an agreement existed, and that the materials were furnished in pursuance thereof. *Id.*

It is not necessary that every item furnished should be contemplated and specified at the time of making the contract; and it makes no difference that the items are charged from time to time in the books of the mechanic or builder in the same manner as he charges ordinary customers; neither is it necessary that it should be expressly agreed that he is to have a lien for his materials or work. *Jones v. Swan*, 21 Id., 181; *Stockwell v. Carpenter*, 27 Id., 119.

One who performs labor for a contractor in the erection of a building may establish a mechanic's lien against the building therefor, though no express contract for payment was made. *Foerder v. Wesner et al.*, 56 Id., 157.

The fact that one who performs labor in the erection of a building also acts as overseer of other workmen, will not defeat his right to a mechanic's lien. *Id.*

The breaking of prairie is not an improvement upon land such as will entitle the person doing the breaking to a mechanic's lien. *Brown v. Wyman*, Id., 452.

A mechanic is entitled to a lien for labor performed on a house standing on the land of the wife, when such labor was performed under a contract with the husband as agent of the wife, for her use and benefit, with her knowledge and consent, and for which they promised to pay. *Riddle v. Wilson*, 23 Id., 464; *Burdick v. Moon et ux.*, 24 Id., 418.

The agency of the husband to make a contract for lumber on the part of the wife will not be presumed from the marital relation alone; nor from the fact that the lumber was used by the husband in the erection of a house upon land belonging to the wife. *Miller v. Hollingsworth*, 33 Id., 224; *Price v. Hornby*, 46 Id., 696. But where the husband purchases lumber with which to make improvements on the land of his wife, and it is, with her acquiescence, so used in the enhancement of her separate property, with full knowledge on her part that it is unpaid for, and of all the facts, the seller will be entitled to an equitable lien on the property for the value of the materials furnished. *Miller v. Hollingsworth*, 36 Id., 163.

A day laborer upon a railroad is entitled to a lien, under the statute, for his wages. *Morgan v. Carroll*, 35 Id., 22.

The lien may be enforced against a party having possession under a contract or bond for deed.

And the subsequent procurement of the full legal title by the holder of the contract or bond will not prejudice the lien. *Monroe v. West*, 12 Id., 119; *Stockwell v. Carpenter*, 27 Id., 119.

A mechanic's lien attaches to the building or improvement erected with the materials furnished, but does not follow the material into the hands of a vendee of the purchaser and attach to a building he may use them to erect. *Heaton & Todd v. Herr et al.*, 42 Id., 187.

Before the enactment of chapter 100 of the acts of 1876, the only manner of establishing the priority of a mechanic's lien on a building over a prior encumbrance on the land was by the sale and removal of the building; and where the nature of the improvement was such that it could not be removed, the lien of the mechanic must have been postponed to the lien on the land. *Conrad et al. v. Starr et al.*, 50 Id., 470.

A mechanic's lien cannot be established against a building owned by a county and used for county purposes. *Lewis v. Chickasaw Co.*, 50 Id., 234; *Breneman v. Harvey*, 70 Id., 479.

The mechanic's lien law is framed with reference only to property which can be sold on execution, and bridges constructed by a county are not, therefore, subject to such a lien. Nor can the court, in an action to enforce a lien upon such property, render a decree for the amount found due, without ordering a sale of the property. *Loring & Co. v. Small et al.*, 50 Id., 271.

A mechanic's lien cannot be established against a public school house. And the fact that lumber which had been attached was released by the officer making the attachment and afterwards used in the construction of a school house, with knowledge of the attachment by the officers of the district, was held not to render the district liable therefor, or to give the attaching creditor a lien thereon. *Charnock v. The Dist. Twp. of Colfax et al.*, 51 Id., 70.

A mechanic's lien will attach and may be enforced against a building and the land on which it is situated for the labor and material used in the construction and erection of lightning rods upon the building, regardless of the question whether or not such rods are of any utility. *Harris v. Schultz*, 64 Id., 539.

The process of the mechanic's lien law cannot be used to subject the indebtedness of a county to a contractor to the payment of a debt owing by him to a subcontractor. *Breneman v. Harvey et al.*, 70 Id., 479.

Under this section and section 2136 a right to a lien on improvements may exist without any contract with the owner of the fee, but by contract with the owner of the improvements. *Lane v. Snow*, 66 Id., 544.

Where the defendant in a mechanic's lien foreclosure is the owner of both the land and the building, and there is no prior lien on the land, it is error to order the sale of the building alone, because its removal from the land would defeat the owner's right of redemption. *Early v. Burt et al.*, 68 Id., 716.

Where materials were furnished the defendants under one contract for two buildings erected by him on separate lots owned by him, held that it was not necessary in the petition to foreclose a mechanic's lien for such material, to set out a bill of particulars showing the materials purchased for such house separately. *The Bowman Lumber Co. v. Newton et al.*, 72 Id., 90.

SEC. 2131 (4). [Extent of lien.]—The entire land upon which any such building, erection, or other improvement is situated, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter, to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or things furnished, and when the interest owned in said land by such owner of such building, erection or other improvement is only a leasehold interest, the forfeiture of such lease for the non-payment of rent, or for non-compliance with any of the other stipulations therein, shall not forfeit or impair such liens so far as concerns such buildings, erections and improvements, but the same may be sold to satisfy said lien, and be moved within thirty days after the sale thereof by the purchaser.

See *Stockwell v. Carpenter*, 27 Iowa, 119.

A mechanic's lien will attach and may be enforced against a building, and the land on which it is situated, for the labor and material used in the construction and erection of lightning rods upon the building, regardless of the question whether or not such rods are of any utility. *Harris et al. v. Schultz et al.*, 64 Id., 539.

Where work was performed on a railway under a subcontract in July and August, 1881, and the notice required by this section, of the filing of the claim for a lien, was given October 31, 1881, and, prior to the giving of the notice, the subcontractor had been paid in full, in accordance with the contract, for the work, after its completion, it was held, that the lien could not be enforced against the railway. *Nash & Phelps v. The C., M. & St. Paul R'y Co.*, 62 Id., 49.

SEC. 2132 (5). [Extent of lien on work of internal improvement.]—And when such material shall have been furnished or labor performed, in the construction, repair, or equipment of any railroad, canal, viaduct, or other similar

improvement, the lien therefor shall extend and attach to the erection, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging; all of which, except the easement of right of way, shall constitute the building, erection or improvement provided and mentioned in this statute.

In *Bear v. The B. & C. R. R. Co.*, filed at the June term, 1878, the supreme court ruled that the mechanic's lien does not extend to the whole line of the railroad, and that the improvements are not of such a character as that they can be sold under the lien and be removed by the purchaser. They are part of the road. 12 West. Jur., 551. See 48 Iowa, 619.

It was also held that the lien of a mechanic for repairs upon a completed railway is not paramount to the lien of a mortgage executed after the commencement and before the completion of the road. *Id.* Nor were the improvements constitute an integral part of the road. *Id.*

SEC. 2133 (6). [**Contractor or subcontractor to make and file statement.**]—Every person, whether contractor or subcontractor, who wishes to avail himself of the provisions of this statute, shall file with the clerk of the district court of the county in which the building, erection or other improvement to be charged with the lien is situated, a just and true statement or account of the demand due him after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien, and verified by affidavit. Such verified statement or account must be filed by a principal contractor, within ninety days, and by a subcontractor within thirty days, from the date on which the last of the material shall have been furnished, or the last of the labor was performed. But a failure or omission to file the same within the periods last aforesaid, shall not defeat the lien, except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed; *provided*, that where a lien is claimed upon a railway, the subcontractor shall have sixty days from the last day of the month in which such labor was done or material furnished, within which to file his claim therefor.

Under the revision it was held that a mechanic's lien for labor performed or materials furnished, held good as against intervening incumbrances for the period of ninety days from the date of the last item, without filing a statement or claim, as the statute directed. After that time the filing was necessary in order to preserve the priority of the lien. *Evans v. Tripp*, 35 Iowa, 371; *Noel v. Temple*, 12 Id., 276; *Jones v. Swan & Co.*, 21 Id., 181.

Where a mechanic's lien, which is junior to a mortgage on the premises, is filed before the expiration of the ninety days, it will not be prejudiced by the commencement of a suit to foreclose the mortgage prior to such filing. Nor will such lien-holder be affected by such foreclosure proceedings to which he is not made a party. *Jones v. Hartstock et al.*, 42 Id., 147.

So also it was held that public bridges of a county cannot be made subject to a mechanic's lien under our statutes. *Loring & Co. v. Small et al.*, and *Dunbar v. same*, Id., 60.

[This same doctrine would seem to apply to all public buildings of state, counties, cities, and school districts.]

It was held, under chapter 49 of the laws of 1874, that the requirement of that statute that the written settlement with the subcontractor should be given to the contractor by the laborer claiming the lien, was sufficiently complied with by filing the settlement with the clerk within the thirty days allowed for filing the lien. *Bundy v. The K. & D. M. R. Co.*, 49 Id., 207.

In an action to enforce a mechanic's lien, the statement or claim filed for the lien, after stating the making of a contract "that under and by virtue of said contract, the said William Valentine furnished materials for the building, etc., as specified, and two promissory notes were given by the said Rawson, to the affiant" (giving dates and amounts), "at and for the usual prices charged for such lumber material," was held insufficient for the reason that it did not contain a "statement or account" of the demand due the plaintiff. It should show the *account* whereon the demand was founded. *Valentine v. Rawson*, 57 Id., 179, 181.

Where the party entitled to a mechanic's lien fails to file the same until after the lapse of ninety days, during which time the property has passed to an innocent purchaser, the mechanic is not entitled to enforce his lien against such purchaser, and the rule is not varied by the fact that the vendee took the property under a bond for a deed, and made no actual payment, but simply executed his note for the purchase price. *Weston & Co. v. Dunlap et al.*, 50 Id., 183.

The contract required to authorize a mechanic's lien need not be express or in writing, but may be oral or implied. *Neilson et al v. The Iowa Eastern R. Co.*, 51 Id., 184.

The fact that such contract was in writing would not exclude evidence to show the purpose for which the materials mentioned in the contract were used. *Id.*

The statement filed with the clerk is the limit of plaintiff's recovery only with respect to purchasers and incumbancers. *Id.*

A mechanic's lien upon a railroad will not embrace the rolling stock thereon. Such stock constitutes no part of the real estate. *Id.*

The fact that a part only of the material furnished is used in a building or improvement will not prevent the lien from attaching for the whole amount furnished. *Id.*

A lien for materials furnished for the construction of a railroad embraces only the completed portion of the road, but the fact that the road, as projected when the materials were furnished, was not fully completed, will not defeat the lien. *Id.*

A subcontractor may waive his right to the mechanic's lien, and if he fails to do what is required of him by the statute, it is and must be conclusively presumed he has done so. *Brown v. Smith*, 55 Id., 31, 32.

A subcontractor on a railroad, in order to secure a mechanic's lien for work done, must file his claim therefor within sixty days from the last day of the calendar month in which the work was performed, the word "done" in the statute having reference to the time of the performance of the work, and not to the time when the work of the subcontractor is completed, and each month's work, for this purpose, being considered as separate from that of other months. *Sandoval v. Ford & Co. et al.*, 55 Id., 461.

As against the holders of other liens it is not essential to the validity of a mechanic's lien that a statement and claim therefor should be filed with the clerk. *Bissell v. Lewis et al.*, 56 Id., 231.

Where the owner of an improvement knows that subcontractors are furnishing labor and materials, and knows who they are, he cannot defeat them of their rights under the mechanic's lien law by paying to the contractor, or to subsequent subcontractors on his orders, the contract price of the work, in disregard of the claims of the prior subcontractors. *The Chicago Lumber Co. v. Woodside et al.*, 71 Id., 550.

Where the plaintiff, a sub-contractor, commenced an action on a statement and claim for a mechanic's lien, and blended therewith was a claim for moneys received and disbursed for his immediate employer, and then claimed a lien for a general balance which was much greater than the balance due him for labor, it was held that a demurrer was properly sustained to the petition showing these facts, because the statement and claim filed was not a "just and true statement" as required by the statute, and did not entitle the plaintiff to a lien. Whether a mere mistake in claiming a lien for too large a sum would defeat the claim, *quere.* *Stubbs v. The C, C. S. & S. W. R'y Co.*, 65 Id., 513.

A mortgage taken more than ninety days after the last item in an account for a mechanic's lien, and before the statement for the lien is filed, is an incumbrance in good faith, without notice, within the meaning of this section of the code, providing that such incumbrances shall be superior to the mechanic's lien. *Gilbert, Hedge & Co. v. Thorp et al.*, 72 Id., 714.

SEC. 2134 (7). [Subcontractor must give notice of filing claim.]—To preserve his lien as against the owner and to prevent payments by the latter to the principal contractor or to intermediate subcontractors, but for no other purpose, the subcontractor must, within the thirty days provided in section six (6), serve upon such owner, his agent or trustee, a written notice of the filing of said claim, which notices may be served by any sheriff or constable, or other person; and if the party to be served, his agent or trustee, is out of the county wherein the property is situated, a return of that fact by the officers shall constitute sufficient service from and after it is filed with the clerk. But the lien of the sub-contractor may at any time be vacated and discharged by the owner, contractor, or intermediate subcontractor, filed [filing] with the clerk of the said district court a bond in twice the amount of the sum for which the mechanic's lien is claimed, and filed with two or more sureties to be approved by the clerk, conditioned for the payment of any sum for which the mechanic may obtain judgment upon the demand of which such statement or account has been filed. But if no claim for a lien is filed within the periods hereinbefore provided and the notice thereof is not served, or if such thing being done and the bond as above provided is filed, then the owner or contractor may thereafter proceed, make payments and adjust their claims, without regard to the lien of the subcontractor, and nothing in this act contained shall be construed to require the owner to pay a greater amount or in any other manner or

at earlier dates than those provided in his contract. But the liens created by this act are for the full enforcement thereof for the use and benefit of the holders of said liens.

Before the statement of his lien by a subcontractor can be given to the owner to establish his lien, either the contractor or his duly authorized agent must have refused to sign a statement of his claim. *Mears & Hays v. Stubbs & Co.*, 45 Iowa, 675. [This case was decided under the provisions of the code of 1873.]

A written notice of the filing of the claim for a mechanic's lien by a subcontractor must be given to the owner, and as this is a statutory lien, it matters not that the owner may have knowledge of the claim; it is not sufficient unless the written notice is given. The statute does not recognize any other notice as sufficient. *Townsbury v. The Iowa, M. & N. P. R. Co.*, June term, 1878; 12 West. Jur., 694.

To entitle a subcontractor, or a party furnishing a subcontractor with materials, to a lien therefor, he must give notice thereof to the owner or his agent, and his lien attaches only to the extent of the balance due the contractor at the time of the giving the notice. *Cutler et al. v. McCormick et al.*, 48 Iowa, 306.

As to the notice required by this section there is no distinction between railroad and other subcontractors, the former like the latter being required to give notice of their claims within thirty days from the completion of their work to prevent payments being made to their principals. *Sandral v. Ford & Co. et al.*, 55 Id., 461.

Subcontractors who furnish materials or perform labor for the erection of a building are required to take notice of the terms of the principal's contract, and the owner is protected in making payments to the principal contractor in accordance with the terms of his contract, unless notified of claims for material or labor furnished before such payments are due. *Stewart & Hayden v. Wright et al.*, 52 Id., 335.

Where, under a contract for the erection of a building, the contractor gave to a party furnishing material, an order upon the owner, which was accepted by him, conditioned upon the performance of the contract, held, that whatever the contractor became entitled to thereafter must be applied to the payment of the order. *Id.*

The filing of a statement of account required to be filed with the clerk by a subcontractor within thirty days, to establish his lien, or, if he claims a lien upon a railway, within sixty days from the last day of the month in which the work was done, as provided in section 6 of chapter 100, laws of 1876, does not entitle the subcontractor to his lien unless he shall, within the proper time, as required in section 7 of said chapter, give written notice of the filing thereof to the owner, his agent or trustee. Any other than the written notice prescribed by the statute will not avail. *Townsbury v. The I. M. & N. P. R. Co.*, 49 Id., 255.

Where a building contract provided that subcontractors should be paid by orders given by the principal contractor, and the owner had knowledge of the furnishing of materials by certain subcontractors, it was held that the owner was liable therefor although full payment had been made to the principal contractor before notice, a claim for a mechanic's lien having been filed and notice served by the subcontractors within the thirty days prescribed by the statute. *Winter & Co. v. Hudson, et al.*, 54 Id., 336.

Where a subcontractor undertakes to enforce a mechanic's lien, he should show in his petition such indebtedness on part of the owner to the contractor, either at the time the subcontractor's account commenced, or later, as will justify the court in decreeing a lien; since under this section the owner cannot be required to pay a greater amount, nor in any other manner, or at earlier dates than those provided in his contract; but notwithstanding the defect in the petition in the case before the court, on account of the manner in which the same was presented, and the plaintiff being entitled to a lien for a certain amount, the judgment was modified accordingly. *Martin v. Morgan* 64 Id., 270.

Where the owner of a building in the course of erection had contracted to pay to the contractors eighty per cent of all the work done and materials furnished every Saturday night, and the rest of the contract price upon completion of the building, and he knew that the contractors would have to purchase, and did purchase, lumber of some one, but he had no reason to suppose that they were insolvent, and there were several lumber dealers in the city where the building was erected, and he did not in fact know who was furnishing the lumber, and the contractor abandoned the work before it was completed, held that he was authorized to pay the contractors, and in strict accordance with the terms of the contract, for the work done and materials furnished, as well as for extra work done on the building by them, and to pay out to others the amount necessary to complete the building, and that the material man, as a subcontractor, could recover of the owner, on a mechanic's lien, only so much of the contract price as yet remained in his hands. *The Fullerton Lumber Co. v. Osborn*, 72 Id., 472.

SEC. 2135 (8). [Extent of lien if claim is filed after expiration of thirty days.]—A subcontractor may at any time after the expiration of said thirty days, file his claim for a mechanic's lien with the clerk of the district court, as herein-

before provided, and give written notice thereof to the owner, his agent or trustee, as provided in section seven (7), and from and after the service of such notice his lien shall have the same force and effect, and be prosecuted or vacated by bond, as if filed within the thirty days; but shall be enforced against the property or upon the bond, if given by the owner, only to the extent of the balance due from the owner to the contractor at the time of the service of such notice upon the owner, his agent or trustee. But if in such case the bond is given by the contractor or person contracting with the subcontractor filing the claim for a lien, such bond shall be enforced to the full extent of the amount found due the subcontractor.

SEC. 9. [**Priority.**—The mechanic's lien provided for by this statute shall take priority as follows:

First—As between persons claiming mechanics' liens upon the same property, according to the order of the filing of the statements and accounts therefor;

Second—[**Over garnishments.**—They shall take priority to all garnishments upon the person of the owner for the contract debt, made prior or subsequent to the commencement of the furnishing of the material or performance of the labor, without regard to the date of filing the claim for mechanic's lien.

Third—[**Over all other liens and incumbrances.**—They shall be preferred to all other liens and incumbrances which may be attached to or upon such building, erection or other improvements, or either of them, and to the land upon which they are situated, made subsequent to the commencement of said building, erection or other improvement. *Provided*, that the rights of purchasers, *encumbrances* (encumbrancers) and other persons, who acquire interests in good faith for valuable consideration and without notice, after the expiration of the time for filing claims for liens, as provided in section six (6), shall be prior and paramount to the claims of all contractors or subcontractors who have not, at the date such rights and interests were acquired, filed their claims for mechanics' liens.

Plaintiffs under a contract with W & Son, furnished the materials for the enlargement of a building occupied by W & Son. Afterwards W mortgaged the premises to E. Plaintiffs, in an action to foreclose their lien, sought to have it established as superior to E's mortgage. But they failed to show that W & Son had such an interest in the property that a mechanic's lien would attach thereto. *Held*, that the evidence did not warrant a decree making their lien superior to the mortgage. *Dierks Bros. & Lamson v. Walrod & Son et al.*, 66 Iowa, 354.

Fourth—[**Shall attach any building, etc., in preference to prior lien on land where building is situated.**—The liens for the things aforesaid or the work, including those for additions, repairs and betterments, shall attach to the buildings, erections or improvements for which they were furnished or done, in preference to any prior lien or incumbrance or mortgage upon the land upon which such erection, building or improvement belongs, or is erected or put. If such material was furnished or labor performed in the erection or construction of an original and independent building, erection or other improvement, commenced since the attaching or execution of such prior lien, incumbrance or mortgage, the court may in its discretion order and direct such building, erection or improvement to be separately sold under execution, and the purchaser may remove the same within such reasonable time as the court may fix. But if, in the discretion of the court, such building should not be separately sold, the court shall take an account and ascertain the separate values of the land, and the erection, building or other improvement, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien, priority upon the land, and to the mechanic's lien, priority upon the building, erection, or other improvement. If the material furnished or labor performed was for addition to, repairs of, or betterments upon buildings, erections or other improvements, the court shall take an account of the values before such material was furnished or labor performed, and the enhanced value caused by such addition, repairs or betterments and upon the sale of the premises, distribute the proceeds of sale so as to secure to the prior mortgage or

lien priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien, and to the mechanic's lien priority upon the enhanced value caused by such additions, repairs or betterments. In case the premises do not sell for more than sufficient to pay off the prior mortgage or other lien, the proceeds shall be applied on the prior mortgage or other liens.

A mechanic's lien will have priority on the building over the lien of a vendor for the purchase money of the land. *Stockwell v. Carpenter*, 27 Iowa, 119.

It was held in *Getchell & Tichnor v. Allen*, 34 Id., 559, under the law as it then stood, that a mechanic's lien for work or materials furnished in making additions or repairs to a building, is not entitled to a prior lien on the building, over a prior mortgage of the premises, but that it will have priority as to an independent structure on the land.

In *Neilson v. The Iowa Eastern R'y Co.*, 44 Id., 71, it was held that a mechanic's lien attaches from the commencement of the building or improvement, and takes precedence over a mortgage executed after that time, although the particular work or material for which the lien is claimed, was not done or promised until after the making and recording of the mortgage.

The party who furnishes materials or machinery for a building, by the filing of his statement and claim for a lien acquires one upon the entire structure, and what he furnishes becomes in turn subject to all liens of his fellow-mechanics which attached earlier. *Equitable Life Ins. Co. v. Slye et al.*, 45 Id., 615. It was also held in this case that a mechanic's lien for materials furnished for the improvement or enlargement of a building does not take priority over an existing mortgage, and this rule prevails even though the building be changed so that very little of the original structure remains. Following *Getchell & Tichnor v. Allen*, 34 Id., 559. [This case was decided upon the law as it stood prior to the taking effect of the act of 1876, now in force.]

Where materials are furnished and used for a building already erected and covered by mortgage, and the whole premises do not sell for more than sufficient to pay off the mortgage, the proceeds must all be applied on the mortgage according to the last clause of this section, which clause must be construed as a *proviso* to the preceding language of the section to which it belongs. *German Bank v. Schloth*, 59 Id., 316.

A mechanic's lien will have priority of a mortgage executed and recorded within ninety days from the date of the last item. *Lamb & Son v. Hanneman*, 40 Id., 41; *Evans v. Gripp*, 35 Id., 371.

Where a mechanic's lien was not filed against a railroad until two years and two months after the materials were furnished, and a sale of the road was made after the ninety days within which the lien should have been filed, it was held, that the purchaser at such sale took the road discharged of the mechanic's lien. *Bear v. The B., C. R. & M. R'y Co.*, June term, 1878; West. Jur., vol. 12, 551; 48 Iowa, 619.

A mechanic's lien upon a railroad for the construction of a new bridge and abutment in place of an old one, is not a paramount lien to a mortgage upon the road previous to the erection of the new bridge. *Id.*

The lien of a mechanic for repairs upon a completed railway is not paramount and superior to the lien of a mortgage executed after the commencement and before the completion of the road. *Id.* Nor will the lien of the mechanic upon the particular work performed by him take precedence of such mortgage, when the improvements he has made constitute an integral part of the road. *Id.*

[This case was decided upon the law as it stood prior to the taking effect of chapter 100, laws of 1876.]

Where a mechanic's lien, which misdescribed what was intended to be covered thereby, had been foreclosed, it was held that the lien did not become merged in the judgment so that another lien, correctly describing the property, might not be filed. *Gray & Stevenson v. Dunham et al.*, 50 Id., 170.

While it is true under this provision of the statute a mechanic's lien will, under certain circumstances, have priority of a mortgage, yet this provision has no application to a case where the mortgage was foreclosed and the premises sold thereunder, before the materials for which the lien is claimed were furnished. *Shepardson Bros. v. Johnson et al.*, 60 Id., 239.

October 20, 1882, B executed to S a trust upon certain real estate to secure an existing debt. Between November 9, 1882, and April 3, 1883, plaintiffs furnished B materials for the erection of a building on the real estate. June 4, 1883, the property was seized upon an attachment at the suit of P against B. July 3, 1883, plaintiffs filed their statement for a mechanic's lien, in the clerk's office. The question being upon the priority of the several liens, held, 1. That the trust deed, as a lien, not only on the land, but on the improvements subsequently placed thereon, was superior to the mechanic's lien. Following *German Bank v. Schloth*, 59 Id., 316. 2. That the mechanic's lien was superior to the attachment, because, while the statement for a lien was not filed within the ninety days required by the statute, P's rights accrued before the expiration of the ninety days, and by the express language of the statute, it is only purchasers and incum-

brancers in good faith without notice, whose rights accrue after the ninety days, that are not defeated by the lien in such cases. *Curtis Bros. & Co. v. Broadwell et al.*, 66 id., 662.

Where there was a prior mortgage on the farm on which a new building was erected, for the materials of which plaintiff claimed the establishment of a mechanic's lien, and the house was securely built upon a stone foundation, and covered a cellar suitable for its purpose, and it was stipulated that the land was not worth enough to pay both plaintiff and the mortgagee, but it did not appear what the land and improvements together were worth, held, that the court below committed no abuse of the discretion vested in it by the statute respecting mechanic's liens, in refusing to order the separate sale and removal of the dwelling for the satisfaction of the plaintiff's lien; and that under the doctrine of *The German Bank v. Schloth*, 59 Id., 316, and *Curtis v. Broadwell*, 66 Id., 662, the court properly decreed the mortgage to be the first lien on the whole property, and ordered a foreclosure accordingly. *Miller v. Seal et al.*, 71 Id., 392.

SEC. 3136 (10). [Definition of "owner."]—Every person for whose immediate use or benefit any building, erection, or other improvement is made, having the capacity to contract, including guardians of minors, or other persons, shall be included in the word "owner" thereof.

A person in possession of real property under a contract or bond for a deed thereto is deemed an "owner" within the meaning of the statute. *Stockwell v. Carpenter*, 27 Iowa, 119; *Monroe v. West*, 12 Id., 119.

SEC. 2137 (11). [Definition of "subcontractor."]—All persons furnishing things or doing work provided for by this act shall be considered subcontractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee.

It was held under the law of the revision that a laborer employed by a subcontractor for building a railroad cannot enforce a lien upon the road for the amount due him, if the contractor has fully paid the subcontractor the amount due under his contract, though the railroad company is indebted to the contractor in a sum exceeding the amount of the claim of the laborer against the subcontractor. *Utter v. Crane et al.*, 37 Iowa, 631.

SEC. 2138 (12). [Lien: how enforced.]—Any person having filed a claim for a lien by virtue of this chapter, may at once bring suit to enforce the same, or upon any bond given in lieu thereof, in the district or circuit court of the county wherein the property is situated.

SEC. 2139 (13). [Suit shall be begun on demand, or lien forfeited.]—Upon the written demand of the owner, his agent or contractor, served on the person claiming the lien requiring him to commence suit to enforce such lien, such suit shall be commenced in thirty days thereafter, or the lien shall be forfeited. The mechanics' liens are assignable, and shall follow the assignment of the debt; and where such lien is for personal services, the same shall be exempt from execution, as now provided for such services.

Where the holder of a mechanic's lien asked that he be decreed the right to redeem from the sale of the property under another lien of even date with his own, which prayer was granted, it was held that he could not also have the option of treating the sale as made for his benefit and claiming a *pro rata* share of the proceeds. *Phelps v. Pope et al.*, 53 Iowa, 691.

The mere inchoate right to a mechanic's lien is not assignable so as to vest in the assignee the right to file and perfect the same; the lien passes, however, by an assignment of the debt. *Brown v. Smith*, 55 Id., 31; *Langan & Noble v. Sankey*, Id., 52.

SEC. 2140 (14). [Duty of clerk.]—The clerk of the district court shall indorse upon every account or statement the date of its filing, and make the abstract thereof in a book by him to be kept for that purpose, and properly indexed, containing the date of its filing, the name of the person filing the lien, the amount of the lien, the name of the person against whom the lien is filed, and a description of the property to be charged with the same.

SEC. 2141 (15). [Acknowledgment of satisfaction: penalty for failure.]—Whenever a lien has been claimed by filing the same in the clerk's office, and is afterwards paid, the creditor shall acknowledge satisfaction thereof upon the proper book in such office, or otherwise, in writing; and if he neglect to do so for ten days after the demand, he shall forfeit and pay twenty-five dollars to the owner or contractor and be liable to any person injured, to the extent of his injury.

Approved March 15, 1876.

(Chapter 8, of title 14 of the code, embracing sections 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145 and 2146, repealed, and substituted by chapter 100, laws of 1876, which is above inserted as chapter 8 of the code aforesaid.)

(CHAPTER 179, LAWS OF 1884.)

TO PROTECT SUBCONTRACTORS.

An Act to protect subcontractors for labor performed and material furnished for public buildings and improvements. [Additional to ch. 100 of the acts of the sixteenth general assembly.

SECTION 1. [**Who may have a lien.**].—*Be it enacted by the general assembly of the state of Iowa:* Every mechanic, laborer or other person who as subcontractor shall perform labor upon, or furnish materials for the construction of any public building or bridge or other improvement not belonging to the state, shall have a valid claim against the public corporation constructing such building, bridge or other improvement for the value of such services and material, in an amount not in excess of the contract price to be paid for the building, bridge or other improvement, nor shall any such corporation be required to pay any such claim, at any time before, or in any manner different from that provided in the principal contract.

SEC. 2. [**How lien shall be made.**].—Such claim shall be made by filing with the public officer through whose order the payment is to be made, an itemized and sworn statement of the demand within thirty days after the performance of the last labor, or the furnishing of the last portion of the material, and claims shall have priority in the order in which they shall be filed.

SEC. 3. [**How adjudicated.**].—Any party in interest may cause the adjudication as to the amount, validity, priority and mode and time of payment of such claim by equitable proceedings in any court having jurisdiction. In such case the court may assess a reasonable sum to be taxed as attorney's fees against the party failing in such action in favor of such corporation.

SEC. 4. [**Contractor may release claim by filing bond: may prevent filing claim by filing bond.**].—The contractor may at any time release such claim by filing with the treasurer of such corporation, a bond to such corporation for the benefit of such claimants in sufficient penalty with sureties to be approved by such treasurer, conditioned for the payment of any sum which may be found due such claimant. And such contractor may prevent the filing of such claim by filing in like manner a bond conditioned for the payment of persons who may be entitled to file such claims. Suit may be brought on said bond by any claimant within one year after the cause of action accrues, and judgment shall be rendered against the principal and sureties for any amount due said claimant.

Approved April 7, 1884.

A subcontractor cannot establish a claim against a county for work done on county bridges, under this chapter, unless he files his claim with the county auditor within thirty days after the date of the last item in his account. *Brenneman v. Harvey et al.*, 70 Iowa, 479.

CHAPTER 9.

OF LIMITED PARTNERSHIP.

SECTION 2147. [**Authorized.**]—Limited partnerships for the transaction of any lawful business within the state may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities herein described.

SEC. 2148. [**General and special partners.**]—Such partnerships may consist of one or more persons who shall be called general partners, and who shall be responsible as general partners; and of one or more persons who shall contribute in actual cash a specific sum as capital who shall be called special partners, and shall not be liable for the debts of the partnership beyond the funds so contributed.

SEC. 2149. [**Power of general partners.**]—The general partners only shall be authorized to transact business and sign for the partnership, and bind the same.

SEC. 2150. [**Certificate signed: what it must contain.**]—The persons desirous of forming such partnership, shall make and severally sign a certificate, which shall contain:

1. The name or firm under which such partnership is to be conducted;
2. The general nature of the business intended to be transacted;
3. The names of all general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence;
4. The amount of capital which each special partner shall have contributed to the common stock;
5. The period at which the partnership is to commence, and the period at which it will terminate.

SEC. 2151. [**Certificate acknowledged.**]—The certificate shall be acknowledged by the several persons signing the same, before some one authorized to administer oaths and take acknowledgments of deeds.

SEC. 2152. [**To be filed and recorded.**]—The certificate so acknowledged shall be filed in the office of the clerk of the district court of the county in which the principal place of business of the partnership is situated, and shall be recorded by him in a book to be kept for that purpose. If the partnership shall have places of business situated in different counties, a transcript of the certificate, and of the acknowledgment thereof duly certified by the clerk in whose office it shall be filed, shall be filed and recorded in like manner in the office of the clerk of the district court of every such county.

SEC. 2153. [**Affidavit attached.**]—At the time of filing the original certificate, an affidavit of one or more of the general partners shall be attached thereto, stating that the sums specified in the certificate to have been contributed by each of the special partners, had been actually and in good faith paid in cash.

SEC. 2154. [**Effect of false statement.**]—If any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners.

SEC. 2155. (*As amended by ch. 8, 19th g. a.*) [**Publication of terms of partnership.**]—[When the certificate and affidavit is filed there shall be published forthwith for six weeks in two newspapers published in the senatorial district in which the business is carried on, to be designated by the clerk of the district court of the county where the certificate and affidavit is filed, a notice which shall contain the facts required to be set out in said certificate, and if such publication is not made the partnership shall be deemed general.]

SEC. 2156. [**Affidavits of filed.**]-Affidavits of the publication of such notice by the printers of the newspapers in which the same shall be published, may be filed with the clerk of the district court directing the same, and shall be evidence of the facts therein contained.

SEC. 2157. [**Renewals acknowledged and recorded.**]-Every renewal of such partnership beyond the time originally fixed, shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued, shall be deemed a general partnership.

SEC. 2158. [**Alterations: Effect of.**]-Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares, or in any other matter specified in the certificate, shall be deemed a dissolution of the partnership, and every such partnership which shall in any manner be carried on after any such alteration has been made, shall be deemed a general partnership according to the provisions of the last section.

SEC. 2159. [**Firm name.**]-The business of the partnership shall be conducted under a firm, in which the names of the general partners only shall be inserted, without the addition of the word "company" or any other general term, and if the name of any special partner shall be used in such firm, with his privity, he shall be deemed a general partner.

SEC. 2160. [**Suits against.**]-Suits in relation to the business of the partnership may be brought and conducted by and against the general partners in the same manner as if there were no special partners.

SEC. 2161. [**Capital contributed by special partner not withdrawn.**]-No part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him, or paid or transferred to him in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital, and if, after the payment of such interest, any profits shall remain to be divided, he may also receive his portion of such profits.

SEC. 2162. [**Capital of restored.**]-If it shall appear that, by the payment of interests or profits to any special partner, the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of capital with interest.

SEC. 2163. [**Special partner may examine and advise as to business.**]-A special partner may, from time to time, examine into the state and progress of the partnership concerns, and may advise as to their management, but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney or otherwise. If he shall interfere, contrary to these provisions, he shall be deemed a general partner.

SEC. 2164. [**Accounting.**]-The general partners shall be liable to account to each other, and to the special partners.

SEC. 2165. [**Penalty for fraud.**]-Every partner who shall be guilty of any fraud in the affairs of the partnership shall be liable, civilly, to the party injured to the extent of his damage, and shall also be liable to an indictment for a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court by which he shall be tried.

SEC. 2166. [**Cannot assign or prefer creditors.**]-Every sale, assignment, or transfer of any of the property or effects of such partnership, made by such partnership when insolvent or in contemplation of insolvency, or after, or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner, over other creditors

of such partnership, and every judgment confessed, lien created, or security given by such partnership, under the like circumstances, and with the like intent, shall be void, as against the creditors of such partnership.

SEC. 2167. [**Same.**—Every such sale, assignment, or transfer of any of the property or effects of a general or special partner, made by such general or special partner, when insolvent or in contemplation of insolvency, or after, or in contemplation of the insolvency of the partnership, with the intent of giving to any creditor of his own, or of the partnership, a preference over creditors of the partnership, and every judgment confessed, lien created, or security given by any such partner under the like circumstances and with the like intent, shall be void, as against the creditors of the partnership.

SEC. 2168. [**Liability of special partners.**—Every special partner who shall violate any provisions of the two last preceding sections, or who shall concur in or assent to any such violation by the partnership, or by any individual partner, shall be liable as a general partner.

SEC. 2169. [**Claims of special partners postponed.**—In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor, until the claims of all the other creditors of the partnership shall be satisfied.

SEC. 2170. [**Dissolution: terms of.**—No dissolution of such partnership by the acts of the parties, shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the office of the clerk of the district court in which the original certificate was recorded, and published once in each week for four weeks, in a newspaper printed in each of the counties where the partnership may have places of business.

CHAPTER 10.

OF WAREHOUSEMEN AND CARRIERS.

SEC. 2171. **All warehouse receipts, certificates, or other evidences of the deposit of property, issued by any warehouseman, wharfinger, or other person engaged in storing property for others, shall be, in the hands of the holder thereof, presumptive evidence of title to said property both in law and equity.**

A warehouse receipt issued by a warehouseman upon his own grain, as collateral security merely, and not intended to transfer the ownership, is invalid under this (2171) section of the code. *Seaton & Abbott v. Graham et al.*, 53 Iowa, 181.

H. delivered certain loads of wheat to defendants, warehousemen, for which he took weighmaster's tickets with the word "stored" written upon their face. After the wheat had all been thus delivered, H. was requested by defendants to bring in his scale tickets and get a warehouse receipt therefor, which he neglected to do. H. afterwards sold and delivered the tickets to plaintiff, but defendants, without the knowledge or consent of H., had sold the wheat, and applied the proceeds thereof upon a debt which H. owed them. In an action by plaintiff upon the tickets, *held*, (1) that they were not warehouse receipts, in contemplation of the statute. (2) That, as H. had no wheat in defendant's hands at the time of the sale and delivery of the tickets to plaintiff—his right to wheat having been changed into a money demand—plaintiff could not recover upon the tickets. *Cathcart v. Snow & Huber*, 64 Id., 504.

SEC. 2172. [**Not issued unless property is in store.**—No warehouseman, wharfinger, or other person shall issue any receipt or other voucher for any personal property to any person unless such property is in store and under his control at the time of issuing the receipt or other voucher.

SEC. 2173. [**Subject to order of holder.**—Such property shall remain in store until otherwise ordered by the holder of the receipt or voucher, subject only

to the conditions thereof, and the contract between the parties as to the time of its remaining in store.

SEC. 2174. [**First canceled before second receipt can issue.**—No such person shall issue any second receipt or voucher for any such property while any former receipt or voucher for the same property, or any part thereof, is outstanding and uncanceled.

SEC. 2175. [**Property cannot be sold or encumbered.**—No such person shall sell or encumber, ship, transfer, or in any manner remove beyond his immediate control, any personal property for which a receipt or voucher has been given as aforesaid, without the written consent of the person holding the same, except to enforce his lien thereon for storage and warehouse charges, as provided for in this chapter.

SEC. 2176. [**Penalty.**—Every person aggrieved by the violation of any of the four sections next preceding, may have and maintain an action at law against the person violating any of the provisions of said sections, before any court of competent jurisdiction, and shall not only recover actual damages, but shall be entitled to exemplary damages which he may have sustained by reason of any such violation, whether such person shall have been convicted under a criminal charge for the same or not.

UNCLAIMED PROPERTY—SALE.

SEC. 2177. [**Lien for charges.**—Personal property transported by, or stored or left with any warehouseman, forwarding and commission merchant, or other depository, express company, or carriers, shall be subject to a lien for the just and lawful charges on the same, and for the transportation, advances, and storage thereof.

A livery stable keeper has no lien at common law for care and feeding, upon a horse delivered to him for such care and keeping, in the absence of a special contract therefor. Nor is such lien conferred by section 2177 of the code. *McDonald & Co. v. Bennett*, 45 Iowa, 456. See chapter 25, laws of 1880.

SEC. 2178. [**Proceedings when goods have remained unclaimed for six months.**—If any such property shall for six months remain in the possession, unclaimed, of any of the persons named in the preceding section, with the just and legal charges unpaid thereon, the person having the same in charge or possession shall first give notice to the owner or consignee, if his whereabouts is known, and if not known, shall go before the nearest justice of the peace and make affidavit, stating the time and place where such property was received, the marks or brands by which the same is designated, if any, and, if not, then such other description as may best answer the purpose of indicating what the property is, and shall also state the probable value of the same, and to whom consigned; also the charges paid thereon, accompanied by the original receipt for such charges and by the bill of lading, also the other charges, if any, due and unpaid, and whether the whereabouts of the owner or consignee of such goods is known to the affiant, and if so, whether notice was first given to him as hereinbefore provided; which affidavit shall be filed by the said justice of the peace in his office, for the inspection of any one interested in the same, and he shall also enter in his estray book a statement of the contents of the affidavit, and time and place where and by whom the same was made.

SEC. 2179. [**Sale: advertisement of: notice: proceedings.**—If any such property still remain unclaimed, and the charges are not paid thereon, then the person in possession of the same, either by himself or his agent, where the probable value does not exceed one hundred dollars, shall advertise the same for sale for the period of fourteen days, by posting five notices in five of the most public

places in the city or locality where said property is held, giving such description as will indicate what is to be sold; but when the goods exceed the probable value of one hundred dollars, then the length of notice shall be four weeks, and, in addition to the five notices posted, there shall be a publication of the notice of sale for the same length of time in some newspaper of general circulation in the locality where the property is held, if there be one, and if not, then in the next nearest newspaper published in that neighborhood, at the end of which period, if the property is still unclaimed, or charges unpaid, the agent or party in charge shall sell the same at public action, between the hours of ten o'clock A. M. and four o'clock P. M., for the highest price the same will bring in cash, which sale may be continued from day to day by public announcement to that effect at the time of adjournment until all the property is sold, and from the proceeds of such sale, the said party who held the same shall take and appropriate a sufficient sum to pay all charges thereon, and all costs and expenses of sale; the cost of advertising to be no more than in the case of a constable or sheriff's sale, and the same to be conducted in a similar manner.

SEC. 2180. [**Perishable property defined: and when and how sold.**—Fruit, fresh fish, oysters, game, and other perishable property, shall be retained twenty-four hours, and if not claimed within that time and charges paid, after the proper affidavit is made as required by section twenty-one hundred and seventy-eight of this chapter, may be sold either at public or private sale, in the discretion of the party holding the property, for the highest price that the same will bring, and the proceeds of the sale disposed of as above provided. But in both cases, if the owner or consignee of said unclaimed property shall reside in the same city, town or locality in which the same shall be, and shall be known to the agent or party having the same in charge, then personal notice shall be given to said owner or consignee, in writing, that said goods are held subject to his order, on payment of charges, and that unless he pays said charges, and removes the property, the same will be sold as provided by law.

DISPOSITION OF PROCEEDS.

SEC. 2181. [**Surplus over charges to be deposited in county treasury.**]—After the charges due and unpaid on the property, and the expenses and costs of sale have been taken out of the proceeds, the excess in the hands of the agent or person who was in charge thereof shall be by him forthwith deposited with the county treasurer of the county where the goods were sold, subject to the order of the owner, said ownership being properly authenticated under oath, and such person shall take from such treasurer a receipt for such money, and deposit the same with the county auditor. He shall also file with the county treasurer a schedule of the property, with the name of the consignee or owner, if known, of each piece of property sold, the sum realized from the sale of each separate package, describing the same, together with a copy of the advertisement as hereinbefore provided, and a full statement of the receipts of the sale, and the amount disbursed to pay charges, costs, and expenses of sale, all of which shall be under the oath of the party or his agent, which schedule, statement, oath, and advertisement shall be filed and preserved in the treasurer's office, for the inspection of any one interested in the same.

SEC. 2182. [**Duty of treasurer.**—Should the owner of the property sold not make a demand upon the county treasurer for any money that may be in the treasury to his credit, according to the provisions of this chapter, the sum so unclaimed shall be accounted for by the county treasurer, and placed to the credit of the county in the next subsequent settlement made by the treasurer with the county; and should the money, or any part thereof, remain unclaimed during the

period of one year, it shall then be paid into the school fund, to be distributed as other funds may be by law, which may be raised by tax on other property of the county. But nothing herein contained shall be a bar to any legal claimant from prosecuting and proving his claim for such money at any time within ten years, and, the claim being within that period prosecuted and proved, it shall be paid out of the county treasury in which it was originally placed without interest.

COMMON CARRIERS—LIABILITY.

SEC. 2183. [**For damages caused to baggage.**]—The proprietors of all omnibuses, transfer companies, or other common carriers, doing business within the limits of this state, and their agents, shall be liable for damages occasioned to baggage or other property belonging to travelers, through careless or negligent handling while in possession of said companies or carriers. And in addition to the damages recoverable therefor, the parties recovering the same shall also be entitled to an allowance of not less than five dollars for every day's detention caused thereby or by a suit brought to recover the same.

This section does not authorize a recovery against a railroad company by a traveler for delay caused by the mere *detention* of baggage, but only for such delay as results from *damage* to the baggage on institution of suit to recover the same. *Anderson v. Toledo N. & W. R'y Co.*, 32 Iowa, 86.

SEC. 2184. [**Cannot limit liability.**]—No contract, receipt, rule, or regulation shall exempt any corporation or person engaged in transporting persons for hire, from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made and entered into.

Where in a contract for the transportation of cattle by railroad from the city of Clinton, Iowa, to Chicago, Illinois, there was an express stipulation restricting the liability of the company as common carriers, the stipulation was held void under this section of the statute. *McDaniel v. The C. & N. W. R'y Co.*, 24 Iowa, 412.

(CHAPTER 25, LAWS OF 1880.)

TO PROTECT KEEPERS OF LIVERY STABLES.

An Act to protect keepers of livery and feed stables, and herders and feeders of stock, and to give them a lien.

SECTION 1. [**Have a lien on stock for proper charges and expenses of keeping.**]—*Be it enacted by the general assembly of the state of Iowa:* That keepers of livery and feed stables, herders, and feeders, and keepers of stock for hire, shall have a lien on all stock and property coming into their hands as such, for their proper charges, and for the expense of keeping when the same have been received from the owner, or from any person; *provided, however,* this lien shall be subject to all prior liens of record.

SEC. 2. [**Release the property on receiving bond: penalty of bond.**]—The owner or claimant of the property may release the lien, and shall be entitled to the possession of the property on tendering to the person claiming the lien a good and sufficient bond, signed by two sureties, residents of the county, who shall

justify, the penalty in the bond being at least three times the amount of the lien claimed, and conditioned to pay any judgment the person claiming the lien shall obtain, for which the property was liable under the lien.

Approved March 10, 1880.

Prior to the enactment of this chapter, a livery stable keeper acquired no lien upon property kept by him, as such, in the course of his business (*McDonald v. Bennett*, 45 Iowa, 456), and where an account for keeping property at a livery stable began before the enactment of this chapter and continued to accrue up to a date subsequent thereto, and there was no evidence from which to infer that the keeping of the property subsequent to the statute was in pursuance of a contract made prior thereto, *held*, that the lien did not attach for that part of the account which accrued prior to the taking effect of the statute, but that it did attach for that part of the account accruing subsequent thereto. *Munson v. Porter*, 63 Iowa, 453.

TITLE XV.

OF THE DOMESTIC RELATIONS.

CHAPTER 1.

OF MARRIAGE.

SECTION 2185. [**A contract.**].—Marriage is a civil contract, requiring the consent of parties capable of entering into other contracts except as herein otherwise declared.

SEC. 2186. [**Between what ages valid.**].—A marriage between a male person of sixteen and a female of fourteen years of age is valid, but if either party has not attained the age thus fixed, the marriage is a nullity or not at the option of such party made known at any time before he or she is six months older than the age thus fixed.

SEC. 2187. [**License.**].—Previous to any marriage within this state, a license for that purpose must be obtained from the clerk of the circuit court of the county wherein the marriage is to be solemnized, agreeable to the provisions of this chapter.

SEC. 2188. [**Same.**].—Such license must not in any case be granted where either party is under the age necessary to render the marriage absolutely valid, nor shall it be granted where either party is a minor without the previous consent of the parent or guardian of such minor, nor where the condition of either party is such as to disqualify him for making any other civil contract.

SEC. 2189. [**Proof of age required.**].—Unless such clerk is acquainted with the age and condition of the parties for the marriage of whom the license is applied for, he must take the testimony of competent and disinterested witnesses on the subject.

SEC. 2190. [**Clerk to make entry of record.**].—He must cause due entry of the application for the issuing of a license to be made in a book to be procured and kept for that purpose, stating that he was acquainted with the parties and knew them to be of competent age and condition, or that the requisite proof of such fact was made to him by one or more witnesses, stating their names, which book shall constitute a part of the records of his office.

SEC. 2191. [**Consent of parent or guardian required.**].—If either party is a minor, the consent of the parent or guardian must be filed in the clerk's office after being acknowledged by the said parent or guardian, or proved to be genuine, and a memorandum of such facts must also be entered in said book.

SEC. 2192. [**Penalty.**].—If the clerk of the circuit court grants a license contrary to the provisions of the preceding sections, he is guilty of a misdemeanor, and if a marriage is solemnized without such license being procured, the parties so married, and all persons aiding in such marriage, are likewise guilty of a misdemeanor.

SEC. 2193. (*As amended by ch. 4, 21st g. a.*) [**Who may solemnize.**].—Marriages must be solemnized either:

1. By a justice of the peace or mayor of the city [or incorporated town] wherein the marriage takes place;
2. By some judge of the supreme, district, or circuit court of this state;
3. By some officiating minister of the gospel, ordained or licensed according to the usages of his denomination.

SEC. 2194. [**Certificate of.**—After the marriage has been solemnized, the officiating minister or magistrate shall, on request, give each of the parties a certificate thereof.

SEC. 2195. [**Penalty.**—Marriages solemnized with the consent of parties in any other manner than is herein prescribed, are valid; but the parties themselves, and all other persons aiding or abetting, shall forfeit to the school fund the sum of fifty dollars each.

No form of marriage is necessary. Any mutual agreement between the parties, to be husband and wife *in presenti*, followed by cohabitation, constitutes a valid and binding marriage, if the parties are under no legal disabilities to make a contract of marriage. *Blanchard v. Lambert*, 33 Iowa, 228. To the same effect are *The State v. Williams*, 20 Id., 98; *The State v. Wilson*, 22 Id., 364, and *Kilburn v. Mullen*, Id., 498.

Where husband and wife separate, and the former lives and cohabits for years with a woman whom he claims, and is reputed to be his wife, the law presumes a divorce from the former wife, and she may legally marry again. *Id.*

If the marriage was originally void, a subsequent marriage will be presumed, if the parties continue to cohabit together after the removal of the legal impediment. *Id.*

The marriage of persons, without having obtained a license, is to be dealt with as a misdemeanor, and in no other manner. *White v. The State*, 4 Id., 449.

SEC. 2196. [**Return: penalty for not making.**—The person solemnizing marriage shall forfeit a like amount, unless within ninety days after the ceremony he make return thereof to the clerk of the circuit court.

SEC. 2197. [**Register of marriage.**—The clerk of the circuit court shall keep a register containing the names of the parties, the date of the marriage, and the name of the person by whom the marriage was solemnized, which, or a certified transcript therefrom, is receivable in all courts and places as evidence of the marriage and the date thereof.

The marriage register required to be kept by the clerk, is sufficient evidence to establish a marriage without other evidence showing that the person who officiated was authorized to solemnize marriages. *Verholf v. Vanhouverlengen*, 21 Iowa, 429; *The State v. Schaunkurst*, 34 Id., 547.

Record evidence, however, is not indispensable to prove a marriage, and the fact may be established by witnesses having knowledge thereof. *Kilburn v. Mullen*, 22 Id., 498; *The State v. Wilson*, Id., 864; *The State v. Williams*, 20 Id., 98.

Certified transcripts of marriage records are receivable as evidence of marriages and the dates thereof in prosecutions for bigamy. *The State v. Mattock*, 70 Id., 229.

SEC. 2198. [**When not applicable.**—The provisions of this chapter, so far as they relate to procuring licenses and to the solemnizing of marriages, are not applicable to members of any particular denomination having, as such, any peculiar mode of entering the marriage relation.

SEC. 2199. [**Husband responsible for return.**—But where any mode is thus pursued which dispenses with the services of a clergyman or magistrate, the husband is responsible for the return directed to be made to the clerk, and is liable to the above named penalty if the return is not made.

SEC. 2200. [**Illegitimates.**—Illegitimate children become legitimate by the subsequent marriage of their parents.

SEC. 2201. [**When void.**—Marriages between persons whose marriage is prohibited by law, or who have a husband or wife living, are void; but if the parties live and cohabit together after the death of the former husband or wife, such marriage shall be deemed valid.

A marriage void *ab initio*, for the reason that one of the parties had a lawful husband or wife living, confers no right upon either in the property of the other. *Carpenter v. Smith*, 24 Iowa, 200.

A marriage between parties one of whom has a husband or wife living is absolutely void, and no rights of the other party are affected thereby. This is not changed by the fact that the statute provides for actions to annul such marriages. *Drummond v. Irish*, 52 Id., 41.

CHAPTER 2.

OF HUSBAND AND WIFE.

SECTION 2202. [Married women may own and dispose of property.]—A married woman may own in her own right, real and personal property acquired by descent, gift, or purchase, and manage, sell, convey, and devise the same by will, to the same extent and in the same manner that the husband can property belonging to him.

By the laws of Iowa the wife has similar property rights, and is chargeable with similar obligations, with her husband under like circumstances, and coverture is no defense against the enforcement of the rights of third persons growing out of her contract. *Spafford v. Warren*, 47 Iowa, 47.

The husband is the head of the family within the meaning of the exemption laws. Exempt property belonging to the wife before her marriage, and used for the family support, is not exempt from execution levied under a judgment against her. *Van Doran v. Marden*, 48 Id., 186.

A married woman is capable of acquiring and holding real property to her own separate use; and a purchase by a married woman on credit, relying upon the earnings of her son with which to pay, was upheld. *Shields v. Keys*, 24 Id., 298.

A married woman may make a valid mortgage upon her separate property, and an extension of time of payment of the debt to another is a sufficient consideration therefor. *Low Bros. & Co. v. Anderson et al.*, 41 Id., 476.

Under this section, where the wife gave to her husband money, with the understanding that he was to use it to the best advantage, and to account to her therefor, with interest or profits, and he invested it in real estate in his own name, the money did not thereby vest in the husband for the benefit of a creditor who became such after the repeal of section 2499 of the revision and the enactment of the above section of the code. *Jones v. Brandt*, 59 Id., 332.

Where the wife allowed her husband to invest her money in real estate in his own name, thereby enabling him to obtain credit, but such real estate was exhausted in the payment of prior debts of the husband, of which the creditors had knowledge when they gave him credit, they were held not prejudiced by the conduct of the wife, and that she was not thereby estopped from asserting her ownership of the money. *Id.*

SEC. 2203. [Property of either not subject to contract between them.]—When property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them, or such interest as will make the same liable for the contracts or liabilities of either the husband or wife who is not the owner of the property, except as provided in this chapter.

Under the code the separate property of the wife cannot be taken for the debts of the husband, even though it be reduced to the possession of the husband, and the creditor have no notice of the wife's interest therein. *Schmidt v. Holtz*, 44 Iowa, 446.

A judgment creditor of the husband has no lien upon the wife's land for improvements made by the husband thereon. Nor can the same be subjected to the payment of the creditor's claim to the extent of such improvements. *Corning v. Fowler*, 24 Id., 584.

Under section 2506 of the revision, a married woman was held liable on her covenants in a deed for her own land. *Richmond v. Tibbles*, 26 Id., 474.

The increase of live stock owned by the wife is her property and is not liable for the debts of the husband, though it is kept and cared for by him. *Russell v. Long*, 52 Id., 250.

An agreement between husband and wife by which each relinquishes the right of dower in the lands of the other is void under this section. *Linton v. Crosley*, 54 Id., 478. See, also, *Trowbridge v. Sypher*, 55 Id., 352, 355.

Under chapter 126 of the laws of 1870, it was held that the husband had no common or joint interest in a right of action accruing to the wife on account of a tort committed against her, and that he could not be joined with her in the action. *Musselman v. Gallagher*, 32 Id., 383.

A wife may in good faith loan to her husband money possessed by her in her own right, and take security therefor upon land, which will be a valid lien upon the same, even though the transaction is not witnessed by any writings. *Doyle v. McGuire*, 38 Id., 410.

And where she takes his promissory note for such loan without security, she stands on an equal footing with other creditors in case of his insolvency. *In re Alexander*, 37 Id., 454.

See, also, *In re Estate of Catharine Lennon*, 58 Id., 760.

The power of husband and wife to contract with each other with reference to the amount which shall be awarded the wife as alimony on the dissolution of the marriage relation by divorce has been recognized by the supreme court in *Blake v. Blake*, 7 Id., 46, and subsequent cases, and such power is not taken away by this section of the code. But courts will in every case scrutinize the transaction very closely, and the contract will not be enforced unless it appears to have been entered into fairly, and to be reasonably just and fair to the wife. *Martin v. Martin*, 65 Id., 255.

A wife's inchoate right of dower is not such an interest in land that she can assert it against the creditors of her husband; and the release of such right in a portion of her husband's land conveyed to a creditor in satisfaction of a debt is not a valuable consideration for the conveyance to her by her husband of other lands. *Haynes v. Kline*, 64 Id., 308.

SEC. 2204. [Rights and liabilities as to property same as other persons.]—Should either the husband or the wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried.

Where money belonging to the wife is used by the husband in payment of the ordinary expenses of the family, with her knowledge and consent, and without any agreement for repayment to her, she cannot recover therefor from her husband's estate. *Courtright v. Courtright*, 53 Iowa, 57.

The statutes of this state do not permit either husband or wife to maintain an action against the other for a tort committed during the existence of the marriage relation. *Peters v. Peters*, 42 Id., 182.

SEC. 2205. [Husband not liable for civil injuries.]—For all civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor except in cases where he would be jointly responsible with her if the marriage did not exist.

SEC. 2206. [Conveyance to each other valid.]—A conveyance, transfer, or lien, executed by either husband or wife to or in favor of the other, shall be valid to the same extent as between other persons.

Prior to the code it was held, that a contract between husband and wife, which was supported by a sufficient consideration and not tainted with fraud, was valid between the parties and against subsequent creditors of the husband. *Wright v. Wright*, 16 Iowa, 496.

A wife may, under the statutes of Iowa, convey to her husband without the intervention of a trustee, an interest held by her in his lands. *Robertson v. Robertson*, 25 Id., 350; *Blake v. Blake*, 7 Id., 52; *Wright v. Wright*, 16 Id., 496; *Logan v. Hall*, 19 Id., 498; *Simms v. Harvey*, Id., 287, (1868).

SEC. 2207. [Abandonment of either: property may be sold to pay debts.]—In case the husband or wife abandons the other and leaves the state, and is absent therefrom for one year without providing for the maintenance and support of his or her family, or is confined in the penitentiary for the period of one year or upward, the district or circuit court of the county where the husband or wife so abandoned or not confined resides, may, on application by petition setting forth fully the facts, authorize him or her to manage, control, sell, and encumber the property of the husband or wife for the support and maintenance of the family, and for the purpose of paying debts. Notice of such proceedings shall be given as in ordinary actions, and anything done under or by virtue of the order or decree of the court, shall be valid to the same extent as [if] the same was done by the party owning the property.

This section was not designed to affect the wife's agency of her husband at common law. *Rawson & Rice v. Spangler*, 62 Iowa, 59.

SEC. 2208. [Contracts and sales binding on both.]—All contracts, sales, or incumbrances made by either the husband or wife by virtue of the power contemplated in the preceding section, shall be binding on both, and, during such absence or confinement, the person acting under such power may sue and be sued thereon, and for all acts done the property of both shall be liable and execution may be levied or attachment issued accordingly. No suit or proceeding shall abate or be in any-

wise affected by the return or release of the person confined, but he or she may be permitted to prosecute or defend jointly with the other.

SEC. 2209. [**Decree set aside.**].—The husband or wife affected by the proceedings contemplated in the two preceding sections may have the order or decree of the court set aside or annulled by filing a petition therefor, and serving a notice on the person in whose favor the same was granted as in ordinary actions. But the setting aside of such decree or order shall in nowise affect any act done thereunder.

SEC. 2210. [**Either may make the other attorney in fact.**].—A husband or wife may constitute the other his or her attorney in fact to control and dispose of his or her property for their mutual benefit, and may revoke the same to the same extent and manner as other persons.

The husband may act as the agent of the wife, but in order to bind her he must be previously authorized to so act, or she must with express or implied knowledge of his act, subsequently ratify it. *McLaren v. Hall et al.*, 26 Iowa, 297.

SEC. 2211. [**Wages of wife: actions by.**].—A wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right; and she may prosecute and defend all actions at law or in equity for the preservation and protection of her rights and property, as if unmarried.

This section authorizes a married woman to bring actions generally against other parties that her husband, but does not permit either husband or wife to maintain an action against the other for a tort committed during coverture. *Peters v. Peters*, 42 Iowa, 182.

Under our statutes the husband has no joint interest in an action for tort committed against the wife, and cannot be joined therein. *Tuttle v. The C., R. I. & P. R. Co.*, 42 Id., 518; *Pan-coast v. Burnell*, 32 Id., 394; *Musselman v. Galliher*, Id., 383.

The husband may recover damages from a physician for treatment of his wife, by which he has been subject to expense and deprived of her society, but if her death is the result of such treatment, the right of action therefor exists only in favor of her administrator. *Mowrey v. Chaney*, 43 Id., 609; *Mewhirter v. Hatten*, 42 Id., 288.

The employment by the owner of a farm of the husband to take charge of and carry on the same, does not imply the employment of the wife, in such sense as to entitle her to compensation from the owner for housework performed in the family of her husband, in the absence of any agreement that she shall be paid for her labor. *Lyle v. Gray*, 47 Id., 153.

In an action by the wife for damages for a tort committed against her, she cannot recover for loss of time caused by the injury unless she is engaged in the prosecution of a separate, independent business, which thereby suffers detriment. *Tuttle v. The C., R. I. & P. R. Co.*, 42 Id., 518.

Nor can she recover for money expended in procuring medical attendance and other expenses growing out of her injury, the husband alone having the right of action therefor. *Id.*

While the wife alone can recover for a direct injury to herself, yet the husband has a right of action for the consequential injuries to himself resulting therefrom. *Mewhirter v. Hatten*, 42 Id., 288.

The "wages of the wife's personal labor" for which she may maintain an action in her own name, are her earnings while in the employment of another than her husband, or while engaged in an independent occupation of her own. Her husband is entitled to her labor and assistance in the discharge of the duties and obligations growing out of the marital relations. *Id.* See also, *Grant v. Greene*, 41 Id., 88, cited in notes to section 2212, *post*.

The wife cannot recover for a loss of time caused by an injury to her person when her occupation is that of mere housewife in the family of her husband, but when she has a separate and independent employment, which she habitually follows, and for which she receives compensation from her employers, she may recover for loss of time; as where she was habitually engaged in washing clothes for others for a regular compensation, she was held entitled to prove and recover the value of the time she had lost by the injury complained of. *Fleming v. Town of Shenandoah*, 67 Id., 505. See, also, *Lyle v. Gray*, 47 Id., 153.

SEC. 2212. [**Property of one not liable for debts of the other.**].—Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, and, except as herein otherwise declared, they are not liable for the separate debts of each other; nor are the wages, earnings, or property of either, nor is the rent or income of such property liable for the separate debts of the other.

It was held, prior to the code, that while a married woman could not be made personally liable

as surety on a promissory note, yet if she suffered a personal judgment to be rendered against her by default on such note, she could not afterwards avoid the judgment on the ground of coverture. *Wolf v. Van Metre*, 23 Iowa, 397; *Guthrie v. Howard et ux*, 32 Id., 54.

Where the wife had been appointed by the commissioners of insanity custodian of her insane husband, it was held, that she could not recover compensation for her services in that capacity from his estate. Such a contract is without consideration and void, the service being such as she owed by virtue of the marital relation. *Grant v. Greene*, 41 Id., 88.

SEC. 2213. [**Contracts of wife.**].—Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried.

SEC. 2214. [**Property of both liable.**].—The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or of either of them, and in relation thereto they may be sued jointly or separately.

One who sells an article of family use to the husband, on his individual credit, may maintain an action against the wife to subject her separate property to payment therefor. *Smedley v. Felt*, 41 Iowa, 588.

The separate property of the wife is liable for the price of a piano purchased by the husband for the use of the family. *Id.* For debts incurred for family expenses, the husband and wife are jointly and severally liable, and may be sued together or either sued alone. *Same Case*, 43 Id., 607.

The wife is personally liable with her husband for family expenses, and a personal judgment may be rendered against her therefor in a joint action against both, notwithstanding the husband may have been discharged in bankruptcy. *Jones v. Glass et al.*, 48 Id., 345.

A reaping machine purchased by the husband and for use on his farm is not a family expense, chargeable on the property of the wife. *McCormick v. Meuth et ux*, 49 Id., 536.

The expenses for the treatment of an insane wife in a hospital for the insane provided by the state, are not part of the family expenses, and the husband is not liable therefor. *The County of Delaware v. McDonald*, 46 Id., 170.

Prior to the code of 1873, it was held that the contingent right of dower of the wife in the lands of the husband, or his in hers, was not the subject of barter and sale between them. And aside from an agreement to separate, it was not competent for one to convey to the other his or her dower interest in lands. *McKee v. Reynolds*, 26 Id., 578.

One who advances money to the husband, which is used for the payment of family expenses, cannot claim a lien on the separate property of the wife therefor, where such advances were not made at her request, and there is no assignment to the plaintiff of the original account for such expenses. *Sherman v. King et ux*, 51 Id., 182.

A breaking plow is not an article of family expense, for the purchase price of which the property of the wife is liable under this section. *Russell v. Long*, 52 Id., 250.

A wife cannot be made liable under this section for money borrowed by her husband, on the ground that it was borrowed and used for the purpose of paying family expenses. *Davis v. Ritchey*, 55 Id., 719.

By the laws of this state, contained in this and previous sections of this chapter, the wife has similar rights of property and is chargeable with similar obligations with the husband under like circumstances, and coverture is no defense against the enforcement of the rights of others growing out of her contracts. *Spafford v. Warren et al.*, 47 Id., 47.

The cost of an organ, though purchased by the husband for re-sale, but never actually sold, but ever afterwards (for about seven years) used in his family, as organs are ordinarily used, is a family expense under section 2214 of the code. And this even in favor of an assignee of the judgment against the husband, on the note given by him for the organ, who is entitled upon a showing of the facts in a proper case to have the wife's property subjected to its payment, and such right is not barred by the statute of limitations, so long as the debt, in the form it has assumed, was not barred against the husband. *Frost v. Parker et ux*, 65 Id., 178; following *Smedley v. Holt*, 41 Id., 588.

Where the husband, without cause, abandons his wife and child, and the wife alone supports the child, she cannot recover therefor, in an action against the husband, since under this section of the code, the support of the children is charged upon the parents jointly and severally. *Johnson v. Burnes*, 69 Id., 641.

The defendant, in writing, forbade plaintiffs to sell goods to his wife on his account, he having no account with plaintiffs at the time. Plaintiffs thereafter sold to defendant's wife family supplies, on his account, and they were used as such, but there was no evidence that there was a necessity for such purchases by the wife on account of the husband's failure to furnish such supplies; held, that defendant was not liable for the goods so sold. *Darendorf & Mann v. Emerson*, 66 Id., 698.

SEC. 2215. [Rights of both as to the homestead.]—Neither husband nor wife can remove the other nor their children, from their homestead without his or her consent, and if he abandons her she is entitled to the custody of their minor children, unless the district or circuit court, upon application for that purpose, shall, for good cause, otherwise direct.

A court of equity will decree to the wife a separate support out of the property held by the husband in her right, when it is shown that she has been deserted without adequate means of support, or has been forced by the cruel conduct of her husband to leave his protection. A separate support will not be granted when the separation was not the result of either of these causes. *McMullen v. McMullen*, 10 Iowa, 412. This holding was prior to the law as now found in the code.

Where a married man introduces a woman of profligate habits into his house, and permits her to remain there as an inmate, the wife will be justified in withdrawing from his protection, and he will be bound to provide her with necessaries. *Descelles v. Kadmus*, 8 Id., 51.

INSANITY OF EITHER.

SEC. 2216. [Interest in property may be conveyed.]—Where either the husband or wife is insane, and incapable of executing a deed, and relinquishing or conveying his or her right to the real property of the other, the same person may petition the district or circuit court of the county where such petitioner resides, or of the county where said real estate is situated, setting forth the facts and praying for an order authorizing the applicant or some other person to execute a deed of conveyance and thereby relinquish the interest of either in the real property of the other.

SEC. 2217. [Proceedings.]—The petition shall be verified by the oath of the petitioner and shall be filed in the office of the clerk of the district or circuit court of the proper county. The court shall appoint some discreet person or attorney guardian for the person alleged to be insane, who shall ascertain as to the propriety, good faith and necessity of the prayer of the petitioner, and who shall have power to resist said application, and subpoena witnesses, or to take depositions to disprove the petition and prove the impropriety of granting said petition, which guardian or attorney shall be allowed by the court a reasonable compensation, to be paid as the other costs.

SEC. 2218. [Same.]—Upon the hearing of said petition, if the court is satisfied that the same is made in good faith, and that the petitioner is the proper person to exercise the power and make the conveyances, and that such power is necessary and proper, said court shall enter up a decree, thereby fully authorizing the execution of all such conveyances for and in the name of such husband or wife, by such person as the court may appoint.

SEC. 2219. [Same.]—All deeds executed as provided in the three preceding sections shall be valid in law and shall convey the interest of such insane person in the real estate so conveyed; provided, said power shall cease and become void as soon as he or she shall become sane and of sound mind, and apply to the court to revoke said power, and the same shall be revoked; but such revocation shall in no wise affect conveyances previously made.

CHAPTER 3.

OF DIVORCE, ANNULING MARRIAGES, AND ALIMONY.

SECTION 2220. [**Jurisdiction.**]—The district or circuit court in the county where either party resides has jurisdiction of the subject matter of this chapter.

But if neither party have an actual residence in the county where the action of divorce is brought, and the plaintiff "fraudulently assumes a colorable residence * * * for the purpose of obtaining a decree of divorce without the knowledge" of the wife and to prevent her making a defense, it was held that the decree should be set aside, the court having no jurisdiction. *Rush v. Rush*, 48 Iowa, 701.

A divorce can be granted only for cause, and not by consent. The evidence must justify the divorce. *Lyster v. Lyster*, 1 Id., 130; *Pinkney v. Pinkney*, 4 G. Greene, 324.

A court of equity will entertain jurisdiction for alimony although no divorce is sought, and has power to vacate a decree obtained by fraud, even though the plaintiff may have subsequently married and become a parent, when such marriage could not have been prevented by any diligence on the part of the party seeking relief against the fraudulent decree. *Whitcomb v. Whitcomb*, 46 Id., 473.

SEC. 2221. [**Petition: statement in.**]—Except where the defendant is a resident of this state served by personal service, the petition for divorce, in addition to the facts on account of which the plaintiff claims the relief sought, must state that the plaintiff has been for the last year a resident of the state, specifying the town and county in which he has so resided, and the entire length of his residence therein, after deducting all absences from the state; that he is now a resident thereof; that such residence has been in good faith and not for the purpose of obtaining a divorce only; and it must in all cases state that the application is made in good faith, and for the purpose set forth in the petition.

SEC. 2222. [**To be verified: proof: dismissal of action.**]—All the statements above required, and all other allegations of the petitioner, must be verified by the oath of the plaintiff, and proved to the satisfaction of the court by competent evidence. Unless the court is satisfied that the allegations or residence are fully proved, the hearing shall proceed no further, and the action shall be dismissed by the court on its own motion. No divorce shall be granted on the testimony of the plaintiff alone, and all such actions shall be heard in open court on the testimony of witnesses, or depositions taken as in other equitable actions triable upon oral testimony, or by a commission appointed by the court.

Actions for divorce must be publicly tried in open court and cannot be sent to a referee for trial as other equitable actions, even with the consent of parties. *Hobart v. Hobart*, 45 Iowa, 501.

The fact that the finding of a referee, in such case, was filed with the court and exceptions thereto heard and decided, does not constitute such trial in open court. Nor will the adoption of the findings of the referee be a compliance with the statutory requirement. But, where such action has been tried by a referee, the evidence taken before him in writing may be used in a re-trial of the case. *Id.*

An issue of fact in an action for divorce cannot be submitted to a jury for determination, and a subsequent adoption of the finding of the jury will not cure the error of the submission. *Hobart v. Hobart*, 51 Id., 512.

A decree in equity setting aside a decree of divorce adjudged against the wife and declaring the same void in so far as to give the wife a portion of the estate of her husband, and at the same time leaving so much of the decree as dissolved the bonds of matrimony in full force, is inconsistent and cannot be supported either upon principle or authority. *McCarney v. McCarney*, 5 Id., 232.

A temporary residence, selected with any other intention than that of making it a permanent domicile, is not sufficient even if extended to the length of time required by the statute, to give the court jurisdiction of an action for divorce. *Whitcomb v. Whitcomb*, 46 Id., 437.

This section requiring petitions for divorce to be verified must be regarded as mandatory, so that a divorce cannot be legally granted upon an unverified petition, but the court may require the verification to be made at any time before the final hearing, and in the meantime have jurisdiction for interlocutory purposes, and though the original petition was radically defective, but

was cured by an amendment which was not verified, but which defendant answered, held that the court had jurisdiction to make an order for the temporary alimony. *Van Duzer v. Van Duzer*, 65 Id., 625.

Sec. 2223. [Causes of.]—Divorces from the bonds of matrimony may be decreed against the husband for the following causes:

1. When he has committed adultery subsequent to the marriage;

In an action for divorce on the ground of adultery, it is not necessary to prove the direct act, it being a crime of darkness and secrecy. The criminal act may be established by, or inferred from, circumstances which lead to the adultery by fair inference, as a necessary consequence; these circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion of guilt. *Inskoop v. Inskoop*, 5 Iowa, 204.

Where the facts and circumstances relied on to establish adultery are capable of two interpretations, one of which is consistent with the innocence of the party charged, they will not be sufficient to establish guilt. *Id.*

But if the facts proved cannot be reasonably reconciled with the innocence of the party charged, but are harmonious and consistent with the assumption of guilt, the court may then infer guilt. *Id.*

Where a cause for divorce designated by the statute as a continuing one, if the cause has continued after the enactment of the statute for the period required therein for its continuance, it is sufficient, though the cause may have commenced before the passage of the statute. *McCarney v. McCarney*, 5 Id., 232.

The verification of the petition in an action for divorce is not necessary to give the court jurisdiction. The verification is not a jurisdictional requisite. *Id.*, 254.

A divorce can be granted only for cause, and not by consent. The evidence must justify the divorce. *Lyster v. Lyster*, 1 Id., 130; *Pinkney v. Pinkney*, 4 G. Greene, 324.

Where a wife deserts her husband without a reasonable cause, such desertion is no defense to an action for a divorce by her on the ground of adultery, unless the desertion has been so long continued prior to his act of adultery as to constitute itself a ground for divorce. *Wilson v. Wilson*, 40 Id., 230; *Dupont v. Dupont*, 10 Id., 112.

In order to justify the abandonment of the husband by the wife, his conduct toward her must have been such as would constitute a ground of action on her part for a divorce. *Pierce v. Pierce*, 33 Id., 238.

2. When he willfully deserts his wife and absents himself without a reasonable cause for the space of two years;

If a husband "willfully desert his wife and absent himself without reasonable cause for the space of two years," she will be entitled to a divorce. The "reasonable cause" of absence mentioned in the statute must be grounded on some fault of the wife, and if his desertion be willful and without cause, he cannot excuse his absence because of some accident or misfortune subsequently happening to him, as after such willful desertion without reasonable cause he became insane. *Douglass v. Douglass*, 31 Id., 421.

Where a wife deserts her husband without a reasonable cause, such desertion is no defense to an action for a divorce by her on the ground of adultery, unless the desertion has been so long continued prior to his action of adultery as to constitute itself a ground for divorce. *Wilson v. Wilson*, 40 Id., 230; *Dupont v. Dupont*, 10 Id., 112.

In order to justify the abandonment of the husband by the wife, his conduct toward her must have been such as would constitute a ground of action on her part for a divorce. *Pierce v. Pierce*, 33 Id., 238.

3. When he is convicted of felony after his marriage;

This provision of the statute authorizing a divorce for a conviction of felony, refers only to a conviction which is final and absolute, either because of affirmance of the appellate court, or because no appeal has been prosecuted. *Vinsant v. Vinsant*, 49 Iowa, 639.

4. When, after marriage, he becomes addicted to habitual drunkenness;

Where a man is an habitual drunkard at the time of his marriage, his wife cannot obtain a divorce on that ground. *York v. Ferner, Adm'r*, 59 Iowa, 487.

Nor can the widow recover on an ante-nuptial contract, from the administrator of her deceased husband, in such case, where she had abandoned him in seven weeks and three days after marriage because of such drunkenness, of which she had knowledge at the time of the marriage. *Id.*

5. When he is guilty of such inhuman treatment as to endanger the life of his wife;

An attempt to injure the person of the wife is not essential to constitute inhuman treatment to such an extent as to authorize a divorce. Acts which endanger her life by destroying her health and peace may constitute sufficient ground for divorce. *Caruthers v. Caruthers*, 13 Iowa, 266.

The statute requires two ingredients in cruel treatment to constitute ground for divorce: 1. It must be inhuman; 2. It must endanger life. *Freerking v. Freerking*, 19 Id., 34.

A petition for divorce on the ground of cruel and inhuman treatment should state the specific facts of inhuman treatment relied on as the ground for divorce; it is not enough to allege generally that the defendant is guilty of such treatment. *Id.*

Insanity occurring after marriage is not ground for a divorce; nor is cruel and inhuman treatment, of which one of the parties, while insane, may be guilty toward the other, a cause for divorce within the contemplation of the statute. *Wertz v. Wertz*, 43 Id., 534.

The treatment received is not cause for divorce, and may be alleged in the petition for divorce only for the purpose of showing a foundation for the apprehended danger to life contemplated in the statute. *Beebe v. Beebe*, 10 Id., 133.

Words of menace which are merely the language of passion do not constitute inhuman treatment in the sense in which the term is used in the statute; but when such words are the expression of determined malignity, and there is reasonable ground to apprehend that they will be carried into effect, they may constitute sufficient cause for divorce. *Id.*

The threatened injury will not constitute sufficient ground for divorce if it does not endanger the life of the party complaining. *Id.*

Cruel treatment consists in conduct which furnishes reasonable apprehension that the continuance of the cohabitation will be attended with bodily harm, or that it endangers the life or health of the wife. There may be legal cruelty without actual personal violence; and whatever form the ill-treatment assumes, if a continuance of it involves the life or health of the wife, it is "inhuman treatment," within the meaning of the statute. *Cole v. Cole*, 23 Id., 433.

A wife is not entitled to a divorce on the ground of cruel and inhuman treatment, when such treatment appears to have been of such a character and under such circumstances as to furnish her no reasonable ground to apprehend physical danger by the continuance of the marriage relation. *Knight v. Knight*, 31 Id., 451.

So, also, if the treatment complained of is the result of the complainant's own misconduct, it will furnish her no sufficient ground for divorce. *Id.*, MILLER, J., dissenting.

It is not essential that personal violence should have been used by the husband toward his wife to entitle her to a divorce on the ground of cruel and inhuman treatment. If danger is to be reasonably apprehended, that is sufficient, and any course of conduct upon his part which would have the effect to impair her health constitutes legal cruelty. *Wheeler v. Wheeler*, 53 Id., 511.

The extent to which intoxication must have become habitual to afford grounds for an action for divorce, discussed. *Id.*

Where a cause for divorce designated by the statute is a continuing one, if the cause has continued after the enactment of the statute for the period required therein for its continuance, it is sufficient, though the cause may have commenced before the passage of the statute. *McCraney v. McCraney*, 5 Id., 232.

A divorce may be granted only for cause, and not by consent. The evidence must justify the divorce. *Lyster v. Lyster*, 11 Id., 130.

SEC. 2224. [**Same.**]—The husband may obtain a divorce from his wife for like cause, and also when the wife at the time of the marriage was pregnant by another than her husband, unless such husband have an illegitimate child or children then living, which was unknown to the wife at the time of their marriage.

SEC. 2225. [**Cross petition.**]—The defendant may obtain a divorce for like causes as above stated, by filing a cross petition.

SEC. 2226. [**Maintenance during litigation.**]—The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action.

In an action for a divorce, the court may direct that either party shall contribute to the support or maintenance of the other, pending the action, or to its prosecution or defense, and in fixing the amount of alimony, the age, sex and pecuniary condition of the parties shall be considered. *Small v. Small*, 42 Iowa, 111.

In an action to set aside a decree of divorce it is not competent for the court to order the defendant to pay a sum of money to plaintiff to enable her to prosecute the action. *Wilson v. Wilson*, 49 Id., 544.

Alimony is the allowance made for the nourishment, maintenance and support of the wife out of the husband's estate when they are legally separated. *Russell v. Russell*, 4 G. Gr., 26; *Jolly v. Jolly*, 1 Iowa, 9; *O'Hagan v. O'Hagan*, 4 Id., 506.

To warrant the court in making an order allowing temporary alimony, the fact of marriage between the parties must be admitted or proved. *York v. York*, 34 Id., 530.

Under this section the authority is conferred upon the court and not upon the judge to order temporary alimony pending a suit for divorce, and a judge in vacation, upon the commencement of a suit for divorce, and before the term at which the defendant is required to appear, has no power

to render a judgment for temporary alimony upon application made for that purpose, even on notice to the defendant. *Prosser v. Prosser*, 64 Id., 378.

SEC. 2227. [Attachment may issue.]—The petition may be presented to the court or judge for the allowance of an order of attachment; and said court or judge may, by indorsement thereon, direct such attachment and the amount for which the same may issue and the amount of the bond, if any, that shall be given, and the clerk shall issue the same accordingly; and any property taken by virtue thereof shall be held to satisfy the judgment or decree of the court, but may be discharged or released as in other cases.

In granting a divorce, the court is not authorized, under this section, to direct that the decree shall date back to the time of the levy of the attachment and become a lien upon the property of the husband, in favor of the wife, to the exclusion of a judgment creditor whose judgment was obtained prior to the decree of divorce. *Daniels v. Lindley et al.*, 44 Iowa, 567.

The law of homestead has no application in actions for divorce or to annul marriages, and the attachment authorized by section 2227 of the code may, in such actions, be lawfully levied upon the homestead of such parties. A grantee of the adverse party, subsequent to the levying of such attachment, takes the property subject to all the rights to which the plaintiff may be adjudged entitled therein upon the trial of the action. *Daniel v. Morris*, 54 Id., 396.

This, and other sections of the same chapter, contain the only provisions relating to attachments in divorce cases; and where the plaintiff presents a petition complying with these provisions, the court may properly grant a writ of attachment without a bond. *Smith v. Smith*, 61 Id., 138.

The remedy by attachment given by this section is cumulative only, and not exclusive. In an action for divorce and alimony the plaintiff, upon a proper showing, is entitled to an injunction restraining the defendant from disposing of his property for the purpose of defeating the claim for alimony. *Wharton v. Wharton*, 57 Id., 696.

The verification of the petition in an action for divorce is not necessary to give the court jurisdiction. The verification is not a jurisdictional requisite. *McCraney v. McCraney*, 5 Id., 254.

The court has power to make such orders regarding the custody of the children as their welfare demands, and may, during the pendency of proceedings for divorce between the parents, award the custody of the children to either parent, or provide for their separate maintenance, being governed always by a regard for the welfare of the children. *Green v. Green*, 52 Id., 403.

The provisions of this section do not confer exclusive jurisdiction in the matter upon the court which rendered the decree of divorce. *Shaw v. McHenry*, 52 Id., 132.

When a suit is brought to set aside a decree of divorce which is voidable only, temporary alimony cannot be allowed to the divorced wife to enable her to prosecute the suit, nor for her support during its pendency. *Wilson v. Wilson*, 49 Id., 544; *McFarland v. McFarland*, 51 Id., 565.

But when a voidable decree for divorce had been rendered, and the wife was subsequently induced by her former husband to return and live with him, upon his representation that the proceedings for divorce were void, and they continued to live together for six years as husband and wife, during which time he treated her as his wife, and so acknowledged her to the world, it was held that she was entitled to temporary alimony to enable her to prosecute her action for permanent alimony. *McFarland v. McFarland*, 51 Id., 565.

Nor was her right to such temporary alimony held to be affected by a showing of misconduct in the marriage relation. *Id.*

Where a divorce was granted, and the custody of three children awarded to the husband, and it subsequently appearing that he was guilty of cruelly treating the children, it was held, on the application of the wife for the custody of the children and alimony for their maintenance, that the application should be granted and alimony allowed. *Boggs v. Boggs*, 49 Id., 190.

Where a prior decree of divorce rendered in this state was interposed by the husband as a bar to an action for divorce by the wife, it was held that the decree might be assailed in that action, and its force and effect as a former adjudication avoided by showing that it was fraudulently obtained. *Whetstone v. Whetstone*, 31 Id., 276.

A decree of divorce may be set aside on the ground that it was obtained by fraud, notwithstanding the rights of innocent third parties may have intervened. *Rush v. Rush*, 46 Id., 648.

Under this section of the code, the court may award permanent alimony and the custody of the children, even though no prayer or claim therefor be made in the pleadings. *Zuwer v. Zuwer*, 36 Id., 190.

The fact that the husband obtains a divorce for the fault of the wife, instead of the wife obtaining one for the fault of the husband, has a material bearing on the amount of alimony to be allowed the wife. *Id.* In this case the alimony allowed by the court below was largely reduced by the supreme court.

The amount to be allowed as alimony is governed by no fixed rule of law, but depends upon the facts and circumstances of each particular case; and when fixed the times of payment thereof

should be so adjusted as to avoid, if possible, a sacrifice of the husband's property to pay the amounts fixed. *Farley v. Farley*, 30 Id., 353.

A proceeding by a divorced wife against the husband, asking for changes or modifications of the former decree making an allowance for the support of the wife and children, abates by the death of the husband. *O'Hagan v. O'Hagan*, 4 Id., 509. STOCKTON, J., *dissenting*.

Where the decree in an action for divorce awards the custody of a child to one parent, it cannot be transferred to another in a collateral action, but only by a change in the decree obtained by direct proceedings for that purpose. *Jennings v. Jennings*, 56 Id., 288.

A modification of a decree of divorce, changing the custody of the child of the parties from the mother to the father may be made where the facts and circumstances render such change proper. *Sherwood v. Sherwood*, 56 Id., 608.

SEC. 2228. [**Situation of parties considered.**—In making such orders, the court or judge shall take into consideration the age, condition, sex, and pecuniary condition of the parties, and such other matters as are deemed pertinent, which may be shown by affidavits in addition to the pleadings or otherwise, as the court or judge may direct.

See *Smalls v. Smalls*, 43 Id., 111, cited in notes to section 2226, *ante*.

SEC. 2229. [**Children: maintenance: changes made.**—When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right and proper. Subsequent changes may be made by the court in these respects when circumstances render them expedient.

Alimony in its original signification meant other than a portion of the husband's lands; it was the fixed allowance made by the court for the support of the wife, out of the husband's estate, when they were legally separated. *Jolly v. Jolly*, 1 Iowa, 8.

Under our law the court has full power to give to the wife as alimony specific portions of the husband's property, real or personal. *Id.*

See, also, to the same effect, *Inskeep v. Inskeep*, 5 Id., 204; *Cole v. Cole*, 23 Id., 433, 443.

In decreeing a divorce and granting alimony, the court will make such order in respect to the homestead as the circumstances will justify, and as shall seem equitable. Ordinarily the husband, when he holds the legal title, and especially when the children are left with him, should be left in its enjoyment. But if the title is in the wife, purchased with her means, and she is given the custody of the only child, she should be awarded the homestead. *Id.*

If the money of the husband has contributed to the value of the homestead in improvements, when owned by the wife, the case will not be varied, and its sale will not be ordered, so that each may have a due proportion. Nor will the wife's legal title be recognized as subject to a lien in the husband's favor for improvements; but the court will adjust these claims with due regard to rights of both parties. *Id.*

In deciding whether the husband or wife is to have the custody of the children, it is the duty of the court, under the statute, to make such order in relation thereto as is proper and right. *Id.*

Although under the statute the court may give the wife, as alimony, a portion of the husband's property, either real or personal, absolutely and in her own right, yet this should not be done, if the husband is in a condition to pay money, unless there is something in the situation of the wife which would render it equitable and just to give her the property instead of the money. *Inskeep v. Inskeep*, Id., 204.

The court will render a decree for a divorce and suitable alimony in favor of the wife who has deserted her husband without reasonable cause, when it appears that her conduct subsequent to the separation has been without reproach, while that of the husband has rendered a reconciliation impossible without a sacrifice of principle and self-respect on her part. *Dupont v. Dupont*, 10 Id., 112.

A decree for alimony in an action for a divorce, when prayed for in the petition, is not void because the original notice contained no statement that alimony was claimed. The power to grant alimony is, at least under the statute, a mere incident to the power to grant a divorce between the parties. *McEwen v. McEwen*, 26 Id., 375.

When parents are living apart, the courts may make such orders regarding the custody of their children as their welfare demands, and may, during the pendency of proceedings for divorce between the parents, award the custody of the children to either parent, or provide for their separate maintenance, being governed always by a regard for the welfare of the children. *Green v. Green*, 52 Id., 403.

The provisions of this section do not confer exclusive jurisdiction in the matter upon the court which rendered the decree of divorce. *Shaw v. McHenry*, 52 Id., 182.

When a suit is brought to set aside a decree of divorce which is voidable only, temporary alimony cannot be allowed to the divorced wife to enable her to prosecute the suit, nor for her

support during its pendency. *Wilson v. Wilson*, 49 Id., 544; *McFarland v. McFarland*, 51 Id., 565.

The court of the county where the plaintiff resides, having jurisdiction in an action for divorce and alimony, may rightfully declare and enforce a lien for alimony granted in the action against real property of the defendant situated in another county. *Harshberger v. Harshberger et al.*, Id., 503.

And such lien will have priority over an attachment issued in an action commenced in the county where the land lies, and which was not levied thereon until after the rendition of the decree for alimony, though before a transcript thereof was filed in the latter county. *Id.*

The attaching creditor, in such case, acquires no greater right in the attached property than the defendant *actually* had when the attachment was levied. *Id.* See, also, *Norton etc. v. Williams*, 9 Id., 528; *Bell v. Evans*, 10 Id., 393; *Thomas v. Hillhouse*, 17 Id., 67.

Where a divorce was granted to the husband on account of the adultery of the wife, alimony will not be granted to her, where the husband has acquired no property by her, or she has not contributed thereto by her industry or otherwise, and he is without fault as respects her crime. *Fivecoat v. Fivecoat*, 32 Id., 198.

An action for alimony cannot be maintained as an independent proceeding after a divorce. The relation of husband and wife must exist to justify the allowance. *Wilde v. Wilde*, 36 Id., 319; *Blythe v. Blythe*, 25 Id., 266.

But a court of equity will entertain an action for alimony alone, and will grant the same, though no divorce or other relief be asked, where a divorce has not been granted, and the wife is separated from the husband on account of conduct on his part justifying such separation. *Graves v. Graves*, 36 Id., 310.

The jurisdiction in such case will be entertained on the ground of preventing a multiplicity of suits, or of the inadequacy of relief at law. *Id.*

The court having jurisdiction to render a decree of divorce embracing an order respecting the children and property of the parties, retains power to modify the same, so long as it remains unexecuted, notwithstanding both parties may, after the rendition of the decree, and before the modification, become residents of another state. *Andrews v. Andrews*, 15 Id., 423.

The power of the court to modify a decree of divorce, under the statute, is not limited to one year after the rendition thereof. *Id.*

The power to change a decree granting alimony, under the statute, can be exercised only where there has been a change of circumstances. The power to grant a new trial of the case is not conferred, but only the power to adapt the decree to the new or changed circumstances of the parties; and an order allowing temporary alimony in a proceeding in which no such change of circumstances is alleged, is erroneous. *Blythe v. Blythe*, 25 Id., 265; *Wilde v. Wilde*, 36 Id., 319; *Fisher v. Fisher*, 32 Id., 20.

Applications for reduction of permanent alimony will not be granted unless it clearly appears that by reason of the changed circumstances of the applicant, the original allowance is no longer proportionate or just. The court will also consider whether the alleged change of circumstances has not been brought about by the improper conduct of the applicant. *Fisher v. Fisher*, 32 Id., 20.

But when a voidable decree for divorce had been rendered, and the wife was subsequently induced by her former husband to return and live with him, upon his representation that the proceedings for divorce were void, and they continued to live together for six years as husband and wife, during which time he treated her as his wife, and so acknowledged her to the world, it was held that she was entitled to temporary alimony to enable her to prosecute her action for permanent alimony. *McFarland v. McFarland*, 51 Id., 565.

Nor was her right to such temporary alimony held to be affected by a showing of misconduct in the marriage relation. *Id.*

Where a divorce was granted, and the custody of three children awarded to the husband, and it subsequently appearing that he was guilty of cruelly treating the children, it was held, on the application of the wife for the custody of the children and alimony for their maintenance, that the application should be granted and alimony allowed. *Boggs v. Boggs*, 49 Id., 190.

Where a prior decree of divorce rendered in this state was interposed by the husband as a bar to an action for divorce by the wife, it was held that the decree might be assailed in that action, and its force and effect as a former adjudication avoided by showing that it was fraudulently obtained. *Whetstone v. Whetstone*, 31 Id., 276.

A decree of divorce may be set aside on the ground that it was obtained by fraud, notwithstanding the rights of innocent third parties may have intervened. *Rush v. Rush*, 46 Id., 648.

Under this section of the code, the court may award permanent alimony and the custody of the children, even though no prayer or claim therefor be made in the pleadings. *Zuver v. Zuver*, 36 Id., 190.

The fact that the husband obtains a divorce for the fault of the wife, instead of the wife obtaining one for the fault of the husband, has a material bearing on the amount of alimony to be

allowed the wife. *Id.* In this case the alimony allowed by the court below was largely reduced by the supreme court.

The amount to be allowed as alimony is governed by no fixed rule of law, but depends upon the facts and circumstances of each particular case, and when fixed, the times of payment thereof should be so adjusted as to avoid, if possible, any sacrifice of the husband's property to pay the amount fixed. *Farley v. Farley*, 30 Id., 353.

A proceeding by a divorced wife against the husband, asking for changes or modifications in the former decree making an allowance for the support of the wife and children, abates by the death of the husband. *O'Hagan v. O'Hagan*, 4 Id., 509.

Where the decree in an action for divorce awards the custody of a child to one parent, it cannot be transferred to another in a collateral action, but only by a change in the decree obtained by direct proceedings for that purpose. *Jennings v. Jennings*, 56 Id., 288.

A modification of a decree of divorce changing the custody of the child of the parties from the mother to the father may be made where the facts and circumstances render such change proper. *Sherwood v. Sherwood*, 56 Id., 608.

Where parents are living apart, the courts may make such orders regarding the custody of their children as their welfare demands, and may, during the pendency of proceedings for divorce between the parents, award the custody of the children to either parent, or provide for their separate maintenance, being governed always by a regard for the welfare of the children. *Green v. Green*, 52 Id., 403.

The provisions of this section do not confer exclusive jurisdiction in the matter upon the court which rendered the decree of divorce. *Shaw v. McHenry*, 52 Id., 182.

When a suit is brought to set aside a decree of divorce which is voidable only, temporary alimony cannot be allowed to the divorced wife to enable her to prosecute the suit, nor for her support during its pendency. *Wilson v. Wilson*, 49 Id., 544; *McFarland v. McFarland*, 51 Id., 565.

SEC. 2230. [**Forfeiture.**—When a divorce is decreed, the guilty party forfeits all rights acquired by the marriage.

ANNULING ILLEGAL MARRIAGES.

SEC. 2231. [**Causes specified.**—Marriages may be annulled for the following causes:

1. Where marriage between the parties is prohibited by law;
2. Where either party was impotent at the time of marriage;
3. Where either party had a husband or wife living at the time of the marriage, provided they have not lived and cohabited together, as provided in section two thousand two hundred and one, of chapter one of this title;
4. Where either party was insane or idiotic at the time of the marriage;

Marriages may be annulled, under the code, where either party was impotent, insane or idiotic at the time of the marriage. But neither of these, whether existing at the time of the marriage or arising subsequently, are in terms grounds for a divorce. *Wertz v. Wertz*, 43 Iowa, 534.

SEC. 2232. [**Petition.**—A petition shall be filed in such cases as in actions for divorce, and all the provisions of this chapter shall apply to such cases except as otherwise provided.

SEC. 2233. [**Validity doubted.**—When the validity of a marriage is doubted, either party may file a petition, and the court shall decree it annulled or affirmed according to the proof.

SEC. 2234. [**Children.**—When a marriage is annulled on account of the consanguinity or affinity of the parties, or because of impotency, the issue shall be illegitimate; but when on account of non-age or insanity, or idiocy, the issue is the legitimate issue of the party capable of contracting marriage.

SEC. 2235. [**When, and of which parent, children become legitimate.**—When a marriage is annulled on account of a prior marriage, and the parties contracted the second marriage in good faith, believing the prior husband or wife to be dead, that fact shall be stated in the decree of annulity; and the issue of the second marriage begotten before the decree of the court, is the legitimate issue of the parent capable of contracting.

SEC. 2236. [**Compensation as in case of divorce.**—In case either party

entered into the contract of marriage in good faith, supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree, and the court may decree such innocent party compensation as in cases of divorce.

CHAPTER 4.

OF MINORS.

SECTION 2237. [Majority.]—The period of minority extends in males to the age of twenty-one years, and in females to that of eighteen years; but all minors attain their majority by marriage.

As to the right of a minor to recover for injuries accruing to him prior to his majority, see *Nelson v. The C., R. I. & P. R. Co.*, 38 Iowa, 564.

If a person who has attained the age of majority voluntarily attends a public school, creating the relation of teacher and pupil, the latter thereby waives any privilege which age confers, and subjects himself to like discipline with those who are within school age, and he may be punished for refractory conduct, and the teacher will not be liable for inflicting such punishment if it was reasonable under the circumstances. *The State v. Mizner*, 45 Id., 248.

SEC. 2238. [Contract and disaffirmance.]—A minor is bound, not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract and remaining within his control at any time after attaining his majority.

A deed of real property by a minor is voidable, but not void. *Jenkins v. Jenkins*, 12 Iowa, 195.

What is a "reasonable time" within which a minor may disaffirm his contract after attaining his majority, under the statute, must be determined upon the circumstances of each case. *Id.* See also *Stout v. Merrill*, 35 Id., 47; *Jones v. Jones*, 46 Id., 466.

Where a minor attained his majority on the 5th of January, and filed his petition on the 23d of the same month, to cancel a deed made by him during his minority, it was held that in the absence of equitable circumstances, requiring an earlier disaffirmance, the delay was not unreasonable. *Id.*

The only property which the party is required to return, upon disaffirming a contract made during minority, is that which was received by him by virtue of the contract and remained in his control at any time after coming of age. *Id.*

The general rule is that the right of a minor to avoid his contract is absolute and paramount to all equities in favor of third persons, including purchasers without notice. *Id.*

Under the statute, a contract made by a minor, in order to be avoided, must be disaffirmed by him within a reasonable time after he attains majority. *Wright v. Germain*, 21 Id., 585; *Stucker v. Yoder et al.*, 33 Id., 177.

In order to avoid the contract, the party must not only disaffirm the same, but redeem or tender to the other party what he received under the contract within a reasonable time after attaining his majority. *Stout v. Merrill*, 35 Id., 47. But this rule does not apply when the minor has never received anything either from his guardian or otherwise on the contract. *Lyon v. Vanatta*, 35 Id., 522.

That the property conveyed by the ward without consideration has passed into the hands of an innocent purchaser will not prevent the revocation of the deed. *Gates v. Carpenter*, 43 Id., 152.

A minor may disaffirm a contract made by him, at any time thereafter during his minority or within a reasonable time thereafter. This section is not intended to prevent a disaffirmation during minority, but only to fix a limit to the time when it may be made. *Childs v. Dobbins*, 55 Id., 205.

Where a minor owns an undivided interest in real property, which has been sold for taxes, he can redeem to the extent of his interest only. *Stout v. Merrill*, 35 Id., 47.

The right of a minor to redeem from tax sale is a transferable interest, which may be conveyed by deed. *Id.*

Where a minor entered into a contract with his father respecting his share of the estate, which he failed to disaffirm within six months after attaining his majority, he was held, not entitled to disaffirm it after that length of time had elapsed. *Jones v. Jones*, 46 Id., 466.

Where a minor has rendered services in accordance with the terms of a contract entered into

by himself, and has received payment for the same, such payment is a full satisfaction for the services and the minor cannot recover a second time therefor. *Murphy v. Johnson*, 45 Id., 57.

The father has a right to the care and custody of his minor children, and when he is deprived thereof by another he has a right of action therefor. The statute has not so far modified the common law as to take away these rights, or the right to sue and recover for the minor's services. The statute only provides that when the minor has made a contract for services, and rendered the same and received payment therefor, the parent cannot again recover. *Everett v. Sherfey*, 1 Id., 357 (1855).

The father may emancipate his minor child, or abandon his right of control, and in the absence of statutory requirements such emancipation need not be evidenced by any formal or recorded act, but may be proved like any other fact. *Id.* See, also, *Nixon v. Spencer*, 16 Id., 214; *Wolcott v. Rickey et al.*, 22 Id., 171.

The earnings of a minor child who has, with his father's consent, been doing business for a number of years upon his own means and in good faith, are not liable to the creditors of the father; nor is a homestead purchased for the family with such means thus liable. *Wolcott v. Rickey et al.*, 22 Id., 171.

An order of the court authorizing a guardian to revoke the deed of his ward is not necessary where there was no consideration for the deed, and no act of revocation is necessary other than an application for relief to a court of equity. *Gates v. Carpenter et al.*, 43 Id., 152.

What is a reasonable time after majority under this section within which an infant may disaffirm a contract made during infancy, will depend upon the circumstances of each case. It was held, in the case where a plaintiff did no act to disaffirm except to bring an action for that purpose three years and eight months after attaining majority, and three months after being legally advised of her right to disaffirm, that the action was not brought within a reasonable time; and that she had been informed by persons not qualified to give legal advice, that she could not bring an action to disaffirm until her infant brother became of full age, was not in the eye of the law a sufficient excuse for the delay. *Green v. Wilding*, 59 Id., 679.

This section, which requires that a minor is bound by his contract, unless he disaffirms it, and "restores to the other party all money or property received by him by virtue of his contract, and remaining within his control," only requires a return of the identical money or property, and not the payment of other money or property which he may have at the time of disaffirmance. *Hawes v. The B., C. R. & N. Ry Co.*, 64 Id., 315. Following *Jenkins v. Jenkins*, 12 Id., 195.

SEC. 2239. [Misrepresentations of.]—No contract can thus be disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting.

If a minor who is engaged in business for himself possesses property and manages his affairs as an adult, persons dealing with him are justified in concluding that he is capable of making contracts; and this is not limited to the particular business in which the minor is engaged, but applies to all contracts he may make. *Jaques v. Sax*, 39 Iowa, 367.

To render a minor who engages in business, and holds himself out as capable of contracting, liable as an adult under this section, his infancy must have been unknown to the person contracting for him. If known to him the statute creates no shield to the disaffirmance of the contract. *Beller v. Marchant*, 30 Id., 350.

SEC. 2240. [Payments to.]—Where a contract for the personal service of a minor has made been with him alone, and those services are afterwards performed, payment made therefor to such minor in accordance with the terms of the contract, is a full satisfaction for those services, and the parent or guardian cannot recover therefor a second time.

Where the contract for personal services of a minor is made with him alone, with knowledge of the parent, and those services are afterwards performed, and paid for to the minor, without fraud, and in accordance with the terms of the contract, such payment will operate as full satisfaction for the services rendered; and the parent or guardian cannot recover therefor. *Nixon v. Spencer*, 16 Iowa, 214; *Murphy v. Johnson*, 45 Id., 57.

CHAPTER 5.

OF THE GUARDIANSHIP OF MINORS, DRUNKARDS, SPENDTHRIFTS, AND LUNATICS.

SECTION 2241. [**Natural guardian.**]—The parents are the natural guardians of their minor children, and are equally entitled to the care and custody of them.

Under the statute of this state the right of the father to the care and custody of a minor child is not paramount to that of the mother. In controversies respecting the custody of a minor child, the controlling consideration is the best interest of the child. A child fifteen months old, and unweaned, was held to have been properly awarded to the custody of the mother, she not being shown to be an improper person to have such custody. *The State v. Kirkpatrick*, 54 Iowa, 373.

The mother as the natural guardian of the person of her minor son, the father being dead, is entitled to recover for the personal services of the son. *Cain v. Devitt*, 8 Id., 116.

SEC. 2242. [**Death of either parent.**]—Either parent dying before the other, and the survivor becomes the guardian. If there be no parent or guardian qualified and competent to discharge the duty, the circuit court shall appoint a guardian.

SEC. 2243. [**Of property.**]—If the minor has property not derived from either parent, a guardian must be appointed to manage such property, which may be either parent if suitable and competent.

SEC. 2244. [**Minor may choose.**]—If the minor be over the age of fourteen years and of sound intellect, he may select his own guardian, subject to the approval of the circuit court of the county where his parents, or either of them, reside; or if such minor is living separate and apart from his parents, the circuit court of the county where he resides has jurisdiction.

SEC. 2245. [**Power of court and guardian.**]—The guardian and court making the appointment have power and authority over any property of the minor situate or being in any other county, to the same extent and in the manner as if the same was situate in the county where the appointment was made. But when any order is made by such court affecting the title of lands lying in another county, a certified copy of the same, and of all the papers on which it is founded, shall be transmitted to the clerk of the circuit court in the county where such lands are situated, and such clerk shall enter such order on the proper docket and index the same, and make a complete record thereof in the same manner as if the cause in which the order is made had been commenced in his court.

SEC. 2246. [**Bond and oath.**]—Guardians appointed to take charge of the property of a minor must give bond, with surety, to be approved by the court, in a penalty double the value of the personal estate and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardians according to law. They must also take an oath of the same tenor as the condition of the bond.

A guardian's bond made payable to the county instead of the parties interested, is not thereby invalid, but inures to the benefit of the latter and suit may be brought thereon by any one injured by a breach thereof. *Pursley v. Hayes*, 22 Iowa, 11.

The surety in a bond required by section 2246 of the code to be given by a guardian appointed to take charge of the property of a minor, is not liable for the loss or misappropriation of money coming into his hands from the sale of his ward's real estate, a special bond being required for the faithful performance of the duties in that respect. *Madison County v. Johnson et al.*, 51 Id., 152.

The sureties in an ordinary guardian's bond, required by section 2246 of the code, are not liable for the wrongs of the guardian in selling his ward's real estate and squandering the proceeds. A special bond is provided for this purpose by section 2261. *Bruce v. Bruce et al.*, 65 Id., 106.

The bond provided for by this section cannot be approved by the clerk; it must be done by the court. *Reno v. McCully et al.*, 1d., 629.

The law does not confer upon the parent the power to make a mere oral gift of his minor child; and the donee in such case, cannot recover the child from his duly appointed guardian. *Burges, by his next friend, v. Frakes*, 67 Id., 460.

SEC. 2247. [**Supplemental security.**—The court may also direct guardians to give new or supplemental security, or may remove them for good cause shown, which cause must be entered on the records.

SEC. 2248. [**Inventory and appraisement.**—Within forty days after their appointment, they must make out an inventory of all the property of the minor, which shall be appraised in the same manner as the property of a deceased person. The inventory must be filed in the office of the clerk of the circuit court.

SEC. 2249. [**Powers.**—Guardians of the persons of minors, have the same power and control over them that parents would have if living.

Under this section, a guardian of the person of a child has the same right to its custody as if he were its parent, and unless he is shown to be an unfit person the child will not be taken from him and given to an aunt, though the will of the mother so requested. *Jenkins v. Clark*, 71 Iowa, 552.

SEC. 2250. [**Duties.**—Guardians of the property of minors must prosecute and defend for their wards. They must also, in other respects, manage their interests under the direction of the court. They may thus lease the lands or loan their money during their minority, and may do all other acts which the court may deem for the benefit of the wards.

This section of the code modified the common law rules as to the power of a guardian over the property of his ward. The power he possesses is alone conferred by this section. He is authorized to manage the interests of his ward under the direction of the court, which direction must precede the act. *Bates v. Dunham*, 58 Iowa, 308.

Under this section of the code, a case made by a guardian is invalid, or voidable at least, unless ordered and approved by the proper probate court. *Alexander, Guardian, v. Buffington et al.*, 66 Id., 360.

Under this section, a guardian has power, under the direction of the court, to compromise a suit against his ward involving the title to real estate; and in doing so he may execute a quitclaim deed for the real estate in litigation, without giving notice to his ward of the application to the court for leave to do so, as is required in ordinary cases where authority is sought to sell the real estate of a minor. *Hagy v. Avery*, 69 Id., 434.

SEC. 2251. [**Failure to comply with order of court: penalty.**—A failure to comply with any order of the court in relation to guardianship, shall be deemed a breach of the condition of the guardian's bond, which may accordingly be put in suit by any one aggrieved thereby, for which purpose the court may appoint another guardian of the minor if necessary. The court may also commit him to jail until he complies with such order.

An action cannot be maintained against a guardian for money of his ward in his hands as soon as the ward attains his majority, and a failure to pay over the money will not constitute a breach of his bond until the guardianship accounts are settled or he has failed to obey a mandate of the court requiring him to account. *O'Brien et al. v. Strang et al.*, 42 Iowa, 643.

The surety on the bond of a guardian which was given in compliance with the revision when the guardian entered upon the discharge of his duties, held, not liable for the loss or misappropriation of money coming into the hands of the guardian from the sale of lands belonging to his ward, a special bond being required for the faithful performance of his duties in that respect. *Madison County v. Johnston et al.*, 51 Id., 152.

Under this section a failure to comply with any order of the court in relation to the guardianship shall be deemed a breach of the condition of the guardian's bond. In an action by a ward against her guardian's surety, to recover the balance found due upon the taking of the guardian's accounts, it appeared that, although the administration was pending in Marshall county, the circuit judge of Webster county had made the order for payment. Held that the order was void, and there had been no breach of the condition of the bond. *Gillespie v. See et al.*, and *Carney v. Same*, 33 N. W. R., 676.

SEC. 2252. [**New guardian.**—Where a new guardian is appointed, the court may order the effects of the minor which are in the hands of his predecessor to be delivered up to such new guardian and failure to comply with such order for three months thereafter, shall subject such guardian to a penalty of one hundred dollars, to be recovered in an action on his bond for the benefit of such minor's estate.

Where a new guardian is appointed the court may order the effects of the minor to be delivered to such new guardian, but there should be no judgment rendered against the outgoing guardian. *Foteaux v. Lepage*, 6 Iowa, 123.

SEC. 2253. (*As amended by ch. 100, laws of 19th g. a.*) [Nonresident minors.]—A guardian may be appointed for non-resident minors who have property in this state on proper application made to the circuit court of the county in which such property or any part thereof may be, who shall qualify in the same manner and shall have the same powers, and be subject to the same rules as guardians of resident minors. (In all cases where a non-resident idiot, lunatic, or person of unsound mind has property in this state requiring care and protection, the circuit court in any county where such property or any part thereof is situated may appoint a guardian of the property of such person, who shall have the same power and authority in relation thereto, and be subject to the same liability, as the guardian of a resident minor.)

SEC. 2254. [Must render account.]—All guardians of minors are required to appear at least once each year before the circuit court, and render an account of all moneys or other property in their possession, together with all the interest which may have accrued on moneys loaned belonging to the minor or minors.

SEC. 2255. [Penalty for failure.]—In case the said guardian shall fail to appear before said court within the time above specified, he shall forfeit and pay into the county treasury the sum of fifty dollars, as in other actions of misdemeanor.

SEC. 2256. [Compensation.]—Guardians shall receive such compensation as the court may from time to time allow. The amount allowed, and the service for which the allowance was made, must be entered upon the records of the court.

See *O'Brien v. Strang*, 42 Iowa, 643. Cited in notes to section 2251, ante.

PROPERTY OF—SOLD.

SEC. 2257. [Real estate: sale or mortgage of.]—When not in violation of the terms of a will by which a minor holds his real property, it may, under the direction of the circuit court, be sold or mortgaged on the application of the guardian, either when such sale or mortgage is necessary for the minor's support or education, or where his interest will be thereby promoted by reason of the unproductiveness of the property, or of its being exposed to waste, or of any other peculiar circumstances.

A guardian of heirs holding only a reversionary interest in real property may, under authority of the probate court, mortgage or otherwise convey the same. *Foster v. Young*, 35 Iowa, 27.

Where a mother as guardian of her children, executes a conveyance, she covenants "for herself, her heirs, executors and administrators, that she is seized of good and indefensible title in fee simple, and that she will warrant and defend the title" to the grantee, she will be estopped from afterwards asserting an interest which she held in the property in her own right at the time of making such conveyance. *Id.*

A guardian may, under the statute and proper order of the proper court, execute a deed of trust as well as a mortgage upon the real property of his ward. *Id.*

A guardian's sale of the real estate of his ward is not a proceeding *in rem*, but one adversary in its nature, and when made without the notice required by law, is void for want of jurisdiction in the court ordering the same. *Lyon v. Vanatta et al.*, 35 Id., 521. See also *Good v. Norley*, 23 Id., 188; *Rankin v. Miller*, 43 Id., 11.

SEC. 2258. [Petition.]—The petition for that purpose must state the grounds of the application, must be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court, must be served personally upon the minor at least ten days prior to the time fixed for such application.

The time when the application will be made is an essential of the notice, hence a notice in which no time is fixed, or which fixes a wrong time, and subsequent to that when the application was made and acted on and the sale ordered, will not confer jurisdiction, and an order of sale thereunder will be void. *Lyon v. Vanatta*, 35 Iowa, 521.

Under a guardian's petition asking an order for the sale of real property, the court has no jurisdiction to make an order authorizing the guardian to mortgage it. *McMannis v. Rice*, 48 Id., 361.

If the notice be defective merely the jurisdiction is saved, and the proceedings cannot be col-

laterally assailed; but it is otherwise where there has been no notice, or where the paper relied on as such is without some of the essential requirements of a notice. *Lyon v. Vanatta, supra.*

Distinction between a case of defective notice and no notice, pointed out by MILLER, J. *Id.* To the same effect is *Haws v. Clark*, 37 Id., 355.

An appearance and answer by a guardian *ad litem*, appointed by the court without proper notice having been given to the minor, will not confer jurisdiction over the person of the infant, and the proceeding, as to him, will be void. *Good v. Norley*, 28 Id., 188.

SEC. 2259. [**Postponement and publication.**]—The court, in its discretion, may direct a postponement of the matter, and may order such further publication through the newspapers or otherwise, as it may deem expedient.

SEC. 2260. [**Reference.**]—It may also direct a reference for the purpose of ascertaining the propriety of ordering the sale or mortgage as applied for.

SEC. 2261. [**Bond to be given before sale.**]—Before any such sale or mortgage can be executed, the guardian must give security to the satisfaction of the court, the penalty of which shall be at least double the value of the property to be sold, or of the money to be raised by the mortgage, conditioned that he will faithfully perform his duty in that respect, and account for and apply all moneys received by him under the direction of the court.

See *O'Brien v. Strang*, 42 Iowa, 643; *Pursley v. Hayes*, 22 Id., 11.

Where the land is not sold by the guardian, but by a referee, in case of partition, the guardian is not required to give a *special* bond for the proceeds, and the sureties on his general bond are liable therefor. But where the bond (the only one) was for \$600, for four wards, the judgment should have been for \$150, in the action by one ward, the others not being parties. *Hooks v. Evans et al.*, 68 Id., 52.

SEC. 2262. [**Costs.**]—When the application for the sale of property is resisted, the court may, in its discretion, award costs to the prevailing party; and, when satisfied that there was no reasonable ground for making the application, may direct the costs to be paid by the guardian from his own funds.

SEC. 2263. [**Deeds, how made: court must approve.**]—Deeds may be made by the guardian in his own name, but they must be returned to the court and the sale or mortgage be approved before the same are valid.

A deed takes effect from its delivery; and a guardian's deed cannot be delivered until it has been approved by the court. Such approval is an affirmance, both of the deed and sale. *Wade v. Carpenter*, 4 Iowa, 361.

SEC. 2264. [**Directions as to sale.**]—The same rule that is prescribed in the sale of real property by executors, shall be observed in relation to the evidence necessary to show the regularity and validity of the sales above contemplated.

SEC. 2265. [**Validity of after five years.**]—No person can question the validity of such sale after the lapse of five years from the time it was made.

This provision of the code has no application to cases of appeals or other process bringing up the matter for review in an appellate court. *Pursley v. Hayes*, 22 Iowa, 11.

Nor was this section intended to cover sales by a person having no semblance of authority, or where the court had no jurisdiction of the parties or subject matter and no possession was taken by the purchaser; and in such case the heir would not be estopped by the statute from questioning the validity of the sale, though after the expiration of five years. *Id.*

In *Good v. Norley*, 28 Id., 188, the doctrine of *Pursley v. Hayes, supra*, was adhered to by BECK and COLE, JJ., while DILLON, Ch. J. and WRIGHT, J., held, that the five years limitation provided in the statute applied to sales that were invalid as well as to those where the proceedings were merely defective, in that the action in that case was barred by the statute. The court being equally divided on this question it was undecided, and the judgment was for that reason, affirmed.

In *Washburn v. Carmichael*, 32 Id., 475, it was held by a majority of the court that this section applied only to cases where the purchaser has taken and held continuous possession of the premises for the statutory period, Mr. Justice BECK expressing satisfaction with the views announced by him in *Good v. Norley*, 18 Id., 188.

In *Rankin v. Miller*, 43 Id., 11, it was held, that this section does not afford protection to those claiming under a void sale; re-affirming the doctrine of *Pursley v. Hayes, supra*. See also *Boyles v. Boyles*, 37 Id., 592, as to sales by an executor.

FOREIGN GUARDIANS.

SEC. 2266. (*As amended by ch. 100, 19th g. a.*) [**Foreign guardians.**]
—The foreign guardian of any non-resident minor, may be appointed the guardian in this state of such minor by the circuit court of the county wherein he has any property, for the purpose of selling or otherwise controlling that and all other property of such minor within this state, unless a guardian has previously been appointed under the preceding section. [The foreign guardian of any non-resident idiot, lunatic or person of unsound mind may be appointed the guardian in this state of such ward by the circuit court, in like manner and with like effect in all cases where the foreign guardian of a non-resident minor could be appointed the guardian of such minor in this state. Such guardian shall have the same powers and be subject to the same liabilities as guardians of resident minors.]

SEC. 2267. [**Appointment: how made.**]
—Such appointment may be made upon his filing with the clerk of the circuit court of the county wherein there is any such property, an authenticated copy of the order for his appointment. He shall thereupon qualify like other guardians, except as in the next succeeding section.

SEC. 2268. Upon the filing of an authenticated copy of the bond and the inventory rendered by the guardian in a foreign state, if the court is satisfied with the sufficiency and the amount of the security, it may dispense with the filing of an additional bond.

SEC. 2269. [**Power of as to personal property.**]
—Foreign guardians of non-resident minors may be authorized by the circuit court of the county wherein such minor has personal property, to receive the same on complying with the provisions of the following sections.

SEC. 2270. [**Bond.**]
—Such foreign guardian shall file in the office of the clerk of the circuit court in the county where the property is situated, a certified copy of his official bond, duly authenticated by the court granting the letters of guardianship, and shall also execute a receipt for the property received by him.

SEC. 2271. [**Order of court.**]
—Upon the filing of the bond as provided by the last section, and the court being satisfied with the amount of said bond, said court shall order the personal property of the minor to be delivered to the guardian; and the court shall spread the bonds and receipt on its records, and direct the clerk to notify, by mail, the court granting the letters of guardianship, of the amount of property allowed to the guardian, and the date of the delivery of the same.

OF DRUNKARDS, SPENDTHRIFTS, AND LUNATICS.

SEC. 2272. [**Guardians of: when appointed.**]
—When a petition is presented to the circuit court, verified by affidavit, that any inhabitant of the county is:

1. An idiot, lunatic, or person of unsound mind;
2. An habitual drunkard, incapable of managing his affairs;
3. A spendthrift who is squandering his property; and the allegations of the petition have been satisfactorily proved upon the trial provided for in the following section, such court may appoint a guardian of the property of any such person, who shall be the guardian of the minor children of his ward unless the court otherwise orders.

The appointment of a guardian for an insane person is a determination of the fact of insanity, and will be presumed to have been made under jurisdiction properly acquired according to the forms of law. *Ockendon v. Barnes et ux.*, 43 Iowa, 615.

While ordinarily, the right of every person to manage and control his property is recognized and conceded on all hands, yet to even this rule there is at least one exception, which is, where a party

is a spendthrift or drunkard, incapable of managing his affairs. For such, a guardian may be appointed under our statute. *Riddle v. Cutter*, 49 Id., 547, 534.

In a proceeding under this section, for the appointment of a guardian of the property of a person of alleged unsound mind, it was shown that defendant was very old, very infirm bodily, and that his mind had shared in his physical disability. The jury found that he was of unsound mind. *Held*:

1. That the verdict was sustained by the evidence.
2. That evidence of a conversation had by a witness with the defendant, was competent to show his mental condition, and that he felt his inability to properly manage and protect his property.

3. That it was not the expression of an opinion for the witness to testify, by way of illustrating the imbecility of age, that the defendant "talked like a child."

4. That in cases of this kind, after stating the facts upon which their opinion is based, non-experts may be allowed to give an opinion as to the defendant's soundness or unsoundness of mind. *Smith v. Hickenbottom*, 57 Id., 733.

SEC. 2273. [**Petition for: trial by jury.**]-Such petition shall set forth as particularly as may be, the facts upon which the application is based, and shall be answered as in other ordinary actions, all the rules of which shall govern so far as applicable and not otherwise provided in this chapter. The applicant shall be plaintiff and the other party defendant, and either party may have a trial by jury. The petition may be presented to the judge, who may appoint a temporary guardian.

SEC. 2274. [**Provisions made applicable.**]-The provisions of this chapter, and all other laws relating to guardians for minors, and regulating or prescribing the powers, duties, or liabilities of each and of the court, so far as the same are applicable, shall be held to apply to guardians and their wards appointed under section two thousand two hundred and seventy-two of this chapter.

SEC. 2275. (*As amended by ch. 70, 22d g. a.*)-[**Power, authority and duty of guardian.**]-Such guardian may sue in his own name, describing himself as guardian of the ward for whom he sues; and when his guardianship shall cease by his death, removal, or otherwise, or by the decease of his ward, any suit, action, or proceeding then pending shall not abate; but his successor, or the person for whom he was guardian, or the executor or administrator of such person, as the case may require, shall be made party to the suit or other proceedings, in like manner as is or may be provided by law for making an executor or administrator party to a proceeding of a like kind when the plaintiff dies during its pendency. [The court shall, if necessary, set off to the wife, and children under fifteen years of age of the insane person, or to either, sufficient of his property of such kind as it shall deem appropriate to support them for twelve months from the time he was adjudged insane.]

SEC. 2276. [**Real estate of may be sold.**]-Whenever the sale of the real estate of such ward is necessary for his support, or the support of his family, or the payment of his debts, or will be for the interest of the estate or his children, the guardian may sell the same under like proceedings as required by law to authorize the sale of real estate by the guardian of a minor.

Where the estate of an insane person under guardianship is inadequate for the payment of his debts, the statute does not authorize an allowance for the support of his family to be made out of that portion of his estate which would be subject to execution for the satisfaction of his debts. *Dutch, Guardian, v. Marvin, Intervenor*, 72 Iowa, 663.

SEC. 2277. [**Guardian to complete contracts.**]-The guardian of any person contemplated in section two thousand two hundred and seventy-two of this chapter, whether appointed by a court in this state or elsewhere, may complete the real contracts of his ward, or any authorized contracts of a guardian who has died or been removed, in like manner and by like proceedings as the real contract of a decedent may under an order of court, be specially performed by his executor or administrator.

SEC. 2278. [**When estate is insolvent.**]—If the estate of such person is insolvent, or will probably be insolvent, the same shall be settled by the guardian in like manner, and like proceedings may be had as is or may be required by law for the settlement of the insolvent estate of a deceased person.

SEC. 2279. [**Custody of: prior right to.**]—The priority of claim to the custody of any insane person, habitual drunkard, or spendthrift aforesaid, shall be:

1. The legally appointed guardian;
2. The husband or wife;
3. The parents;
4. The children.

CHAPTER 6.

MASTER AND APPRENTICE.

SECTION 2280. [**Minors.**]—Any minor child may be bound to service until the attainment of the age of legal majority as hereinafter described.

SEC. 2281. [**Indenture: when minor to sign.**]—Such binding must be by written indenture, specifying the age of the minor and the terms of agreement. If the minor is more than twelve years of age and not a pauper, the indenture must be signed by him of his own free will.

SEC. 2282. [**Consent of relatives required.**]—A written consent must be appended to or indorsed upon such agreement, and signed by one of the following persons, to-wit:

1. By the father of the minor; but if he be dead, or has abandoned his family, or is from any cause incapacitated from giving his assent, then,
2. By the mother; and if she be dead, or unable, or incapacitated for giving such assent, then,
3. By the guardian; and if there be no guardian, then by the clerk of the circuit court.

SEC. 2283. [**Paupers.**]—The clerk of the circuit court may bind minors who are paupers till they have attained the age of majority, without obtaining their assent.

SEC. 2284. [**Indenture.**]—The written indenture must, in that case, be signed by the master and said clerk.

SEC. 2285. The indenture must, in all cases where there is a parent or guardian, be in three parts, one being left with the master, another with the clerk of the circuit court, and the third with the person by whose assent he is bound.

SEC. 2286. [**Powers: rights: liabilities.**]—The powers, liabilities, and duties of the master, and the rights of the apprentice, are the same as those of parent and child, respectively, except as to inheritances and except as is otherwise provided by law.

SEC. 2287. [**Duty of parent, guardian, or officer.**]—The parent, guardian, or officer, by whose act or consent any minor is thus bound, must watch over the interest of the minor, and, if the case require, must enter complaint as provided for in the following section.

SEC. 2288. [**Complaint against master.**]—Upon complaint by the minor or by any other person made to the judge of the district or circuit court, stating under oath that the master is ill-treating his apprentice or is in any other manner palpably failing in the discharge of his duty in regard to him, and stating the particulars with reasonable certainty, the court shall summon the master to appear and answer such complaint.

SEC. 2289. [**Service of.**]-The complaint, with the proper notice indorsed thereon, must be served and returned in the same manner as in the commencement of an action, and the time for appearance shall be regulated by the same rules.

SEC. 2290. [**Answer: issue trial.**]-The answer of the master must also be under oath, and, if any other issue be joined thereon, it must be tried as in other cases in court.

SEC. 2291. [**Judgment: discharge.**]-If the court or jury before whom the cause is pending finds the cause of complaint admitted by the master, or proved upon the trial to be of sufficient magnitude to justify the discharge of the minor from farther service, judgment shall be rendered accordingly, and a certificate of such judgment placed in said minor's hands.

SEC. 2292. [**Appeal.**]-From any judgment in such cases, either the minor or the master may appeal in the same manner as provided for in ordinary cases.

SEC. 2293. [**Suit for damages.**]-The above proceedings form no bar to the bringing of a suit by or on behalf of the minor for damages, or for compensation for services.

SEC. 2294. [**Complaint against apprentice.**]-If the apprentice bound as aforesaid refuses to serve according to the terms of the indenture, upon complaint made in the manner aforesaid, the judge shall issue a warrant to cause the apprentice to be brought forthwith before him, and shall also cause notice of the proceedings to be given to the parent, guardian, or officer by whose act or consent the minor was bound as an apprentice, if to be found in the county.

SEC. 2295. [**Answer: when made.**]-A reasonable space of time, not exceeding three days, shall be allowed to the minor to consult his parent, guardian, or other friends, previous to making his answer to the complaint.

SEC. 2296. [**Issue: trial.**]-The answer must be made, and the issues thereon tried in the manner hereinafter provided.

SEC. 2297. [**Discharge of.**]-If he shows sufficient cause for refusing to serve, he may be discharged from service in the manner hereinbefore provided.

SEC. 2298. [**Master released from indenture.**]-Instead of proceeding as aforesaid, the master may, for any refusal to serve or for any gross misbehavior on the part of the apprentice, file a complaint for the purpose of releasing himself from the force and effect of the indenture aforesaid.

SEC. 2299. [**Proceedings.**]-Proceedings thereupon shall be had similar to those provided in case of a complaint by or in behalf of the apprentice, and judgment rendered in like manner with the same right of appeal.

SEC. 2300. [**Dissolution of by death or removal.**]-The death of the master, or his removal from the state, works a dissolution of the indenture unless otherwise provided therein, or unless the apprentice elects to continue in his service. And in the event of a dissolution, the apprentice shall receive such allowance for services previously rendered as may be thought necessary under the circumstances of the case.

SEC. 2301. [**Natural guardian when removed.**]-Upon complaint being made to the circuit court of the proper county, verified by affidavit, that the father or mother of a minor child is, from habitual intemperance and vicious and brutal conduct, or from vicious, brutal, and criminal conduct towards said minor child, an unsuitable person to retain the guardianship and control the education of such child, the court may, if it find the allegations in the complaint manifestly true, appoint a proper guardian for the child, and may, if expedient, also direct that such child be bound as an apprentice to some suitable person until he attains his majority. But nothing herein shall be so construed as to take such minor child, if the mother be a proper guardian.

Where upon the application of the father of an illegitimate child for the custody thereof, it appeared that his moral character was no better than that of the mother, and that she had a nat-

ural affection for the child, neither neglecting, abusing, nor failing to provide for it, *held* that the custody of the child should not be awarded to him. *Pratt v. Nitz*, 48 Iowa, 33.

SEC. 2302. [**Proceedings.**]-The same proceedings may take place, and a like order be made where the mother, who has for any cause become the guardian of her minor child, is in like manner found to be manifestly an improper person to retain such guardianship.

SEC. 2303. [**Same.**]-The complainant in such cases must be sworn to his complaint and file it in the office of the clerk, and a copy thereof, with a notice thereon indorsed, stating the time when the matter will be brought before the circuit court for adjudication, must be served personally on the parent from whom the guardianship is sought to be taken, at least ten days before the time so fixed for the adjudication.

SEC. 2304. [**Trial.**]-Issues joined shall be tried in the same manner as in ordinary civil actions.

SEC. 2305. [**Preference over other cases.**]-Preference shall be given to such cases over the ordinary business of the court, but trials actually commenced need not be suspended for that purpose.

SEC. 2306. [**Schooling and treatment of minors.**]-The master shall send said minor child, after the same be six years old, to school at least four months in each year, if there be a school in the district, and at all times the master shall clothe the minor in a comfortable and becoming manner.

CHAPTER 7.

OF THE ADOPTION OF CHILDREN.

SECTION 2307. [**Who may adopt.**]-Any person competent to make a will is authorized in manner hereinafter set forth, to adopt as his own the minor child of another, conferring thereby upon such child all the rights, privileges and responsibilities, which would pertain to the child if born to the person adopting it in lawful wedlock.

SEC. 2308. [**Consent of parents, mayor of city, or clerk of circuit court required.**]-In order thereto, the consent of both parents, if living and not divorced or separated, and if divorced or separated, or if unmarried, the consent of the parent lawfully having the care and providing for the wants of the child, or if either parent is dead, then the consent of the survivor, or if both parents be dead, or the child shall have been and remain abandoned by them, then the consent of the mayor of the city where the child is living, or, if not in a city, then of the clerk of the circuit court of the county where the child is living, shall be given to such adoption by an instrument in writing signed by the parties or party consenting, and stating the names of the parents, if known, the name of the child, if known, the name of the person adopting such child, and the residence of all if known, and declaring the name by which such child is thereafter to be called and known, and stating also that such child is given to the person adopting, for the purpose of adoption as his own child.

SEC. 2309. [**Instrument of adoption: acknowledged and recorded.**]-Such instrument in writing shall be also signed by the person adopting, and shall be acknowledged by all the parties thereto in the same manner as deeds affecting real estate are required to be acknowledged; and shall be recorded in the recorder's office in the county where the person adopting resides, and shall be indexed with the name of the parents by adoption as grantor, and the child as grantee, in its original name if stated in the instrument.

Where the instrument intended to affect the adoption of a minor child was signed and acknowledged by the parent but was not signed by the person adopting the child, it was held, not a legal adoption, although the child resided with the intended parents for a year and a half. *Long v. Hewitt et al.*, 44 Iowa, 363.

Where a guardian of the person and property of a minor has been duly appointed, such child cannot be adopted by a third person without the consent of the guardian. Whether it can be done with such consent, *quære*. *Burger, by his Next Friend, v. Frakes*, 67 Id., 460.

SEC. 2310. [**Rights and relations of child.**—Upon the execution, acknowledgment, and filing of record of such instrument, the rights duties and relations between the parent and child by adoption, shall, thereafter, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth.

Where a father adopted two children of his daughter, and afterward died intestate, it was held, that the children so adopted inherited from him as his own children, and would also inherit the share of their deceased mother. *Wagner v. Varner*, 50 Iowa, 532.

Where a written instrument for the adoption of a child was signed and acknowledged by the parties, but not filed for record until after the death of the party making the adoption, it was held that the act of adoption was incomplete, and that the child would not inherit as an heir of the decedent. *Tyler et al. v. Reynolds*, 53 Id., 146.

Rights of inheritance can be acquired through adoption only by a full compliance with the provisions of the statute in respect thereto; where articles of adoption are properly executed, but are not recorded during the lifetime of the person adopting, no right to inherit from him is thereby conferred upon the child, though the latter has complied with the terms of such articles during the full period of his minority. *Shearer et al. v. Weaver et al.*, 56 Id., 578.

SEC. 2311. [**Maltreatment of child: consequences of.**—In case of maltreatment committed or allowed by the adopted parent, or palpable neglect of duty on his part toward such child, the custody thereof may be taken from him and entrusted to another at his expense, if so ordered by the circuit court of the county where the parent resides, and the same proceedings may be had therefor, so far as applicable, as are authorized by law in such a case in the relation of master and apprentice; or the court may, on showing of the facts, require from the adopted parent, bond with security, in a sum to be fixed by him, the county being the obligee, and for the benefit of the child, conditioned for the proper treatment and performance of duty toward the child on the part of the parent; but no action of the court in the premises shall affect or diminish the acquired right of inheritance on the part of the child, to the extent of such right in a natural child of lawful birth.

TITLE XVI.

OF THE ESTATES OF DECEDENTS.

CHAPTER 1.

OF PROBATE JURISDICTION.

SECTION 2312. [Circuit court has exclusive.]—The circuit court of each county shall have original and exclusive jurisdiction of the probate of wills, and the appointment of such executors, administrators, or trustees, as may be required to carry the same into effect; of the settlement of the estate of deceased persons, and of the persons and estates of minors, insane persons, and others requiring guardianship, including applications for the sale of real property belonging to any such estates, except as prescribed in chapters one and three, of title fifteen.

(Chapter 134, Laws of 1886, abolishes the circuit court and vests this jurisdiction in the district court. See page 40, *ante*.)

This section does not deprive the district court of jurisdiction of an original action to set aside a will. It has reference only to the probate. The district court cannot admit a will to probate for want of jurisdiction over the subject matter. Not so, however, in respect to an original action to set it aside. *Leighton v. Orr*, 44 Id., 679, 683; *Maples v. Marsh*, 49 Id., 381.

The circuit court as a court of probate has jurisdiction to appoint an administrator, even in a county where there is no property of deceased beyond an interest in an action at law, and its adjudication is not open to be attacked collaterally. *Murphy, Neal & Co. v. Creighton*, 45 Id., 179. But see *Christy v. Vest*, 36 Id., 285.

An order of the circuit court, discharging an administrator, does not amount to an adjudication than an heir of the intestate, whom the administrator reported that he was unable to find, is in fact dead, nor will it estop such heir or his creditors from claiming his distributive share of the estate. *Crosby v. Calhoun et al.*, 45 Id., 557.

Upon the probate of a will a jury trial cannot be demanded as a matter of right; and where such trial is granted it will not be error to set aside the finding of the jury. *Gilruth v. Gilruth*, 40 Id., 346.

The jurisdiction conferred upon the circuit court of the estates of insane persons does not exclude the jurisdiction of the district court upon questions of right between insane persons and others. *Flock et al. v. Wyatt et al.*, 49 Id., 466.

The district court has original jurisdiction of actions for the breach of the conditions of administrators' bonds. *Wheelhouse v. Bryant et al.*, 13 Id., 160; *Jenkins v. Shields*, 36 Id., 526. So, also, the statute conferring jurisdiction on the probate court in respect to claims against estates of deceased persons, does not defeat or oust the general equity jurisdiction of the district court. *Hartin v. Stevenson*, 30 Id., 371.

An action to set aside a will has always been held to be an action at law, in which either party has a right to a jury trial. *Id.* See, also, *Gilruth v. Gilruth*, 40 Id., 346.

The admission of a will to probate is not conclusive on the parties adversely interested, and an appeal may be taken on an original action brought to set the will aside. *Id.*

In *Citizens' Bank v. Rhutusel et al.*, 67 Id., 316, it was held, under sections 2312 and 2315 of the code, that it was the duty of the clerk to appoint administrators, when the circuit court was not in session; but when it was in session that duty devolved upon the court. But by whomsoever appointed, it was the duty of the clerk to issue the letters of administration.

Want of jurisdiction of the subject matter cannot be waived, even by consent of parties, and the objection may be raised at any time. *Orcutt v. Hanson, Ex., et al.*, 71 Id., 514.

SEC. 2313. (As amended by ch. 144, 21st g. a.)—[**Always open: exception.**]
The court shall be always open for the transaction of probate business; but the

hearing of any matter requiring notice shall be had only in term time, or at such time and place as the judge may appoint [and in case there is no contest, such hearing may be had at any place within the judicial district to which belongs the county in which the business is pending.]

Under this section the court has no authority to hear and determine a matter in probate outside of the county where it belongs, and an order made outside of such county is void. *Capper v. Sibley et al.*, 65 Id., 754.

SEC. 2314. When the judge fixes a time and place of hearing, as contemplated in the preceding section, he shall determine what notice shall be given thereof, and no such hearing shall be had until proof is made of the giving of such notice.

The legislature has conferred upon the judge of the circuit court as a court of probate the right to determine what notice shall be given of the hearing of any matter pending in that court in which notice is required. This includes the kind of notice and mode of service. It was accordingly held that, where an administrator made an application to the court to sell real estate to pay debts, and the court ordered that a notice of the hearing should be served on the defendants (who were non-residents of state) by publication for two weeks in a newspaper, which was done accordingly and due proof made thereof, the court thereby acquired jurisdiction of the person of the defendants. *Casey et al. v. Stewart*, 60 Iowa, 160.

SEC. 2315. [Clerk: power in vacation.]—The clerk, in vacation, shall have power to appoint executors, administrators [guardians] and appraisers; to issue citations and other notices, and to discharge such other duties in relation to estates of decedents as are in this title specially devolved on him.

It is the exclusive province of the court under section 2246 to approve of a guardian's bond, and the clerk has no power to do so under section 2315, which authorizes him to appoint a guardian in vacation. *Reno v. McCully et al.*, 65 Iowa, 629.

SEC. 2316. [Orders of clerk set aside.]—Any act of the clerk, as contemplated in the preceding section, shall be binding on all parties interested therein until the next term of the court after they are entered of record, when they shall be read in open court and approved, set aside, or modified, but until so set aside or modified, it shall have the same force and effect as if done by the court.

SEC. 2317. [Causes transferred to district court.]—Where the judge is a party, or connected by blood or affinity with any person so interested nearer than the fourth degree, or is personally interested in any probate matter, he shall order the same transferred to the district court, which shall have jurisdiction therein the same as the circuit court would otherwise have, and its proceedings shall be entered on the records of the circuit court.

SEC. 2318. [Jurisdiction of court.]—When a case is originally within the jurisdiction of the courts of two or more counties, that court which first takes cognizance thereof by the commencement of proceedings, shall retain the same throughout.

SEC. 2319. The court of the county in which a will is probated, or in which administration is granted, shall have jurisdiction co-extensive with the state in the settlement of the estate of the decedent and the sale and distribution of his real estate.

SEC. 2320. [Process revoked.]—Any process or authority emanating from the court in probate matters, may for good cause, be revoked and a new one issued.

SEC. 2321. [Bonds filed: approval of.]—All bonds relating to probate matters shall be filed in the office of the clerk of the circuit court, and shall not be deemed sufficient until examined by the clerk and his approval indorsed thereon.

CHAPTER 2.

OF WILLS AND LETTERS OF ADMINISTRATION.

SECTION 2322. [**Who may make.**].—Any person of full age and sound mind may dispose, by will, of all of his property except what is sufficient to pay his debts, or what is allowed as a homestead, or otherwise given by law as privileged property to his wife and family.

The republication of a will revoked by the subsequent birth of a child cannot be shown by parol. In the absence of statutory provisions the same formalities are necessary to the republication as were required in the original publication. *Carey v. Baughn*, 36 Iowa, 540; *Perjue v. Perjue*, 4 Id., 520.

Parol evidence is not admissible to supply an omission or cure a defect in a will, caused through oversight or mistake. Nor in any case to show the intention of the testator, except where there is a latent ambiguity arising, dehors the will, as to the person or subject-matter, or to rebut a resulting trust. *Fitzpatrick v. Fitzpatrick*, 36 Id., 674.

SEC. 2323. [**Subsequent property.**].—Property to be subsequently acquired, may be devised when the intention is clear and explicit.

This section of the code has the effect only to extend to real property the rule which before existed at common law with respect to personal property; and the meaning of the section is, that whenever the intention of the testator to have it so pass is fairly to be inferred from the provisions of the will, when construed according to the established rules for the construction of such instruments. So where a testator devised the remainder of his personal property and the whole of his real estate to the plaintiffs; held, that it carried to plaintiff's real estate, the title of which the testator acquired after the execution of said will. *Briggs et al. v. Briggs et al.*, 69 Iowa, 617.

SEC. 2324. [**Verbal wills.**].—Personal property to the value of three hundred dollars may be bequeathed by a verbal will, if witnessed by two competent witnesses.

A verbal will disposing of personal property exceeding three hundred dollars in value is of no validity even to the extent of that sum. *Stricker v. Oldenbaugh*, 39 Iowa, 653.

A bequest of a promissory note of the nominal value of \$400 will be held invalid in the absence of proof that its value did not exceed \$300.

It is necessary to the validity of a will bequeathing personal property exceeding three hundred dollars in value, that two witnesses should *subscribe* the same; and it is not valid unless thus subscribed, though the witnesses were present and can testify that it was signed by the testator. *In the matter of the last will, etc., of Boyer Boyens*, 23 Id., 354.

It is not necessary that the witnesses by which a nuncupative will is established should have been called upon by the testator to witness such will. *Milligan et al. v. Leonard et al.*, 46 Id., 692.

Where a decedent on his death bed several times expressed a desire that certain persons should have his property, it was held that the *animus testandi* would be presumed and his property disposed of in accordance with such desire to the extent which a nuncupative will would be valid. *Id.*

The fact that real and personal property in excess of three hundred dollars in value are included in a verbal will does not render it invalid *in toto*, but only for the excess over that sum. *Id.*

SEC. 2325. [**Soldier or mariner.**].—A soldier in actual service, or a mariner at sea, may dispose of all his personal estate by a will so made and witnessed.

SEC. 2326. [**In writing.**].—All other wills, to be valid, must be in writing witnessed by two competent witnesses and signed by the testator, or by some person in his presence and by his express direction.

It is not essential to the validity of a will that the character and purposes of the instrument should be stated to the witnesses by the testator. The statute requires the instrument to be "witnessed," that is, "to see the execution of the instrument, and subscribe it for the purpose of establishing its authenticity." And this may be done without any declaration of the testator, as to the character and purpose of the instrument, made to the witnesses. *In the matter of the Will of Rachel Hulse*, 52 Iowa, 663.

It is essential to the validity of a will bequeathing property exceeding in value the sum of three hundred dollars, that two witnesses should *subscribe* the will; and it is not sufficient or valid

unless thus subscribed, even though the witnesses were present and can testify that it was signed by the testator. *In the matter of last Will, etc., of Boyer Boyens*, 23 Id., 534.

A will, in order to pass the title to land situated in this state, must have been executed and witnessed as required by the laws of this state. *Lynch v. Miller et al.*, 54 Id., 516.

SEC. 2327. No **subscribing witness** to any will can derive any benefit therefrom, unless there be two disinterested and competent witnesses to the same.

The fact that a husband is a legatee under a will does not render his wife incompetent as a subscribing witness to such will. *Hawkins v. Hawkins*, 54 Iowa, 443.

SEC. 2328. But, if without a will, he would be entitled to any portion of the testator's estate, he may still receive such portion to the extent in value of the amount devised.

SEC. 2329. **Wills can be revoked**, in whole or in part, only by being cancelled or destroyed by the act or direction of the testator with the intention of so revoking them, or by the execution of subsequent wills.

Where a testator undertakes to dispose by will of both real and personal estate, and he subsequently conveys the real estate by deed, it will not, in general, work a revocation of the will as to the personal property owned by the testator at the time of his decease. *Warren v. Taylor*, 56 Iowa, 182.

See *Milburn v. Milburn*, 60 Id., 411.

SEC. 2330. When done **by cancellation**, the revocation must be witnessed in the same manner as the making of a new will.

The cancellation of the signature to a will, made by drawing a scroll through it in such manner as to not render it illegible but was not witnessed in such manner as the making of a new will, as required by the statute, held not to constitute a revocation of the will. *Gay v. Gay*, 60 Id., 415.

SEC. 2331. [**Deposit of.**]—Wills, duly sealed up and indorsed, may be deposited with the clerk of the court, who shall file and preserve the same until the death of the testator, unless he sooner demand them.

The cancellation of a signature to a will, made by drawing a scroll through it, was not witnessed in the same manner as the making of a new will, as required by this section. Held, not good as a revocation of the will. *Gay v. Gay*, 60 Iowa, 415.

SEC. 2332. **If no executors** are named in the will, one or more may be appointed to carry it into effect.

Where the testator has named an executor in his will, the court has no power to appoint an administrator to precede the executor in the settlement of the estate. *Pickering v. Weiting*, 47 Iowa, 242.

SEC. 2333. [**If no executor.**]—If no executors are named therein, or if the executors named fail to qualify and act, it shall be retained until an executor is appointed and qualified in the manner herein prescribed.

POSTHUMOUS CHILDREN—DEVISEE.

SEC. 2334. [**Posthumous children.**]—Posthumous children unprovided for by the father's will, shall inherit the same interest as though no will had been made.

Where a testator, having two children, bequeathed his entire property to his wife, and subsequently two other children were born to him, it was held that the will was presumptively revoked. *Negus v. Negus et al.*, 46 Iowa, 487. To the same effect is *Fallon v. Chidister*, Id., 588.

The probate of a will establishes its execution and renders it admissible in evidence, but does not determine the title of property claimed under it. *Id.*

SEC. 2335. [**Allowance to.**]—The amount thus allowed to a posthumous child, as well as that of any other claim which it becomes necessary to satisfy in disregard of or in opposition to the contemplation of the will, must be taken ratably from the interests of heirs, devisees, and legatees.

SEC. 2336. [**"Devisees": meaning of.**]—The word "devisees" as used in this title, when applicable, be construed to embrace "legatees," and the word "devised" shall, in like cases, be understood as comprising the force of the word "bequeathed."

SEC. 2337. [**Devisee: children of inherit.**]—If a devisee die before the testator, his heirs shall inherit the amount so devised to him unless from the terms of the will a contrary intent is manifest.

The widow of a deceased husband will not inherit from the child who died before the death of the husband. *Will v. Gustav L. H. Overdieck*, 50 Iowa, 244.

Where a devisee dies before the testator, leaving a widow and a brother, the brother is, but the widow is not, an heir of the devisee within the meaning of this section, and in such case the legacy will go to the brother, and held further that the word "heirs" as used in sections 2337 and 2454 of the code have the same meaning. *Blackman et al. v. Wadsworth et al.*, 65 Id., 80; citing *McMenomy v. McMenomy*, 22 Id., 148, and *Will of Overdieck*, 50 Id., 244.

CUSTODIAN—PROBATE.

SEC. 2338. [To file will.]—Any person having the custody of a will, shall, as soon as he is informed of the death of the testator, file the same with the clerk, who shall open and read the same.

SEC. 2339. [Penalty for refusal.]—If any person having the custody of a will fail to produce the same as required by the preceding section after receiving a reasonable notice so to do, the court may commit him to jail until he produce the same; and he shall be liable for all damages occasioned by his failure to produce such will.

SEC. 2340. (*As amended by ch. 11, 16th g. a.*) [Probate.]—After the will is produced and read, a day shall be fixed by the court or clerk for proving the same, which day shall be during a term of court, and may be postponed from time to time in the discretion of the court. [Whenever the proving of a will is contested either party shall be entitled to demand a jury and to the verdict of a jury on the issues involved.]

It was held, in *Gilruth v. Gilruth*, 40 Iowa, 346, prior to the amendment of this section, that, upon the probate of the will, a jury trial could not be demanded as a matter of right.

The amendment to this section requires the issues on the probate of a will to be submitted to a jury on demand of either party, and the verdict in such case has the same effect as in ordinary actions at law, and should not be set aside for any less weighty reasons. *Collins v. Brazill*, 63 Id., 432.

SEC. 2341. **The clerk shall give notice of the time** thus fixed by publishing a notice, signed by himself and addressed to all whom it may concern, in a daily or weekly paper printed in the county where the will is filed, for three consecutive weeks, the last publication of which shall be at least ten days before the time fixed for such hearing; but the court in its discretion may prescribe a different kind of notice.

Publication of the notice required by this section (2341) may be proved by the affidavit of any person who is in a situation to have personal knowledge of the fact. *Farrell v. Leighton et al.*, 49 Iowa, 174.

A will devising the use and enjoyment of certain real estate to A, "to be enjoyed by her during her natural life only," and after her death to her heirs, "free and clear of all liens and incumbrances thereon, was held, to give the devisee only a life estate, the intent of the testator being to create a new stock of descent at her death. *Slemmer v. Crampton et al.*, 50 Id., 302.

No other or further notice than that contemplated in this section was necessary to give the circuit court jurisdiction of proceedings for the probate of a will. *In re Will of Middleton*, 72 Id., 424.

SEC. 2342. [Certificate: evidence.]—Wills, when proved and allowed, shall have a certificate thereof indorsed on or annexed thereto, signed by the clerk and attested by the seal of the court; and every will so certified, or the record thereof, or the transcript of such record duly authenticated, may be read in evidence in all courts without further proof.

A will having the certificate of proof and allowance attached, as provided by this section, may be read in evidence without further proof, or any showing that all the directory provisions of the statute have been complied with. Nor need the certificate state such compliance, but only the fact of the proof and allowance of the will. *Latham v. Latham*, 30 Iowa, 294.

The probate of a will establishes its execution and renders it admissible in evidence, but does not determine the title of the property claimed under it. The effect of the will and its interpretation, whereon titles are rested, are not determined in the proceedings for its probate. These are

matters for adjudication when rights and property are claimed under the will. *Fallon v. Chidester*, 46 Id., 538.

SEC. 2343. [**Recorded.**]—After being approved and allowed, the will, together with the certificate hereinafter required, shall be recorded in a book kept for that purpose.

SEC. 2344. [**Executor to have copy.**]—When proved and recorded, the court shall direct the will, or an authenticated copy thereof, to be placed in the hands of the executor therein named or otherwise appointed.

EXECUTORS—TRUSTEES.

SEC. 2345. [**Married woman.**]—A married woman may act as executor independent of her husband.

SEC. 2346. [**Minors.**]—If a minor under eighteen years of age is appointed an executor, there is a temporary vacancy as to him until he reaches that age.

SEC. 2347. [**Vacancies.**]—If a person appointed executor refuses to accept the trust, or neglects to appear within ten days after his appointment and give bond as hereinafter prescribed, or if an executor removes his residence from the state, a vacancy will be deemed to have occurred.

An executor may refuse to accept the trust, or may create a vacancy by removal from the state, and he may also surrender his trust by resignation. *The United States Rolling Stock Company v. Potter*, 43 Iowa, 66.

Non-residence alone does not disqualify one so that he cannot lawfully be appointed an administrator of an estate in this state; but ordinarily, in the absence of circumstances requiring the appointment of a non-resident, it should not be made. *The C., B. & Q. R'y Co. v. Gould*, 64 Id., 343.

While there are no restrictions or limitations in the statute upon the right of a wife to administer upon the estate of her husband, yet that right cannot be regarded as absolute, for she may be insane or otherwise incompetent, and something must be left to the discretion of the court. *The estate of O'Brien*, 63 Iowa, 622.

SEC. 2348. [**How filed.**]—In a case of vacancy, letters of administration, with the will annexed, may be granted to some other person; or if there be another executor competent to act, he may be allowed to proceed by himself in administering the estate.

Upon the resignation of an administrator, the person appointed his successor, whatever may be the peculiar designation applied to him, succeeds to all the duties and powers of his predecessor, and he may complete the discharge of obligations first assumed by the latter without delay or interruption. *Shawhan v. Loffer*, 24 Iowa, 217.

Under sections 2348 and 2349 of the code, a substituted administrator succeeds to the duties and obligations as well as to the powers of the first administrator. *Stewart v. Phenice et al.*, 65 Id., 475. Following *Shawhan v. Loffer*, 24 Id., 217.

SEC. 2349. [**Substitution.**]—The substitution of other executors shall occasion no delay in the administration of the estate. The periods hereinafter mentioned within which acts are to be performed after the appointment of executors, shall all, unless otherwise declared, be reckoned from the issuing of the commission to the first general executor.

SEC. 2350. [**Trustees to give bond.**]—Trustees appointed by will, or by the court, must qualify and give bonds the same as executors, and shall be subject to control or removal by the court in the same manner.

Persons to whom personal property is bequeathed by will, and who are charged with certain trust duties in respect thereto, are properly legatees, and not trustees within the meaning of this section of the code requiring trustees to give bonds. This provision applies only to those who take property to hold for a determinate period, at the expiration of which it is to be transferred to the beneficiaries, and during the continuance of which period the estate remains unsettled and under the supervision of the probate court. *Perry et al. v. Drury et al.*, 56 Iowa, 60. **SEEVERS, J.**, dissenting.

FOREIGN WILLS.

SEC. 2351. [**Probated in other states: effect of.**]-Wills probated in any state or country, shall be admitted to probate in this state without the notices required by law in the case of domestic wills on the production of a copy of such will and of the original record of probate thereof, authenticated by the attestation of the clerk of the court in which such probate was made; or, if there be no clerk by the attestation of the judge thereof, and by the seal of office of such officers, if they have a seal.

It has been held that the sufficiency of the attestation of a foreign will by the judge of the probate court where the same was proven, without being authenticated by the clerk, cannot be collaterally called in question after the probate court in the county of this state has, under the provisions of the statute, allowed and recorded the will and passed upon the sufficiency of the authentication. *Stanley v. Morse et al.*, 26 Iowa, 454.

Under this section, a will proved and allowed in another state should be allowed and may be recorded by the circuit court of this state. Such allowance is conclusive of the due execution of the will. *Vance et al. v. Anderson*, 39 Id., 426; see section 2353 of code.

SEC. 2352. All provisions of law relating to the carrying into effect of domestic wills after probate, shall, so far as applicable, apply to foreign wills admitted to probate in this state as contemplated in the preceding section:

(*As amended by ch. 162, 18th g. a.*) [**Foreign executor empowered to sell real estate.**]-[*Provided*, That where, by any will first admitted to probate in any other state or country and then admitted to probate in Iowa, the executors or trustees under said will are empowered to sell and convey real estate, then upon the production of and recording in the proper probate record a copy of the original record of the appointment, qualification and giving bond, unless such bond was waived in the will, of such executors or trustees by the foreign court granting the original probate of the will, duly authenticated in the same manner as foreign wills are required to be, then, in conformity with the power granted in such wills, such executors or trustees may sell and convey real estate within any county in this state where such probate of will and proof of qualification may be so of record, without further qualifying in this state, and without reporting such sale to the circuit courts in this state for approval; and such sales and conveyances shall have the same force and validity as if made by executors and trustees duly qualified within this state and reported to, and approved by the circuit courts, unless at the time of the execution and delivery of said deed, letters testamentary or of administration upon the estate of such decedent shall have been granted in this state and remain in force and unrevoked, and due notice of such letters be given in such county in this state, if other than the one in which such letters were originally granted here as required by section 2629 of the code, in reference to actions affecting real estate; in which case any conveyance made shall be subject to all the rights acquired under the appointment and letters granted in Iowa; *provided*, that no such conveyance shall be made by such executor or trustee until three months after the recording of a duly authenticated copy of the will, original record of appointment, qualification and bond (unless bond was waived in the will) in the proper probate record of the county where the land is situated.

SEC. 2. [**Deed by foreign executors heretofore made: legalized.**]-That all conveyances heretofore made by foreign executors and trustees in which the requirements of this act have been complied with, or in which such proof of authority at the date of conveyance shall be hereafter made of record as provided in section 1 of this act, are hereby declared to be legal and valid in law and equity from the date of such deed; *provided*, that the provisions of this section shall in no manner affect adverse rights vested at the date of such conveyance and prior to the taking effect of this act, or the performing the additional requirements of this section.]

SEC. 2353. [**Foreign or domestic must be probated.**]—Wills, foreign or domestic, shall not be carried into effect until admitted to probate as hereinbefore provided, and such probate shall be conclusive as to the due execution thereof, until set aside by an original or appellate proceeding.

The probate of a will is not conclusive upon the parties adversely interested, and an original action will lie at law to set it aside. *Leighton v. Orr*, 44 Iowa, 679, 682.

The same rule applies to the probate of a foreign will on the ground that such will is invalid as an instrument of title to land in this state. *Lynch v. Miller et al.*, 54 Id., 516.

In an action brought to construe and enforce a will, the guardian *ad litem* of a minor legatee filed a cross-petition attacking its validity. It was held that such cross-petition would be regarded as if made in an original action contemplated by this section; and the guardian in such cross-petition, as in an original action, may lawfully interpose the question of the validity of the will. *Kelsey v. Kelsey*, 57 Id., 383.

An order of court granting the probate of a will cannot be attacked by motion to set it aside for error in the proceedings, but the remedy must be sought by original or appellate proceedings as directed by this section. *Middleton v. Middleton*, 72 Id., 424.

ADMINISTRATION.

SEC. 2354. [**Who entitled: order of.**]—In other cases where an executor is not appointed by will, administration shall be granted:

1. To the wife of the deceased;
2. To his next of kin;
3. To his creditors;
4. To any other person whom the court may select.

Where the time given by the statute for the next of kin or creditors to take out letters of administration has expired, a stranger may be appointed *de bonis non*. *Crossan v. McCrary*, 37 Iowa, 684.

The probate court may appoint one or more administrators of an estate, and an appointment of an additional administrator, against the protest of the one first appointed, will not be disturbed when it does not appear that the court has abused its discretion in making such appointment. *Read v. Howe*, 13 Id., 50.

SEC. 2355. [**Classes united.**]—Individuals belonging to the same or different classes, may be united as administrators whenever such course is deemed expedient.

SEC. 2356. [**Time allowed each class.**]—To each of the above classes in succession, a period of twenty days, commencing with the burial of the deceased, is allowed within which to apply for administration upon the estate.

SEC. 2357. [**Special administrators.**]—When from any cause general administration cannot be immediately granted, one or more special administrators may be appointed to collect and preserve the property of the deceased.

In the absence of direct review, by appeal or otherwise, the action of the circuit court in appointing a special administrator will be presumed correct. *Masterson v. Brown*, 51 Iowa, 442. A special administrator is authorized to prosecute an action on behalf of his intestate's estate. *Id.*

Where a person dies testate, naming an executor in his will, the court has not jurisdiction to appoint a general administrator to precede the executor in the settlement of the estate; and where, under such circumstances, an administrator is appointed in pursuance of a petition asking the appointment of a special administrator, he will be presumed to be such an one, notwithstanding the letters purport to confer general powers. *Pickering v. Weiting*, 47 Id., 242.

SEC. 2358. [**Appeal.**]—No appeal from the appointment of such special executors shall prevent their proceeding in the discharge of their duties.

SEC. 2359. [**Inventory.**]—They shall make and file an inventory of the property of the deceased, in the same manner in all respects as is required of general executors or administrators, and shall preserve such property from injury.

SEC. 2360. [**Duties.**]—For this purpose they may do all needful acts under the direction of the court, but shall take no steps in relation to the allowance of claims against the estate.

SEC. 2361. [**Special: when powers cease.**]-Upon the granting of full administration, the powers of the special administrators shall cease, and all the business shall be transferred to the general executor or administrator.

SEC. 2362. [**Bond of.**]-Every executor or administrator, except as herein otherwise declared, before entering on the discharge of his duty, must give bond in such penalty as may be required, to be approved by the clerk, conditioned for the faithful discharge of the duties imposed on him by law, according to the best of his ability.

SEC. 2363. [**Oath of.**]-He must also take and subscribe an oath, the same in substance as the condition of the bond aforesaid; which oath and bond must be filed with the clerk.

SEC. 2364. [**New bonds.**]-New bonds may be required by the court to be given, and in a new penalty and with new sureties, whenever the same is deemed expedient.

SEC. 2365. [**Letters.**]-After the filing of the bond aforesaid, the clerk shall issue letters testamentary, or of administration, as the case may be, under the seal of the court, giving the executor or administrator the power authorized by law.

Whether the appointment of an executor or administrator be made by the court in session or by the clerk in vacation, it is the duty of the clerk to issue the letters testamentary or of administration. *Citizens Bank v. Rhutasel et al.*, 69 Iowa, 316.

SEC. 2366. [**To give notice of appointments.**]-The executors or administrators first appointed and qualified for the settlement of an estate, shall, within ten days after the receipt of their letters, publish such notice of their appointment as the court or the clerk may direct; which direction shall be indorsed on the letters when issued.

This section of the statute is directory, and the omission to give the notice prescribed does not have the effect to annul the appointment of an executor or prevent him from discharging the duties pertaining to his office. *Johnson v. Barker*, 57 Iowa, 32.

It is competent to prove the posting of notices of the appointment of an administrator by the affidavit of the administrator attached to a copy of the notice, as provided in section 3698 of the code. *Brownell v. Williams et al.*, 54 Id., 353.

SEC. 2367. [**Limitation.**]-Administration shall not be originally granted after the lapse of five years from the death of the decedent, or from the time his death was known in case he died out of the state.

An administrator *de bonis non* may be appointed after the lapse of five years from the death of a testator, if the estate has not been fully settled, and the administrator originally appointed has been discharged. *Crossan et al. v. McCrary*, 37 Iowa, 684.

SEC. 2368. [**Administration: when granted in other states.**]-If administration of the estate of a deceased non-resident has been granted in accordance with the laws of the state or country where he resided at the time of his death, the person to whom it has been committed may, upon his application, and upon qualifying himself in the same manner as is required of other executors, be appointed to administer upon the property of the deceased in this state, unless another has been previously appointed.

A presumption will be indulged in favor of the regularity of the appointment of an administrator in another state, and his consequent appointment as ancillary administrator here, to dispose of property in this state, upon proper application therefor, may be made after five years from the death of the intestate. *Woodruff v. Shultz*, 49 Iowa, 430.

The property left by a decedent cannot be subjected to the claim of a judgment creditor by an action to revive a judgment against the heirs of the decedent, in the absence of any administration upon the estate. *Bridgman & Co. v. Miller et al.*, 50 Id., 392.

The mere fact that no administrator of an estate has been appointed after a considerable space of time, does not confer upon the heirs of the intestate the property in the personal effects of the deceased, nor enable them to maintain an action in their own name on a promissory note forming part thereof. *Haynes et al. v. Harris*, 33 Id., 516.

Upon the appointment of an administrator his title to the personal property relates back to the death of the intestate. *Id.*

If, however, it were shown that there were no debts against the estate, and that the period fixed

for granting letters of administration had expired, it seems the right of the heirs to the proceeds of the note should be protected and enforced. *Id.*

Where an administrator made a final report and was discharged, but the records of the probate court showed that real property belonging to the estate was undisposed of and debts remained unpaid, such order of discharge was regarded as not a *final* settlement. *Crossan v. McCrary*, 37 *Id.*, 684.

SEC. 2369. [Same.]—The original letters or other authority, conferring his power upon such executor, or an attested copy thereof, must be filed with the clerk of the proper court before such appointment can be made.

CHAPTER 3.

OF THE SETTLEMENT OF THE ESTATE.

SECTION 2370. [Inventory.]—Within fifteen days after his appointment the executor shall make and file with the clerk an inventory of all the personal effects of the deceased of every description which have come to his knowledge, and a list of all book accounts which appear by the books or papers of the deceased to be unsettled. Such inventory shall be so made out as to show separately and distinctly, each by itself, the property inventoried as general assets of the deceased; the property inventoried and which is regarded as exempt under the next two sections, and the book accounts.

The ancient common law rule that the debtor who is made the executor of his creditor is thereby released from the debt, it not appearing that the assets of the estate are insufficient to meet the testator's debts, is not in force in this county, and the debt in the hands of the executor is regarded as general assets of the estate for the benefit, not only of creditors but, of legatees and others interested. *Kaster v. Pierson*, 27 *Iowa*, 90.

In an action by a receiver against an executor on a promissory note made by the latter to the testator, judgment should be rendered against him in his individual capacity, and not as executor. *Id.*

SEC. 2371. [When not assets.]—When the deceased leaves a widow, all personal property which in his hands as the head of the family would be exempt from execution, after being inventoried and appraised, shall be set apart to her as her property in her own right, and be exempt in her hands as in the hands of the decedent.

Property of the intestate set apart to the widow under section 2361 of the revision, when no longer needed and used by her as the head of his family, fell into the general personal estate, and became liable to distribution according to law, but not for the payment of debts. *Gaskell v. Case*, 18 *Iowa*, 147; *Meyer v. Meyer*, 23 *Id.*, 359.

It was also held, under the same section, that an heir could not claim the exclusive right to property set apart to the widow, by the executor, even though the widow was not entitled thereto because there was no longer a family within the meaning of the section. *Paup v. Sylvester*, 22 *Id.*, 371.

Upon the death of a married man leaving money derived from a pension received from the United States, the money goes to the administrator and not to the widow. *Perkins v. Hinkley*, 71 *Id.*, 499.

It was also held under the revision, that the property, which under the statute was exempt to the widow, as the head of the family, was not to be deemed assets in the hands of the administrator, nor to be administered upon as such; and that even consent on her part to such administration, under a misapprehension of her rights, would not estop her from afterwards claiming the property or its proceeds. *Elsworth v. Elsworth*, 33 *Id.*, 164.

Personal property belonging to the wife and exempt from execution in her hands does not, under this section, vest in her husband at her death but goes to the administrator. This section bestows a right upon the widow, in the property of her deceased husband, which is not given to the husband of a deceased wife in her property. *Wilson v. Breeding*, 50 *Iowa*, 629.

When the husband dies, leaving personal property which was exempt from execution in his hands, and the same is taken possession of by his widow, she will not be deprived of her right thereto under the statute by reason of the fact that no inventory or appraisement were made as provided in this section. *Adkinson v. Breeding*, 56 *Id.*, 26.

SEC. 2372. (*As amended by ch. 5, 18th g. a.*) [**Life insurance.**]*—*The avails of any life insurance [or any other sum of money made payable by any mutual aid or benevolent society upon the death of a member of such society] are not subject to the debts of the deceased, except by special contract or arrangement, but shall, in other respects, be disposed of like other property left by the deceased.

The proceeds of a policy of insurance upon the life of the husband or wife are not exempt from the debts of the survivor, after the proceeds shall be realized.

The proceeds of a policy of life insurance are not exempt from execution for the debts of the beneficiary. When such property descends to the widow and children of the insured, it becomes subject to their individual debts the same as any other inheritance. *Murray v. Wells*, 53 Iowa, 256.

See *Rhode v. Bank et al.*, 53 Id., 375, cited in notes to section 1182, *ante*.

SEC. 2373. [**Appraisement.**]*—*All property inventoried by the executor shall be appraised by three appraisers, who shall be appointed immediately on the filing of the inventory.

See *Herriman v. McKee*, 49 Iowa, 187, cited in note to section 1182, *ante*.

SEC. 2374. [**Clerk to notify appointees.**]*—*The clerk shall issue to them a notification of their appointment, accompanied by a copy of the inventory as returned by the executor, and in making their appraisement they shall affix a value to each item of property, separately, as it appears in such inventory.

SEC. 2375. [**Allowance to widow and children.**]*—*The court shall, if necessary, set off to the widow, and children under fifteen years of age, of the decedent, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them for twelve months from the time of his death.

Under this section the court, in a proper case, may direct the executor to pay to the widow of the decedent, for the support of herself and children, a sum of money in quarterly installments, instead of setting apart for their support specific property, and it is no valid objection to such order that the executor has not at the time enough money in his hands to pay the first installment; nor is such order objectionable as being in violation of section 2377 of the code. *Estate of McReynolds*, 61 Iowa, 586.

An allowance made by the court to the widow of a decedent under this section unless notified by the provisions of section 2377, must be paid in preference to a claim of a creditor of the decedent, filed and allowed as a claim against the estate; and the administrator has no power to contract with a creditor that his claim shall have preference; nor has the court power, upon the allowance of the claim, to order that it shall be first paid. *In re. estate of Dennis*, 67 Id., 110.

SEC. 2376. [**Supplemental Inventory.**]*—*A supplemental inventory must be made in like manner, whenever the existence of additional property is discovered.

Under this section the publication of a notice of sale for two weeks in a weekly newspaper, as ordered by the court, was held sufficient. *Read et al. v. House et al.*, 39 Iowa, 553.

An application by an executor for an order to sell real property of the decedent must be made within eighteen months from the time when he gives notice of his appointment, unless the circumstances of the case would justify a court of equity in making an exception to the rule, in which case the application should be made within a reasonable time; but thirteen years is not a reasonable time. *McCrary v. Jasper et al.*, 41 Id., 255.

Where the court ordered a sale of real estate to pay the debts of the decedent upon an administrator's petition, which did not contain a full statement of all the claims against the estate, it was held, that the judgment of the court therein could not be collaterally impeached even if erroneous. *Myers v. Davis*, 47 Id., 325.

That the service of the notice was defective, merely, would not render the judgment void and subject to collateral attack; and the failure of the court to appoint a guardian *ad item* for the minor defendants constituted a mere irregularity, which could not be taken advantage of in a collateral proceeding. *Id.*

Where proceedings were instituted, by an administrator, in the probate court, for the sale of real property to pay the debts of the decedent, in which the widow was made a party and duly served with notice, and the land sold under the order of court, it was held that the widow's right to dower was adjudicated in the proceedings for the sale of the land, and that she could not subsequently maintain an action therefor. *Olmstead v. Blair et al.*, 45 Id., 42.

SEC. 2377. [**Allowance reversed.**]*—*The court may, on the petition of the widow, or other person interested, review the allowance so made to the widow or

children, and increase or diminish the same, and make such order in the premises as it shall deem right and proper.

SEC. 2378. [**Property in another county.**]—If any portion of the decedent's personal property be in another county, the same appraisers may serve, or others may be appointed.

SEC. 2379. [**Discovery of assets: proceedings.**]—The court or judge may require any person suspected of having taken wrongful possession of any of the effects of the deceased, or of having had such effects under his control, to appear and submit to an examination under oath touching such matters; and if on such examination it appear that he has the wrongful possession of any such property, the court or judge may order the delivery of the same to the executor of the estate.

SEC. 2380. If, on being duly served with the order of the court or judge requiring him to do so, any person fail to appear in accordance with such order; or if, having appeared, he refuse to answer any question which the court or judge deem proper to be put to him in the course of such examination; or if he fail to comply with the order of the court or judge requiring him to deliver the property to the executor, he may be committed to the jail of the county until a compliance be yielded.

Under this and the preceding section the examination must be confined to the person summoned; and it is not competent to introduce other evidence to contradict his statements or to establish the administrator's claim to the property. *Smythe v. Smythe*, 24 Iowa, 491.

The person thus subjected to examination is not a witness within the meaning of section 3932 of the revision. *Id.*

These sections of the statute do not confer authority upon the court to try, as an issue of fact, upon general evidence, whether the person examined has taken wrongful possession of the effects of the estate of the deceased, but merely to summon and compel the appearance of such person, and subject him to an examination under oath; and where it appears therefrom that he has property belonging to the estate, order the same to be delivered to the administrator, and to enforce such order by imprisonment of the defendant if necessary. *Rickman v. Stanton*, 32 Id., 134.

Where the property, claimed to be assets of the estate, has been taken and converted into real estate, this proceeding is not applicable. *Madison v. Shockley*, 41 Id., 451, 453.

SEC. 2381. Whenever it is probable that the known and acknowledged property of the deceased will not be sufficient for the payment of his debts, any person to whom the legal title of any real estate was conveyed by the decedent or any person through whom the legal title to any real estate conveyed by the decedent has subsequently passed, or any person claiming an interest in any such real estate, may be required to appear and submit to an examination as contemplated in the preceding sections, subject to the penalties therein prescribed; and the court or judge shall have full power to order the proper declaration of trust to secure the estate, to be made by any person who may appear on such examination to hold the legal title to any real estate which in the event of the insufficiency of the personal property would be assets for the payment of debts, and to enforce compliance with such order as is provided in the next preceding section.

SEC. 2382. [**May compound.**]—The executor, with the approbation of the court, may compound with any debtor of the estate who may be thought unable to pay his whole debt.

SEC. 2383. [**Mortgage assets.**]—The interest of a deceased mortgagee shall be included among his personal assets, and, upon its being paid off, satisfaction shall be entered by the executor.

SEC. 2384. [**Creditors: will sustained.**]—When a person by his will makes such a disposition of his effects as to prejudice the rights of creditors, the will may be sustained by giving security to the satisfaction of the court for the payment of the claims of the creditors to the extent of the value of the property devised.

SEC. 2385. [**Funds collected: paid out.**].—When no different direction is given in the will, debts due the estate, shall, as far as practicable, be collected, and the debts owing by the estate paid off therewith to the extent of the means thus obtained.

SALE OF PROPERTY.

SEC. 2386. [**Personal.**].—The court, on the application of the executor, shall, from time to time, direct the sale of such portion of the personal effects as are of a perishable nature, or which, from any cause, would otherwise be likely to depreciate in value, and also such portions as are necessary to pay off the debts and charges upon the estate.

SEC. 2387. [**Real estate: when ordered sold.**].—If the personal effects are found inadequate to satisfy such debts and charges, a sufficient portion of the real estate may be ordered to be sold for that purpose.

The real estate of an intestate descends to the heirs at law, and the personal property only goes to the administrator unless the latter proves inadequate for the payment of the debts of the intestate, in which case he may be empowered to sell enough of the real estate to make up the deficit. *Kinsell v. Billings*, 35 Iowa, 154.

The interest of the widow in the real estate of her deceased husband is not subject to the payment of his debts, and may be set apart to her without reference thereto. *Mock v. Watson*, 41 Id., 241.

This section should be understood as referring to the interest of the intestate as distinguished from that of the wife, in the hands of the intestate. *Id.*

But where the administrator instituted proceedings in the probate court to sell lands of the intestate to pay the debts of the estate, making the widow a party, and she was duly served with process, and the land sold under the order of the court, it was *held*, that her right to dower was adjudicated in that proceeding, and that she could not afterward maintain an action therefor. *Olmsted v. Blair*, 45 Id., 42; *Garvin v. Hatcher*, 39 Id., 685. See, also, 41 Id., 255.

SEC. 2388. [**Application.**].—Application for that purpose can be made only after a full statement of all the claims against the estate, and after rendering a full account of the disposition made of the personal estate.

SEC. 2389. [**Notice.**].—Before any order to that effect can be made, all persons interested in such real estate shall be served with notice in the same manner as is prescribed for the commencement of civil action, unless a different notice is prescribed by the judge.

In a proceeding for the sale of real estate by an executor, wherein the court has prescribed the same notice as is provided by law in ordinary actions, a defendant, who has been served by publication only and has not appeared, may avail himself of the provisions of section 2877 of the code, and may thereunder have the order of sale, made on default, set aside, on motion therefor at any time within two years after the making of the order. *Huston v. Huston*, 29 Iowa, 347.

SEC. 2390. [**Sold in parcels: appraisement.**].—If convenient, the real estate must be divided into parcels, and each appraised in the manner above provided for personal property, and the appraisement filed in like manner.

SEC. 2391. [**Whole may be.**].—When a part cannot be sold without material prejudice to the general interests of the estate, the court may order the sale of the whole, or of such parts as can be sold advantageously.

The objections that the requirements of the statute in regard to the appraisement of lands were not complied with, and that the lands, composed of several tracts, were sold in a body, are not jurisdictional in their character, and will not affect the validity of the sale. *Covins v. Tool, Ex'r*, etc., 36 Iowa, 82.

The approval of the administrator's deed by the probate court furnishes presumptive evidence of the validity of the sale, and of the regularity of all the prior proceedings. *Id.*

SEC. 2392. [**Private sale.**].—Property may be permitted to be sold at private sale, whenever the court is satisfied that the interest of the estate will be thereby promoted.

SEC. 2393. [**Public.**—In other cases, sales must be made at public auction, after giving the same notice as would have been necessary for the sale of such property on execution.

SEC. 2394. [**Must sell for appraisement.**—No property can be sold at private sale for less than the appraisement price, without the express approbation of the judge.

SEC. 2395. Property may be ordered to be sold on a partial credit of not more than twelve months.

SEC. 2396. [**Sale: how prevented.**—Any person interested in the estate, may prevent a sale of the whole or any part thereof, by giving bond to the satisfaction of the court, conditioned that he will pay all demands against the estate, to the extent of the value of the property thus kept from sale, as soon as called upon by the court for that purpose.

SEC. 2397. [**Same.**—If the conditions of such bond are broken, the property will still be liable for the debts, unless it has passed into the hands of an innocent purchaser, and the executors may take possession thereof and sell the same under the direction of the court, or they may prosecute the bond, or both at once if the court so direct.

SEC. 2398. [**Same.**—If the conditions of the bond are complied with, the property passes by devise, distribution, or descent, in the same manner as though there had been no debts against the estate.

SEC. 2399. [**Conveyances: approval of.**—Where real estate is sold, conveyances thereof, executed by the executor, pass to the purchaser all the interest of the deceased therein; but such conveyances shall not be valid until approved by the court.

The interest of the widow in the real estate of her deceased husband is not subject to the payment of his debts, and may be set apart without reference thereto. *Watson v. Wilson et al.*, 41 Iowa, 241.

SEC. 2400. [**Record of: presumption.**—Such approval shall be entered of record. A certificate thereof must be indorsed on the deed, with the signature of the clerk and the seal of the court affixed thereto; and the deed so indorsed shall be presumptive evidence of the validity of the sale, and of the regularity of all the proceedings connected therewith.

The approval of the administrator's deed by the court furnishes presumptive evidence of the validity of the sale and the regularity of all the prior proceedings. *Covins v. Tool*, 36 Iowa, 82.

SEC. 2401. [**Limitation.**—No action for the recovery of any real estate sold by an executor can be sustained by any person claiming under the deceased, unless brought within five years next after the sale.

In *Good v. Norley*, 28 Iowa, 188, it was held by BECK and COLE, Justices, that the limitation prescribed in this section did not apply to, and would not bar, a sale that was absolutely void for want of jurisdiction in the court to make the order therefor; while DILLON, Ch. J., and WRIGHT, J., held that the statute applied to sales that were invalid as well as to those where the proceedings were merely defective, and that the action in that case was barred. This section does not apply to a case where the proceedings are attacked and sought to be set aside on the ground of fraud, and in such case the statute will not commence to run until five years from the time of the discovery of the fraud under section 2529 and 2530 of the code. *Cowin v. Tool*, 31 Id., 513.

It was held in *Washburn v. Carmichael*, 32 Iowa, 475, that a guardian's sale of real estate, without notice to the heirs, is void for want of jurisdiction in the court ordering the sale. The opinion of BECK and COLE, JJ., in *Good v. Norley*, 28 Id., 188, adhered to by BECK, J.

Where an administrator, under the statute, has applied to the court and obtained authority to sell real estate on which rests a mortgage in the execution of which the wife joined, such sale will have the same effect as one made on special execution in a foreclosure proceeding to which she had been made a party, and the purchaser takes the land discharged of dower. *Mead v. Mead et al.*, 39 Id., 28.

POSSESSION OF REAL PROPERTY.

SEC. 2402. [**When taken by executor.**—If there be no heir or devisee present and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate and demand and receive the rents and profits thereof, and do all other acts relating thereto which may be for the benefit of the persons entitled to such real estate.

SEC. 2403. [**Proceeds: how applied.**—Such executor or administrator, under the order and direction of the court, may apply the profits of such real estate to the payment of taxes and of debts and claims against the estate of the deceased in case the personal assets are insufficient.

SEC. 2404. [**Accounts: compensation.**—Such executor or administrator shall account to such heirs or devisees for the rents, profits, or use of such real estate, deducting therefrom the payments made under the preceding section, together with a reasonable compensation for his own services, to be fixed by the court.

SEC. 2405. [**When there are minors who have no guardian.**—When there are minor heirs for whom no guardian has been appointed, the executor or administrator shall pay out of any assets in his hands, all taxes assessed against the estate not otherwise provided for, and he shall be credited therefor as for the payment of other claims against the estate.

SEC. 2406. [**Testator may prescribe manner of settling estate.**—When the interests of creditors will not thereby be prejudiced, a testator may prescribe the entire manner in which his estate shall be administered on; may exempt the executor from the necessity of giving bond, and may prescribe the manner in which his affairs shall be conducted until his estate is finally settled, or until his minor children become of age.

SEC. 2407. [**Court may direct any business continued.**—The court, in its discretion, may also authorize an executor or administrator to continue the prosecution of any business in which the deceased was engaged at the time of his death, in order to wind up his affairs with greater advantage; but such authority shall not exempt him from returning a full inventory and appraisal as in other cases.

CLAIMS—PAYMENTS.

SEC. 2408. [**Claims stated: proved: allowance of.**—Claims against the estate shall be clearly stated, sworn to, and filed, and ten days' notice of the hearing thereof, accompanied by a copy of the claim, shall be served on one of the executors in the manner required for commencing ordinary proceedings, unless the same have been approved by the administrator, in which case they may be allowed by the clerk without said notice.

The stating, verifying and filing of a claim against an estate is in the nature of a petition. When it is based upon a written instrument it is sufficient to file a copy, but the original must be produced at the time of trial or when it is allowed. *Brought v. Griffith et al.*, 16 Iowa, 26.

It is not a prerequisite to the commencement and prosecution of proceedings against an administrator to correct errors in accounts taken between the plaintiff and the decedent, that a claim shall be stated, sworn to and filed in the clerk's office. *The County of Linn v. Day*, 16 Id., 153.

If a claim be filed within the time prescribed, the filing will not be rendered invalid because it was not sworn to when thus filed. It may be verified after the filing. This section, being directory, is thus sufficiently complied with. *Goodrich v. Conrad*, 24 Id., 254; *Wile v. Wright*, 32 Id., 451; *O'Donnell v. Hermann*, 42 Id., 60.

The court may set aside or modify the allowance of a claim against an estate, approved by the administrator and allowed by the clerk in vacation, without any other evidence than what is shown by the papers. *Ordway & Husted v. Phelps*, 45 Id., 279.

An action against an administrator, properly commenced in the circuit court, may, by consent, be transferred to the district court. *McCreary v. Deming et al.*, 38 Id., 527.

The filing of a claim against an estate advises the administrator that the claim has been made only when he has received notice thereof as contemplated by the statute. *Ashton et al. v. Miles*, 49 Id., 564.

Where an administrator, as a pretended creditor of the estate, procures an allowance of his claim through fraud, the court in a proper proceeding, may set aside the allowance, but it cannot be assailed by an exception to his report. *Id.*

The provision of this section with respect to the verification of accounts filed against an estate is directory only, and the account may be sworn to after it has been filed. *Goodrich v. Conrad*, 24 Id., 254.

SEC. 2409. [Form in which claim should be made out.]—All claims filed against the estate shall be entitled in the name of the claimant against the executor, naming him as executor of the estate, naming it; and in all further proceedings on the claim this title shall be preserved.

All claims filed against an estate must be entitled in the name of the claimant against the executor, and if the same are not approved by the latter, they may be proved as in an action by ordinary proceedings. Per *SEEVERS*, Ch. J., in *Ordway & Husted v. Phelps*, 45 Iowa, 281.

SEC. 2410. [Denial.]—All claims filed and not expressly admitted in writing, signed by the executor with the approbation of the court, shall be considered as denied without any pleading on behalf of the estate.

SEC. 2411. [Court may allow trial by jury.]—If a claim filed against the estate is not so admitted by the executor, the court may hear and allow the same, or may submit it to a jury; and, on such hearing, unless otherwise provided, all proceedings of law applicable to an ordinary proceeding shall apply.

SEC. 2412. [Referees: examination of accounts.]—In matters of accounts of executors, the court shall have authority to appoint one or more referees, who shall have all the powers and perform all the duties of referees appointed by the court in a civil action.

The circuit court had power to appoint a referee to examine the accounts of an administrator and report thereon to the court. *In re Heath's Estate*, 58 Iowa, 36.

SEC. 2413. [Not due.]—Demands, though not yet due, may be presented, proved, and allowed as other claims.

SEC. 2414. [Contingent liabilities.]—Contingent liabilities must also be presented and proved, or the executor shall be under no obligation to make any provision for satisfying them when they may afterwards accrue.

The filing of the claim by a creditor against the estate of the principal debtor, obviates the necessity of filing the same as a contingent claim. *Brought v. Griffith et al.*, 16 Iowa, 26.

SEC. 2415. [Proved before referees.]—Claims against an estate, and counter claims thereto, may, in the discretion of the court, be proved up before one or more referees, to be agreed upon by the parties or approved by the court, and their decision being entered upon the record becomes a decision of the court.

SEC. 2416. [Suits pending.]—Suits pending against the decedent at the time of his death may be prosecuted to judgment, his executor being substituted as defendant, and such judgment shall be placed in the catalogue of established claims, but shall not be a lien.

A suit pending before a justice of the peace against a decedent at the time of his death may be prosecuted to judgment, the administrator being substituted as defendant, and the justice may adjourn the hearing one or more times, as may be necessary, to allow substitution to be made. *Coughlin v. Blake*, 55 Iowa, 634.

SEC. 2417. [Executor interested.]—If either of the executors is interested in favor of a claim against the estate, he shall not serve in any matter connected with that case. And if the executors are thus interested, the court shall appoint some competent person a temporary executor in relation to such claims.

SEC. 2418. [Expenses of funeral.]—As soon as the executors are possessed of sufficient means, over and above the expenses of administration, they shall pay off the charges of the last sickness and funeral of deceased.

Expenses incurred in the last sickness and funeral charges do not constitute claims for which the homestead is liable. *Knox v. Hanlon*, 48 Id., 252.

SEC. 2419. [Allowance to widow.]—They shall, in the next place, pay any allowance which may be made by the court for the maintenance of the widow and minor children.

SEC. 2420. [Other demands.]—Other demands against the estate are payable in the following order:

1. [Order of payment.]—Debts entitled to preference under the laws of the United States;

2. Public rates and taxes;

3. Claims filed within six months after the first publication of the notice given by the executors of their appointment;

4. All other debts;

5. Legacies.

The filing of a claim within six months after notice of the granting of letters of administration fixes its character as a claim of the third class, without reference to the time of its establishment by evidence. *Noble v. Morrey*, 19 Iowa, 509.

The filing of a claim within six months after the notice was given by the administrator of his appointment, entitles it to payment before those filed after that time, even though it is not admitted by the administrator or found upon by the court, until after the six months. *Chandler v. Hockett's Adm'r*, 12 Id., 269.

It was held under the revision that where an action was commenced in the district court, upon a claim against an executor, of which the court had jurisdiction, within six months after notice of his appointment, the judgment, when rendered, should be allowed and paid as a claim in the third class, although the judgment was not filed as a claim against the estate until after the expiration of one year and a half after such notice. *Cooley v. Smith*, 17 Id., 99.

A claim filed within six months after notice of the appointment of the administrator, will not be affected by the limitation relating to claims of the fourth class, and may be established after eighteen months. *Goodrich v. Conrad*, 24 Id., 254.

The court may allow or disallow a claim, and designate the class in which it shall be paid. *Hart v. Jewett*, 11 Id., 276.

When a claim has been allowed and its class designated by the court, it should be paid ratably with other claims of the same class, when the assets are insufficient to pay the full amount of all. *Id.*

In the settlement of an estate of an intestate it is proper for the court to order taxes due on the lands belonging to the estate to be paid out of the proceeds of a sale of land. *Trowbridge v. Sypher*, 55 Id., 352, 358.

A claim of the third class against an estate is not barred because not proved up until after the expiration of twelve months from notice of the appointment of an administrator. *Smith v. McFadden*, 56 Id., 482.

A delay in bringing on for hearing a claim against an estate will not operate as an estoppel to prevent its being proved unless the estate has been prejudiced by the delay. *Id.*

The allowance of part of a claim by an administrator and its approval by the court will not constitute an adjudication which will prevent the claimant from demanding a trial as to the part of his claim not allowed. *Id.*

SEC. 2421. [Limitation.]—All claims of the fourth of the above classes not filed and proved within twelve months of the giving of the notice aforesaid, are forever barred, unless the claim is pending in the district or supreme court, unless peculiar circumstances entitle the claimant to equitable relief.

Under the revision all claims of the fourth class had to be filed, proved and allowed within eighteen months, and were barred unless embraced within the exceptions provided in section 2405 of the revision (section 2421 of the code). *Woodward v. Laverty*, 14 Iowa, 381; *Noble v. Morrey*, 19 Id., 509; *Brewster v. Hendrick*, 17 Id., 479. See 39 Id., 675.

The equitable relief contemplated by the statute will not be granted to a party who had full notice of the decease of the intestate and the appointment and qualification of the administrator, and was negligent in the prosecution of his claim. *Farrall v. Irvine*, 12 Id., 52.

Whether equitable relief will be granted or not must depend upon the facts of each particular case. *Johnston v. Johnston*, 36 Id., 608.

For cases where equitable relief was granted and claims allowed to be established after the time limited in the statute. See *McCormack v. Cook*, 11 Id., 267; *Brewster v. Hendrick*, 17 Id., 479; *Farrall v. Irvine*, 12 Id., 52; *Johnston v. Johnston*, 36 Id., 608; 37 Id., 189; 33 Id., 505.

For cases where equitable relief was refused, see *Shomo v. Bissell*, 20 Iowa, 68; *Preston v. Day*, 19 Id., 127.

Where the administration in this state is but auxiliary to the original administration in a foreign state, and the law applicable to the case in that state is not shown, it will be presumed to be the same as our own; and where an application for the sale of land for the payment of the debts of the intestate is made long after the original administration, and after the time allowed by our statutes for establishing claims has expired, the proceedings will be barred. *Hadley v. Gregory et al.*, 57 Iowa, 157, 159.

Where a claim against the estate of a deceased person, barred by the statute for a failure to present the same within the time prescribed by law, was afterwards allowed by the administrator and ordered by the court to be paid, it was held that the sureties upon the administrator's bond were liable for his failure to pay the claim out of the funds of the estate in his hands, and that they could not urge in defense that the claim was barred by the statute at the time of its allowance. *Weber v. North et al.*, 51 Id., 375.

A claim against an estate, filed within six months from notice of the appointment of the administrator, belongs to claims of the third class, and is not affected by the limitation relating to claims of the fourth class, as prescribed in this section, and may be established after the expiration of eighteen (twelve) months. *Goodrich v. Conrad*, 24 Id., 254 (1868).

If a claim be filed in time, the filing will not be rendered void because the account was not then sworn to. The oath may be administered afterward. *Id.*

As to evidence to remove the bar of the statute, see *Brownell v. Williams*, 54 Id., 353.

It is not necessary that the statute of limitations upon claims of the fourth class, referred to in this section, should be pleaded in bar by the administrator. The matter of the allowance or disallowance of the claim is for the court, and whenever it appears to the court, from an inspection of the claim or otherwise, that it has not been filed or proved as required, it is the duty of the court, independently of any pleading upon the part of the administrator, to reject it. *Brownell v. Williams et al.*, 54 Id., 353, 356.

Where a claim was filed but not proved, within the statutory period, because of the case being continued for the purpose of perfecting service, and because of a re-trial being ordered at a subsequent term, it was held that the claim was not barred. *Wile v. Wright*, 32 Id., 451.

It was held under the revision that while a judgment rendered against one prior to his death may be enforced against real estate upon which it became a lien, after his death, without being filed as a claim against the estate, this must be done while the judgment lien exists. Nor can the lien of the judgment in such case be revived for that purpose, after it has expired, by an action on the judgment. *Davis v. Shawhan*, 34 Id., 71.

It was also held, that the bar of this section of the statute applied only to claims, the satisfaction of which was primarily sought out of the personal assets of the decedent, and not to claims secured by mortgage upon which the creditor relied for satisfaction. *Allen v. Moer*, 16 Id., 307.

A claim of the fourth class against the estate of a decedent, not filed and proved within twelve months after the publication of the notice of appointment of administrator, is barred, unless the case presents circumstances entitling the claimant to equitable relief. *Wilcox v. Jackson*, 51 Id., 296; *Lacey v. Loughridge*, Id., 629.

Where plaintiff's attorney held a claim of the fourth class against an estate, and at the request of another attorney whom he had good reason for believing was authorized to speak for the administratrix, delayed proving the same within the year provided by this section, but as the delay was slight, and the estate was solvent and unsettled, and there was no counter equity arising, it was held that the plaintiff was entitled to equitable relief as against the bar of the statute. *Pettus v. Farrell, Adm'x*, 59 Id., 296.

This section of the statute applies only to claims existing at the time of the decedent's death, and not to debts subsequently incurred by the estate. *Savery v. Sypher*, 39 Id., 675.

When a person who is indebted to an estate is appointed administrator, the amount of his indebtedness becomes assets of the estate in his hands, and goes to its use. *Id.*

That a claim against an estate was not filed within the time prescribed by law, because of the promise of the administrator to pay it, and his statement to the creditors that such a course was not necessary, constitutes sufficient ground for equitable relief within the meaning of section 2421. *Burroughs v. McLain*, 37 Id., 189.

The pendency in the district court of an action based upon a claim against an estate at the time of granting administration, is to be regarded as a compliance with the statutory requirement that the claim be filed with the administrator, and in lieu of proving it before the probate court. *O'Donnell v. Hermann*, 42 Id., 60.

Where a note was filed against an estate as a claim of the fourth class, within twelve months after the giving of the notice required by this section, but the cause was continued by consent of parties, so that the claim was not proved within the twelve months, it was held that the circumstances entitled the claimant to "equitable relief," and that the claim was not barred. *Ingham v. Dudley*, 60 Id., 17.

Plaintiff held a note secured by chattel mortgage against an estate. He filed it as a claim

against the estate in proper time, but neglected to prove it within the twelve months provided by this section of the code. *Held* that the claim was barred, notwithstanding plaintiff had permitted the mortgaged property to be sold in the belief that there was "plenty of property to pay the debts," and notwithstanding the administrator had agreed to see him paid. The discharge of the property was immaterial, and the promise of the administrator, whether made before or after the claim was barred, was incompetent to bind the estate. *Colby v. King*, 67 Id., 458.

Where an administrator himself held a claim of the fourth class against the estate, but neglected, without excuse, to file until within a few days of the expiration of the year next following the giving of notice of his appointment, and there was not time within such year to give due notice of the filing of the claim, and for the parties adversely interested to prepare for trial, and so the claim was not proved within the year, as required by this section of the code, it was *held* that the claim was barred by the statute at the time the trial was reached. *Clark v. Tallman et al.*, 68 Id., 372.

SEC. 2422. [**Third class: when to pay.**].—After the expiration of the time for filing the claims of the third of the above classes, the executors shall proceed to pay off all claims against the estate in the order above stated, as fast as the means of so doing come into their hands.

SEC. 2423. [**When to pay fourth class.**].—Claims of the fourth class may be paid off at any time after the expiration of six months aforesaid, without any regard to those claims not filed at the time of such payment.

SEC. 2424. No payment can be made to a claimant in any one class until those of a previous class are satisfied.

SEC. 2425. [**Claims not due.**].—Demands not yet due shall be paid off if the holder will consent to such a rebate of interest as the court thinks reasonable. Otherwise, the money to which such claimant would be entitled shall be safely invested until his debt becomes due.

SEC. 2426. [**Order of payment.**].—Within their respective classes, debts shall be paid off in the order in which they are filed, subject to the provisions of the next section.

SEC. 2427. [**Dividend.**].—If there are not likely to be means sufficient to pay off the whole of the debts of any one class, the court shall, from time to time strike a dividend of the means on hand among all the creditors of that class, and the executors shall pay the several amounts accordingly.

SEC. 2428. [**Incumbrances.**].—The executors may, with the approbation of the court, use funds belonging to the estate to pay off incumbrances upon lands owned by the deceased, or to purchase lands claimed or contracted for by him prior to his death.

SPECIFIC LEGACIES—PAYMENT.

SEC. 2429. [**When paid.**].—Specific legacies of property may, by the court, be turned over to the rightful claimant at any time upon his giving unquestionable real estate security to restore the property, or refund the amount at which it was appraised if wanted for the payment of debts.

SEC. 2430. [**Same.**].—Legacies payable in money may be paid on like terms whenever the executors possess the means which can be thus used without prejudice to the interest of any claim already filed.

SEC. 2431. [**Same.**].—After the expiration of the twelve months allowed for the filing claims as above provided, such legacies may be paid off without requiring the security provided for in the preceding two sections, if the means are still retained to pay off all the claims proved or pending as hereinbefore contemplated.

SEC. 2332. [**Order when testator has given no direction.**].—If the testator has not prescribed the order in which legacies are to be paid off, and if no security is given as above provided, in order to expedite their time of payment, they may be paid off in the order in which they are given in the will, where the estate is sufficient to pay all.

SEC. 2433. [**When paid ratably.**]—When not incompatible with the manifest intention of the testator, the court may direct all payments of money to legatees to be made ratably.

SEC. 2434. Such must be the mode pursued when there is danger that the estate will prove insufficient to pay off all the legacies, unless security be given to refund as above provided.

SEC. 2435. [**Executor failing to pay: judgment on bond.**]—If the executors fail to make payment of any kind in accordance with the order of the court, any person aggrieved by their failure may, on ten days notice to the executors and their sureties, apply to the court for judgment against them on the bond of the executors. The court shall hear the application in a summary manner, and may render judgment against them on the bond for the amount of money directed to be paid and costs, and issue execution against them therefor. If any of the obligors are not served, the same proceedings in relation to them may be had with like effect as in an action by ordinary proceedings under similar circumstances.

Upon a verbal order of the county judge, the executor was authorized to pay to into his hands any moneys belonging to the estate or legatees thereof; the judge was held liable on his bond for the proper disbursement of the same. *Doogan v. Elliott*, 43 Iowa, 342.

The county judge was authorized to receive money paid by an executor upon claims filed and allowed against the estate, and was held liable on his official bond for a failure to pay the same to the proper parties. *Wright & Co. v. Harris et al.*, 31 Id., 272.

It was held under the revision, that, while the county court might, in a summary manner enforce compliance with an order directing an administration to make payments in accordance with the prior order of the court, such court did not have exclusive jurisdiction. *Wheelhouse v. Bryant et al.*, 13 Id., 160. But see section 2312 of the code.

Under section 2419 of the revision, which is embodied in section 2435 of the code, with amendments, it was held, that in a proceeding to enforce the payment of a claim by an administrator pursuant to an order of the court, it was not necessary to file a petition alleging a breach of the administrator's bond. *Hart v. Jewett*, 17 Id., 234.

Where a claim against the estate of a deceased person, barred by the failure to present the same within the time prescribed by law, was afterwards allowed by the administrator and ordered by the court to be paid, it was held, that the sureties on the administrator's bond were liable for his failure to pay the claim out of the funds of the estate in his hands, and that they could not urge in defense that the claim was barred by the statute at the time of its allowance. *Weber v. North et al.*, 51 Id., 375.

(CHAPTER 41. LAWS OF 1888.)

SETTLEMENT OF ESTATES.

An Act to facilitate the settlements of estates, and to enable administrators, guardians, trustees and referees to deposit funds and securities subject to approval of court, and making the clerk and treasurer liable therefor in certain cases.

SECTION 1. [**Final report of administrator.**]—*Be it enacted by the general assembly of the state of Iowa:* Whenever any administrator, guardian, trustee or referee shall desire to make his final report as such, and who shall then have in his possession or under his control, in his fiduciary capacity, any funds, moneys, or securities due or to become due to any heir, legatee, devisee, or other person, the payment of which might then be made to such heir, legatee, devisee, or other person, if living or present within the county where such appointment as administrator, guardian, trustee or referee was made, such funds, moneys or securities may be deposited with the clerk of the district court of the county wherein such appointment was made, and if he shall otherwise discharge all the duties imposed upon him by such appointment, he may take the receipt of the clerk of the district court for such funds, moneys or securities so deposited, which receipt shall specifically set forth from whom said funds, moneys or securities were derived, the amount

thereof, and the name of the person to whom due or to become due, if known. Thereupon said administrator, guardian, trustee or referee may file such receipt with his final report, and if it shall be made to appear to the satisfaction of the court that he has in all other respects complied with the law governing his appointment and duties, the court may approve such final report and enter his discharge: *Provided*, that notice of such contemplated deposit, and if final report shall be given for the same time and in the same manner as now required in case of final report by administrators.

SEC. 2. [Clerk of district court keep book of deposit account.]—The clerk of the district court with whom any funds, moneys or securities shall be made as provided in the preceding section, shall enter in a book to be provided and kept for the purpose hereof, the amount of such deposit, the character thereof, the date of its deposit, from whom received, from what source derived, to whom due or to become due, if known. He shall be liable upon his bond for all funds, moneys or securities which may be deposited with him under the provisions hereof. If the funds, moneys or securities so deposited with the clerk shall not be paid to the person to whom the same is due or to become due within one year from the date of its deposit, the clerk shall then deposit such funds, moneys or securities with the county treasurer for the use of the county wherein such appointment was made, taking the treasurer's receipt therefor, countersigned by the county auditor, who shall thereupon charge upon the books of his office and against the treasurer the amount named in such receipts.

SEC. 3. [Treasurer to keep book of account of deposits.]—Whenever any funds, moneys or securities shall be deposited with the county treasurer, as provided in this act, he shall enter in a book provided and kept for that purpose the date of such deposit, the amount thereof, from whom received, the source from which derived, and the name of the person to whom the same is due or to become due, if known. Whenever the claimant therefor, upon proper application made to the district court, shall satisfactorily show to such court that he is the rightful owner of said funds, moneys or securities and entitled thereto, the court, by order entered of record, shall direct the county auditor to issue a warrant on the county treasurer for said money, funds or securities, and upon such order the said treasurer shall pay to the person named in such order the funds, moneys or securities to which the claimant shall have shown himself entitled.

Approved April 3, 1888.

CHAPTER 4.

OF THE DESCENT AND DISTRIBUTION OF INTESTATE PROPERTY.

SEC. 2436. [Distribution of personal property.]—The personal property of the deceased, not necessary for the payment of debts, nor otherwise disposed of as hereinbefore provided, shall be distributed to the same persons and in the same proportions as though it were real estate.

Upon the death of the husband without issue, the wife takes only one-half of his personal estate, either as dower or by descent. The same rule applies to the husband, and to real, as well as personal property. *Dodds v. Dodds*, 23 Iowa, 306; *Burns v. Keas*, 21 Id., 257; *Hale v. Hunter*, 24 Id., 181.

The right to a distributive share rests in the person entitled thereto, whether widow or next of kin, *instantly* upon the death of the intestate, and not from the time of distribution actually made; and distribution gives no new title but only ascertains the property to which the title attaches. If the death of the distributee takes place before distribution actually made, his share goes to his legal representatives or legatees and that the right of the widow to her distributive

share is held by a title as high as that of the heir or next of kin, and, like his, is not personal but transmissible. *Moore v. Gordon*, 24 Id., 153.

The common law rule that a debtor who is made executor of his creditor's estate is thereby released from the debt, is not in force in this state, and the debt in the executor's hands is regarded as general assets of the estate for the benefit, not only of creditors, but of legatees and all others interested. *Kaster v. Pierson*, 27 Id., 90.

In an action by a receiver against the executor to collect a debt due the estate, judgment should be rendered against the defendant in his individual capacity, and not as executor. *Id.*

Under this section, a mother who is the surviving parent of an intestate takes one-half of his estate absolutely. *Hale v. Hunter*, 21 Iowa, 181.

The law places no restriction or limitation on the power of the husband to make such disposition of his personal property during his life-time as he may elect, even though the wife is thereby deprived of the distributive share which otherwise would fall to her upon his death. *Samson v. Samson*, 67 Id., 253. (The restraining power of the wife, however, is sufficient for her protection without other law.—ED.)

SEC. 2437. [Payment.]—The distributive shares shall be paid over as fast as the executor can properly do so.

SEC. 2438. [In kind.]—The property itself shall be distributed in kind whenever that can be done satisfactorily and equitably. In other cases the court may direct the property to be sold, and the proceeds to be distributed.

SEC. 2439. [Partial distribution: when made.]—When the circumstances of the family require it, the court, in addition to what is hereinbefore set apart for their use, may direct a partial distribution of the money or effects on hand at any time after filing the inventory and appraisement, upon the execution of security like that required of legatees in like cases.

SEC. 2440. [Share of husband or wife.]—One-third in value of all the legal or equitable estates in real property, possessed by the husband at any time during the marriage, which have not been sold on execution or any other judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property in fee-simple, if she survive him. The same share of the real estate of a deceased wife shall be set apart to the surviving husband. All provisions made in this chapter in regard to the widow of a deceased husband, shall be applicable to the surviving husband of a deceased wife. The estates of dower and courtesy are hereby abolished.

At no time during our existence as a territory, was dower changed from what it was under the organic acts of Wisconsin and Iowa, or different from what it was at common law. *Pense v. Hixon*, 8 Iowa, 402.

Independently of statute, a sale of real property on execution or other judicial sale under a judgment against the husband, would not bar the wife's right of dower. *Id.*

A woman who has been fully divorced from her husband, cannot maintain against his heirs an action for one-third of the real estate of which he died seized; such right belongs only to her who is the wife of the deceased at the time of his death. *Marrin v. Marvin et al.*, 59 Id., 699.

It is competent for the legislature, at any time before the husband's death, to enlarge, abridge or entirely take away the dower right of the wife in the husband's lands. *Lucas v. Sawyer et al.*, 17 Id., 517.

The general rule is that dower is to be measured by the law in force at the time of the husband's death. *Id.* See also *Sturdevant v. Norris et al.*, 30 Id., 65.

The interest of the widow in her deceased husband's real property is not subject to the payment of his debts, and may be assigned without reference thereto. *Mock v. Watson*, 41 Id., 241; *Kendall v. Kendall*, 42 Id., 464.

The wife's interest attaches upon the concurrence of the seizing of the husband and coverture of the wife, and is not like that of the heirs, made subject to the rights of others or charges against the estate. *Id.*

The first section of chapter 151, laws of 1662, which changed the estate of dower from one for life to a fee simple, did not abolish but enlarged the dower estate of the widow. *Kendall v. Kendall*, 42 Id., 464. See also *Moore v. Kent*, 37 Id., 20.

The surviving husband or wife cannot hold at the same time both dower and homestead in the same property, but must elect by which right he or she will take. *Butterfield v. Wicks et al.*, 44 Id., 310; *Meyer v. Meyer*, 23 Id., 359; *Briggs v. Briggs*, 45 Id., 318.

A judgment against a widow after her homestead rights have accrued, is not a lien upon the distributive share to which she is entitled in the lands of her deceased husband set off to her in lieu of her homestead. *Briggs v. Briggs*, 44 Id., 318.

So a husband entitled to dower in the lands of his wife which she has devised to another, may, after her death, waive and relinquish his right thereto, so that the devisee of the wife shall take a full title, free from and unaffected by the lien of a judgment existing against the husband at the time of his wife's decease. *Shields v. Keys*, 24 Id., 298.

Where an intestate left neither wife nor children, and both parents were dead, his father having died last, leaving a second wife, it was held that the latter was entitled to one-sixth of the real property left by the decedent, being one-third of the share which would have been inherited by her husband had both parents of the decedent been living at the time of his death. *Moore et al. Weaver et al.*, 53 Id., 12.

In *Smith v. Zuckmeyer*, 53 Id., 14, it is held that the distributive share of a surviving husband or wife in the lands of the decedent, and which is held free from the debts of such decedent, is limited in all cases to one-third; where intestate leaves no children, and the surviving husband or wife becomes entitled to one-half of the estate, under section 2455 of the code, one-third is held as dower interest under section 2449, and the remaining one-sixth as heir at law.

It was also held, in the same case, where the wife dying without issue, seized of a homestead, which the husband elected to occupy during life in lieu of his distributive share, that the share thus relinquished was one-third interest only, and that upon his abandonment of the homestead he was entitled to one-sixth of the estate as heir at law.

The widow of one who purchases real property, assuming the payment of a mortgage thereon as a part of the purchase price, is not entitled to dower in the property as against the mortgagee. *Kennedy v. Boures*, Id., 172.

Where the wife joined in the execution of the mortgage, a foreclosure and sale thereunder, after the death of her husband operates to bar her right to dower in the land mortgaged. *Mead v. Mead*, 39 Id., 28; *Mooney v. Maas*, 22 Id., 380.

Where the husband through negligence or fraud permitted his son by a former marriage to obtain possession of his real property, by acquiring a sheriff's deed thereto, it was held that the proceeds, in excess of the amount of the judgment under which the property was sold, should be subjected to the widow's claim for dower. *Buzick v. Buzick*, 44 Id., 259.

The surviving husband or wife cannot enjoy at the same time both dower and homestead in the real estate of the decedent, and must elect which of those rights he or she will take. *Stevens et al. v. Stevens*, 50 Id., 491.

A conveyance of real property in which the wife joins the husband in the granting clause, and in the covenants, operates under our statutes to pass all the estate of the wife conveyed, including her contingent right of dower. *Edwards v. Sullivan et al.*, 20 Id., 502; *Jones v. The City of Des Moines et al.*, 43 Id., 209. And such conveyance will have this effect although the deed releasing dower or conveying an estate be neither acknowledged nor recorded. *Lake et al. v. Gray et al.*, 30 Id., 415.

Where the husband dies seized of several distinct parcels of real property, the widow may have her distributive share in the whole assigned in a body. *Montgomery v. Horn et al.*, 46 Id., 285.

The assignment of the widow's dower in the lands of her deceased husband must be governed by the law in force at the time of his death. *Parker v. Small*, 55 Id., 732; *Cunningham v. Wilde et al.*, 56 Id., 369.

Equity will recognize and enforce a sale and conveyance of the dower interest of the widow before the dower has been assigned or admeasured, and will accordingly recognize and enforce the rights which a purchaser of the dower interest of the husband or wife, as the case may be, acquires at a foreclosure sale under a mortgage in the execution of which both joined. *Huston v. Seeley et al.*, 27 Id., 183.

Where a contract entered into by husband and wife, before marriage, provided that "each is to have the untrammelled and sole control of his or her own property, real and personal, as though no such marriage had taken place," it was held that the grantees of the husband took real estate conveyed by him unincumbered by the wife's claim of dower, and that after his death she could not assert any right of dower in his estate. *Jacobs v. Jacobs et al.*, 42 Id., 600.

But a contract made between husband and wife after marriage, by which each relinquishes the right of dower in the lands of the other, is void under section 2203 of the code. *Linton v. Crosby et al.*, 54 Id., 478.

A wife's inchoate right of dower, or interest in her husband's estate, is not such an interest in land that she can assert it against the creditors of her husband; and the release of such right in a portion her husband's land conveyed to a creditor in satisfaction of a debt is not a valuable consideration for the conveyance to her by her husband of other land. *Hayes v. Kline*, 64 Id., 308.

Where one makes an assignment under the statute of all his property, including real estate, for the benefit of his creditors, a sale of the real estate by the assignee is such a "judicial sale" as will, under this section of the code, cut off the wife's right of dower therein. *Stidger v. Evans*, 64 Id., 91. See, also, *Sturdevant v. Norris*, 30 Id., 65.

A widow may lawfully take her share of one-third of her deceased husband's real estate as provided in this section, usually termed dower, notwithstanding she also takes other real property under his last will and testament, unless there be an express provision in the will to the con-

trary, or the claim of dower be inconsistent with and will defeat some provision of the will. So where a devise to the widow of certain lots absolutely, and of a life estate in certain lands with remainder to another, *held* not to cut off her right to take, in addition thereto, her one-third fee-simple of his lands under this section of the code. *Daugherty v. Daugherty*, 69 Id., 677.

Under sections 2440 and 2452 the interest of the surviving husband or wife of the deceased spouse is not affected by a will, unless consent thereto is entered of record within six months after notice of the provisions of the will. Consent and acceptance are not sufficient without the record entry. Following *Baldozier v. Haynes*, 57 Id., 683. In this case the executors of the deceased wife sought to have the consent of the husband entered after his death as against his administrator. *Houston, Adm'r. v. Lane's Ex'rs*, 62 Id., 291.

SEC. 2441. [Homestead.]—The distributive share of the widow shall be so set off as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share allotted to her by the last section, unless she prefers a different arrangement. But no different arrangement shall be permitted where it would have the effect of prejudicing the rights of creditors.

When the widow applies for and has her dower set off so as to include the dwelling-house of the deceased and a portion of the forty acres comprising the homestead, she cannot claim the residue under a homestead right. *Meyer v. Meyer et al.*, 23 Iowa, 359.

Whether the heirs can compel the widow to accept dower and give up the homestead right, *quære. Id.*

When the widow elects to take her distributive share under the law, and when such share embraces a part or all of the homestead, she does not surrender the right to have the property other than that set apart to her first exhausted in the payment of a mortgage lien on the whole premises. *Wilson v. Hardesty*, 48 Id., 515.

The unassigned dower interest of a widow in the real estate of her deceased husband is not subject to attachment in an action at law. *Rausch v. Moore*, 43 Id., 611.

A judgment rendered against a married woman after her rights of homestead have accrued, is not a lien upon the distributive share in the estate of her deceased husband which she elects to have set apart to her in lieu of the homestead. *Briggs v. Briggs et al.*, 45 Id., 318. See, also, *Nye v. Walliker*, 46 Id., 306; *Knox v. Hanlan*, 48 Id., 252.

No person but the widow herself has the power to waive the provision of this section, that her distributive share shall be so set off as to include the homestead, not even her guardian where she is insane. *Ratchiff, Guardian, v. Davis et al.*, 64 Id., 467.

SEC. 2442. [Widow of alien.]—The widow of a non-resident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from the decedent.

SEC. 2443. [How set off.]—The share thus allotted to her may be set off by the mutual consent of all parties interested, when such consent can be obtained, or it may be set off by referees appointed by the court.

This section contemplates the appointment of more than one referee, and where more than one is appointed, and only one acts in the appraisal of the property, the assignment of dower may be set aside upon a slighter showing of prejudice than if the appraisal had been made by all. *Jones v. Jones*, 47 Iowa, 337.

SEC. 2444. [Application: when made.]—The application for such a measurement by referees may be made at any time after twenty days and within ten years after the death of the husband, and must specify the particular tracts of land in which she claims her share, and ask the appointment of referees.

It was *held* that this section had no application to a proceeding in equity to admeasure dower, when the defendant had not been in the adverse possession of the land more than ten years prior to the commencement of the suit. *Starry v. Starry*, 21 Iowa, 254.

It was also *held* in the same case that courts of equity had concurrent jurisdiction with the probate court in the assignment of dower, and that the limitation in section 2428 of the revision applied only to proceedings in the county court. *Id.*

A right of dower, where the dower has not been assigned, cannot be pleaded as a defense in an action to recover possession of lands, as against the holder of the fee thereto. *Cavender v. Smith*, 8 Id., 360.

The limitation prescribed in this section respecting applications for the admeasurement of dower, to ten years from the death of the husband, was held to be applicable only to proceedings in the county court: and that the general statute of limitations applies and begins to run against the dowress or her assignee, and in favor of the heir or his assignee, when and only when he either denies her right or does some act equivalent to such denial. *Sully v. Nebergall et al.*, 30 Id., 339, (1870.) See *Phares v. Walters*, 6 Id., 106.

It was also held that in addition to the special proceeding in the county court provided by the statute, and a proceeding in equity, a widow could recover her dower by an action under the statute providing for action for the recovery of real property. *Rice v. Nelson*, 27 Id., 148, (1869).

SEC. 2445. [**Notice of appointment.**]—The court shall fix the time for making the appointment, and direct such notice thereof to be given to all parties interested therein as it deems proper.

If it appears that there was a notice, though it be defective, or the service thereof be imperfect, neither in strict compliance with the statute, and the court has determined in favor of the sufficiency of the notice and service, though such decision were erroneous, the judgment will not be held void in a collateral proceeding. *Shawhan v. Loffer*, 24 Iowa, 217.

SEC. 2446. [**Duty of referees.**]—The referees may employ a surveyor, if necessary; and they must cause the widow's share to be marked off by metes and bounds, and make a full report of their proceeding to the court as early as practicable.

SEC. 2447. [**Report: Discharge of.**]—The court may require a report by such a time as it deems reasonable; and, if the referees fail to obey this or any other order of the court, it may discharge them and appoint others in their stead, and may impose on them the payment of all costs previously made, unless they show good cause to the contrary.

SEC. 2448. [**Confirmation: new reference.**]—The court may confirm the report of the referees, or it may set it aside and refer the matter to the same or other referees, at its discretion.

SEC. 2449. [**Same.**]—Such confirmation, after the lapse of thirty days, unless appealed from according to law, shall be binding and conclusive as to the admeasurement, and the widow may bring suit to obtain possession of the land thus set apart for her.

SEC. 2450. [**Right contested.**]—Nothing in the last section shall prevent any person interested from controverting the right of the widow to the share thus admeasured.

SEC. 2451. [**Sale ordered: division of proceeds.**]—If the referees report that the property, or any part thereof, cannot be readily divided as above directed, the court may order the whole to be sold and one-third of the proceeds to be paid over to the widow; but such sale shall not take place, if any one interested to prevent it will give security to the satisfaction of the court, conditioned to pay the widow the appraised value of her share, with ten per cent interest on the same, within such reasonable time as the court may fix, not exceeding one year from the date of such security. If no such arrangement is made, the widow may keep the property by giving like security to pay off the claims of all others interested upon the like terms. With any money thus paid to her the widow may procure a homestead, which shall be exempt from liability for all debts from which the former homestead would have been exempt in her hands. And such sale shall not be ordered so long as those in interest shall express a contrary desire, and shall agree upon some mode of sharing and dividing the rents, profits, or use of such property, or shall consent that the court divide it by rent, profits or use.

SEC. 2452. [**Share cannot be affected by will.**]—The widow's share cannot be affected by any will of her husband, unless she consents thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered on the proper records of the circuit court.

Where the wife executed a written contract by which she agreed to accept a certain sum of money in lieu of dower, and the husband provided in his will for the payment of this sum, which, after his death, the wife claimed and received from the administrator, giving him a receipt therefor, it was held, that her conduct amounted to an election to take under the will and that she was estopped to claim dower in the estate. *Stoddard v. Cutcompt*, 41 Iowa, 329.

It is a settled rule in the construction of wills, that where there is no express declaration in the will barring the dower of the wife, the intention that it shall be barred must be deduced by clear

and manifest implication, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to some of its dispositions as to defeat them. *Metteer v. Wiley et al.*, 34 Id., 215; *Corriell v. Ham*, 2 Id., 552; *Sully v. Nebergall*, 30 Id., 339; *Clark v. Griffith*, 4 Id., 405.

The widow's election to take under the will, does not therefore defeat her right to dower unless the provisions for her in the will are either expressed to be in lieu of dower, or are thus inconsistent with her claim therefor. *Id.*

The acceptance by the widow of a bequest of a life estate in her husband's lands does not bar her right of dower. *Id.*

See, also, to the same effect, *McGuire v. Brown*, 41 Id., 650; and *Clark v. Griffith*, 4 Id., 405.

Where a widow elected to accept the bequests in her husband's will giving her one-third of his real estate in lieu of dower, in consideration that all of the heirs should agree to give her one-third of the personalty in addition, and only part of the heirs consented to the agreement, it was held that the widow was not estopped from afterward relinquishing all rights conferred by the will and claiming her rights of dower. *Richart v. Richart*, 30 Id., 465.

The widow's share of her husband's property as contemplated in this section includes both real and personal property, and a husband cannot by will, made either before or after marriage, deprive his widow of her share in his personal estate. *Ward v. Wolf et al.*, 56 Id., 465.

The acceptance by a widow of the provisions of a will in lieu of dower, in order to be binding on her under this section, must be made within six months after she received notice of its provisions, and such acceptance must be entered in the proper records of the circuit court and be evidenced by such record, and no other evidence thereof is sufficient or competent. A written notice of acceptance not entered of record is insufficient, and the widow is not estopped thereby from claiming her distributive share in her husband's estate. *Baldozier v. Haunes et al.*, 57 Id., 683.

This section does not apply to personal property. *In the matter of the estate of Jacob Davis deceased*, 36 Id., 24.

Section 2435 of the revision required *action* on the part of the widow, in order to preserve her right unaffected by the will. She was required to *object* and relinquish all rights under the will. *Kyne v. Kyne*, 48 Id., 21, 24.

Where a father adopted two children of his daughter, and afterward died intestate, it was held that the adopted children would inherit from him as his own children, and would also inherit the share of their deceased mother. *Wagner v. Varner*, 50 Id., 532.

Where a will was in the following form: "I give and bequeath to my beloved wife all my estate, consisting of 170 acres of land, together with all my personal property (after paying my debts) during her life, or so long as she remains my widow. And if she should be disposed to sell the estate and improve other lands she is at liberty to do so; and at her death or marriage the estate is to be equally divided between my heirs"; it was held that the widow's election to take under the will did not defeat her right of dower. *Sully v. Nebergall et al.*, 30 Id., 339.

So a devise by the testator to his wife of one-third of all his real estate with the residue to his children, does not bar the wife's right of dower. *Watrous v. Winn et al.*, 37 Id., 72.

And so where the will contained the following provision for the widow: "After the payment of my debts, I give and bequeath to my wife all my property, real and personal, except what is heretofore devised, to be held by her during her natural life for her sole use and benefit; but at her death I direct that the same be divided among all my children or their heirs," her right of dower held not barred. *Metteer v. Wiley et al.*, 34 Id., 214.

Where the widow filed a petition asking that the provisions of her husband's will be enforced in her favor, she thereby elects to take thereunder and cannot afterward revoke such election and claim under the statute. *Ashlock v. Ashlock*, 52 Id., 319.

The rule is recognized in this state that aside from statute a will to be in lieu of dower must expressly so state, or it must appear by necessary implication that such was the testator's intent; that the claim of the widow would be repugnant to and defeat some part of the testator's disposition. *Cain v. Cain et al.*, 23 Id., 31.

A husband entitled to dower in the real estate of his wife which she has devised to another may, after her death, waive and relinquish his right thereto, so that the devisee will take the full title free from and unaffected by the lien of a judgment standing against the husband at the time of the death of the wife. *Shields v. Keys*, 24 Id., 298.

Unless a devise to the wife, to be ascertained either from express words or by necessary implication, is clearly intended to be in lieu of dower, she will not be compelled to elect which she will take, but will be entitled to both. But in a case where the testator in the second paragraph of his will, gave certain described property to his wife, and in the third, fourth and fifth paragraphs gave certain legacies, and in the sixth paragraph disposed of all the residue of his property without description, and then in the seventh paragraph provided for the sale of all the remainder of his real estate for the purpose of carrying out the devises named in the sixth paragraph, held, that the manifest intent of the testator would be defeated by allowing the widow to take the property devised to her by the will, and also one-third of the real estate not devised to her. *Snyder v. Miller, Ex'r, et al.*, 67 Id., 261.

Where a testator bequeaths all of his property absolutely to his widow, it is not necessary, in order that she may take under the will, that she file her election so to take, instead of taking her one-third of the estate under the statute. This section does not apply to such a case. *Bulfer v. Willigrod*, 71 Id., 620.

DESCENT.

SEC. 2453. [**To decedents' children.**—Subject to the rights and charges hereinbefore contemplated, the remaining estate of which the decedent died seized, shall, in the absence of other arrangement by will, descend in equal shares to his children.

SEC. 2454. [**Grandchildren.**—If any one of his children be dead, the heirs of such child shall inherit his share in accordance with the rules herein prescribed in the same manner as though such child had outlived his parents.

This section held not to authorize the widow of a deceased husband to inherit from their child who died before the death of the husband. *McMenomy v. McMenomy*, 22 Iowa, 148; *Journell v. Leighton*, 49 Id., 601.

While the word "heir" is not technically limited to children, yet it was not intended by its use to embrace the widowed mother of a child that died before its father. *Id.*

Where a child was adopted in a foreign state under an act of the legislature which provided that she should inherit from the adopting parents, "as if she were their legitimate child" it was held that her status as an heir was fixed by the act, and that it did not constitute her an heir of her adopting parents to the extent of enabling her to inherit through them. Consequently she was not an heir of her adopting father in the sense contemplated by this section and did not inherit his share of his father's estate, who survived him and died intestate, leaving property in Iowa. ADAMS and DAY JJ., *Dissenting. Estate of Sunderland*, 60 Id., 732.

SEC. 2455. [**Wife and parents.**—If the intestate leave no issue, the one-half of his estate shall go to his parents and the other half to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents.

Upon the death of the wife without issue, the husband is under this section entitled to but the one-half of her entire estate for his dower as heir at law. *Burns et al. v. Keas et al.*, 21 Iowa, 257. See, also, *Gill v. Sullivan*, 55 Id., 341, 344.

Under this section the widow or surviving husband is entitled to one-half of the estate of the deceased only when he or she dies without issue and intestate. *Clark v. Griffith*, 4 Id., 405.

If the husband or wife die without issue, and the estate or a part of it is disposed of by will, the widow or widower is not entitled to one-half of the estate. *Id.*

A testator may by will deprive his widow of all interest in his estate, except her dower as allowed by law. *Id.*

SEC. 2456. [**Surviving parent.**—If one of his parents be dead, the portion which would have gone to such deceased parent shall go to the surviving parent, including the portion which would have belonged to the intestate's wife, had she been living.

Where a child survived his father, but died without issue before the death of his grandfather, from whom the property in controversy was derived, it was held that the child never had any vested estate in the property, and that his mother surviving would take nothing by descent. Parents succeed only to the estate which the child has at the time of his death. *Leonard v. Lining*, 57 Iowa, 648.

SEC. 2457. [**Heirs of parents.**—If both parents be dead, the portion which would have fallen to their share by the above rules, shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, and so on through ascending ancestors and their issue.

Where a testator, dying without issue, devised all of his real estate to his widow during her natural life, the provisions of section 2457 do not apply, so that she may claim one-half of his estate, that section having application only to cases where the owner dies intestate as well as without issue. *Dobson v. Dobson et al.*, 30 Iowa, 410.

The heirs of the father and mother of a deceased intestate who leaves neither wife nor issue, under section 2457, inherit the same as they would have done if both parents had survived the intestate, and each died in possession of one-half of the estate. *Bassil v. Loffer*, 33 Id., 451.

Where the parents of a testator are dead at the time of his decease, their share in his estate, where the will directed that, in the event of the marriage of the widow to whom he bequeathed

the estate during widowhood, the estate should "take the course designated by existing laws," will be distributed in the same manner as if their death had occurred after they came into possession of the estate. *McGuire v. Brown*, 41 Id., 650.

Section 2454 does not authorize the widow of a deceased husband to inherit from their child who died before the death of the husband. While the term "heir" is not technically limited to children, yet it was not intended by its use to embrace the widowed mother of a child that died before the death of the father. *McMenomy v. McMenomy*, 22 Id., 148.

Under the revision, children of the half blood inherited equally with children of the whole blood, when the inheritance was derived through the common parent, and even if the code had changed this rule (which is not decided) the party so claiming must show that the descent was cast after the code took effect. *Neeley v. Wise et al.*, 44 Id., 544.

Where an intestate left neither wife nor children, and both of his parents were dead, his father having died last leaving a second wife, it was held that the latter was entitled to one-sixth of the real estate of the intestate, being one-third of the share which would have been inherited by her husband had both parents of the intestate been living at the time of his death. *Moore et al. v. Weaver et al.*, 53 Id., 12.

Where a person died intestate, leaving neither wife nor issue, and both parents being dead, it was held that his property never constituted any portion of his father's estate; that the persons inheriting took directly from the intestate and that the heirs of a deceased sister, cut off by the father's will, inherited the estate notwithstanding the will. *Lash v. Lash*, 57 Id., 88.

SEC. 2458. [**Wife and her heirs.**].—If heirs are not thus found, the portion uninherited shall go to the wife of the intestate, or to her heirs if dead, according to like rules; and if he has had more than one wife who either died or survived in lawful wedlock, it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation.

SEC. 2459. [**Advancement.**].—Property given by an intestate by way of advancement to an heir, shall be considered part of the estate so far as regards the division and distribution thereof, and shall be taken by such heir towards his share of the estate at what it would now be worth if in the condition in which it was so given to him. But, if such advancement exceeds the amount to which he would be entitled, he cannot be required to refund any portion thereof.

The provisions of this section that an advancement "shall be considered part of the estate so far as regards the distribution thereof, and shall be taken by such heirs towards his share of the estate," at its value at the time of distribution to him, etc., applies only to the heirs and not as to the widow who had renounced under the will and elected to take her distributive share. *In re Will of Miller*, Dec., 34 N. W. R., 769.

ESCHEAT.

SEC. 2460. [**When no heirs.**].—If there be property remaining uninherited, it shall escheat to the state.

During the pendency of proceedings instituted by the attorney-general to declare lands escheated to the state, the legislature may, by statute, order an abatement of the proceedings and release all interest in the property in controversy to the parties claiming adversely. *The State ex rel v. Tilghman et al.*, 14 Iowa, 474.

SEC. 2461. [**Duty of clerk in case of.**].—When the judge or clerk has reason to believe that any property within the county should, by law, escheat to the state, he must forthwith inform the auditor of state thereof, and must also appoint some suitable person administrator to take charge of the property, unless an executor or administrator has already been appointed for that purpose in some county in the state.

SEC. 2462. [**Notice.**].—The administrator must give such notice of the death of the deceased, and the amount and kind of property left by him within this state, as, in the opinion of the clerk or judge appointing him, will be best calculated to notify those interested or supposed to be interested in the property.

SEC. 2463. [**Sale: proceeds paid to school fund.**].—If, within six months from the giving of such notice, no claimant thereof appears, such property may be sold and the money appropriated by the administrator for the benefit of the

school fund, under the direction of the auditor of state; and such sale shall be conducted and the proceeds thereof treated like those of other school lands.

SEC. 2464. [**Payment to persons entitled.**—The money or any portion thereof, shall be paid over to any one who shows himself entitled thereto within ten years after the sale of the property, or the appropriation of the money as an escheat, but not afterwards.

ILLEGITIMATE CHILDREN.

SEC. 2465. [**Inherit from mother.**—Illegitimate children inherit from the mother, and the mother from the children.

An illegitimate child inherits from the mother, and the fact that she is dead before the descent is cast will not prevent the child from inheriting her share of the estate. *McGuire v. Brown*, 41 Iowa, 650.

Under sections 2465, 2466, 2467, an illegitimate child, which has been notoriously recognized by her father, inherits from the father, share and share alike with his legitimate children; and the birth and recognition of an illegitimate child, after the execution of a will by the father, has the effect to revoke the will, the same as the birth of a legitimate child. *Milburn v. Milburn*, 60 Id., 411.

SEC. 2466. [**From father.**—They shall inherit from the father whenever the paternity is proven during the life of the father, or they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing.

The recognition in writing of an illegitimate child by the father is not required to be in the shape of a formal avowal, executed for the purpose of making known and perpetuating the fact, but may be sufficiently established from letters and correspondence; and when the recognition is thus established, the illegitimate will inherit from his father, the same as a legitimate. *Crane v. Crane et al.*, 31 Iowa, 296.

The rendition of a verdict does not prove the finding of facts as were not necessary to stain the verdict. So, it was held that a verdict, and judgment thereon, in favor of plaintiff's mother and against the defendant's intestate, for seduction, which was alleged to have resulted in the birth of plaintiff, did not conclusively prove that plaintiff was the child and heir of the defendant's intestate. *Koon v. Mallet Adm'r., et al.*, 68 Id., 206.

In *Blair et al., by Guardian, v. Howell et al.*, Id., 619., the supreme court, upon consideration of the evidence, held it sufficient to establish such general and notorious recognition by a father of his illegitimate children as to entitle them to inherit from him under this section of the code. BECK and REED, J.J., dissenting.

SEC. 2467. [**Same.**—Under such circumstances, if the recognition of relationship has been mutual, the father may inherit from his illegitimate children.

SEC. 2468. [**Rule in such cases.**—But in this inheriting from an illegitimate child, the rule above established must be inverted so that the mother and her heirs take preference of the father and his heirs, the father having the same right of inheritance in regard to an illegitimate child that the mother has in regard to one that is legitimate.

CHAPTER 5.

OF ACCOUNTING AND MISCELLANEOUS PROVISIONS.

SECTION 2469. [**Term of.**—On the expiration of six and within seven months from the first publication of notice of his appointment, and soon if required by the court, the executor shall render his account to the court, showing the then condition of the estate, its debts and effects, and the amount of money received, and if any received what disposition has been made of it by him. And, from time to time as may be convenient, and as may be required by the court, he shall render further accounts until the estate is finally settled. And such final settlement shall be

made within three years, unless otherwise ordered by the court. Such accounts shall embrace all matters directed by the court and pertinent to the subject.

In an action for a breach of an administrator's bond for not accounting as required by the statute, is not a complete defense that the administrator made a report and statement of account to the court since the commencement of the action. Nor does, an accounting constitute a defense to an action for a breach of the bond by converting the assets of the estate to his own use. *Clark v. Cress*, 20 Id., 50.

In the absence of fraud, mistake, or other grounds of equitable relief, a settlement made by the probate court with an administrator cannot be set aside, though made in the absence of those interested, after the expiration of three months. *Patterson v. Bell*, 25 Id., 149. [So held under the revision.]

SEC. 2470. [Examination of executor.]—The executor may be examined under oath by the court, upon any matters relating to his accounts when the vouchers and proofs in relation thereto are not sufficiently full and satisfactory.

SEC. 2471. [Appraised price.]—He must account for all the property inventoried at the price at which it was appraised, as well as for other property which has come into his hands belonging to the estate.

SEC. 2472. [Presumption.]—The appraisement is only presumptive evidence of the value of an article, and shall be so regarded, either for or against the executor.

SEC. 2473. [Profit and loss.]—He shall derive no profit from the sale of property for a higher price than the appraisement, nor is he chargeable with any loss occurring without any fault of his own.

SEC. 2474. [Mistakes corrected.]—Mistakes in settlement may be corrected at any time before final settlement and discharge of the executor, and even after that time on showing such grounds for relief in equity as will justify the interference of the court.

Settlements made by the probate court with an administrator have the force and effect of adjudications, and are conclusive unless impeached for fraud or mistake. *Cowins v. Tool et al.*, 36 Iowa, 82; *Patterson v. Bell*, 25 Id., 149.

Mistakes in prior settlements may be corrected at any time before final settlement and discharge of the administrator; but this must be done by proper proceedings in the probate court. *Cowins v. Tool, supra*.

Where an administrator, as a pretended creditor of the estate, procures an allowance of his claim by fraud, the court, in a proper proceeding, may set aside the allowance, but it cannot be assailed by an exception to his report. *Ashton v. Mills*, 49 Id., 564.

The settlement of an estate and the discharge of the administrator is an adjudication, binding upon all the parties in interest, that the estate has been properly administered upon; and such adjudication can only be set aside for fraud or mistake, within the time fixed by the statute. *Daniels v. Smith*, 58 Id., 577.

Where an administrator, upon notice published in a newspaper of the county, but without actual notice to the plaintiffs, (heirs) who resided in the county, obtained an order of the court approving his final report and discharging him, held that after the lapse of two years, upon a showing that by mistake or fraud he had failed to report as to a certain fund and to charge himself therewith, the order was properly set aside, under this section, in a suit in equity by the heirs against him and his sureties, and judgment rendered against them in favor of each of them for his distribution share of the fund not accounted for. The provisions of section 2475 of the code requiring proceedings to open such accounts to be begun within three months, does not apply to cases of mistake or fraud. *Arnold et al. v. Spates et al.*, 65 Id., 570.

SEC. 2475. [Settlement contested.]—Any person interested in the estate may attend upon the settlement of accounts by the executor and contest the same. Accounts settled in the absence or any person adversely interested and without notice to him, may be opened within three months on his application.

An interlocutory *ex parte* accounting by an administrator does not conclude any party interested. *Clark v. Cress*, 20 Id., 50.

Where a petition is filed to open up the settlement of an estate under section 2474, which does not charge fraud, or set forth any fraudulent acts, it was held barred after three months. *Kows v. Mower*, 57 Id., 20.

Where a final order discharging administrators is based upon the receipts of distributees for the amounts due them, respectively, on final accounting, and no application to set aside such order is made within three months, it becomes conclusive as to the distributees, although they are plaintiffs

in an action pending at the time of settlement against the administrators and their securities. *Diehl v. Miller et al.*, 56 Id. 313.

SEC. 2476. [**Discharge.**]-Upon final settlement by the executor, an order shall be entered discharging him from further duties and responsibilities.

SEC. 2477. [**Judgment: execution against executor.**]-If judgment be rendered against an executor for costs in any suit prosecuted or defended by him in that capacity, execution shall be awarded against him as for his own debt, if it appear to the court that such suit was prosecuted or defended without reasonable cause. In other cases the execution shall be awarded against him in his representative capacity only.

SEC. 2478. [**Receipts by one executor.**]-One of several executors may receive and receipt for money. Such receipt shall be given by him in his own name only, and he must individually account for all the money thus received and receipted for by himself; and this shall not charge his co-executor, except so far as it can be shown to have come into his hands.

SEC. 2479. [**Notice affecting executor: how served.**]-Whenever the court shall make an order affecting an executor, and such order cannot be personally served upon him, service of such order may be made by publication of a notice, stating the substance thereof, in some weekly newspaper published in the county where such order was made, for four weeks in succession.

SEC. 2480. [**Publication of.**]-When there is no newspaper published in such county, then said notice may be published in the newspaper published nearest to the county seat of the county in which said order is made, which publication may be proved as required in like cases in the court.

SEC. 2481. [**Effect of.**]-Service made as above shall be as effectual as if personally served, and suits and proceedings may be prosecuted or commenced, had and maintained, in all respects as if such notice or notices, order or orders, had been personally served.

SEC. 2482. [**Failure to account: penalty.**]-Any executor failing to account, upon being required to do so by the court, or as he is required to do by law, shall, for every such failure, forfeit one hundred dollars, to be recovered in a civil action on his bond, for the benefit of the estate, by any one interested therein.

SEC. 2483. [**Executor of executor.**]-An executor has no authority to act in the matter wherein his principal was merely executor or trustee.

SEC. 2484. [**Executors in their own wrong.**]-Any person who, without being regularly appointed an executor, intermeddles with the property of a deceased person is responsible to the regular executor when appointed, for the value of all property taken or received by him, and for all damages caused by his acts to the estate of the deceased, but his liability extends no further.

An administrator *de son tort* is liable in an action by a creditor of the decedent to the extent of the value of the property of the deceased which has come into his hands. *Elder v. Littler*, 15 Iowa, 65.

Where the widow and heirs have appropriated all the assets of the estate prior to the appointment of an administrator, they are liable as administrators *de son tort* to the extent of the property appropriated. *Madison v. Shockley*, 41 Id., 451.

It is no defense in an action against them by a creditor, that an administrator has been appointed. *Id.*

SEC. 2485. [**Action against heirs or devisees.**]-In an action against the heirs and devisees, where the judgment is to be against them in proportion to the respective amounts received by them from the estate, costs awarded against them shall be in like proportion.

SEC. 2486. [**Tender.**]-In such cases, any one may tender the amount due from him to the plaintiff, which shall have the same effect, as far as he is concerned, as though he was the sole defendant.

SEC. 2487. [**Specific performance.**]-When a person under such obligation to convey real estate as might have been enforced against him if living, dies before

making such conveyance, the court may enforce a specific performance of such contract by the executor, and require him to execute the conveyance accordingly.

In an action to enforce the specific performance of a contract to convey real property executed by the decedent, the administrator is a proper, though not a necessary party. The action may be against the heirs alone. *Judd v. Mosely*, 30 Iowa, 423.

SEC. 2488. [**Who made parties.**—It is not necessary to make any other than the executor party defendant to such proceedings in the first instance; but the court, in its discretion, may direct other persons interested to be made parties, and may cause them to be notified thereof in such manner as the court may deem expedient. Heirs and devisees may, on their own motion, at any time be made defendants.

SEC. 2489. [**Considered as one person.**—In an action against several executors they are considered one person, and judgment may be taken and execution issued against all as such, although only part were duly served with notice.

RECORDS OF CLERK.

SEC. 2490. [**In probate matters.**—The clerk shall keep a record, additional to the other records required by law, showing, as follows:

1. The name of every deceased person whose estate is administered, and who dies seized of any real estate situate within the county, and the date of his death;
2. The names of all the heirs at law, and widow of such deceased person, and the ages and places of residence of such heirs so far as the same can be ascertained;
3. A note of every sale of real estate made under the order of the court, with a reference to the volume and page of the court record, where a complete record thereof may be found.

SEC. 2491. [**Executor to furnish list of heirs.**—In order to ascertain the facts required to be stated in such record, the clerk may require each executor or administrator to furnish him with a list of the names, ages, and place of residence of the heirs, which list shall be sworn to by the executor; but if such executor shall certify under oath that there are no heirs, or that, after using due diligence, he has been unable to ascertain their names, ages, or residence, the clerk shall make an entry in the record accordingly. If deemed necessary, the clerk may examine the county records to ascertain whether any deceased person died seized of any real estate, and he shall be allowed such fee therefor as may be fixed by the court.

SEC. 2492. [**Complete record.**—In every case where a sale of real estate is made under the order of the court, either by an executor, administrator, or guardian, the clerk shall enter a complete record thereof in the court record, including complete records of all papers filed and all orders made, and of the deed and the approval thereof.

SEC. 2493. [**Bond record.**—He shall also keep a book known as "records of bonds," in which he shall record all bonds given by executors, administrators and guardians.

COMPENSATION OF EXECUTORS.

SEC. 2494. [**Amount of.**—Executors shall be allowed the following commission upon the personal estate sold or distributed by them, and for the proceeds of real estate sold for the payment of debts, which shall be received in full compensation for all their ordinary services:

For the first one thousand dollars the rate of five per cent;

For the overplus between one and five thousand dollars, at the rate of two and a-half per cent;

For the amount over five thousand dollars, at the rate of one per cent.

The probate court may, under the statute, for extraordinary services, allow an administrator a compensation additional to that provided for ordinary services. And where it appears that more than ordinary compensation has been allowed, it will be presumed that it was for extraordinary services, in the absence of a showing to the contrary. *Patterson v. Bell*, 25 Iowa, 149.

SEC. 2495. Such **farther allowances** as are just and reasonable may be made by the court for actual, necessary, and extraordinary expenses or services.

REMOVAL OF EXECUTORS.

SEC. 2496. [**For what causes.**]—After letters testamentary, or of administration, with the will annexed, or of administration, shall have been granted to any person, he may be removed whenever the interests of the estate require it, for any of the following causes:

1. When by reason of age, continued sickness, imbecility of mind, change of residence, or any other cause, he becomes incapable of discharging his trust in such manner as the interest and proper management of the estate may require;

2. When any such executor or administrator shall fail or refuse to return inventories or accounts of sales of the estate, or to make reports of the condition of the estate, or fail or refuse to comply with any order of the court; or fail to seasonably apply to the court for authority to sell personal or real estate for the payment of debts or claims against the estate, when it shall be necessary for him so to do; or fail or refuse to discharge any of the duties prescribed for him by law, or shall be guilty of any waste or mal-administration of the estate;

3. Where it shall be shown to the court by his sureties that such executor or administrator has become, or is likely to become insolvent, in consequence of which such sureties have or will suffer loss.

SEC. 2497. [**Petition for.**]—Petition for the removal of executors or administrators, or for the purpose of requiring additional sureties, shall be filed in the court from which letters were issued by any person interested in the estate.

No one is authorized to maintain an action for the removal of an administrator unless he be "interested in the estate" as contemplated in this section of the code, unless he have a right to benefits from the estate, which prompts him to act for preserving its assets, increasing their value, and directing their disposition and appropriation; and one against whom an administrator has brought an action for the recovery of money cannot sue for such removal on the ground that he would not be safe in paying a judgment to a *de facto* administrator. *The C., B. & Q. Ry Co. v. Gould*, 64 Iowa, 343.

SEC. 2498. [**Verification.**]—Such petition must be verified by oath, and shall specify the grounds of complaint.

SEC. 2499. [**Citation.**]—Upon the filing of such petition, a citation shall issue to the person complained of, requiring him to appear and answer the complaint.

SEC. 2500. [**How served.**]—If the executor or administrator is not a resident of the county where such complaint is made, notice thereof shall be served upon him in such manner as the court or clerk may direct.

SEC. 2501. [**Property delivered to person entitled to.**]—Upon the removal of any executor or administrator, he shall be required by order of the court to deliver to the person who may be entitled thereto, all the property in his hands or under his control belonging to the estate.

SEC. 2502. [**Penalty for failure.**]—If any executor fail or refuse to comply with any proper order of the court, he may be committed to the jail of the county until compliance is yielded.

SEC. 2503. [**Removal of: acts void.**]—Whenever the letters of any executor or administrator are revoked or superseded, all his authority shall cease, and all his acts thereafter as such shall be absolutely void.

(CHAPTER 33, LAWS OF 1878.)

ESTATES OF DECEASED PATENTEES.

An Act to vest title in the heirs, devisees, or assignees of deceased patentees. [Additional to code, title 16, "Of the estates of decedents."]

SECTION 1. [If patentee dies pending the issuance of patent to lands.] —*Be it enacted by the general assembly of the state of Iowa:* That where patents have been, or may be issued in pursuance of any law of the state of Iowa, to a person who had died, or who hereafter dies before the date of such patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees or assignees of such deceased patentee, as if the patent had issued to the deceased person during life.

Approved March 12, 1878.

(CHAPTER 103, LAWS OF 1886.)

AUTHORIZING ADMINISTRATORS, EXECUTORS AND GUARDIANS TO RELEASE JUDGMENTS, ETC.

An Act to authorize administrators, executors and guardians appointed in other states or countries to release judgments, mortgages and deeds of trust.

SECTION 1. [Certificate and attestation of.] *Be it enacted by the general assembly of the state of Iowa:* That a copy of the original record of the appointment and qualification of any administrator, executor or guardian in any other state or country including the will of decedent if any, as probated, together with the certificate of the custodian of such record that such appointment is then in full force, which copy of the record shall be duly attested and authenticated as is now provided by law in the case of judicial records of another state, may be recorded in the proper probate record of any county in this state, such record or a duly certified copy thereof shall be presumptive evidence in all cases of such appointment and qualification.

SEC. 2. [Authorized to release of record.]—Any administrator, executor or guardian, a copy of whose record of appointment or qualification is recorded as provided by section 1 of this act is hereby authorized to release and fully discharge of record in many anner and by any instrument authorized by law, to the same extent as any administrator, executor or guardian appointed under the laws of this state could do, any judgment rendered by the supreme court or by any court of the county where such copy of the original record is recorded, or any mortgage or deed of trust given as a mortgage of property within such county, belonging to the estate or to the minor or other person represented by him, and may also in the same manner and to the same extent release and fully discharge any property in this state from the lien of such judgment, mortgage or deed of trust, "*provided*, that the duly attested copies of the records herein provided for also show that the judgment, mortgage or deed of trust is listed in the assets of the estate in the court from which the said records come; and *provided further*, that appended to and as a part of such release shall be the certificate of the judge or clerk of the foreign court, duly attested that said executor, administrator or guardian is, at the date of such release or instrument, still acting as such executor, administrator or guardian under authority of said court; and *provided further*, that nothing herein contained shall authorize any administrator, executor or guardian of another state

or country to release or discharge any judgment, mortgage or deed of trust while any administrator, executor or guardian of the estate to which such judgment, mortgage or deed of trust belongs is authorized to act by virtue of appointment and qualification under the laws of this state."

SEC. 3. **All releases and discharges of record** of any judgment, mortgage or deed of trust heretofore made by administrators, executors or guardians in the manner and to the extent authorized by this act where the copy of the original records required by this act has been or shall hereafter be recorded as required by this act, are hereby declared to be legal and valid from the date of such release or discharge.

Approved April 8, 1886.

(CHAPTER 105, LAWS OF 1884.)

CIVIL RIGHTS.

An Act to protect all citizens in their civil and legal rights.

SECTION 1. [**All citizens entitled to same civil rights.**]*—Be it enacted by the general assembly of the state of Iowa:* That all persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, barber shops, theaters and other places of amusements; subject only to the conditions and limitations established by law, and applicable alike to every person.

SEC. 2. [**Violations of section 1, a misdemeanor.**]*—That any person who shall violate the foregoing section by denying to any person, except for reasons by law applicable to all persons, the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated in said section, or by aiding or inciting such denial, shall, for each offense, be deemed guilty of a misdemeanor.*

Approved March 29, 1884.

(CHAPTER 132, LAWS OF 1884.)

BUREAU OF LABOR STATISTICS.

An Act to create a bureau of labor statistics, and to provide for the appointment of a commissioner of said bureau, and to define his duties and term of office.

SECTION 1. [**Appointment of commissioner provided for.**]*—Be it enacted by the general assembly of the state of Iowa:* That there is hereby created a bureau of labor statistics, to be under the control and management of a commissioner thereof, to be appointed as hereinafter provided by this act.

SEC. 2. [**Governor to appoint within 30 days.**]*—That the governor shall, within thirty days after the taking effect of this act, and biennially thereafter, with the advice and consent of the executive council, appoint a commissioner of labor statistics. The term of office of said commissioner to commence on the first day of April in each even-numbered year and continue for two years and until his successor is appointed and qualified; and said commissioner before entering upon the discharge of his duties shall take an oath or affirmation to discharge the same faithfully and to the best of his ability; and shall give bond in the sum of two thousand dollars (\$2,000) with sureties to the approval of the governor, conditioned for the faithful discharge of his official duties.*

SEC. 3. [**Salary \$1,500 per annum.**]*—Said commissioner shall receive a salary of fifteen hundred dollars per annum, payable monthly, and necessary post-*

age, stationery and office expenses. the said salary and expenses to be paid by the state as the salaries and expenses of other state officers are provided for. He shall have and keep an office in the capitol at Des Moines in which shall be kept all records, documents, papers, correspondence and property pertaining to his office, and shall deliver them to his successor in office.

SEC. 4. [May be removed by governor.]—Said commissioner may be removed from his office by the governor for neglect of duty or malfeasance in office; and any vacancy occurring at any time may be filled by the governor by and with the consent of the executive council.

SEC. 5. [Duties of commissioner: statistics to be gathered.]—The duties of said commissioner shall be to collect, assort, systematize and present in biennial reports to the governor on or before the 15th day of August preceding each regular meeting of the general assembly, statistical details relating to all departments of labor in the state, especially in its relations to the commercial, social, educational and sanitary conditions of the laboring classes, and to the permanent prosperity of the mechanical, manufacturing and productive industries of the state, and shall as fully as practicable collect such information and reliable reports from each county in the state the amount and condition of the mechanical and manufacturing interests, the value and location of the various manufacturing and coal productions of the state, also sites offering natural or acquired advantages for the profitable location and operation of different branches of industry; he shall by correspondence with interested parties in other parts of the United States impart to them such information as may tend to induce the location of mechanical and producing plants within the state, together with such other information as shall tend to increase the productions, and consequent employment of producers; and in said biennial report he shall give a statement of the business of the bureau since the last regular report, and shall compile and publish therein such information as may be considered of value to the industrial interests of the state, the number of laborers and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics and apprentices' wages earned, the savings from the same, with age and sex of laborers employed, the number and character of accidents, the sanitary condition of institutions where labor is employed, the restrictions if any which are put upon apprentices when indentured, the proportion of married laborers and mechanics who live in rented houses, with the average annual rental and the value of property owned by laborers and mechanics; and he shall include in such report what progress has been made with schools now in operation for the instruction of students in the mechanic arts and what systems have been found most practical, with details thereof.

Such report when printed shall not consist of more than six hundred printed pages octavo.

Five thousand copies thereof shall be printed and bound uniformly similar to the reports of other state officers as now authorized by law. Said reports when published to be disposed of as follows, viz.: To the public libraries in the state, to the various trade organizations, agricultural and mechanical societies, and other places where the commissioner may deem proper and best calculated to accomplish the furtherance of the industrial interests of the state.

SEC. 6. [Power of commissioner.]—The commissioner shall have power to issue subpoenas for witnesses and examine them under oath and enforce their attendance to the same extent and in the same manner as a justice of the peace; said witnesses to be paid the same fees as are now allowed witnesses before a justice of the peace, the same to be paid by the state.

SEC. 7. [Publication.]—This act being deemed of immediate importance shall be in force and take effect from and after its publication.

PART THIRD.

CODE OF CIVIL PRACTICE.

TITLE XVII.

OF PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

CHAPTER 11

PRELIMINARY PROVISIONS.

SECTION. 2504. [**Remedies classed.**—Remedies in civil cases in the courts of this state are divided into actions and special proceedings.

SEC. 2505. [**Civil action defined.**—A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party, known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for a recovery of penalty or forfeiture.

The term "civil action" relates to civil proceedings as distinguished from criminal, and includes proceedings at law and in equity. *Kramer v. Redman*, 9 Iowa, 114.

"If a right is sought to be enforced or protected, or a wrong redressed or prevented, but one 'form' is given, and that is styled a 'civil action.'" Per WRIGHT, CH. J., in *Conyngham v. Smith*, 16 Id., 475.

Under the revision, it was held, that *certiorari* was a "special proceeding." *Thompson v. Reed*, 29 Id., 117.

The probate of a will is a special proceeding, triable in the circuit court as an ordinary proceeding, and it follows the rule governing ordinary proceedings as to the manner of appeal to the supreme court. *Sisters of Visitation v. Glass*, 45 Id., 154.

A proceeding in *mandamus* is held to be "a civil action." *Brown v. Crego*, 29 Id., 321.

SEC. 2506. [**Special proceedings.**—Every other remedy in a civil case is a special proceeding.

A proceeding to disbar an attorney on charges preferred by a private prosecutor is a special proceeding. *State v. Clark*, 46 Iowa, 155.

Certiorari is a special proceeding and not properly denominated an action. So held under the revision of 1860. *Thompson et al. v. Reed et al.*, 29 Id., 117.

So, also, a proceeding for the probate of a will is a special proceeding. *Sisters of Visitation et al. v. Glass*, 45 Id., 154.

A proceeding upon charges preferred by a private prosecutor to disbar an attorney in a special proceeding wherein a change of venue on account of prejudice on part of the judge may be granted upon the same conditions and upon compliance with the same rules as in ordinary actions. *The State v. Clark*, 46 Id., 155.

The supreme court has no jurisdiction to try *de novo* a cause prosecuted by special summary proceedings. *Bret v. Myers*, 65 Id., 274.

SEC. 2507. [**Form of actions.**—All forms of action are abolished in this state; but the proceeding in a civil action may be of two kinds, ordinary or equitable.

"All prior forms of actions and pleadings are abolished, and the rules of the code, and not those laid down by Stephens and Chitty, are the tests of the sufficiency of all pleadings." Per DILLON, J., in *Taylor v. Adair and Goff*, 22 Iowa, 279, 281; *Sargent v. Pittman Bros. & Co.*, 16 Id., 469, 473.

"Under the code of 1873 we have but two kinds of actions, viz: ordinary and equitable. And equitable actions are not divided into two classes and triable by two methods, as under the revision." Per MILLER, CH. J., in *Wadsworth v. Wadsworth*, 49 Id., 449.

While the code abolishes forms of actions, yet it contemplates that the facts constituting a cause of action or defense in its substance shall be stated with briefness, clearness, distinctness, good logic and order. *Baltzell v. Nosler*, 1 Id., 588.

There is no "general issue" under the code. *Dyson v. Ream*, 9 Id., 51.

Under our statutes all forms of actions and pleadings are abolished, and the plaintiff recovers, if at all, on the facts stated and proved. Per MILLER, J., in *McGinn v. Butler*, 31 Id., 163.

SEC. 2508. [Equitable proceedings.—The plaintiff may prosecute his action by equitable proceeding in all cases where courts of equity, before the adoption of this code, had jurisdiction; and must so proceed in all cases where jurisdiction was exclusive.

If the action is in the nature of a creditor's bill, or if it seeks upon any equitable ground to subject the real property of a deceased to the payment of debts, the administrator would be a proper if not a necessary party. *Parshall v. Moody et al.*, 24 Iowa, 314.

The plaintiff may prosecute his action in equity in all cases where courts of equity, before the adoption of the code, had jurisdiction. *Bushnell v. Robeson*, 62 Id., 540.

Inasmuch as courts of equity prior to the adoption of the code had jurisdiction to restrain by injunction the continuance of nuisances, that jurisdiction still exists, notwithstanding a remedy by action at law is provided by section 3331 of the code. *Id.*

This section of the code authorizes the bringing of an action in equity for the abatement of a nuisance and for damages, according to the procedure in vogue prior to the enactment of said section 3331. *Gribben v. Hausen*, 69 Id., 255.

SEC. 2509. [Foreclosure of mortgage: action on note.]—The action on a note, together with a mortgage or deed of trust, for the foreclosure of the same, shall be by equitable proceedings. An action on the bond or note alone without regard therein to the mortgage or deed of trust, shall be by ordinary proceedings.

SEC. 2510. [Mechanics' lien.]—The action for mechanics' lien shall be prosecuted by equitable proceedings, and therewith shall no other cause of action be joined.

It was held under this and other sections of the code, that while an action to enforce a mechanic's lien should be prosecuted by equitable proceedings, yet if no motion nor order be made that the testimony be reduced to writing, the case was not triable *de novo* in the supreme court. *Kennedy v. Gauli*, 44 Iowa, 547. This, however, was changed by chapter 145 of the laws of 1878, by a repeal and enactment of a substitute for section 2742 of the code. See, also, *Sherwood v. Sherwood*, 44 Id., 192; *Price & Hornby v. Seydell et al.*, 46 Id., 696.

The manner of enforcing the lien of a mechanic was, under the revision, by an ordinary action at law. *Brodt v. Rohkar*, 48 Id., 33, 39.

Where several parties had commenced actions against a common defendant to enforce mechanics' liens, it was held, that it was competent for plaintiff and defendant, by agreement, to have united therewith an ordinary action at law, prosecuted by ordinary proceedings. *Hines v. The Whitebreast Coal and M. Co.*, 48 Id., 296.

No other cause of action can be joined with an action to establish a mechanic's lien. *Sweetzer & Currier v. Harwick et al.*, 67 Id., 488.

Where an action at law was brought on a promissory note against one of the defendants, and plaintiff afterwards filed an amendment, bringing in other parties, and asking the establishment of a mechanic's lien, held, that a motion to strike out the amendment, or to compel plaintiffs to elect on which cause of action they would proceed, was properly sustained; and when plaintiffs refused to elect, the court was justified in striking out the amendment and proceeding with the original cause of action. Plaintiffs should have elected on which cause they would proceed, or else they should have filed several petitions, as per section 2634 of the code. *Id.*

SEC. 2511. [Divorce.]—An action for a divorce shall be prosecuted by equitable proceedings, and no cause of action, save for alimony, shall be joined therewith.

Under the revision an action for divorce was tried as an ordinary proceeding, and upon appeal to the supreme court the verdict of the jury was entitled to the same effect as in a purely law action. *Cole v. Cole*, 23 Iowa, 433.

An order relating to alimony, made on the same day as the rendition of the decree for divorce,

and following immediately after it, will be regarded as a part of the same judgment that orders the decree. *Id.*

In *Sherwood v. Sherwood*, 44 Iowa, 192, it was held that the action for divorce is an equitable action, and is not triable on appeal to the supreme court upon errors of law alone, but must be tried *de novo*, regardless of the provisions of section 2742 of the code, before that section was amended by chapter 145, laws of 1878.

The action of divorce is now triable by equitable proceedings, and an issue of fact therein cannot be submitted to a jury for determination, and a subsequent adoption by the court of the finding of the jury will not cure the error in the submission. *Hobart v. Hobart*, 51 Id., 512. Nor can such issue be referred to a referee, but must be publicly tried in open court by the court itself. *Same v. Same*, 45 Id., 501.

SEC. 2512. [**Sureties: occupying claimants.**—Actions by sureties, and by occupying claimants, and on a lost note or bond, may be by ordinary proceedings.

Where an action has been commenced in equity which should have been at law, if the defendant failed to move, at the proper time, to have the cause transferred to the law docket, he will be held to have waived his right to a jury trial. *Richmond v. The Dubuque & S. C. R. Co., et al.*, 33 Iowa, 422. MILLER, J., *dissenting*.

A person having the equitable title to real property cannot recover the same in an action at law on the ground that the legal title is based upon fraud. The legal title must first be attacked and declared void on this ground by an action in equity. *Walker v. Kynett*, 32 Id., 524.

SEC. 2513. [**Ordinary proceedings.**—In all other cases, except in this code otherwise provided, the plaintiff must prosecute his action by ordinary proceedings.

The objection that the action should have been at law instead of in equity cannot be made for the first time in the appellate court. *Tugel v. Tugel et al.*, 33 Iowa, 349; *Van Orman v. Merrill*, 27 Id., 476. See, also, *Drumb v. Keen*, 47 Id., 437.

SEC. 2514. [**Error: effect of.**—An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer of the action to the proper docket.

That a party has an adequate remedy at law is, under the statute, no longer ground for the abatement or dismissal of the action. *Savery v. Browning*, 18 Iowa 246, 251; *Conyngham v. Smith*, 16 Id., 471; *Byers v. Rodabaugh*, 17 Id., 53; *Taylor v. Adair et al.*, 22 Id., 279, 281; *Brown v. Mallory*, 26 Id., 469; *Van Orman v. Merrill*, 27 Id., 476; *Moore v. The District Tp. of Union*, 28 Id., 425; *Tugel v. Tugel et al.*, 33 Id., 349; *Gibbs v. McFadden*, 39 Id., 371; *Richmond v. The D. & S. C. R. Co.*, 33 Id., 422; *Rozier v. Van Dam*, 16 Id., 175.

The right to have a cause transferred from one docket to the other arises *only* when the plaintiff has brought his action by the wrong proceeding, and is not absolute even in such cases. *Byers v. Rodabaugh*, 17 Id., 53.

Where in an action to recover for fraudulently seizing a stock of goods and selling the same under a chattel mortgage, an amendment to the petition was filed during the trial averring specific acts of fraud in the sale, a motion to strike the amendment, for the reason that it set up matters of equitable cognizance, was properly overruled. *Weaver v. Kintzley*, 58 Id., 191.

The district court has jurisdiction both at law and in equity, and a defendant in an action therein at law, which was in fact brought to establish and enforce a trust, who fails to ask for a transfer of the case to the proper docket, cannot on appeal object to the jurisdiction. *Spelman v. Gill*, 38 N. W. R., 168.

SEC. 2515. [**How corrected by plaintiff.**—Such error may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterwards, on motion in court.

When an action has been commenced in the wrong forum the appropriate remedy is a motion to have the action changed into the proper proceedings. See the cases cited in note to section 2514. And this objection will be waived by going to trial without making it. *Hatch v. Judd*, 29 Iowa, 95; *Taylor v. Adair*, 22 Id., 279; *Conyngham v. Smith*, 16 Id., 473; *Savery v. Browning*, 18 Id., 251; *Byers v. Rodabaugh*, 17 Id., 53.

The question whether an action should have been brought at law instead of in equity, or *vice versa*, cannot be raised by demurrer. *Byers v. Rodabaugh*, 17 Id., 53; *Wright v. McCormick*, 22 Id., 545; *McDole v. Purdy*, 23 Id., 277; *Moore v. The Dist. Tp. of Union*, 28 Id., 425; *Richmond v. Dubuque & S. C. R'y Co.*, 33 Id., 422; *The Ind. School Dist. of Georgia et al. v. The Ind. School District of Victoria et al.*, 41 Id., 321.

An action by a landlord against his tenant and those to whom the latter has sold and delivered the crops on which the former had a landlord's lien, should be at law for the damages arising

from the conversion of the property, but error in bringing such action in equity did not cause an abatement of the cause. The court should have set the cause down for trial at law. *Scallan v. Wait et al.*, 64 Id., 795.

SEC. 2516. [By defendant.]—The defendant may have the correction made by motion at or before the filing of his answer, where it appears by the provisions of this code the wrong proceedings have been adopted.

Objection cannot first be made in the appellate court that the remedy sought in equity should have been at law. *Tugel v. Tugel et al.*, 38 Iowa, 349; *Van Orman v. Merrill*, 27 Id., 476.

A motion to transfer a cause from the chancery to the law docket, on the ground that it is not cognizable in the former forum, should be made at or before the filing of the answer to the original petition, if it is then apparent that it is proper to be made. *Moore v. The District Tp. of Union*, 28 Id., 425.

The right to have corrected, or to object upon on the ground of mistake in the selection of the forum, as where the action should have been brought at law instead of in equity, is waived by going to trial without objection. *Hatch v. Judd*, 29 Id., 95; *Taylor v. Adair*, 22 Id., 279; *Conyngnam v. Smith*, 16 Id., 471; *Savery v. Browning*, 18 Id., 251; *Byers v. Rodabaugh*, 17 Id., 53; *Richmond v. The Dubuque & S. C. R'y Co. et al.*, 33 Id., 442; *Holstein v. Dickinson*, 51 Id., 244, 248.

The bringing an action in equity when it should have been at law, or *vice versa*, is not ground of demurrer. The appropriate remedy is a motion to transfer the cause to the proper docket. *Conyngnam v. Smith*, 16 Id., 471; *Byers v. Rodabaugh*, 17 Id., 53; *Brown v. Mallory*, 26 Id., 469; *Gibbs v. McFaddon*, 39 Id., 371.

A cause cannot be transferred, under the statute, from the law to the equity docket before issue is joined and it is shown on the face of the pleadings that the defense is equitable, in its character. *McHenry v. Sypher*, 12 Id., 585.

The failure of a defendant to move for a transfer of a case erroneously commenced as an action in equity, before answering, is a waiver of the error, and of the right to demand a jury trial. *Gibbs Bros. v. Coonrod*, 54 Id., 736.

SEC. 2517. [Ordinary, changed into equitable.]—Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were such as were heretofore cognizable in equity, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings.

The statute authorizes the pleading of equitable defenses in actions at law; and in an action on a judgment the defendant may plead facts which would, under the former practice, have constituted sufficient grounds for a bill in equity directly assailing the judgment. *Rogers v. Gwin*, 21 Iowa, 58; *Rozier v. Van Dam*, 16 Id., 175; *Van Orman v. Spofford, Clark & Co.*, Id., 186; *Kramer v. Conger*, Id., 434; *Warren v. Crew*, 22 Id., 315; *Shawhan v. Long*, 26 Id., 488; *Van Orman v. Merrill*, 27 Id., 476; *Hackett v. High*, 28 Id., 539; *Byers v. Rodabaugh*, 17 Id., 53.

Where, in an action properly commenced by ordinary proceedings, a portion of the issues are exclusively cognizable in equity and a portion are law issues, either party is entitled to a jury for the trial of the latter. Those issues, whether legal or equitable, the determination of which will be most likely to dispose of the case, should be first tried. *Morris v. Merritt & Co. et al.*, 52 Id., 496.

When the defendant has pleaded equitable matter in defense, he is entitled to have the issues thus presented tried in the manner provided for the trial of equitable actions; and the court may order, and the better practice would dictate, that these issues be first tried. *Hackett v. High*, 28 Id., 539; *Kramer v. Conger*, 16 Id., 434; *Byers v. Rodabaugh*, 17 Id., 53.

An answer which sets up a tax title, and asks to have the same quieted in the defendant, does not present an issue or defense which he is entitled to have tried as an equitable issue. *Walton v. Gray*, 29 Id., 440.

Not only an equitable defense is allowed in a law action, but an equitable counter-claim may be pleaded as well as a legal one, whether the action is at law or in equity. *Rozier v. Van Dam*, 16 Id., 175.

SEC. 2518. [Court may order change.]—If there be more than one party plaintiff or defendant who fail to unite on the kind of proceeding to be adopted, the court, on its own motion, may direct such proceedings to be changed to the same extent as if the parties had united in asking that the same be done.

SEC. 2519. [Errors waived.]—An error as to the kind of proceedings adopted in the action is waived by a failure to move for its correction at the time and in

the manner prescribed in this chapter, and all errors in the decision of the court are waived unless excepted to at the time, except final judgments and interlocutory or final decrees entered of record.

When the wrong proceedings have been adopted in the commencement of an action, the cause may be placed on the proper docket by motion. *Conyngnam v. Smith*, 16 Iowa, 471.

The objection will be waived unless such motion be made at the proper time. *Knott v. Tincher*, 39 Id., 628.

Where a case properly cognizable at law is placed on the equity calendar, and, without objection, tried as an equitable action, it will, on appeal, be regarded as an equitable action and tried *de novo*. *Corbin v. Woodbine*, 33 Id., 297.

If there is an error in the kind of proceedings adopted by the plaintiff it is waived by a failure to move for its correction at the proper time. *Hosleton v. Dickinson*, 51 Id., 244, 248.

SEC. 2520. [Uniformity of procedure.]—The provisions of this code, concerning the prosecution of a civil action, apply to both kinds of proceeding, whether ordinary or equitable, unless the contrary appears, and shall be followed in special proceedings, not otherwise regulated, so far as applicable.

A proceeding *ad quod damnum*, except in so far as otherwise directed by statute, is to be conducted as an ordinary civil action, and be governed by like rules so far as the same are applicable. *Forney & Thayer v. Ralls & Willits*, 30 Iowa, 559.

It was accordingly held, that a sale of a mill during the pendency of a proceeding to assess the damages caused to the property of adjacent land-owners by reason of hightening the mill-dam, did not abate the proceeding, and that the purchaser might be substituted for the original owner. *Id.*

The provisions of the code relating to the granting of a change of venue in civil actions apply also to proceeding on appeal from an award for damages for a right of way by a sheriff's jury. *Whitney v. The Atlantic R'y Co.*, 53 Id., 651.

SEC. 2521. [Actions on judgments: when brought.]—No action shall be brought upon any judgment, against a defendant therein, rendered in any court of record of this state within fifteen years after the rendition thereof without leave of the court for good cause shown, and no notice to the adverse party, nor on a judgment of a justice of the peace of this state within eight years after the same is rendered, except in cases where the docket of the justice, or record of such judgment is, or shall be, lost or destroyed.

This section does not limit the remedy of a judgment creditor, when the record of the judgment has been lost or destroyed, to the recovery of a new judgment. But he may apply to the court, and it has power to supply a new record in such case. This power is inherent in courts of record, independent of legislation. *Gammon & Deering v. Knudson*, 46 Iowa, 455.

In an action upon a judgment of a court of record of this state, brought within fifteen years from the date of the judgment, it must be alleged in the petition that leave of the court to bring the action has been obtained; otherwise the petition may be assailed by demurrer. *Watts v. Everett*, 47 Id., 269.

SEC. 2522. [Judgment cannot be annulled.]—Judgment obtained in an action by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered. But such judgment does not prevent the recovery of any claim, though such claim might have been used by way of counter-claim in the action on which the judgment was recovered.

Where the maker of a promissory note held a receipt, acknowledging payment thereof, from the indorsee, who sued upon the note, representing to the maker, however, that he did not intend to enforce its collection against him, but against the payee and indorser, and judgment was accordingly rendered by default, it was held that an injunction should be granted, perpetually restraining the enforcement of the judgment against the maker of the note. *Baker v. Reed*, 44 Iowa, 179.

An action in equity is not maintainable to enjoin the enforcement of a judgment at law, within one year after its rendition, upon grounds which authorize the granting of a new trial under the statute. *Hintrager v. Lumbargo et al.*, 54 Id., 604.

SEC. 2523. [For discovery: when brought.]—No action to obtain a discovery shall be brought, except that where any person or corporation is liable, either jointly or severally with others by the same contract, an action may be brought against any parties who are liable, to obtain discovery of the names and

residences of the others who are liable. In such action, the plaintiff shall state in his petition, in effect, that he has used due diligence, without success, to obtain the information asked to be discovered, and that he does not believe the parties to the contract who are known to him have property sufficient to satisfy his claim. The petition shall be verified, and the cost of such action shall be paid by the plaintiff, unless the discovery be resisted.

SEC. 2524. [**Successive actions.**—]—Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action has arisen therefrom.

A judgment in an action for damages for a breach of contract which is not total, will not constitute a bar to an action for *future* breaches of the same contract. *Richmond v. The D. & S. C. R. Co.*, 33 Iowa, 422, 499.

SEC. 2525. [**Actions survive.**—]—All causes of actions shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same.

The common law rule that a personal action dies with the person is not in force in this state; and under our statute no cause of action either *ex delicto* or *ex contractu* abates by the death of either party. *Shafer v. Grimes*, 23 Iowa, 550.

A claim based upon a personal tort, which at common law died with the party, may be assigned or transferred like any other cause of action. *Gray v. McCallister*, 50 Id., 497.

An action for damages caused to the estate of an infant by wrongful acts resulting in his death, is limited to his probable earnings after he shall have attained his majority, and must be brought by the administrator for his personal services and earnings *during* his minority the father, or where abandonment is shown, the mother may maintain the action. *Lawrence v. Birney*, 40 Id., 377; *Walters v. The C., R. I. & P. R. Co.*, 36 Id., 458.

A cause of action for a personal tort survives under our statute, and may be assigned or transferred like any other cause of action. *Gray v. McCallister et al.*, 50 Id., 497.

The assignee of such claim, who is a creditor of the assignor, is not postponed to the holder of a judgment against the assignor; nor his equities inferior to those of the judgment creditor. *Id.*

Under this section the cause of action for a tort survives the death of the wrong doer, yet only compensatory damages are recoverable in an action against his personal representatives. *Sheik v. Hobson*, 64 Id., 146.

Whether or not our statutes give a remedy for a personal injury resulting in instantaneous death, not determined; but where the injured person survives the injury for but a moment of time, a cause of action, (which survives to his representatives,) accrues to him as certainly as if he had lived for a month or a year thereafter; the test being whether he lived after the injury, and not how long he lived. *Sherman v. Western Stage Co.*, 24 Id., 515, overruled. *Kellow, Jr., Adm'r, v. The Central I. R'y Co.*, 68 Id., 470.

Where a personal injury is inflicted in Iowa, a cause of action arises thereon which is assignable under the laws of this state, and where the assignment is made and delivered in a state where such assignment is void, still an action may be maintained thereon by the assignee in the courts of Iowa. *Vimont v. The C. & N. W. R'y Co.*, 69 Id., 296.

While at common law an action was not maintainable for a personal injury resulting in immediate death, yet the reasons for that rule are abrogated by sections 2525 and 2527 of the code, and now an action by the administrator may be maintained in such a case. *Connors, Adm'r, v. The Burlington, C. R. & N. R'y Co.*, 71 Id., 490.

SEC. 2526. [**Homicides civilly liable.**—]—The right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of, and in addition to, the punishment of the latter. When a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts.

Where an employe of a railroad is injured in consequence of the negligence of a co-employe, the company will be regarded as the perpetrator within the meaning of the statute. *Philo v. The Ill. Cen. R. Co.*, 33 Iowa, 47.

The right of action in such case accrues to the representatives of the deceased. *Id.* See also, *Lawrence v. Birney*, 40 Id., 377.

A corporation is liable in a civil action for the wrongful acts of its servants, done in its employment and producing death. *Donaldson v. The M. & M. R. Co.*, 18 Id., 280; *Sherman v. The Western Stage Co.*, 24 Id., 516; *Walters v. The C., R. I. & P. R. Co.*, 36 Id., 458; *Lawrence v. Birney*, 40 Id., 377.

Libel being a public offense, is actionable *per se* under this section, and it is not necessary to

allege that the defendant charged plaintiff with the commission of a statutory offense, nor to allege special damages. It is sufficient to allege facts constituting a libel under sections 4097 and 4098 of the code. *Call v. Larabee*, 60 Id., 212.

SEC. 2527. [**Proceedings: limitation of action.**]—The actions contemplated in the two preceding sections may be brought, or the court, on motion, may allow the action to be continued by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had survived. If such is continued against the legal representative of the defendant, a notice shall be served on him as provided for service of original notices.

See *Walters v. The C., R. I. & P. R. Co.*, 36 Iowa, 458, cited in note to section 2525, *ante*.

A notice to defendant is not necessary when an action is continued in favor of the legal representative of the plaintiff, and the substitution of such representative is not ground for continuance on behalf of the defendant. *Masterman v. Brown*, 51 Id., 442.

SEC. 2528. [**Construction: rule of common law not applicable.**]—The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.

This section requires the courts to construe the provisions of the code, and all proceedings under it, literally, and with a view to promote its object, and assist parties in obtaining justice. Per WRIGHT, Ch. J., in *Hudson v. Blaufus*, 22 Iowa, 323; *Sauke v. Temple*, 33 Id., 189.

This section contains the fundamental rule of construction to be applied to the code. Per MILLER, Ch. J., in *Bacon v. Black*, 33 Id., 164; *Wright v. Millard*, 3 G. Greene, 86; see also, *Ryerson v. Hendrie*, 22 Id., 480.

CHAPTER 2.

OF LIMITATION OF ACTIONS.

SEC. 2529. [**Period of.**]—The following actions may be brought within the times herein limited respectively after their causes accrue and not afterwards, except when otherwise specially declared.

It was held under the code of 1851, that where the jurisdiction was concurrent, courts of equity, equally with courts of law, are bound by the statutes of limitations; and that they act in obedience to the statute, rather than by way of analogy to the law. *Phares v. Walters*, 6 Iowa, 106.

And under the revision it was held that the statute directly applies to a suit in equity to foreclose a mortgage. *Newman v. DeLorimer*, 19 Id., 244.

Under the revision, the rule that the statute of limitations is applied only by analogy to suits in equity, no longer prevails in this state. The statute *ex vigore suo*, operates in both courts alike and not in equity by the mere discretion of the chancellor. *Relf v. Eberly*, 23 Id., 467.

Statutes of limitation pertain to the *remedy* and not to the *essence* of the contract, and an act extending the time for bringing an action is valid as to existing contracts. *Edwards v. McCaddon*, 20 Id., 521.

The statute of limitations is not available to a party unless taken advantage of by demurrer, or pleaded as a defense in the answer. *Robinson v. Allen*, 37 Id., 27.

Under section 1289 of the code making railroad companies liable for double the value of stock killed by them, and not paid for after thirty days' notice, the action is deemed to have accrued at, and the statute of limitations begins to run from, the date of the injury rather than from the giving of the notice. *Coons v. C. & N. W. R'y Co.*, 23 Id., 493.

Where a cause of action accrues to the *estate* of a decedent instead of to the deceased in his lifetime, the statute will not commence to run until the appointment of an administrator. But if the statute has once begun to run in the lifetime of the party entitled to sue, it is not interrupted by his subsequent death, but continues to run and *survives* but does not *accrue* to the personal representatives of the deceased. *Sherman v. Western Stage Co.*, 24 Id., 517.

So upon an unliquidated account against a county, the statute commences to run from the time the account accrued, and not from the date of its presentation for allowance to the board of supervisors. *Baker v. Johnson Co.*, 33 Id., 151.

The statute of limitations does not run against the state, and an action brought in the name of a county for the use of and to recover money belonging to the school fund is, in effect, an action by the state, and is not barred by the lapse of the statutory period applicable to other actions. *The County of Des Moines, for the use, etc., v. Harker et al.*, 34 Id., 84; *Kellogg et al. v. Decatur County et al.*, 38 Id., 524.

This section of the code limits actions within the prescribed time after "their causes accrue," not after a time when the plaintiff has prepared his proof, and is thereby able to recover judgment. *First Nat. Bank v. Green et al.*, 64 Id., 452.

1. [Two years.]—Actions founded on injuries to the person or reputation, whether based on contract or tort, or for a statute penalty, within two years.

An action by a husband, against a stage company, to recover damages for the loss of his wife and child who had been killed while traveling on the defendant's stage, is an action for a personal injury, falling within the first subdivision of section 2529, and will be barred after two years from the time the cause of action happened. *Sherman v. Western Stage Company*, 22 Id., 556. But where the action has accrued to the estate of a decedent instead of to the deceased while living, the statute will not commence to run until the appointment of the administrator. Where the statute has commenced to run, it will not be interrupted by the death of the party having the right of action, but continues. Same case in 24 Id., 515.

An action for damages against the seller of intoxicating liquors, for causing the intoxication of the husband, is an action for a personal injury and must be brought within two years from the date of the sale. *Emmert v. Grill*, 39 Id., 690.

The statute of limitations as to actions to recover damages for personal injuries commences to run from the time the injury is committed, although the full extent and nature thereof may not be developed until later. *Gustin v. Jefferson County*, 15 Id., 158.

In an action under section 1289 of the code, to recover double damages for stock killed or injured on a railroad, the statute of limitations commences to run from the time of the injury rather than from the service of the notice. *Koons v. C. S. N. W. R'y Co.*, 23 Id., 493.

An action against a railroad company to recover for injuries sustained by the negligence of co-employees is, though founded on a contract between the plaintiff and the company, deemed an action for injuries to the person within the meaning of this section, and barred in two years from the time the cause of action accrued. *Nord v. The B. & M. R'y Co.*, 37 Id., 498.

An action for damages against a seller of intoxicating liquors, for causing the intoxication of the plaintiff's husband, cannot be maintained after two years from the date of the sale. *Emmert v. Grill*, 39 Id., 690.

The essential idea of "forfeiture" is a loss of property by way of punishment, and as used in chapter 68, laws of 1874, it indicates something more than compensation; and where so much of the claim as embraces a statute penalty is barred, the whole will be barred, for the same provisions of the statute of limitations must be applied to the entire claim. *Herriman v. The B., C. R. & N. R'y Co.*, 57 Id., 187.

2. Actions to enforce a mechanic's lien within two years from the time of filing the statement in the clerk's office.

The failure of a mechanic to file his statement and claim for a lien under section 2137 (section 6, chapter 100, laws of 1870) of the code, will not extend the time within which the action to enforce the lien must be commenced. *Gilchrist v. Gottschalk et al.*, 39 Iowa, 311.

One having an interest in real property to be affected by a decree in an action to which he was not made a party, to enforce a mechanic's lien thereon, may resist the enforcement of the decree by injunction on the ground that the action was barred by the statute of limitations. *Gates v. Ballou et al.*, 56 Id., 741.

The provisions of this clause of the statute in fixing the time within which an action to enforce a mechanic's lien may be brought, has reference to the thirty or ninety days allowed for the filing of claims by subcontractors and contractors respectively under the mechanic's lien statute, and the limitation statute begins to run against such an action at the expiration of such time, if the claim be not sooner filed. *Suier v. Parks*, 56 Id., 407.

3. [Three years.]—Those against a sheriff or other public officer, growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the non-payment of money collected on execution, within three years.

In an action of *mandamus* against the clerk of the board of supervisors to compel him to affix the county seal to a county warrant, the statute would begin to run from the date of issuing the warrant, and not from the time of demand of performance made on such officer and refusal or omission by him, and the proceeding would be barred in three years. *Prescott v. Gonser*, 34 Iowa, 175.

An action against a county treasurer on his official bond is barred in three years after the

cause of action arises. *The State v. Henderson*, 40 Id., 242; *Keokuk County v. Howard*, 41 Id., 11.

That such action is brought by and in the name of the state will not avoid the operation of the statute. *The State v. Henderson*, *supra*.

So also an action against the treasurer personally, instituted, not on his official bond, but upon his implied undertaking to pay over moneys collected by him, as required by law, will be barred in three years. *Keokuk County v. Howard*, *supra*.

The failure of a county treasurer to account to the county and state and pay over the revenue in his hands, is the "omission of an official duty" within the meaning of this provision, and an action therefor cannot be maintained unless commenced before the expiration of three years from the time the cause of action accrued. *The State v. Dyer et al.*, 17 Id., 223.

An action against a county treasurer upon his official bond or against him personally upon his implied obligation to pay over moneys collected, as required by law, is barred in three years after the cause of action arises. *Keokuk County v. Howard*, 41 Id., 11; *The State v. Henderson*, 40 Id., 242.

The statute of limitations will not bar an action of *mandamus* to compel township trustees to certify to the county treasurer the result of a vote of a tax in aid of a railroad by the electors of the township, in a case where the vote had been taken prior to the enactment of chapters 2 and 50 of the laws of 1872, until three years after they took effect. *Harwood v. Quinby et al.*, 44 Id., 335.

In an action against a railroad company for damages for a breach of contract to transport freight, it was *held* to be barred in five years from the time of the accruing of the cause of action. *Cobb, Blasdel & Co. v. The Ill. Cent. Ry Co.*, 38 Id., 601.

An action against a public officer or his sureties for a breach of his official bond is barred in three years from the time of the breach, and the fact that within that time a judgment is obtained against the officer will not remove the bar of the statute in an action afterward brought against his sureties. *Wadsworth & Co. v. Gerhard et al.*, 55 Id., 367.

Where a township clerk paid a road order drawn on him by the township trustees, but failed to have the same audited and allowed in his regular settlement with the trustees, the statute of limitations commenced to run thereon from the date of the first settlement, at which the claim should have been presented and paid. *Dewey v. Lins et al.*, 57 Id., 235.

A right of action accrues in favor of the land owner against a sheriff, for money received by him from a railroad company upon the condemnation of a right of way, immediately upon the expiration of the thirty days allowed for appealing from such proceedings; and unless brought within three years after such accruing, it is barred both as against the sheriff and against his sureties. *Lower v. Miller, Sheriff, and two other cases*, 66 Id., 408.

4. [Five years.]—Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.

When the legal title to real property has been obtained by fraud, an action to recover by the equitable owner may be commenced at any time within five years after the discovery of the fraud. *McLennan v. Sullivan*, 13 Iowa, 521.

An action for relief on the ground of fraud must, under the 4th subdivision of section 2529 of the code, be brought within five years from the discovery of the fraud, or it will be barred by the statute of limitations. *Hantenbeck v. Riley et al.*, 35 Id., 105; *Shank v. Teeple*, 33 Id., 189; *Ryan v. Doyle*, 31 Id., 53; *Cowan v. Toole*, Id., 513.

An action against a railroad company for damages for a breach of contract to transport freight will be barred in five years from the time the cause of action accrues. *Cobb, Blasdel & Co. v. The Ill. C. R. Co.*, 38 Id., 601.

The statute of limitations will run in favor of a trustee in possession of real property under a constructive or resulting trust, from the time when he denies the trust and claims the trust property as his own. *Gebhard v. Sattler*, 40 Id., 152; *Peters v. Jones*, 35 Id., 512.

A cause of action for the recovery, from the county of taxes illegally levied and paid, accrues at the very moment of payment, and the action is barred after the lapse of five years from that time. *Callanan v. The County of Madison*, 45 Id., 561.

Actions for the recovery of money which had been paid for intoxicating liquors, instituted under section 1550 of the code, will not be barred until after five years from the time the payment was made. *Woodward v. Squires & Co.*, 41 Id., 677.

While the statute will not run against the state or sovereignty, it will against a municipal corporation. *The City of Pella v. Scholte*, 24 Id., 234.

Where the original proprietor of a town held open and visible possession of a square therein for more than ten years, claiming that he had never relinquished, but still retained title thereto, the right of the corporation to recover possession thereof was *held* to be barred. *Id.*

The operation of the statute cannot be suspended in such case, by a forcible entry, where the entry is not followed by continuous possession. *Id.*

Where a party against whom a cause of action exists, by fraud or actual fraudulent concealment prevents the party in whose favor it exists from obtaining knowledge of it, the statute will only commence to run the time the right of action is discovered, or by the exercise of proper diligence might have been discovered. *Findley v Stewart*, 46 Id., 655. *The District Tp. of Boomer v. French* 40 Id., 601, —, and cases cited.

Where the relation of principal and surety does not appear on the face of a note made by several persons, and must be established by parol evidence, and the instrument has been merged in a judgment, and satisfied of record, the right of action at law of the surety against the principal will be barred after the lapse of five years from the time when the action accrued. *Lamb v. Withrow*, 31 Id., 164. The same rule will apply where the surety has paid the note before judgment thereon, in an action to recover the same, or to be subrogated to the rights of the payee. *Id.*

A cause of action accrues against a county for the recovery of illegal taxes paid at the time of their payment, and the statute runs against the claim from that time. The fact that the person paying such taxes is not aware of their illegality will not prevent the running of the statute against his claim. *Beecher v. The County of Clay*, 52 Id., 140.

The defense of the statute of limitations is an affirmative one, and the burden of proof is on the party pleading the statute. It was accordingly held, in an action to set aside a conveyance on the ground of fraud, where more than five years had elapsed since the right of action accrued, that it was incumbent on the defendant, in order to avail himself of the defense of the statute, to show that the plaintiff had knowledge of the fraud more than five years before the action was commenced. *Hartlin v. Stevenson*, 30 Id., 371.

A resolution by the board of supervisors offering a bounty for enlistments, and the acceptance of such resolution by persons enlisting thereunder, constitutes a parol contract, and an action thereon is barred in five years. *Kinsey v. Louisa County*, 37 Id., 438; *Baker v. Johnson County*, 33 Id., 151.

A proceeding to set aside a sheriff's sale of land, sold in gross, in which actual fraud is alleged by the plaintiff, is an action cognizable as well at law as in equity; and, hence, does not fall within this subdivision of the statute, which provides that actions for relief on the ground of fraud, in cases heretofore solely cognizable in equity, must be brought within five years from the time the action accrued. *Williams v. Allison*, 33 Id., 278.

Where a judgment plaintiff failed to credit a payment made on the judgment, and afterward collected the whole amount on execution, it was held that an action to recover the amount thus overpaid was barred in five years from the date of the collection of the judgment, although defendant in the action had no knowledge that the proper credit had not been given until after the expiration of that time. *Shreve v. Leonard*, 56 Id., 74.

An action for willful trespass committed by entering upon plaintiff's land and, by digging a ditch thereon, interfering with his water-power, accrues immediately upon the act of trespass, and is barred in five years thereafter. *Williams v. Mills County*, 71 Id., 367.

An action by a surety against a principal, for money paid as such surety, is barred in five years from the time of the payment. *Miller v. Lesser*, 71 Id., 147.

5. [Ten years.]—Those founded on written contracts, on judgments of any courts, except those courses provided for in the next section, and those brought for the recovery of real property, within ten years.

The statute of limitations requiring actions founded upon written contracts to be commenced within ten years, applies to suits for the foreclosure of mortgages as well as to actions upon notes. *Hendershoit v. Ping*, 24 Iowa, 134; *Newman v. De Lorimer*, 19 Id., 244.

An action in equity to compel the conveyance of land, purchased for and with the means of the plaintiff, is an action for the recovery of real property, and not "for relief on the ground of fraud in cases heretofore solely cognizable in a court of equity," as prescribed in subdivision three of section 2529, and is not barred until after the expiration of ten years. *Stanley v. Morse*, 26 Id., 454.

A mere naked possession without claim or color of title, will not enable a defendant in an action of right to avail himself of the statute of limitations. To constitute an adverse position so that the statute will run, there must be either "color of title" or "claim of title." It need not be under "color of title" if it is held under claim of title. *Hamilton v. Wright*, 30 Id., 480; *Clagett v. Conlee*, and *Jones v. Hockman*, 16 Id., 487; *Jones v. Hockman*, 12 Id., 102; *Wright v. Keithler*, 7 Id., 92.

In case of a breach of a written contract for the sale of real estate, where the vendor refuses to convey, after tender of the balance of the purchase money and demand of a deed by the vendor, the statute begins to run against an action by the vendee to recover the purchase money paid, from the date of demand and refusal, and not from the time of payment. Such an action is not

for money had and received, but for a breach of the written contract. *Deming v. Harney*, 23 Id., 77.

A descent cast upon heirs by the ancestor, dying in possession, though he was but a mere trespasser, gives color of title to the heirs. *Hamilton v. Wright*, 30 Id., 480.

To constitute color of title it is not necessary that the title under which he claims should be a valid one, and it makes no difference whether its want of validity results from the original and inherent defects, or from subsequent causes, or whether they be attributable to individual or judicial causes. *Id.*

The statute of limitations is not available as a defense in an action to recover land unless the defendant has held possession of the land for the statutory period under *color of title* or *claim of right*. Mere possession is not sufficient. *Grube v. Wells*, 34 Id., 148; *Solberg v. City of Decorah*, 41 Id., 501.

All actions for the recovery of real property, and all personal actions on written contract commenced since July 1, 1836, must be commenced within ten years after the cause of action accrued. *Johnson v. Hopkins*, 19 Id., 49.

Where the grantee of real estate assumes the payment of a judgment against the grantor as part of the consideration, but with no definite time of payment being fixed, and the grantor afterwards pays off the judgment himself, on the failure of the grantee to do so, the statute begins to run against an action by the grantor from the date of payment by him, and not from the date of the undertaking by the grantee. In equity the parties sustain the relation of principal and surety. *Foster v. Marsh*, 25 Id., 300.

An action to recover dower, that is to have it assigned or admeasured, is within the general statute of limitations, and must be brought within ten years from the time when the cause of action accrued. *Rice v. Nelson*, 27 Id., 148.

The right to maintain an action to foreclose a title bond, treating it as a mortgage, is barred in ten years from the time the cause of action accrued. *Day v. Baldwin*, 34 Id., 380.

The right of a junior mortgagee to redeem therefrom is absolutely barred in ten years. The right to redeem corresponds with the right to foreclose, being based upon the same instrument, and barred in the same time. The doctrine of adverse possession has no influence upon this right. *Gower v. Winchester*, 33 Id., 303. See, also, *Day v. Baldwin*, 34 Id., 380; *Palmer v. Butler*, 36 Id., 576, 583; *Clinton County v. Cox*, 37 Id., 570; *Jameson v. Perry*, 38 Id., 14, 18; *Crawford v. Taylor et al.*, 42 Id., 260.

In an action to cancel a deed intended to operate as a mortgage, the mortgagee having been in possession, the statute of limitations was pleaded: it was *held*, 1. That a mortgagee in possession, after having received payment of the debt, will not be protected by the statute, unless he shows that he has held *adversely* to the mortgagor for the period which bars recovery of the land. 2. The relation of mortgagee and mortgagor is analogous to that of trustee and *cestui que trust*, and the possession of the mortgaged premises by either is not, as to the other, adverse. *Green v. Turner*, 38 Id., 112; *Crawford v. Taylor et al.*, 42 Id., 260.

The intention with which the possession was taken and held by the defendant is an essential consideration. It must be shown that he intended to hold in hostility to the true owner. *Grube v. Wells*, 34 Id., 148.

A mere *belief* that the lot which the defendant claimed extended to the limits of the inclosure is not equivalent to a claim of title or right, and, therefore, not sufficient to constitute adverse possession. *Grube v. Wells*, 34 Id., 148. See also, the following cases, which are to the same effect: *McDunn v. The City of Des Moines et al.*, Id., 467; *Burdick v. Heivly*, 23 Id., 511.

To show adverse possession there must be an absence of proof of favor, or mistake as to the true line of the land. *The State v. Crow*, 20 Id., 258.

A party relying upon the bar of the statute of limitations, in an action for the recovery of real property, must show that he has held, for the statutory period, not only by a possession actual, open and adverse, but that it has been maintained as a right resulting from an exclusive property in and dominion over the estate, and not subordinate to the will of another, or by an agreement with the true owner of the title. *McNamee v. Moreland*, 26 Id., 96.

To constitute color of title and adverse possession thereunder it is not necessary that the person in possession should hold under a valid and perfect title. He may, in good faith, acquire a title by adverse possession to a strip of land which is in fact beyond his lines as established by his deed or patent, and upon that of an adjacent owner. *Close et al. v. Samm et al.*, 27 Id., 503.

To constitute adverse possession under which a title to land may be acquired, it is not necessary that the possession should be known to the other party. He must take notice at his peril. *Id.*

The seizin and possession of one tenant in common are the seizin and possession of the others, and the statute of limitations will not operate in favor of the former to give him title by adverse possession, unless it be sole and exclusive, with the knowledge and acquiescence of his co-tenants. *Burns v. Byrne et al.*, 45 Id., 285.

Possession of real property to be adverse must be:

(1). Actual, continued, visible and notorious, hostile and distinct, and commenced under color of title or claim of right.

(2). Actual residence upon or inclosure or cultivation of the land is not necessary to constitute adverse possession.

(3). An entry upon the land under claim of right, and the exercise of such acts of ownership without interruption as clearly indicate an intention to assert ownership, and a notorious claim of title within the knowledge of the plaintiff and those under whom he claims, constitutes adverse possession.

(4). Acts done under claim or color of title, equivalent to actual possession, and which are as open and notorious, exclusive and hostile, will justify the finding of actual adverse possession if continued for sufficient length of time. *Booth & Graham v. Small et al.*, 1 Id., 177.

It is not necessary to constitute *actual possession* that the land should be inclosed with a fence, or that the party claiming it should reside thereon, but may exist by the exercise of such acts of ownership as are necessary to enjoy the ordinary use of which it is capable, and acquire the profits it yields in its present condition. Such acts, if continued uninterruptedly, will amount to *actual possession*, and if under claim of right or color of title, will be *adverse*. *Id.* See, also, as to what constitutes "actual possession," *Fleming v. Maddox*, 30 Id., 239, and cases cited.

Under the statute of limitations, ten years' adverse user of a highway by the public under a claim of right, will bar the owner of the soil. *Keys & Crawford v. Tait et al.*, 19 Id., 123; *Onstott v. Murray*, 22 Id., 457; *The State v. Crow*, 30 Id., 258.

If the public, with the knowledge of the owner of land, has claimed and continuously exercised the right of using the same as a public highway for a period equal to that fixed by the statute of limitation of real actions, a complete right to the highway thereby becomes established against the owner, unless it appears that such use was by favor, leave or mistake. *Onstott v. Murray*, 22 Id., 457; *The State v. Crow*, 30 Id., 258.

Where lands of adjacent owners are divided by a partition fence not on the true line of survey, and one of such owners claims and cultivates up to the fence as the true line, though it is in fact beyond it, and on the land of his neighbor, for a period of ten years, his possession will be held to be adverse under claim of right, and to confer upon him a title by prescription to the land lying between the actual line of survey and the fence. *Brown v. Bridges*, 31 Id., 138.

And in order to the application of this rule it is not necessary that there should have been any controversy in respect to the division line, prior to the expiration of the statutory period of limitation. *Id.*

A roving possession from one part of a tract of land to another will not bar the right of the owner upon any part which has not been held adversely for the statutory period. *Id.*

The possession of a mortgagor or a mortgagee is not adverse as to the other. *Crawford v. Taylor et al.*, 42 Id., 260.

Possession for more than ten years, in good faith, under a claim of title, hostile and adverse, must also be visible and notorious to give title to real property. *Teabout v. Daniels*, 38 Id., 158.

Where, in the case of an implied trust, the trustee holding the legal title assumed ownership and sold and conveyed the land to a third person, it was held that this amounted to a denial or repudiation of the trust, and the possession of the grantee under such conveyance was regarded as adverse. *Peters v. Jones*, 35 Id., 512.

Where the right of action in tenants in common would be barred by adverse possession under the statute, except as to one who is within the saving clause, as, for instance, a minor, the right of the others is not thereby saved. *Id.*

The statute of limitations will run in favor of a trustee in possession of real property under a resulting trust, from the time he claims the property as his own. *Gebhard et al. v. Statler et al.*, 40 Id., 152.

Adverse possession, under a sale in pursuance of a deed of trust, although the sale was made without sufficient notice, is based on color of title, and is entitled to the protection of the statute of limitations. *Id.*

A party in possession of land under a contract for a deed which provided that if he made default in payment he should have the rights of a tenant at will, and be allowed thirty days after notice in which to quit the possession, does not hold adversely to the owner until after such notice shall have been received. *Austin v. Wilson et ux.*, 46 Id., 362.

The fact that more than ten years had elapsed since the maturity of the last note for the purchase money, would be no defense to an action to recover possession. *Id.* Proof that the notes are barred would not sustain an averment of payment. *Id.*

When the possession is shown to be open and notorious, the person against whom it is maintained is presumed in law to know it, or to be negligent in not knowing it; and in either case he is bound by it. *Teabout v. Daniels*, 38 Id., 158.

The heirs of one who held adverse possession of land under a mere claim of right, are in possession under color of title. *Id.*

To constitute a bar under the statute of limitations, the adverse possession need not have been

held under *color of title*; it is sufficient if possession was taken and held under *claim of right*. *Calvin v. McCune*, 39 Id., 502.

A tax deed void on its face will constitute *color of title*, under which adverse possession, held for the statutory period, will operate as a bar. *Id.*

Where timber land with a quarry thereon was claimed by the owner of adjacent land, who leased the quarries for ten years, and afterwards continued to procure stone and timber from the land, or permitted others to do so upon payment for the right, and during the time regularly paid the taxes thereon, it was *held* that the claimant had maintained continued adverse possession. *Id.*

That a city permitted a street which had not been open to be partially inclosed and occupied for sixteen years by the owner of abutting property, will not estop it to assert its ownership in the land inclosed. *Solberg v. City of Decorah*, 41 Id., 501.

Section 2401 of the code, limiting actions for the recovery of real property sold by an administrator to five years from the date of the sale, does not apply to a case where the proceedings are attacked on the ground of fraud; and in such case the statute will, under sections 2529 and 2530 of the code, commence to run only from the time of the discovery of the fraud. *Cowan v. Toole*, 31 Id., 513.

To establish a highway by prescription there must have been a general uninterrupted use of the same as such by the public under a claim of right for a period equal to that for the limitation of actions. *The State v. Tucker*, 36 Id., 485; *Houghman v. Harvey*, 40 Id., 634; *The State v. Greene*, 41 Id., 693.

Where plaintiff held possession of land for twenty years, under a deed purporting to convey the whole, but which in fact conveyed but one-third, claiming ownership of the whole, the statute did not run in his favor as to the whole, against the owners of the two-thirds, who resided in another state during the time, without knowledge of their rights, or of plaintiff's claim and possession, and were most of that time infants. *Killmer v. Wachner et al.*, 37 N. W. R., 778.

6. [Twenty years.]—Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years.

The statute does not begin to run in actions for relief on the ground of fraud until the discovery of the fraud by the aggrieved party. *Ryan v. Doyle et al.*, 31 Iowa, 53; *McLenan v. Sullivan*, 13 Id., 521; *Hanlenbeck v. Riley*, 35 Id., 105; *Shank v. Teeple*, 33 Id., 189; *Cowan v. Toole*, 31 Id., 513. But if relief can be had at law or in equity, the action must be brought within five years after the perpetration of the fraud. *McGinnis v. Hunt*, 47 Id., 668.

Where a judgment is sought to be enforced against land which it is alleged the debtor fraudulently conveyed to his wife before the rendition of the judgment, the burden of proof is on the defendant pleading the statute of limitations to prove not only that five years have elapsed since the fraud, but since it was discovered or became known to the plaintiff. Both of these facts are essential to constitute the bar. *Baldwin v. Tuttle*, 23 Id., 66.

The revivor of a judgment by *scire facias* was simply a proceeding to enforce the judgment, and did not have the effect of a new judgment, with respect to the operation of the statute of limitations. The statute begins to run at the date of the original judgment. *Meek v. Meek*, 45 Id., 294.

The statute of limitations pertains to the remedy, and not to the validity or right of the cause of action, and the states are not inhibited by article 4, section 1, of the United States constitution, from enacting such statutes barring actions upon judgments rendered in other states. *Id.*

This provision applies to judgments rendered in other states as well as those rendered in this state. *Id.*

Where a cause of action based upon fraud had not accrued more than five years before the enactment of this provision in chapter 167 of the acts of the thirteenth general assembly, it was *held* that the right of action would continue until barred by this provision. *Higgins v. Mendenhall*, 42 Id., 675.

Where an action of slander is brought, and recovery is sought for repetition thereof, each repetition must be declared upon as a distinct cause of action. And where the petition charged the speaking of slanderous words more than two years prior to bringing of the action, the action was barred by the statute of limitations, notwithstanding it also charged the further speaking of slanderous words on many occasions up to the time of filing the petition. *Gean v. Hennessy*, 69 Id., 373.

SEC. 2530. [Fraud: mistake: trespass.]—In actions for relief on the ground of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake or trespass complained of shall have been discovered by the party aggrieved.

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Section 2401 of the code, limiting actions for the recovery of real property sold by an administrator to five years from the date of the sale, does not apply to a case where the proceedings are attacked on the ground of fraud; and in such case the statute will, under sections 2529 and 2530 of the code, commence to run only from the time of the discovery of the fraud. *Cowan v. Toole*, 31 Id., 513.

To recover money paid by mutual mistake, or by the mistake of one party and fraudulently received and retained by the other, an action at law will lie, and would be barred, by the statute of limitations, in five years after the payment. *Higgins v. Mendenhall*, 51 Id., 135, overruling the same case reported in 42 Id., 675.

An action on the bond of a treasurer of a school district, not being based upon fraud, although by fraudulent concealment the forfeiture of the bond was not discovered until after the bar of the statute had intervened, is not saved by the provisions of this section of the code. *The Dist. Tp. of Boomer v. French*, 40 Id., 601.

When there is no fraudulent concealment of the fact that a right of action exists, but a concealment merely of the existence of property from which a judgment might be satisfied, the operation of the statute of limitations is not suspended by this section. *Humphreys v. Mattson et al.*, 43 Id., 556.

This section applies only to cases where relief is asked in controversies heretofore solely cognizable in courts of chancery. *Brown v. Brown*, 44 Id., 349; *Gebhard v. Sattler*, 40 Id., 152; *The Phoenix Ins. Co. v. Dankwardt et al.*, 47 Id., 432; *Higgins v. Mendenhall*, 51 Id., 135. See *Muir v. Bozarth et al.*, 44 Id., 499, where the facts established were held to postpone the running of the statute until the discovery of the alleged fraud; and was held entitled to rents and profits for five years preceding the commencement of the action.

Where a party against whom a cause of action exists, by fraud or actual concealment, prevents the party in whose favor it exists from obtaining knowledge of it, the statute only commences to run from the time the right of action is discovered, or might by the use of due diligence have been discovered. *Findley et al. v. Stewart et al.*, 46 Id., 655.

An action for the rescission of a contract on the ground of fraud must be commenced within five years from the time of the discovery of the fraud. *Evans v. Montgomery*, 50 Id., 325.

Where by a mistake of the county treasurer, land is sold for taxes which have previously been paid, the purchaser may, at any time within five years after he discovers the mistake, maintain an action against the county for money paid by him on such sale. In such case, the petition should show the discovery of the mistake within five years of the bringing of the action. *The Storm Lake Bank v. Buena Vista County*, 66 Id., 128; citing and distinguishing *Callanan v. County of Madison*, 45 Id., 561; *Beecker v. County of Clay*, 52 Id., 140.

The retention of money collected upon collateral security in excess of the debt secured is only a breach of contract, and not a fraud; and the failure to discover it will not prevent the running of the statute of limitations under section 2530 of the code. *Brunson v. Ballou*, 70 Id., 34.

An action to set aside a fraudulent conveyance of real estate is barred in five years after the fraud is discovered, and it is conclusively presumed to be discovered when the fraudulent conveyance is filed for record. *Laird v. Kilbourne et al.*, 70 Id., 83.

In actions for relief on the ground of fraud or mistake, the cause of action will not be deemed to have accrued until the fraud or mistake shall have been discovered by the party aggrieved, and the entry of a judgment against a person without his knowledge, or without service of summons, is such a mistake that a cause of action to cancel such judgment will not be deemed to have accrued until discovery that the judgment is so entered, at which time the statute of limitations will commence to run. *Gerrish v. Seaton et al.*, 34 N. W. R., 485.

When the party against whom a cause of action in favor of another has accrued, by fraud or actual fraudulent concealment prevented him from obtaining knowledge thereof, the statute of limitations will commence to run only from the time the right of action is discovered, or might, by the use of due diligence, have been discovered. *Bradford v. McCormick et al.*, 71 Iowa, 129. See, also, *Dist. Tp. of Boomer v. French*, 40 Id., 601; and *Findley v. Stewart*, 46 Id., 655.

The statute of limitations does not run against the state university. It does not commence to

run in any case where the action is for relief on the ground of mistake until the mistake is discovered by the plaintiff. *Manatt v. Sarr et al.*, 72 Id., 680.

SEC. 2531. [**Open account.**]
When there is a continuous open current account the cause of action shall be deemed to have accrued on the date of the last item therein as proved on the trial.

A continuous, accruing indebtedness for board, rent and the like, is a continuous, open, current account within the meaning of this section, and the portion of the account beyond five years is not barred, as the statute will, in such case, commence to run only from the date of the last item in the account as proved on the trial. *Moses v. Crooks*, 32 Iowa, 172. See, also, *Wendling v. Besser*, 31 Id., 248; *Tubbs v. The City Maquoketa*, 32 Id., 564.

The statute commences to run under this section from the date of the last item in the account, whether such item be on the debit or credit side thereof. *Thorn & Stein v. Moore*, 21 Id., 285.

To constitute a continuous, open, current, account upon which the statute of limitations will begin to run only from the date of the last item, the account must not be broken or interrupted, but constitute a running, connected series of transactions. *Tucker v. Quimby*, 37 Id., 17.

An account which was broken by a hiatus of two years, and then resumed by charges of a different nature and outside of the usual business of the creditor, does not constitute such an account. *Id.*

In an action to enjoin the removal of a county seat, the action was deemed commenced by the service of the writ of injunction, and held that the action was not barred when the writ was served within five years after the election, but the notice was served after that time had elapsed. *Sweatt v. Faville*, 23 Id., 321.

The statute of limitations commences to run from the date of the last item of an account current, whether such item be on the debit or credit side of the account. *Miles & Co. v. Davies*, 42 Id., 91.

Where, on the retirement of a partner from a mercantile firm, the retiring partner assigned his interests in the accounts to his late co-partner, who continued the business; and where, after such assignment, there were credits entered from time upon one of said unsettled accounts, it was held that the account was an open, continuous, one, and that the assignment thereof did not close it. *Keller v. Jackson*, 58 Id., 629.

SEC. 2532. [**Commencement of action.**]
The delivery of the original notice to the sheriff of the proper county with intent that it be served immediately, which intent shall be presumed unless the contrary appears, or the actual service of that notice by another person, is a commencement of the action.

An action is to be deemed commenced from the delivery of the original notice to the sheriff, or from the date of service, and not from the filing of the petition. *Collins v. Bane*, 34 Iowa, 385; *Reed v. Chubb Bros., Barrows & Co.*, 9 Id., 178; *Hagan v. Burch*, 8 Id., 309; *Elliott v. A. J. Stevens & Co.*, 10 Id., 418.

Where the original notice was not served until a month after the petition was filed, it will be presumed that the notice was delivered to the sheriff at the time of filing the petition, with the intention that it should be served immediately, and from that time the statute of limitations was suspended. *Snyder v. Ives*, 42 Id., 157.

It is only for the purpose of the statute of limitations that the delivery of an original notice to the sheriff for service constitutes the commencement of an action; for all other purposes the commencement of the action dates from the actual service of the notice. *Brooks v. McCormick*, 56 Id., 318.

A notice of an action, with the appearance day left blank, is not an "original notice" within the meaning of this section; and the delivery of such a notice by a justice of the peace to a constable for service, with the understanding that the latter should insert the appearance day at or before the time of service, held not to be the beginning of an action within the meaning of said section; and where action was not otherwise begun on the promissory note in question until more than ten years after the note was due, an action thereon was barred by the statute of limitations. *Phinney v. Donahue*, 67 Id., 192.

Under this section of the code the delivery of an original notice to the sheriff with intent that it shall be served immediately, is the commencement of the action for the purposes of the statute of limitations, yet such intent must be continuous until such service shall be effected. And so where a notice was placed in the hands of the sheriff, but he neglected to serve it, and afterwards returned it to plaintiff's attorney, who lost it, and nearly two years later another notice was drawn and placed in the sheriff's hands and served on defendant, held that the action was not begun with the delivery of the first notice to the sheriff, and that the period of the statute of limitations having expired before the second notice was placed in the sheriff's hands, the action was barred. *Wolfender v. Barry*, 65 Id., 653.

SEC. 2533. [Non-residence.]—The time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation above described.

The statute of limitations of this state commences to run upon contracts made and matured in other states from the time the defendant became a resident of this state. *Petchell v. Hopkins*, 19 Iowa, 531; *Gillett v. Hill*, 32 Id., 220.

In the absence of a statute to the contrary, the law is that a debt barred by the laws of the State where it was contracted, is not for that reason barred in another state in which an action may be brought. *Sloan v. Waugh*, 18 Id., 224.

But under our statute such bar may be set up in an action brought in this state, when the bar was complete under the laws of the state where the defendant previously resided. *Id.*

The statute of limitations will not run in favor of a non-resident, to bar an action for the recovery of land after ten years, notwithstanding such non-resident has always had a tenant in possession of the land. *Heaton v. Fryberger*, 38 Id., 185.

Where, by reason of the non-residence of the defendant which under the statute is deducted from the period of limitation, an action on a promissory note is not barred. Neither is an action to foreclose a mortgage or deed of trust made to secure such note. *Clinton County v. Cox*, 37 Id., 470.

Residence and not citizenship is contemplated in the statute of limitations, and it will run in favor of a debtor who resides in this state, although he has his domicile in another state or country. *Savage v. Scott*, 45 Id., 130.

A defendant in pleading the statute of limitations is not bound to show a continuous residence within the state during the period of limitation; but the plaintiff, if he seeks to avail himself of the exception thereto, has the burden of bringing the case within it. *Evans v. Montgomery*, 50 Id., 325.

A railway corporation doing business in this state, though incorporated elsewhere, is always subject to notice and personal judgment in the courts of this state, and hence is a resident of this state, within the meaning of the statute of limitations, and it may rely upon the statute in bar of an action not begun within the time limited therefor. *Wall v. The C. & N. W. Ry Co.*, 69 Id., 493.

SEC. 2534. [Exception.]—When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter; but this section shall not apply to causes of action arising within this state.

The bar of another state or country to a cause of action sued on in this state, must have been completed previous to the time the defendant became a resident of Iowa, in order that such bar shall be a defense here. *Patchen v. Hopkins*, 19 Iowa, 531; *Sloan v. Waugh*, 18 Id., 224; *Lloyd v. Perry*, 33 Id., 144.

Where the defendant came to this state, from a state where the debt was contracted, resided here for a time, and returned to the state by the laws of which the debt became barred, from whence he returned to this, and became a resident of this state, the case was held not to come within the exception in section 2534 of the code. *Id.*

The last clause of this section being an amendment added thereto by chapter 167, section 10, acts of the thirteenth general assembly, held, not to act retrospectively so as to revive an action already barred. *Thompson v. Reed*, 41 Id., 48.

When an action has been fully barred by the laws of another state, such bar may be pleaded here. *Webster & Gage v. Rees*, 23 Id., 269; *Sloan v. Waugh*, 18 Id., 224; *Lloyd v. Perry*, 32 Id., 144.

In an action to foreclose a mortgage it is not enough to plead in the answer that an action on the note was fully barred by the laws of another state where the note and mortgage were executed; it should also be averred that the right to foreclose the mortgage was so barred. *Gillett v. Hill*, 32 Id., 220.

This section of the code does not require that a person shall become a resident of this state to be entitled to plead that the action is barred by the laws of the state in which he resided. *Liebrecht v. Wilcozen*, 40 Id., 93.

It was held under section 2746 of the revision that when a personal action has become barred by the laws of any other country or state in which the defendant has resided, such bar will constitute a defense to an action on the same cause in this state, and this whether or not the cause of action arose in this state. *Davis v. Harper*, 48 Id., 513. The amendment of that section as in section 2534 of the code, however, changes it so that it is not now applicable to "causes of action arising within this state."

This section is not available as a defense against a cause of action arising in this state, unless the action was fully barred at the time of the taking effect of chapter 1678 of the laws of 1870, which amended this section. *Goodman v. Stryker*, 62 Id., 221.

SEC. 2535. [**Minors and insane persons.**]*—*The times limited for actions herein, except those brought for penalties and forfeitures, shall, in favor of minors as defined by the code, and persons insane, be extended so that they shall have one year from and after the termination of such disability within which to commence said actions.

The extension of time as to minors in cases in which the cause of action shall have accrued more than ten years before majority is attained, expires with the first year of majority. *Campbell v. Long*, 20 Iowa, 382.

Ignorance of a right does not prevent the operation of the statute of limitations. *Id.*

The statute, limiting the time within which actions for the recovery of real property may be commenced is not suspended during the infancy of a party by the provisions of section 2535 of the code. *Mathews v. Stevens*, 39 Id., 279.

Adverse possession of real property, either actual or constructive, for ten years, will not bar minors of the right of action to quiet title, within one year after attaining their majority. *McGinnis et al. v. Edgell*, 39 Id., 419.

SEC. 2536. [**Death: exception.**]*—*If the person entitled to a cause of action die within one year next previous to the expiration of the limitation above provided for, the limitation above mentioned shall not apply until one year after such death.

Where a cause of action accrues to *the estate* of a decedent instead of the deceased while living, the statute of limitations will not commence to run until the appointment of an administrator. But if the statute has once begun to run in the lifetime of the party entitled to sue, it is not interrupted by his subsequent death, but continues, and the cause of action *survives* to the personal representatives. *Sherman v. The Western Stage Co.*, 24 Iowa, 515.

SEC. 2537. [**Failure of action.**]*—*If, after the commencement of an action, the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

This section applies only when no judgment upon the merits has been rendered in the first action, and the second is brought upon the same cause of action. *McDonald v. Jackson*, 55 Iowa, 37.

In case of failure of an action for any cause, other than negligence, this section extends the time of commencing a new action within six months, but it does not extend the time for bringing into existence the condition without which no action can be maintained, as to make a demand, where no demand had been made, until the action was barred. *The Dist. Tp. of Spencer v. The Dist. Tp. of Riverton*, 62 Id., 30.

Where a petition was not filed by the time fixed in the original notice, because of its having mislaid and overlooked by the attorneys of the plaintiff, it was *held* that the discontinuance of the action was through negligence in its prosecution, and that another action subsequently brought on the same cause of action could not be considered a continuation of the first under the provisions of this section. *Clark et al. v. Stevens*, 55 Id., 361.

Where plaintiff began an action in the state court for personal injury, which defendant had removed to the federal court, where the plaintiff had it dismissed without prejudice, on the ground that he believed that he could not obtain a fair trial, in the federal court, *held*, that a new action for the same cause, begun more than two years after the cause of action accrued, but less than six months after the first action was dismissed, was barred by section 2529 of the code, and that section 2537 did not save it. *Archer v. The C., B. & Q. Ry Co.*, 65 Id., 611.

SEC. 2538. [**Bank bills.**]*—*The above limitations and provisions shall not apply to evidences of debt intended to circulate as money, but shall, in other respects, be applicable to all actions brought by or against all bodies corporate and politic, except when otherwise expressly declared.

The statute of limitations does not run against the state. The words "bodies corporate and politic" are held not to include the state. *Des Moines County, for the use, etc., v. Harker*, 36 Iowa, 84.

An action brought in the name of a county for the use of, and to recover money belonging to, the school fund, is, in effect, an action by the state, and hence not barred by the lapse of the statutory period applicable to other actions. *Id.*

The statute may, however, run against a municipal corporation. It was accordingly *held*, where the original proprietor of a town held open and visible possession of a square therein for the statutory period for the limitation of real actions, claiming that he never had relinquished, but still retained title thereto, the right of the corporation to maintain an action for the recovery thereof was barred. *The City of Pella v. Scholte*, 24 Id., 233.

SEC. 2539. [Admission in writing.]—Causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same. But such admission or new promise must be in writing, signed by the party to be charged thereby.

Under our statute of limitations the acknowledgment arising from part payment, and indorsement thereof on a promissory note, is not sufficient to prevent the bar of the statute. The admission or new promise required by the statute must, in all cases, be in writing, signed by the party to be charged. *Parsons v. Carey*, 28 Iowa, 431; *Price v. Price*, 34 Id., 404.

The admission or new promise, however, need not be by a formal writing, but may be established by letters, written and signed by the debtor. And where such letters are addressed to the creditor by name, it may be shown by parol that he was the person intended. So, also, parol evidence is competent to prove the contents of a letter in answer to which the one in question was written, where it is shown that such letter has been lost or destroyed. *Collins v. Bane*, 34 Id., 385.

A letter or writing relied upon as reviving a cause of action barred by the statute, must, to be available, contain a new promise or an admission of liability. A statement tending to relieve defendant of negligence claimed, and consequent liability, is insufficient. *Oakson v. Beach*, 36 Id., 171.

The treasurer of a school district township has no authority to bind his district by his contracts or admissions, and his indorsements of payments upon a school warrant, within ten years, will not defeat the bar of the statute of limitations. *Carpenter v. District Township of Union*, 58 Id., 335.

The statute of limitations commences to run, upon school warrants, drawn by the district township upon its own treasurer, from the time they are presented for payment. *Id.*

To receive a cause of action barred by the statute of limitations, by a written admission, it is not necessary that the name of the party to whom it is made should appear therein. It is enough if it was intended for the benefit of the holder of the note. *Mahon v. Cooley*, Id., 479.

A recital in a mortgage that it is made subject to a prior one executed by the mortgagor on the same premises to the same mortgagees, is sufficient as an acknowledgment of indebtedness on the prior mortgage to remove the bar of the statute both as against the mortgagor and a subsequent grantee of the premises from him. *Palmer v. Butler*, Id., 576.

A new promise to pay, made *before* the debt is barred will remove or prevent the bar of the statute. It is not necessary that it should be made *after* the debt was barred. *Penley v. Waterhouse*, 3 Id., 418; *Lindsey v. Lyman*, 37 Id., 206.

The bar of the statute may be removed by a written admission of the debt as well as a new promise to pay the same; both are not necessary. *Ayres v. Bane*, 39 Id., 518.

An action is commenced when the notice is served upon the defendant, and not when it is placed in the hands of the officer for service. *Parkyn v. Travis et ux.*, 50 Id., 436.

The bar of the statute may be removed by evidence of the written admission of the debt, as well as a new promise to pay it; both are not necessary. *Ayres v. Bane*, 39 Id., 518; *Penley v. Waterhouse*, 3 Id., 419.

A letter addressed by the maker of a promissory note to the holder, stating that the writer "hoped to pay," and that in case of his death he had provided for payment out of his life insurance, was held to amount to an admission that the debt was unpaid, reviving the right of action thereon. *Bayliss et al. v. Street*, 51 Id., 627.

A note and mortgage which have become barred by the statute of limitations may be revived by an admission of indebtedness by the mortgagors and the priority of the mortgage lien will be thereby preserved as against subsequent liens taken before the mortgage became barred and not foreclosed until after it is revived. *Kerndt & Bros. v. Potterfield et al.*, 56 Id., 412.

SEC. 2540. [Counter-claim: when barred.]—A counter-claim may be plead as a defense to any cause of action, notwithstanding the same is barred by the provisions of this chapter, if such counter-claim so pleaded was the property of the party pleading it at the time it became barred, and the same was not barred at the time the claim sued on originated; but no judgment thereon except for costs can be rendered in favor of the party so pleading the same.

It was agreed in a foreclosure suit that the mortgaged property should be taken at the sale in full satisfaction of the judgment, and accordingly the debtor failed to claim for certain payments he had made; held that the statute of limitations would not run against the counter-claim, until after the repudiation of the agreement. *Savery v. Sypher*, 39 Iowa, 675.

In an action to foreclose a mortgage the defendant may plead, as a counter-claim, an account against a firm of which the foreclosure plaintiff is a member; and in such case the statute of limitations does not operate to bar the counter-claim. *Allen v. Maddox*, 40 Id., 124.

Although a cause of action may be barred by the statute of limitations, yet it may be pleaded as a counter-claim, provided it was the property of the defendant at the time it became barred,

and provided further, that it was not barred when the cause of action against which it is pleaded originated; but no judgment can be rendered thereon for the defendant except for costs. *Folsom v. Winch*, 63 Id., 477.

SEC. 2541. [**Injunction or statutory prohibition.**]—When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of such injunction or prohibition shall not be part of the time limited for the commencement of the action.

SEC. 2542. [**School fund.**]—The provisions of this chapter shall not be applicable to any action brought on any contract for any part of the school fund.

CHAPTER 3.

OF PARTIES TO AN ACTION.

SECTION 2543. [**Party in interest.**]—Every action must be prosecuted in the name of the real party in interest, except as provided in the next section.

A party acting for himself and others, in depositing with a stakeholder the amount of a wager, cannot sue in his own name and recover from the stakeholder more than the amount contributed by himself to the wager. *Toney v. Snyder*, 50 Iowa, 73.

The grantee in a deed of trust is entitled to the benefit of the covenants running with the land and may sue for a breach thereof. *Devin v. Hendershott*, 32 Id., 192.

Where certain promissory notes belonging to B. were placed in the hands of attorneys for the sole purpose of being collected, and the proceeds applied in the payments of certain debts of B. then in the hands of such attorneys, it was held that the parties for whose benefit said notes were thus deposited became, in equity, the owners thereof; that as to them the death of B. did not terminate the agency of the attorneys, and that they were entitled to the notes and their proceeds until the indebtedness for which they were pledged was paid. *Bennett v. Stoddard et al.*, 58 Id., 654.

The holder without indorsement of a promissory note payable to the order of the payee may maintain an action thereon in his own name, but without prejudice to the right of the maker to set-off equities existing before notice of the transfer. *Younker v. Martin*, 18 Id., 143.

Under our system of practice the assignee of a bond, claiming under a parol assignment may maintain an action thereon in his own name. *Conyngham v. Smith*, 16 Id., 471.

Under this section the party beneficially interested, though he may not have the legal title to the cause of action, may sue thereon in his own name. *Cottle v. Cole*, 20 Id., 481; *Conyngham v. Smith*, 16 Id., 471; *Rice v. Savery*, 22 Id., 470; *Pearson v. Cumings*, 28 Id., 344; *McDowell v. Bartlett*, 14 Id., 157.

So, under section 2544, the party holding the legal title to a note or instrument, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery, may sue thereon; but he is open, in such case, to any defense which exists against the party beneficially interested. *Id.*

In cases of simple contracts, if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it. *Roberts v. Corbin & Co.*, 26 Id., 315.

Where a bond given for the primary security of one person also contains a clause intended for the security of another, an action may be brought thereon by the latter, though not named in the bond, if he sustains any injury by a breach thereof. *Huntingdon v. Fisher*, 27 Id., 276.

Where a recognizance for the appearance of a party in a criminal prosecution at the district court of the county is taken in the name of the state, and becomes forfeited, suit may be brought thereon in the name of the county. *Shelby County v. Simmonds et al.*, 33 Id., 345.

A surety on a promissory note cannot maintain an attachment proceeding against the principal until he has paid the note after maturity. Payment after the commencement of the action will not be sufficient. *Dennison v. Soper*, 33 Id., 183.

An assignee of an open account may maintain an action thereon in his own name. *Knadler v. Sharp*, 36 Id., 232.

Where a bond given for the primary security of one person, also contains a clause intended for the security of another, suit may be brought thereon by the latter, though not named in the bond, if he is injured by a breach thereof. *Huntingdon v. Fisher*, 27 Id., 276.

Where a promissory note placed in the hands of an agent for collection after maturity was con-

verted by him to his own use, and afterwards sold under an execution against him, it was held that the purchaser acquired no interest in the note which would enable him, or any one claiming through him, to maintain an action thereon against the maker or guarantor. Having no interest in the note he could maintain no action thereon. *McCormick v. Williams*, 54 Id., 50.

A party holding a note and mortgage by a verbal assignment may maintain an action thereon in his own name. *Barthol v. Blakin*, 34 Id., 452; *Moore v. Lowrey*, 25 Id., 338.

A person to whom a note and guaranty have been transferred by a verbal assignment, becomes invested with the right of property therein, and may, as the real party in interest, maintain an action thereon in his own name. *Green v. Marble*, 37 Id., 95.

An understanding by a railroad company to transport grain may be enforced by the party with whom the contract was made, and who was entitled to its benefits, although he was not the owner of the property to be transported at the time of making the contract and the tender or delivery of the property. *Cobb, Bladsdel & Co. v. The Ill. C. R. Co.*, 33 Id., 602.

The assignment of a claim vests the legal title thereto in the assignee. Being such owner, he is legally the real party in interest, and as such this section requires that an action on such claim must be in the name of such party. Per *SEEVERS, J.*, in *Vinout v. The C. & N. W. R'y Co.*, 64 Id., 520.

SEC. 2544. [Exception.]—An executor or administrator, a guardian, a trustee of an express trust, a party with whom, in whose name, a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the suit is prosecuted.

The party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name, under this section. *Cottle v. Cole*, 20 Iowa, 481; *Conyngham v. Smith*, 16 Id., 471; *Rice v. Savery*, 22 Id., 470; *Pearson v. Cummings*, 23 Id., 344.

Under this section an administrator may, at his election, sue either in his individual name or in his representative capacity. *Oliner v. Townsend*, 16 Id., 430; *Carleton v. Byington*, 17 Id., 579.

The trustee of a voluntary association, having no corporate powers, may, under this section, maintain an action in his own name for the benefit of the association. *Laughlin v. Greene & Weare*, 14 Id., 92.

A chose in action may be transferred to a trustee, and by this section he is clothed with the right and power to prosecute an action thereon in his own name. *Goodnow v. Litchfield*, 63 Id., 275.

An action upon a cause which accrued to a partnership, but brought after the death of a partner, is properly brought in the name of the surviving partner, and it is not necessary to join the personal representative of the deceased partner. *Brown v. Allen*, 35 Id., 306.

An assignee of an open account may bring an action thereon in his own name. *Knaddler v. Sharp*, 36 Id., 232.

Where a promissory note was given by two persons for the purchase money of a stock of goods, the vendor agreeing not to engage in the same business in the same town, which purchase was made by one of the makers of a note for the benefit of a third person who engaged with the other maker in the prosecution of the business, the makers of the note, in an action thereon, can maintain a counter claim, under section 2544 of the code, for a breach of the agreement not to resume the business. *Moovehead v. Hyde & Braden*, 38 Id., 385.

Where plaintiffs were the joint owners of a chest, but owners in severalty of articles contained therein, which chest and contents they shipped on the defendant's railway, and a check was issued to them jointly therefor. The chest and contents were lost, and plaintiffs brought their joint action to recover therefor. Held, that by issuing the check to plaintiffs jointly the defendant entered into a joint contract with them, and that it could not insist that the contract should be severed, and separate actions brought thereon, to correspond with the ownership of the property. *Anderson et al. v. The Wabash, St. L. & P. R'y Co.*, 65 Id., 131.

The county as a trustee of an express trust may prosecute an action in its name to recover losses on loans of the school fund made in the county. *Madison County v. Tullis et al.*, 69 Id., 720.

A county may, as a trustee of an express trust, maintain an action in its own name to recover losses upon loans of the school fund made in the county, *Id.*

SEC. 2545. [Plaintiffs joined.]—All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in this code.

Persons who are citizens, voters and tax payers of a county may join as parties plaintiff in an action to restrain by injunction the expenditures of county moneys in the erection of a courthouse at a place which is not the county-seat of the county. *Rice v. Smith et al.*, 9 Iowa, 570; *The State, ex. rel. Byers, v. Bailey*, 7 Id., 396; *The State, ex. rel. Rice, v. Smith*, Id., 186.

In a suit in equity, where part of the relief asked is the cancellation of a contract, one of the

parties to the contract may be properly joined as plaintiff. *McMurray v. Van Gilder*, 50 Id., 605.

The several owners of lands subject to assessment for the construction of a levee, under proceedings had by the county supervisors, may join as plaintiffs in an action, the object of which is to declare the proceedings void. *Richman et al. v. The Board of Supervisors of Muscatine County*, 70 Id., 627.

SEC. 2546. [Assignment: right of defendant saved.]—In case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any counter claim, defense or cause of action whether matured or not, if matured when plead, existing in favor of the defendant and against the assignor before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good faith and upon valuable consideration before due.

A judgment is a chose in action merely; is not invested with the peculiar character of negotiable paper, and passes to an assignee thereof charged with all the equities which could be asserted against it in the hands of the assignor. *Ballenger v. Tarbell*, 16 Iowa, 419; *Burtis v. Cook & Sargent*, Id., 194.

In an action by the original payee upon a promissory note, for the use of the assignee to whom it has been transferred without indorsement, the same defenses may be made as if held by the original payee. *Yunker for use, etc., v. Martin*, 18 Id., 143.

Under this section when a promissory note is indorsed after maturity, and the maker having no notice of the indorsement, afterwards makes payment to the original payee, he may plead such payment as a defense in an action on the note against him by the indorsee. *Haywood & Son v. Leeber et al.*, 61 Id., 574.

Under this section the defendant in an action on a negotiable promissory note by the assignee thereof, transferred after maturity, may set up as a counter-claim or cause of action a note held by him against the assignor, which was acquired by him before notice of the transfer of his note by the assignor. *Downing v. Gibson*, 53 Id., 517.

But in an action by the indorsee of a promissory note transferred after maturity, the maker cannot plead a counter-claim existing in his favor against the payee and growing out of a transaction unconnected with the note itself. Section 2546 applies to non-negotiable paper and does not change the above rule. *Richards v. Daily*, 34 Id., 427.

While under our statute, an unnegotiable note is assignable and the assignee may sue thereon in his own name, it is subject in his hands to any defense or set-off which the maker had against the assignor thereof before notice of the assignment. *Sayre v. Wheeler*, 31 Id., 112.

Prior to the code of 1873, and under section 2760 of the revision, it was held that the assignment of an unnegotiable cause of action, did not necessarily draw after it all of the equities of an independent nature, but those only which were connected with the transaction. *Davis v. Milburn*, 3 Id., 169; *Burtis v. Cook & Sargent*, 16 Id., 124; *Isett & Brewster v. Lucas*, 17 Id., 503; *Stannus v. Stannus*, 30 Id., 448; *Shipman v. Robbins*, 10 Id., 208; *Lewis v. Denton*, 13 Id., 441; *Ryan & Louthan v. Chew*, Id., 589; *May v. Lamb*, 15 Id., 79.

Where the plaintiff, as assignee, brought suit on an injunction bond executed by the defendant to one M., the defendant set up a certain promissory note made by M. to the defendant, and also a judgment against M. in favor of defendant, as counter-claims. Held:

1. That the counter-claims were properly pleaded as against the plaintiff as assignee of the bond.
2. That the plaintiff had the right to show that the note was obtained by duress, and that the judgment was void for want of jurisdiction in the court rendering it. That the plaintiff, as assignee, could assert the same defenses to said counter-claims that M. could have done. *Miller v. City of Centerville*, 57 Id., 640.

SEC. 2547. [Defendants.]—Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff; or who is a necessary party to a complete determination or settlement of the question involved in the action, except as otherwise expressly provided by law.

Where a mortgagor of real property has conveyed the same by deed containing a covenant of warranty against all incumbrances, he has such an interest that he may, on his own application, be made a party to an action to foreclose the mortgage. *Gifford v. Workman et al.*, 15 Iowa, 34.

In an action to remove a cloud upon a title to land, all persons necessary to a complete settlement of the question involved may properly be made parties. *Beckwith v. Dargets et al.*, 18 Id., 303.

Upon the failure of a national bank, the receiver, appointed by the controller of the currency, is a proper party defendant in a suit against the bank. *Turner v. The First National Bank, etc., et al.*, 26 Id., 562.

In an equitable action the fact that a person is a member of a firm which is plaintiff will not prevent the joinder of another firm of which he is also a member, as defendant. *Ford & Musson v. The Jud. Dist. etc.*, 46 Id., 294.

SEC. 2548. [**United interest: joinder of parties.**—Persons having an united interest must be joined on the same side either as plaintiffs or defendants, except as otherwise expressly provided by law. But when some who should thus be made plaintiffs refuse to join, they may be made defendants; the reason thereof being set forth in the petition.

One of two joint owners of a promissory note cannot maintain an action thereon in his own name without joining the other owner, though the note is payable to bearer and in his possession. *McNamee v. Carpenter*, 56 Iowa, 276.

SEC. 2549. [**Common interest: one suing for all.**—When the question is one of a common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

The owner of the real property on which a mechanic's lien is sought to be established is a necessary party to an action for that purpose. *Killer & Bennett v. Tracey et al.*, 11 Iowa, 530.

In *Fleming v. Mershon*, 36 Id., 413, MILLER and DAY, JJ., held, under this section that to authorize a plaintiff to sue in behalf of others not named, they must have a common or general interest with him in the result sought to be accomplished by the action, and that several persons charged with a tax have no such common or general interest in resisting the collection of the same as will authorize one to sue for all. COLE, J., dissented and BECK, Ch. J., expressed no opinion.

Since that case it has been held that where a question representing the validity of a tax extends to the whole assessment, or where it affects in the same manner a number of persons, so that the question involved can be presented, without confusion, in one suit, all, or any number of those thus affected, may join in bringing the action. *Branduff et al. v. Harrison County et al.*, 13 West Jur., 112.

Where an alleged illegality in taxation extends to the whole assessment, or where it affects in the same manner a number of persons, so that the question involved can be presented by one petition filed by all or any number thus interested, such joint petitions may be filed. *Branduff et al. v. Harrison County et al.*, 50 Id., 164.

Where the parties interested are numerous, and it is impracticable to bring them all before the court, and they have a common interest in the subject of the litigation, arising from the fact that all hold land under the conveyance which defendants fraudulently seek to defeat, one of them may prosecute an action for the benefit of all, to enjoin the consummation of the fraud under section 2549 of the code. *The Palo Alto B. & I. Co. et al. v. Mahar et al.*, 65 Id., 74, following *Brandriff v. Harrison County*, 50 Id., 164.

SEC. 2550. [**Joint and several obligations: how sued.**—Where two or more persons are bound by contract, or by judgment, decree or statute, whether jointly only, or jointly or severally, or severally only, and including the parties to negotiable paper, common orders, and checks, and sureties on the same, or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all such representatives. An action or judgment against any one or more of several persons jointly bound, shall not be a bar to proceedings against the others.

Under this section an action may be maintained against either the administrator of a deceased joint obligor or the survivors, whether the death occurred before or after the taking effect of the statute. *Sellon & Co. v. Braden*, 13 Iowa, 365; *Mosier v. Hull*, 15 Id., 603.

A decree in an action to foreclose a mortgage against the principal maker of a note, the sureties thereon not being made parties, does not merge the note as to the sureties, unless the decree is fully satisfied by sale of the mortgaged property. A separate action may be maintained against one of the sureties for any balance remaining unpaid. *The County of Dubuque, etc., v. Koch*, 17 Id., 229.

Under this section an action may be maintained against one partner alone upon a promissory note executed by the firm. *Ryerson v. Hendrie*, 22 Id., 480; *Hosmer v. Burke*, 26 Id., 353, 356.

An assignor who guarantees the payment of a non-negotiable note, may be joined as a party defendant. *Tucker v. Shiner*, 28 Id., 334; *Marvin v. Adamson*, 11 Id., 371; *Meix v. Fairchild*, 12 Id., 351.

This section authorizes actions, at the option of the plaintiff, against any one or more, or all of the parties bound by non-negotiable instruments. *Heuse v. Hamblin*, 29 Id., 501, 506; *Tucker v. Shiner*, 24 Id., 334.

A defendant may plead as a set-off or counter-claim against a plaintiff a claim arising on con-

tract which would constitute, in the defendant's favor, a cause of action against the plaintiff *and others jointly bound with him*. *Redman & Fear v. Malvern & Cloud*, 23 Id., 296.

So, in an action to foreclose a mortgage, the defendant may plead, as a counter-claim, an account against a partnership of which the plaintiff is a member. *Allen v. Maddox*, 40 Id., 124.

Where an action was commenced against two as partners, but was prosecuted as against one of them only, there was no error in rendering judgment upon a verdict against this one only. *Poole, Gillman & Co. v. Hintrager*, 60 Id., 180.

Where a claim arises out of a joint contract, and one of the joint contractors is dead, an action may be brought against the survivor, and there may be joined with him as defendants the representatives of the deceased. *Moore v. McKinley*, Id., 367.

When a claim arises out of a joint contract, and one of the joint contractors is dead, an action may be brought against the survivor, and there may be joined with him as defendants the representatives of the deceased. Code, § 2550. And the filing of the petition in such case in the circuit court of the county where the administration of the estate of the deceased is pending, within the time prescribed by law, is a sufficient filing of the claim against the estate. Following *McCrary v. Denning*, 38 Id., 527. *Id.*

An indorser in full, of a promissory note payable to bearer, may be joined with the maker in an action thereon. *Stout & Co. v. Noteman*, 30 Id., 414.

The maker and guarantor of a negotiable note may be joined as defendants in an action thereon. *Marvin v. Adamson*, 11 Id., 371; *Meix v. Fairchild*, 12 Id., 351.

This section does not apply to defendants in actions for damages for selling intoxicating liquors to the injury of wife or children. *LaFrance v. Krayser et al.*, 42 Id., 143.

The statute has altered the common law rule which required all *joint debtors* to be sued in the same action, but has made no alteration of the rule in relation to *torts*, where all the tortfeasors might be sued jointly or each separately, although there could be but one satisfaction. *Turner v. Hitchcock*, 20 Id., 310.

A judgment by confession against the principal maker of a promissory note is no bar to subsequent actions against the surety on the same note. *Citizens' Savings Bank v. Oleson*, 47 Id., 492.

Under this section and sections 2655 and 3097 an execution issued upon a judgment in favor of a sole plaintiff may be set off against an execution issued upon a judgment in which the plaintiff is a joint defendant. *Ballenger v. Tarbell et al.*, 16 Id., 491.

In an action to recover for a tort, in which two are joined as defendants, and it is alleged that the tort was committed by them jointly, the jury may find that it was committed by one of the defendants alone, and judgment may properly be rendered against him therefor. *Boswell & Tobbin v. Gates et al.*, 56 Id., 143. See, also, *Carothers v. Van Hogan*, 2 G. Greene, 481.

This section abolishes the common law distinction between joint and several liabilities, and any one of several parties to a joint obligation may be sued. The holder of such obligation may, therefore, proceed to collect the same from one without first pursuing his remedy against the other. *Strong v. Laurence*, 58 Id., 55.

SEC. 2551. [Other parties brought in.]—The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. But when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, the court must order them to be brought in.

The execution defendant is not a necessary party to a proceeding to set aside a sheriff's sale on the ground that the real estate sold was the property of a third person. *Baldwin v. Thompson*, 15 Iowa, 504.

When the amount due on a promissory note is claimed by a judgment plaintiff under a garnishment, and by an indorsee under a transfer before such garnishment, the court should proceed to have all the parties interested brought before the court. *Fowler v. Doyle et al.*, 16 Id., 534.

In an action by an assignee of a cause of action, a motion to bring in the assignor as a party plaintiff, on the ground that he is the real party in interest, and that the assignment was but a pretense, was properly overruled, where it appeared that the controversy could be determined between the original parties without prejudice to the assignor. The statute does not contemplate the bringing in of a party for the convenience of one who is already a party. *Vimont v. The C. & N. W. Ry Co.*, 64 Id., 514.

When the question of the right to levy taxes involves the validity of a title adverse to that of the plaintiff in the lands, the court will dismiss an application for an injunction if the adverse claimant be not brought in as a party. *Litchfield v. Polk County*, 18 Id., 70.

On an action to quiet title and to correct a description of the premises running through the deeds of several prior grantors, such grantors, or, if dead, their heirs, should be made parties to the action. *Flanders v. McClanahan*, 24 Id., 486.

SEC. 2552. [Bond payable to state, county or municipal corporation.]
—When a bond or other instrument given to the state or county, or other munic-

ipal corporation, or to any officer or person, is intended for the security of the public generally, or of particular individuals, suit may be brought thereon in the name of any person intended to be thus sued who has sustained an injury in consequence of a breach thereof.

A guardian's bond, made payable to the county instead of to the parties interested, is not thereby vitiated, but inures to the benefit of the latter, and suit may be brought thereon in the name of any one thus secured who has suffered injury by a breach thereof. *Pursley v. Hayes*, 22 Iowa, 11.

A defective delivery bond, conditioned to indemnify the sheriff against all damages and to deliver attached property to him when ordered, or an equivalent in money, although defective as a statutory bond, is valid as a common law obligation. *Garretson v. Reeder et al.*, 23 Id., 21; *Shepperd & Morgan v. Collins*, 12 Id., 570.

This section does not change the general rule requiring that the trustee named in a deed of trust shall be made a party to an action to foreclose the same. *Rowley v. Jewett*, 56 Id., 593.

An attachment plaintiff or his assignee may maintain an action on a delivery bond. *Id.*

Where, after the levy of a writ of attachment upon property sufficient to satisfy the plaintiff's demand, the defendant made to the sheriff a bond conditioned "that he should produce said goods in satisfaction of the judgment in said action, or pay such judgment as shall be rendered against him," it was held that the bond was valid, and that an action could be maintained for a breach thereof by the plaintiff in the attachment suit. *Shepperd et al. v. Collins*, 12 Id., 570.

A bond for the return or delivery of property is not invalid because it fails to recite the time, terms and conditions upon which the return or delivery is to be made; and where such bond is given primarily for the security of one person, and containing a clause intended for the security of another person not named, suit may be brought thereon by the latter, if he sustains injury by the breach of the bond. *Huntington v. Fisher*, 27 Id., 276. To the same effect are the following cases: *Moorman v. Collier*, 32 Id., 138; *Morgan v. Long*, 29 Id., 434; *Strunk v. Ocheltree*, 11 Id., 158; *State v. Fredericks*, 8 Id., 553; *Latham v. Brown*, 16 Id., 118; *Bininger v. Dickenson*, 20 Id., 260.

Where in a contract for the erection of a public school house, the contractor was bound to deliver the building to the district "free from liens or claims of every kind," and in a bond given for the performance of the contract it was stipulated that the contractor should "pay all claims for materials, labor, etc., used in the construction of said building and produce proper receipts therefor," persons furnishing materials for the building may, in default of payment therefor, have an action on the bond against the contractor and sureties, the bond being regarded under the statute as intended for their security, and it is not necessary in such case for them to prove that they relied upon this security. *Baker & Co. v. Bryant et al.*, 64 Id., 561; *Jordan v. Kavanaugh*, 23 Id., 152.

Although an administrator's bond given in 1868 ran to the county judge and his successors in office, it was, under this section, held that after the removal of the administrator who gave the bond his successor might sue thereon for assets of the estate remaining in his hands. *Stewart v. Phenice et al.*, 65 Id., 475.

A person for whose security an injunction bond must have been intended, may maintain an action thereon, though it be not expressly payable to him. *Van Gorder v. Lundy et al.*, 66 Id., 448.

SEC. 2553. [Partnership.]—Suits may be brought by or against a partnership as such, or against all or either of the individual members thereof, and a judgment against the firm, as such, may be enforced against the partnership property or that of such members as have appeared or been served with notice. But a new action may be brought against the other members on the original cause of action.

Under the revision the method of making the individual property of members of a partnership liable for the satisfaction of a judgment against the firm was by *scire facias*. *Davis & Co. v. Buchanan & Bone*, 12 Iowa, 575; revision, § 2785; *Lewis & Bro. v. Conrad, Young & Co.*, 11 Id., 153; *Hamsmith v. Espy et al.*, 13 Id., 439; *Levally et al. v. Ellis et al.*, Id., 544; *Ticonic Bank v. Harvey*, 16 Id., 141, 145.

An action may be brought against a partnership either in the firm name or in the individual names of the partners. *Markham v. Buckingham*, 21 Id., 494. And they may sue in the same manner. *Id.*

When a partnership is sued by the individual names of the partners the property of either partner may be taken under execution, without *scire facias*. *Id.*; *Hamsmith v. Espy*, 13 Id., 439; *Jones v. Jones*, Id., 276; *Levally v. Ellis*, Id., 544.

An action on a claim due to a partnership may be maintained in the firm name, although one of the partners may be entitled to the proceeds if the claim itself has not been applied to extinguish the debt due such partner. *White & Smith v. Savery*, 50 Id., 515.

An action may be brought against one partner alone, upon a partnership note executed in the firm name. *Byerson v. Hendrie*, 22 Id., 480.

Where an action is brought against one person as a member of a partnership, the court may properly allow another partner to enter an appearance as a party defendant. *Green v. Green*, 52 Id., 403.

A judgment rendered against a partnership in the firm name is not a lien on the real property of the individual partners. *Stadler Bro. & Co. v. Allen et al.*, 44 Id., 193. See, also, *Lathrop v. Brown*, 23 Id., 40; *Hamsmith v. Espy*, 13 Id., 439; *Davis & Co. v. Buchanan et al.*, 12 Id., 575.

A partnership may be sued before a justice of the peace of the county where the partnership had its place of business, one member of the firm residing therein, and service of notice upon the resident member will give the justice jurisdiction of the partnership, and he may render judgment against it, as such, which may be enforced against the partnership property, and that of such partners as have been served with notice or have appeared in the action; but where the action is brought against the partners as individuals, the justice has no jurisdiction to render judgment against a partner who resided and was served with notice in another county, except where the action is on a written contract for the payment of money in the township where the action is brought. *Ebersole & Son v. Ware*, 59 Id., 663.

SEC. 2554. [Foreign corporations.]—Foreign corporations may bring suits in the courts of this state in their corporate name.

SEC. 2555. [Unmarried woman.]—An unmarried female may prosecute as plaintiff an action for her own seduction, and recover such damages as may be found in her favor.

It was held under the code of 1851 that the right of the father to recover for the seduction of his *minor* daughter was not taken away by the statute, but that he might recover, although she be not living with him, and there be no actual loss of service. *Updegraff v. Bennett*, 8 Iowa, 72.

In that case it was also held that it need not be alleged in the petition that she was the "unmarried daughter" of the plaintiff, nor that she was of "previously chaste character." *Id.*

Where an action of seduction is brought by the female seduced and she dies pending the action, it may be prosecuted to judgment by her administrator. The action does not abate as at common law. *Shafer v. Grimes*, 23 Id., 550.

Where the petition, after alleging the facts of the seduction, averred "that plaintiff had been damaged by the defendant in the sum of \$5,000, for which she asks judgment," it was held, after verdict, that the damages were sufficiently alleged to be the result of the seduction to sustain the verdict. *Gray v. Bean*, 27 Id., 221.

In a trial for seduction, inquiry into the character of the prosecuting witness for chastity must be strictly limited to the time prior to the alleged seduction. *The State v. Deitrick*, 51 Id., 467.

This section, by giving an unmarried female the right to prosecute, as plaintiff, an action for her own seduction, does not take away or negative the father's right of action for the seduction of his minor daughter. *Stevenson v. Belknap*, 6 Id., 97; *Updegraff v. Bennett*, 8 Id., 72.

Such right of action accrues to the father at the time of the seduction of his minor daughter, and he may maintain his action even after she has attained majority. *Id.*

In an action by the father, the petition need not allege that she was the "unmarried daughter" of the plaintiff, nor that she was of "previously chaste character." *Updegraff v. Bennett*, 8 Id., 72.

Where an action is brought under this section by the father for the seduction of his daughter, where he alleges that his daughter is of full age, or fails to allege that she is a minor, the petition is bad on demurrer. *Dod v. Focht*, 34 N. W. R., 425.

SEC. 2556. [When parents of may sue.]—A father, or in case of his death or imprisonment or desertion of his family, the mother, may prosecute as plaintiff an action for the expenses and actual loss of service resulting from the injury or death of a minor child.

In an action by the administrator for damages caused the estate of a minor by wrongful acts resulting in his death, the recovery is limited to his probable earnings after he shall have attained his majority; for his personal service and earnings during minority, the father, or in case of abandonment by him, the mother, is entitled to maintain the action. *Lawrence v. Birney et al.*, 40 Iowa, 377; *Walters v. The C., R. I. & P. R. Co.*, Id., 458.

A parent cannot, under this section, maintain an action for the seduction of his minor daughter, where he has sustained no loss of service resulting therefrom. And where there was no loss of service or expenses incurred prior to her confinement, but she having prior thereto been married to another man, held, that he was not entitled to recover for loss of services or expenses incurred after such marriage. *Hanible v. Shoemaker*, 70 Id., 223.

An action by a parent for the seduction of a child can be maintained only when the child is a

minor; and a petition in such case which does not allege the minority of the child is bad on demurrer. *Dodd v. Focht*, 72 Id., 579.

SEC. 2557. [**Name unknown.**—When the precise name of any defendant cannot be ascertained, he may be described as accurately as practicable, and when the name is ascertained it shall be substituted in the proceedings.

In the absence of a statute expressly authorizing an order for the substitution of the true name of a defendant when ascertained, it is entirely competent for the court to so direct, under the numerous liberal statutory provisions relating to amendments of pleadings. *Arbuckle v. Bowman*, 6 Iowa, 70

SEC. 2558. [**Written instrument: how sent or brought.**—When an action is founded on a written instrument, suit may be brought by or against any of the parties thereto, by the same name and description as those by which they are designated in such instrument.

Where a promissory note was made payable to the "S. B. Peminaw and Owners," it was held that a suit could not be maintained in the name of the "Steamboat Peminaw." This section was not intended to authorize a suit to be brought in the name of a steamboat, hotel, toll-gate or race horse. The word "name" in the statute refers to persons or corporations. *Steamboat, etc., v. Wilson*, 11 Iowa, 479.

In action by a corporation upon a promissory note, payable to it by its corporate name, it is not necessary to allege the corporate capacity of the plaintiff. *The Harris Mfg. Co. v. Marsh*, 29 Id., 11.

When a petition is based upon a contract in writing, and shows that a copy cannot be set out, but it appears by the contract admitted in evidence that the defendants are sued by the name in which they signed the contract, a motion in arrest of judgment should not be sustained on the ground that the petition neither alleged that defendants are a corporation or partnership, nor that the action is founded upon a written instrument wherein defendant's name and description are designated. *Wendall v. Osborne & Co.*, 63 Id., 99.

SEC. 2559. [**Prisoners in penitentiary.**—No judgment can be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or if there is none, by a person appointed by the court to defend him.

SEC. 2560. [**State: actions by.**—The state shall commence and prosecute suits according to the laws of the land as in cases between individuals, except that no security shall in such cases be required.

SEC. 2561. [**Transfer: abatement.**—No action shall abate by the transfer of any interest therein during its pendency.

A conveyance by the plaintiff, during the pendency of an action for the recovery of land, of the title to the property, will not abate the action; and the prosecution thereof may be continued in his name notwithstanding such conveyance. *Jordan v. Pmg*, 32 Iowa, 64.

Where, pending an action, its cause is assigned to a third person, the action may, at the discretion of the court, be continued in the name of the original party, or the assignee may be substituted. *Chickasaw County v. Pitcher*, 36 Id., 593.

The sale and transfer of a mill pending *ad quod damnum* proceedings to assess the damages caused to the property of adjacent land owners by reason of heightening the mill-dam, was held not to abate the proceedings, and that the purchaser might be substituted for the original owner. *Foney et al. v. Ralls et al.*, 30 Id., 559.

MARRIED WOMEN.

SEC. 2562. [**May sue without joining husband.**—A married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action shall be enforced by or against her as if she were a single woman.

Under the revision a married woman could maintain an action relating to her separate property without the joinder of her husband with her. *Kramer v. Couger*, 16 Iowa, 434.

In an action for the slander of the wife, the husband was a necessary party, jointly with the wife, under the revision. *Enders v. Beck*, 13 Id., 86.

Where a wife had abandoned her husband for cause, or had been driven from his home without cause, it was held that she could maintain an action of replevin against him in her own name, to recover possession of her separate property. *Jones v. Jones*, 19 Id., 236.

Section 2771 of the revision changed the common law rule, that, in an action wherein the husband and wife were joined, for an injury to the wife, the recovery was limited to damages for

that injury alone, and did not embrace the injury to the husband, so that under that section the husband, in such an action, could properly join thereto a claim in his own right, and recover for the loss of the services of his wife, caused by the injury. *McDonald v. The C. & N. W. R'y Co.*, 26 Id., 124.

The provisions of the statute as contained in sections 2202-2213, 2562, have effected a complete emancipation of married women from the disabilities of coverture to which they were subjected by the common law, so that now the husband has no common or joint interest in a right of action accruing to the wife on account of a tort inflicted against her, and he cannot, therefore, be joined with her in an action upon such tort. *Musselman v. Galliger et ux.*, 32 Id., 383. To the same effect is *Pancoast v. Burnell*, Id., 394; *Tuttle v. The C., R. I. & P. R'y Co.*, 42 Id., 518.

In an action against a husband and wife jointly, they cannot plead a counter-claim for a previous malicious prosecution of the wife. *Id.*

Nor can the husband, in such action, set up as a counter-claim, a claim for damages accruing to him personally for a malicious prosecution of his minor children or himself by the plaintiff. *Id.*

While the wife alone can recover for a direct injury to herself, yet the husband has a right of action for the consequential injuries to himself resulting therefrom. *Mewhirter v. Hatten*, 42 Id., 288.

SEC. 2563. [Defense by.]—If husband and wife are sued together, the wife may defend for her own right; and if either neglect to defend, the other may defend for such one also.

It was held under the revision that a married woman was liable on her covenants in a deed made by her for her own real property, the same being a contract in relation to her separate property. *Richmond v. Tibbles et al.*, 26 Iowa, 474. See revision, § 2506.

SEC. 2564. [When husband or wife deserts family.]—When a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had; and under like circumstances the same right shall apply to the husband upon the desertion of the wife.

MINORS.

SEC. 2565. [Action, how brought.]—The action of a minor must be brought by his guardian or next friend; but the court has power to dismiss it if it is not for the benefit of the minor, or to substitute the guardian of the minor or other person as next friend.

It is entirely competent for the court to discharge the "next friend" of a minor, in whose name an action has been commenced, on his motion, and to substitute another to prosecute the action. *Thurston v. Carenor*, 8 Id., 155.

An action for damages caused to the estate of an infant by wrongful acts and resulting in his death, must be brought by his administrator; for his personal earnings and services during minority which have been lost by his death, the father, or where abandonment is shown, the mother, may maintain the action. *Lawrence v. Birney et al.*, 40 Id., 377.

Under this section the court is authorized to dismiss an action brought for an infant by his next friend, upon finding that the action is not being prosecuted for the benefit of the infant; and where the record does not contain the evidence upon which the court below acted, the supreme court will presume that there was sufficient evidence to warrant the finding and action of the court. *Ball, by Next Friend, v. Miller*, 59 Id., 634.

An infant may bring an action by his next friend, and in such action it is proper to prove infancy. *Byers v. The Lessees of the D. V. R. Co.*, 21 Id., 54.

The court has no power to appoint a guardian *ad litem* for an infant defendant unless there has first been a complete service of notice upon such infant, and an appearance and answer by a guardian *ad litem* appointed without such service of notice having been made, will not confer jurisdiction of the person, and the proceedings as to him will be void. *Good v. Norley et al.*, 28 Id., 188.

In the absence of a statute to the contrary, the next friend in an action by an infant plaintiff is liable for costs. *Vance v. Fall*, 48 Id., 364.

SEC. 2566. [Defense by.]—The defense of a minor must be by his regular guardian, or by a guardian appointed to defend him where no regular guardian appears, or where the court directs a defense, by a guardian appointed for that purpose. No judgment can be rendered against a minor until after a defense by a guardian.

Where in an action against the minors, the mother was permitted by the court to come in and defend for them, it was *held*, that the decree should not be reversed because there was no formal entry of the appointment of a guardian *ad litem*. *Triber v. Shafer*, 18 Iowa, 29.

In an action in behalf of minors by their mothers as "next friend and guardian," it was held unnecessary to serve upon the minors an original notice of the filing of an answer in the nature of a cross-bill. *Id.*

The district court has jurisdiction of actions against minors as well as adult defendants, but where a minor is sued, his defense must be made by his regularly appointed guardian, if he has one, and if not, by the guardian appointed by the court. *Judd v. Mosely*, 30 Id., 423.

A minor may be sued in his own name, but he cannot appear by attorney, but only by guardian duly admitted or appointed by the court. *Cavender v. Heirs of Smith*, 5 Id., 157.

An infant is supposed to be incapable of guarding his own interests, and it is the duty of the court, before it divests him of his estate, to be satisfied that he has had a full opportunity to have "his day in court," by a proper and suitable guardian, and to see, notwithstanding any admissions of facts, even by his guardian, that his rights are not sacrificed. *Id.*

When the court has jurisdiction of the person of the minor and of the subject matter of the action, the failure to appoint a guardian *ad litem* is a mere irregularity, and the judgment is valid until set aside by direct proceedings. An injunction will not be granted to restrain the enforcement of the judgment. *Drake v. Hanshaw et al.*, 47 Id., 291.

The failure to appoint a guardian *ad litem*, in an action against a minor, until after the trial has commenced, will not vitiate the verdict where no prejudice is shown to have resulted from such failure. *Wickersham v. Timmons*, 49 Id., 267.

Notice to a ward of an application to the circuit court for an order directing the guardian to aay for the support of the ward is unnecessary, the proceeding not being adversary in its nature, and the guardian being subject to the direction of the court like its own officers. *Brewer et al v. Stoddard*, 49 Id., 279.

The guardian *ad litem* of a minor is not limited, under this section, to a mere *defense* of an action against the minor, but may interpose any matter which will defeat the action, even to the extent of matter pleaded as a cross-petition. *Kelsey v. Kelsey*, 57 Id., 383, 385.

The appointment of a guardian *ad litem* in an action against a minor is not jurisdictional, and a failure to appoint one is only an irregularity or error which does not render void a judgment subsequently rendered in the action. *Hoover v. Kinsey Plow Co. et al.*, 55 Id., 668.

SEC. 2567. [**Guardian: appointment of.**]

—The appointment cannot be made until after service of the notice in the action as directed in this code, and may then be made by the court or judge thereof, or during vacation, by the clerk; but the court shall have the power to remove such guardian when the interests of the minor require such change. If made by the judge or clerk, it shall be done by indorsing the name of the person appointed, and the time thereof, on the petition in the action.

Before any judgment can be rendered against a minor he must be defended by guardian, and the court is authorized to appoint a guardian for this purpose only after due and legal service of the original notice on the infant, in the manner directed in the statute. *Judd v. Mosely*, 30 Iowa, 423.

The publication of notice as required by law is all that is necessary to confer jurisdiction of the parties, and personal service upon a minor under fourteen years of age is not necessary. *Farrell v. Leighton*, 49 Id., 174.

SEC. 2568. [**When over fourteen years of age.**]

—The appointment may be made on the application of the minor if he is of the age of fourteen years, and applies at or before the time he is required to appear and defend. If he does not so apply, or is under that age, the appointment may be made on the application of any friend of the minor or on that of the plaintiff in the action.

INSANE.

SEC. 2569. [**Plaintiff: action by.**]

—The action of a person judicially found to be of unsound mind must be brought by his guardian, and, if he have none, the court or judge thereof, or the clerk in vacation, may appoint one for the purposes of the action.

SEC. 2570. [**Defense: guardian of.**]

—The defense of an action against a person judicially found to be of unsound mind, or a person confined in any state lunatic asylum, who, by the certificate of the physician in charge, appears to be of

unsound mind, must be by his guardian or a guardian appointed by the court to defend for him. Such appointment may be made upon the application of any friend of the defendant, or on that of the plaintiff, but not until service has been made as directed in this code, and no judgment can be rendered against him until defense has been made as herein provided.

SEC. 2571. [**Pending suit.**]—Where a party is judicially found to be of unsound mind, or is confined in any state lunatic asylum, and, by the certificate of the physician in charge, appears to be of unsound mind during the pendency of an action, the fact being stated on the record, if he is plaintiff his guardian may be joined with him in the action as such; if he is defendant, the plaintiff may, on ten days' notice thereof to his guardian, have an order making the guardian a defendant also.

SEC. 2572. [**Interpleader: substitution of parties: deposit of property.**]—Upon affidavit of a defendant before answer, in any action upon contract for the recovery of personal property, that some third party without collusion with him has, or makes a claim to the subject of the action, or on proof thereof as the court may direct, the court may make an order for the safe keeping, or for the payment or deposit in court or delivery of the subject of the action to such person as it may direct, and an order requiring such third person to appear in a reasonable time and maintain or relinquish his claims against the defendant, and in the meantime stay the proceedings. If such third party, being served with a copy of the order, fails to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If such third person appears, he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action upon his compliance with the order of the court for payment, deposit, or delivery thereof.

SEC. 2573. [**Application of rule to sheriffs and officers.**]—The provisions of the last section shall be applicable to an action brought against a sheriff or other officer, for the recovery of personal property taken by him under an attachment or execution, or for the value of such property so taken and sold by him. And the defendant in any such action shall be entitled to the benefit of these provisions against the party in whose favor the attachment or execution issued, upon exhibiting to the court the process under which he acted, with his affidavit that the property for the recovery of which, or its proceeds, the action was brought, was taken under such process.

Sections 2572, 2573 and 2574 were held unconstitutional because they deprive the plaintiff of rights which are in the nature of property without "due process of law." *Lunbegg v. Babcock, Sheriff, etc.*, 61 Iowa, 42. See and compare *Foule v. Mann*, 35 Id., 42; *Craig v. Fowler*, 59 Id., 200.

SEC. 2574. [**Same.**]—In an action against a sheriff or other officer, for the recovery of property taken under an attachment or execution, the court may, upon application of the defendant and of the party in whose favor the process issued, permit the latter to be substituted as defendant, sureties for the costs being given.

In an action against a sheriff to recover property taken by him under process, a joint application by the sheriff and the person in whose favor the process issued to have the latter substituted as defendant, may be made at any time, although an answer has been previously filed by the sheriff. *Bixby v. Blair & Co. et al.*, 56 Iowa, 416.

This section has reference only to actions for the recovery of specific personal property seized by an officer, and does not allow the substitution of the attachment plaintiff for the sheriff in an action against the latter for trespass committed in serving the writ. *Sperry, Watt & Garver v. Etheridge*, 70 Id., 28.

SEC. 2575. [**In case of landlord's attachment.**]—An action to recover the possession of specific personal property taken under a landlord's attachment, when it is brought by the tenant or his assignee or under-tenant, may be against the party who sued out the attachment; and the property claimed by such action may,

under the writ therefor, be taken from the officer who seized it when he has no other claim to hold it than that derived from the writ. The indorsement of a levy on the property made upon the process by the officer holding it, shall be sufficient taking of the property to sustain action against the party who sued out the writ.

Sections 2572, 2573, 2574 and 2575 provide merely cumulative remedies, of which the officer may avail himself at his own election. *Kaster & Farwell v. Pease*, 42 Iowa, 488.

CHAPTER 4.

OF PLACE OF BRINGING SUIT.

SECTION 2576. [In relation to real property.]—Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated:

1. For the recovery of real property, or of an estate therein, or for the determination of such right or interest;
2. For the partition of real property;
3. For injuries to real property.

SEC. 2577. Actions for **injuries to real property** may be brought either in the county where the property is, or where the defendant resides.

SEC. 2578. (*As amended by ch. 126, 20th g. a.*) [**Mortgage: mechanic's lien.**]—An action for the foreclosure of a mortgage of real property, or for the sale of real property under an incumbrance or charge, or to enforce a mechanic's lien on real property [shall] be brought in the county in which the property to be affected, or some part thereof, is situated.

An equitable action against husband and wife jointly to recover judgment for articles properly included within the terms "expenses of the family," and to make the same chargeable upon the real estate of the wife, is a proceeding for the sale of real property under a charge, and under the statute may be brought in the county in which the property is situated. *Hawke & Bro. v. Urban et ux.*, 18 Iowa, 83.

In an action on a promissory note secured by mortgage, if the object of the action is for a judgment for the amount due, to be enforced by general execution, suit should be brought in the county where the mortgagor resides. But if the object of the action is to foreclose the defendant's equity of redemption in the mortgaged property, suit should be brought in the county in which the property is situated. *Cole v. Conner*, 10 Id., 299.

This section is permissive only; an action to recover on a note, and to foreclose a mortgage securing it, may be brought in the county where the note is, by its terms, made payable, though not that in which the mortgaged property is situated, and this although the mortgage was executed while the revision was in force, which required the action of foreclosure to be brought in the county where the land was situated, the change in the statute being one not affecting the substantial rights of the parties. *The Equitable Life Insurance Co. of Iowa v. Gleason et al.*, 56 Id., 47.

An action to foreclose a mortgage on real property must be brought in the county in which the mortgaged property, or some part thereof, is situated. *Chadbourne et al. v. Gillman et ux.*, 29 Id., 181.

Where a defendant in a criminal prosecution takes a change of venue to another county and gives bail for his appearance at the district court of the latter county, which is forfeited for want of appearance, the forfeiture belongs to the county where, by the terms of the bond, the defendant was bound to appear, rather than to the county where the indictment was found; and suit on the bond should be brought in the county thus entitled. *Decatur County v. Maxwell*, 26 Id., 398.

Where several deeds, conveying land in several different counties, were executed as security for a debt evidenced by a promissory note, it was held that they all constituted but one mortgage, and that the action to foreclose was properly brought in the county where some of the land was situated. *Lomax v. Smith & Co.*, 50 Id., 223, 232.

An action by the obligor of a title bond against the obligee to compel specific performance, or an action to foreclose the bond as a mortgage, is local in its nature, and is properly brought in the county in which the land is situated. *Johns v. Orcutt*, 9 Id., 350.

SEC. 2579. [**Fines: forfeitures: against officers and on official bonds.**]—Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. An action for the recovery of a fine, penalty or forfeiture imposed by a statute, except that when the offense for which the claim is made was committed on a water course or highway which is the boundary of two counties, the action may be brought in either of them;

2. An action against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or against one who, by his command, or in his aid, shall do anything touching the duties of such officer, or for neglect of official duty;

3. An action on the official bond of a public officer.

See *Decatur County v. Maxwell*, 26 Iowa, 393.

SEC. 2580. [**Attachment of property.**]—An action, when aided by attachment, may be brought in any county of the state wherever any part of the property sought to be attached may be found, when the defendant whose property is thus pursued is a non-resident of this state. If such defendant is a resident of this state, such action must be brought in the county of his residence, or that in which the contract was to be performed, except that if an action be duly brought against such defendant in any other county by virtue of any provisions of this chapter, then such action may, if legal cause for an attachment exist, be aided by an attachment.

In legal contemplation, a railroad corporation resides in the counties through which its road passes, and in which it transacts its business, and may be sued in any county through which the road runs. *Richardson & Co. v. The B. & M. R. R. Co.*, 8 Iowa, 26.

Where property is attached the defendant not being served, or when the action relates to real property, the action may be brought in any county where any of the personal property may be found, or where the real property, or any part thereof, is situated. *Courtney v. Carr*, 6 Id., 238; *Hedrick v. Gillipsie*, 9 Id., 319; *Cole v. Connor*, 10 Id., 299; *Finnigan v. Manchester*, 12 Id., 521; *Chadbourne v. Gilman*, 29 Id., 181.

In actions for the recovery of money before a justice of the peace, the justice has no jurisdiction of residents of another county, even though the actions be aided by attachment. *Gates v. Wagner*, 46 Id., 355.

Where an action was commenced against a non-resident by attachment, no property of the defendant being attached in the county where the suit was commenced, but a levy was made upon property in another county to which, on motion of defendant, by special appearance therefor, the venue was changed; *held*, that the lien upon the property was valid from the date of the levy, and took precedence of an attachment in another action brought in the county to which the venue was changed, the attachment therein being issued and levied after the first, and before the cause was transferred. *Laird Bros. v. Dickerson et al.*, 49 Id., 665.

The attachment of property in a county in which the defendant does not reside does not give the court of such county jurisdiction to hear and determine the cause if he is a resident of the state and demands a change of venue. *Langworthy & Bro. v. Root*, 10 Id., 260.

SEC. 2581. [**Place of contract.**]—When, by its terms, a written contract is to be performed in any particular place, action for breach thereof may be brought in the county wherein such place is situated.

Where by the terms of a verbal contract for the purchase of a lot of hogs, they were to be delivered to the purchaser at a certain time and place named, it was *held*, that an action for a breach thereof was properly commenced in the county of the place where, by the terms of the contract, the property was to be delivered, though the defendant resided in another county. *Oliver v. Bass*, 30 Iowa, 90.

But a verbal contract stipulating that payment for goods sold, should be made at the place of sale, the purchaser residing in another county, will not sustain a personal action in the county where the goods were sold; holding this section applicable only to written contracts. *Hatch & Abbott v. Johnson*, 44 Id., 535. [This case seems to be in conflict with *Oliver v. Bass*, *supra*.]

Where an action to foreclose a mortgage was commenced in the county where the note was, by its terms, made payable, and pending a motion by defendant for a change of venue to the county where he resided and the mortgaged premises were situated, the plaintiff asked leave to amend his petition, withdrawing that portion seeking a foreclosure of the mortgage, and asking judg-

ment on the note alone, which the court refused to grant, and ordered the venue changed; *held*, that the ruling of the court was erroneous. *Allen v. Bidwell*, 35 Id., 218.

An action to recover damages, for a failure on the part of the vendee of personal property to receive it, may, under this section, be brought in the county of the place, where by the terms of the contract, the property was to be delivered. *Haugen & Co. v. McCartney*, 34 Id., 415. Following *Oliver v. Bass*, 30 Id., 90.

This section does not authorize an action to be brought against a defendant where by *implication*, merely, he was by the contract to make payment. The promise to pay or perform in the particular place must be *in terms*. *Hunt v. Brait*, 23 Id., 171; *Manley v. Wolf & Co.*, 24 Id., 141.

Where a banker's certificate was by its terms payable at a specified date, "on the return of this certificate," it was *held*, that it was payable at the place where the bank was located, and that an action might be brought in the county where the bank was located. *Sanborn v. Smith*, 44 Id., 152.

The district court of a county in which a contract, by its terms, is to be performed, acquires no jurisdiction of the person of the defendant, in an action thereon, by the attachment of property situated in another county. There must be personal service to warrant a judgment *in personam*, and property must be attached in the county in which the action is brought to authorize a judgment *in rem*. *Hendrick & Gillispie v. Brandon*, 9 Id., 319; *Courtney v. Carr*, 6 Id., 238.

Where a party signs a note as guarantor, merely for the purpose of enabling the holder to bring his action on the note, in a county different from that in which the maker resides, or in which the note is, by its terms, payable, and not for the purpose of additionally securing the debt, the venue should be changed to the proper county, if demanded. *The Troy Portable G. M. Co. v. Bowen & Co.*, 7 Id., 465.

This section authorizes an action to be brought against non-residents of the county only in cases where liability arises upon some written instrument signed by the defendant in the action. And where a note was made payable in one county, but the makers and another who had orally agreed to pay the note, were residents of another county, *held* that in action against all the parties for the amount of the note, the one who was only orally bound was entitled to have the cause transferred to the county of his residence. *McDaniels v. Wheeler et al.*, 64 Id., 678. See *The Iowa Loan and Trust Co. v. Day et al.*, *supra*, as to proper venue where a mortgage on land in one county is made to secure a note payable in another county.

Where a note made payable in one county is secured by a mortgage on land located in another county, the court of the county where the note is payable has no jurisdiction of an action to foreclose the mortgage, where the notice to the maker is by publication only. The action in such case is strictly *in rem*, and must be brought in the county where the land lies; but if such service is had upon the maker of the note, and the action is so brought as to enable the court of the county where the note is payable to render a personal judgment upon a note against the maker thereof, (See code, § 2581,) then that court may also render a decree foreclosing the mortgage, though the land lies in another county. *Equitable Life Ins. Co. v. Gleason*, 56 Id., 47. The rule was different under section 2795 of the revision. See *Chadbourne v. Gilman*, 29 Id., 181. *Iowa Loan and Trust Company v. Day*, 63 Id., 459.

SEC. 2582. [Common carriers.]—Actions may be brought against railway corporations, the owners of mail stages, or other line of coaches or cars, including express companies, car companies, telegraph and canal companies, and the lessees, companies, or persons operating the same, in any county through which the line or road thereof passes, or is operated.

A railroad corporation may be sued in any county through which the road passes, or in which the corporate powers of the company are exercised. *Baldwin v. The M. & M. R. Co.*, 5 Iowa, 518; *Richardson v. The B. & M. R. R. Co.*, 8 Id., 260; *The Niagara Ins. Co. v. Roderich*, 47 Id., 162.

A party, by accepting the benefits of a proposition for a sale made by and through another, constitutes the latter his agent, and the place where the sale is made is the agency, in such sense that an action may be maintained against the principal for a breach of warranty in the sale. *Milligan et al. v. Davis*, 29 Id., 126.

Telephone companies, for the purposes contemplated in this section of the code, are to be considered as telegraph companies, and under said section justices of the peace may entertain suits against such corporations, in any county through which their line is operated, where the amount is within the justice's jurisdiction. *Franklin v. The N. W. Tel. Co.*, 69 Id., 97; *Hunt v. Farmers Ins. Co.*, 67 Id., 742. See, also, *Wall v. The C. & N. W. R'y Co.*, 69 Id., 493.

SEC. 2583. [Construction of railways, telegraphs or canals.]—An action may be brought against any corporation, company or person engaged in the construction of a railway, telegraph line or canal, on any contract relating thereto, or to any part thereof, or for damages in any manner growing out of the

work thereon, in any county where such contract was made, or performed in whole or in part, or where the work was done out of which arose the damage claimed.

The provision of the statute in relation to bringing suits against corporations is permissive and not mandatory. *Baldwin v. The M. & M. R. Co.*, 5 Iowa, 518.

A corporation organized under the laws of another state than Iowa will be regarded by the courts, for all jurisdictional purposes, as a citizen of the state under whose laws it is organized. *Treadway et ux. v. The C. & N. W. R'y Co.*, 21 Id., 351.

Where a subcontractor is entitled to a mechanic's lien for work done in the construction of a railroad, and the contractors by their contract are personally liable to pay the claim of the subcontractor, such contract is one in relation to the construction of a railway under this section, and the contractors would be entitled to a change of venue to the county of their residence. *Vaughn v. Smith & Co.*, 58 Id., 553.

It is not necessary to allege in the petition the facts which show plaintiff's right to maintain his action in the county in which it was brought; and if the defendant appears and moves to have the cause removed to another county, alleged to be the county of his residence, the plaintiff may show such facts by affidavits filed in opposition to the motion. *Jordan v. Kavanaugh*, 63 Id., 152.

SEC. 2584. [Insurance companies.]—Insurance companies may be sued in any county in which is kept their principal place of business, in which was made the contract of insurance, or in which the loss insured against occurred.

The district court of the county, where a loss by fire occurred, has jurisdiction of an action to recover on an insurance policy, although the company resides in a different county. *The State Ins. Co. v. Granger*, 62 Iowa, 272.

This section of the code confers jurisdiction upon a justice of the peace of an action brought on a policy of insurance insuring property within his county, where the loss occurs, although the principal office or place of business of the insurance company is in another county. *Hunt v. The Farmers Ins. Co.*, 67 Id., 742.

SEC. 2585. [Office: agency: suits growing out of.]—When a corporation, company or individual, has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located.

In an action against a corporation service of notice may be made upon any agent, general or special, charged with the business of the corporation in the county where the action is brought, if it arises out of or is connected with the business of the agency in that county. *The Centennial Mutual Life Ass'n v. Walker et al.*, 50 Iowa, 75.

The plaintiff and defendant, who were residents of different counties, entered into a contract whereby the plaintiff became the agent of defendants for the transaction of certain business, in plaintiff's county. Plaintiff brought an action in his county to recover for a breach of said contract—the discharge of plaintiff without cause; *held* that under this section the action was properly brought in the county where the agency was located, and that a motion by defendants to remove it to the county of their residence was properly overruled. The statute applies to actions between principal and agent, and it makes no difference that the relation had ceased when the action was brought. *Ockerson v. Burnham & Co.*, 63 Id., 570.

A partnership is a legal entity, known to and recognized by the law, and for jurisdictional purposes it may be considered as having a residence in every county in which it does business, though neither partner resides in such county. Consequently a justice of the peace has jurisdiction to render judgment against a partnership doing business in his county, though all the partners reside elsewhere, where the action grows out of the business of an agency established within the county and notice is served upon the agent in charge as provided by this section of the code. *Fitzgerald et al. v. Grimmell et al.*, 64 Id., 261.

The provision of the statute in relation to bringing suits against corporations is permissive and not mandatory. *Baldwin v. The M. & M. R. Co.*, 5 Id., 518.

A corporation organized under the laws of another state than Iowa will be regarded by the courts, for all jurisdictional purposes, as a citizen of the state under whose laws it is organized. *Treadway et ux. v. The C. & N. W. R'y Co.*, 21 Id., 351.

SEC. 2586. [Place of residence.]—Except where otherwise provided herein, personal actions must be brought in a county wherein some of the defendants actually reside. But if none of them have any residence within this state, they may be sued in any county wherein either of them may be found. But in all actions upon negotiable paper, except when made payable at a particular place in which any maker of such paper, being a resident of the state, is made defendant, the

place of trial shall be limited to a county wherein some one of the makers of such paper resides.

The attachment of property in a county in which the defendant does not reside, does not confer jurisdiction on the court in such county to hear and determine the cause, if the defendant is a resident of some other county in the state and demands a change of venue. *Langworthy & Bro. v. Root*, 10 Iowa, 260.

The courts of this state can acquire no jurisdiction of the person of a non-resident of the state by service of an original notice beyond their respective geographical limits. *Weil et al. v. Lowenthal*, 10 Id., 575.

When a person while in the act of changing his residence from one county to another, is passing through an intermediate one, he is regarded under this section as having no residence within the state, and may be tried in such intermediate county. *Cohen v. Daniels*, 25 Id., 88.

So also a non-resident of the state may be sued in any county in this state where he or any of his co-defendants may be found and served with notice. *Swan et al. v. Smith*, 26 Id., 87.

The general rule established by this section is that personal actions must be brought in the county wherein some of the defendants actually reside. *Hatch & Abbott v. Johnson*, 44 Id., 535; *Savage v. Scott*, 45 Id., 130, 133.

When defendants, though non-residents, appear in a personal action and demur to the petition, the court thereby acquires jurisdiction of their persons. *Johnson & Co. v. Postevin & LeRoy*, 60 Id., 46.

The general rule under the statute is that personal actions must be brought in the county wherein some of the defendants actually reside; but if none of them have a residence in the state they may be sued in any county wherein either of them may be found. *Courtney v. Carr*, 6 Id., 238.

An indorser of a promissory note, payable to bearer, may be joined in an action against the maker, and the suit may be properly brought in the county in which the indorser resides, though the maker resides in a different county. *Stout & Co. v. Noteman et al.*, 30 Id., 414.

An action on a bond conditioned for the payment of a penalty if the principal shall fail to erect a school house according to the terms of a written contract, is a personal action which must be brought in the county wherein some of the defendants reside. *Superintendent of School District, etc., v. Reichard et al.*, 39 Id., 168.

A personal action may be brought in the county in which any one or more of the defendants reside; and the objection that the action is brought in the wrong county, for the reason that it is apparent on the face of the petition that the defendant residing therein is not legally liable on the contract upon which the suit is founded, cannot be raised on the motion for a change of venue. *Armstrong v. Borland et al.*, 35 Id., 537, citing *Troy Portable Mill Co. v. Brown*, 7 Id., 465; *Myer v. Woodbury et al.*, 14 Id., 57.

SEC. 2587. [Non-residents.]—Where an action embraced in the preceding section is against several defendants, some of whom are residents, and others non-residents, of the county, and the action is dismissed as to the residents, or judgment is rendered in their favor, or there is a failure to obtain judgment against such residents, such non-residents may, upon motion, have said cause dismissed with reasonable compensation for trouble and expense in attending at the wrong county, unless they, having appeared to the action, fail to object before judgment is rendered against them.

This section applies solely to purely personal actions, and does not apply to actions for the recovery of specific personal property. *Porter v. Dalhoff & Co. et al.*, 59 Iowa, 459.

Where one is sued upon a contract in a county of which he is not a resident, along with other defendants who are residents of that county, he cannot have the cause removed to the county of his residence under this section of the code on the ground that the plaintiff has failed to obtain judgment against the other defendants, so long as a right to judgment against such other defendants remains undetermined. *McAlister v. Safely*, 65 Id., 719.

SEC. 2588. [Change of residence after suit brought.]—If, after the commencement of an action in the county of the defendant's residence, he removes therefrom, the service of notice upon him in another county shall have the same effect as if it had been made in the county from which he removed.

SEC. 2589. [Effect, if brought in wrong county.]—If a suit be brought in a wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demand a change of place of trial to the proper county. In which case, the court shall order the same at the costs of the plaintiff, and may award the defendant a reasonable compensation for his trouble and expense in attending at

the wrong county. And if the sum so awarded, and costs, are not paid to the clerk at a time to be fixed by the court, or if the papers in such case are not filed by the plaintiff in the court to which the change is ordered ten days before the first day of the next term thereof, or if ten days do not intervene between the making of said order and the first day of the next term of said court, ten days preceding the first day of the next succeeding term thereof, in either event the action shall be deemed to be discontinued.

It is error to dismiss an action because it is commenced in the wrong county. The venue should be changed as prescribed in this section. *Cole v. Conner*, 10 Iowa, 299.

The district court of the county where the plaintiff resides, having jurisdiction of the cause for divorce and alimony, may rightfully declare and enforce a lien for alimony, granted in the action, against real estate of the defendant situated in another county. *Harshberger v. Harshberger et al.*, 26 Id., 503. See also, *Carnes v. Crandall*, 4 Id., 151; *Breckenridge v. Brown*, 9 Id., 396; *Cole v. Conner*, 10 Id., 299; *Finnagan v. Manchester*, 12 Id., 521.

That a personal action was brought in the wrong county does not affect the validity of the judgment rendered therein. Nor can fraud be predicted upon such fact. The failure of the defendant to move for a change of venue is a waiver of his right to such change. *Leach v. Kohn et al.*, 36 Id., 144.

To enjoin the enforcement of a judgment by execution the action must be brought in the county and court where the judgment was rendered upon which the execution is issued. *Anderson v. Hall et al.*, 43 Id., 346. See section 3396 and notes.

Where, upon a default being set aside, the defendants were ruled to answer in twenty days, but failed to do so and at the expiration of the time moved for a change of venue on the ground that they were residents of another county, held, that they were not then entitled to the change. *The First Nat. Bank of Muscatine v. Krance et al.*, 50 Id., 235.

This section is not applicable to proceedings before a justice of the peace. *Post v. Brownell & Co.*, Id., 497; *Meunch v. Breitenbach*, 41 Id., 527, 529.

An action on a bond, conditioned for the payment of a penalty, if the principal shall fail to erect a school house according to the terms of a written contract between the principal and the school district, is a personal action, which must be brought in the county wherein some of the defendants reside. *The Ind. School District, etc., v. Reichard et al.*, 39 Id., 168.

If, in such case, an action is brought in the county where the school house was to be erected, but in which none of the defendants resided, they will be entitled to a change of venue under this section. *Id.*

An action may be properly brought in the county where the indorser of a promissory note resides, though the maker resides in a different county. *Stout v. Noteman*, 30 Id., 414.

The party resisting a motion for a change of venue does not waive his objection to the ruling of the court granting the change by appearing in the court to which the cause is transferred and stipulating for a trial thereof at a time certain, or by moving for a new trial. *Ferguson v. Davis County*, 51 Id., 220.

Upon the transfer of an action brought in the wrong county to that of the defendant's residence the original papers are required to be filed in the court to which the transfer is made, and if they are not so filed ten days before the next ensuing term of such court the cause will be deemed discontinued. And such omission is not waived by the appearance of the defendant to move a dismissal of the action. *Hall v. Royce*, 56 Id., 359.

An action to recover specific personal property, brought in the county where the defendant resides, will not be defeated simply because the plaintiff fails to prove that the property is detained in that county, for even if the suit should have been brought in the county in which the property or part of it was situated, still the action may be prosecuted to judgment in the county of defendant's residence unless he makes application for its removal to the proper county. *Goldsmith v. Wilson*, 67 Id., 662.

The plaintiff brought an action, aided by attachment, against the defendant in the wrong county, but defendant appeared, and had the cause removed to the county of his residence under this section. Held, that the attachment, having been issued in the wrong county, was without authority of law; that this section did not validate it, or authorize its transfer with the case; that it could not be enforced by the court to which the cause was transferred, and that it should have been dissolved upon motion in that court. (*Laird v. Dickinson*, 40 Id., 665, distinguished.) *Wasson v. Millsap*, 70 Id., 348.

When an action which should have been brought in the county of the defendant's residence is brought in another county, but the court has no jurisdiction of the subject matter, the defendant does not waive the want of jurisdiction by failing to move for a change of venue to the proper county under section 2589 of the code. *Orcutt v. Hanson*, 71 Id., 514.

CHAPTER 5.

OF CHANGE IN PLACE OF TRIAL.

SEC. 2590. [**When granted.**]—A change of the place of trial in any civil action may be had in any of the following cases:

1. Where the county in which the action is pending is a party thereto, if the motion is made by the party adversely interested, and the issue be triable by jury;

2. Where the judge is a party, or is directly interested in the action, or is connected by blood or affinity with any person so interested nearer than the fourth degree;

3. (*As amended by ch. 94, 20th g. a.*) Where either party files an affidavit verified by himself and three disinterested persons, not related to the party making the motion nearer than the fourth degree, nor standing in the relation of servant, agent, or employe of such party, stating that the inhabitants of the county, or the judge, is so prejudiced against him, or that the adverse party or his attorney has such an undue influence over the inhabitants of the county that he cannot obtain a fair trial. [But when either party files an affidavit as provided by this subdivision the other party shall have a reasonable time to file counter affidavits, and the court or judge, in the exercise of a sound discretion, must decide whether a change shall be granted, when fully advised, according to the very right and merits of the matter.]

The court may in its discretion cause the affiants on either side to be brought into court for examination upon the matters contained in their said affidavits.]

4. By the written agreement of the parties and their attorneys.

5. If the issue is one triable by jury, and it is made apparent to the court or judge that a jury cannot be obtained in the county where the action is pending, then, upon the application of either party, a change of place of trial shall be granted to the nearest county in which a jury can be obtained.

(*As amended by ch. 118, 17th g. a.*) [**Number of changes limited.**]—[*Provided, however,* that not more than two changes to either party of the place of trial shall be allowed for any of the causes enumerated in this section; nor shall a change of venue from the county be allowed in case of appeal from a justice of the peace; nor shall a change of the place of trial be allowed when the issue can only be tried to the court, for any objection to the inhabitants of the county, or for the objection that the adverse party or his attorney has such an undue influence over the inhabitants thereof that he cannot obtain a fair trial; and

Provided, that after any change of venue has been taken as herein provided, and a trial had and the jury been discharged or a new trial has been granted them, a subsequent change of venue may be taken for any of the causes mentioned in said section.

A stipulation for a change of venue, under section 2590 of the code, may be signed either by the parties or their attorneys, the word "and" in the statute being used in a disjunctive sense. *Oltrogge v. Schutte et al.*, 51 Id., 279.

The discretion confided to the court in determining applications for change of venue in criminal cases does not exist in applications for change of venue in civil cases, and where the applicant for the change brings himself within the provisions of the statute, it is generally erroneous to refuse it. *Jones v. The C. & N. W. Ry Co.*, 36 Id., 68; *Welch v. Savery*, 4 Id., 241; *Eckles v. Hinney*, Id., 539; *Berner v. Frazier*, 8 Id., 77; *Miller v. Laraway*, 31 Id., 538; *Turner v. Hitchcock*, 20 Id., 310.

An affidavit for change of venue under their subdivision, by two or more, is not sufficient, unless it appears that neither of the deponents is related nearer than the fourth degree to either of the persons making the motion. *Fairburn v. Goldsmith*, 58 Id., 339.

The application under this provision must be verified by the party himself. *Hedge v. Gibson*, Id., 656.

An application for a change of venue based upon the prejudice of the inhabitants of the county, cannot be made under this section in vacation before the issues are made up. *Gibson v. Abbott*, 50 Id., 155.

The provisions of this section apply to proceedings on appeal from an award of damages for right of way by sheriff's jury. *Whitney v. The Atlantic Southern R'y Co.*, 53 Id., 651.

The statute does not authorize a change of venue after verdict and while a motion for a new trial is pending. *Perkins v. Jones & League*, 55 Id., 211.

A change of venue may be had on the ground of the prejudice of the judge, on a proper showing, although the term of the presiding judge expires before the next ensuing term of court, which is the first term at which the case can be tried. *Allerton v. Eldridge*, 56 Id., 709.

Where an application for a change of venue was made on account of prejudice of the judge, purporting to be supported by the affidavit of the requisite number of persons, whom the applicant refused to designate to an officer, that they might be subjected to cross-examination, it is competent for the court upon being satisfied that the application is made solely for delay, not in good faith, and without any ground therefor, to overrule the application. *Davis v. Rivers*, 49 Id., 435.

A proceeding upon charges preferred by a private prosecutor to disbar an attorney is a "special proceeding" wherein a change of venue on account of prejudice of the judge should be granted upon the same terms and upon compliance with the same rules as in ordinary civil actions. *The State v. Clarke*, 46 Id., 155.

It does not constitute ground for a change of venue, in an action for the recovery of a forfeiture, that the county in which the action is brought is the party-plaintiff in the action. *The State v. Merrihew*, 47 Id., 112.

Where a corporation defendant moves for a change of venue on account of the prejudice of the judge, the principal affidavit therefor, as required by this section, may be made by any officer or agent of the corporation having sufficient acquaintance with the facts to make it conscientiously, but an affidavit which does not show the official character of the deponent except by an unverified recitation thereof in the body of the affidavit, is not sufficient. *McGavern v. The Keokuk Lumber Co.*, 61 Id., 265.

Where in an application for a change of venue the affiants stated in reference to their relation to the applicant, "that they are not related to the plaintiff in this action nearer than the fourth degree; nor do they, nor any of them, stand in the relation of servant, agent, or employe of said plaintiff; nor are they in any manner interested in the result or issue in this action," held sufficient. *Goodnow v. Litchfield*, 63 Id., 275.

This section, as amended by chapter 94 of the laws of 1884, permitting affidavit to be filed in resistance of a motion of change of venue because of the prejudice of the judge, and investing the court with a discretion in the matter, applies to actions which were pending when the amending statute was enacted, as well as to those since begun. *Eikenberry & Co. v. Edwards*, 71 Id., 82.

SEC. 2591. [To whom and when made.]—The application for a change of place of trial may be made either to the court or to the judge in vacation, and, if made in term time, shall not be awarded until issue be made up unless objection be to the court; nor shall such application be allowed after a continuance, except for a cause not known to the affiant before such continuance; and after one change, no party is entitled to another for any cause in existence when the first change was obtained.

An application for a change of venue, based upon the alleged prejudice of the judge, made after the cause has been once continued, is insufficient where it fails to state that the grounds for the change were not known prior to such continuance. *Finch v. Billings*, 22 Iowa, 223, cited and followed in *McCracken v. Webb*, 36 Id., 551.

Where the defendant made a motion for a more specific statement of the cause of action, which was overruled, and he thereupon made an application for a change of venue on account of alleged prejudice of the judge, which was withdrawn from the files by the plaintiff's attorney, and the court, without knowledge of the application, rendered judgment by default; held, that the default should have been set aside without a showing of a meritorious defense, and the application for a change of venue should have been considered by the court. *Beasley v. Cooper et al.*, 42 Id., 542.

After a change of venue, the party applying for another must allege and show that the cause upon which he bases his application was not in existence when the first change was obtained. *Schaentgen v. Smith*, 48 Id., 359.

An application for a change of venue, upon the ground of prejudice of the people of the county, cannot be made in vacation before the issues are made up. *Gibson v. Abbott et al.*, 50 Id., 155.

Where, upon motion of defendants, a change of venue was granted from the circuit to the district court, held to be error for the district court to grant another change of venue on motion of the plaintiff, after several terms of court had intervened since the first change, in the absence of a

showing that the cause on which plaintiff based his application was not *in existence* when the first change was granted. It was not a compliance with this section for the plaintiff to allege that the cause on which the application was based "*came to his knowledge since the last continuance.*" The statute must be strictly complied with. *Michaels v. Crabtree et al.*, 59 Id., 615.

This section does not apply to a case where the first change of venue was by the agreement of parties. *Bixby v. Carskadden et al.*, 63 Id., 164.

The statute relating to changes of venue does not contemplate a change of forum as distinguished from a change of the place of trial; and when the change is made on account of the prejudice of the judge, and is sent to another court of the same county, it is as much a change of the place of trial, within the meaning of the statute, as when it is sent to another county on account of the prejudice of the inhabitants; and when a change of either kind has been taken, a second change cannot be had for any cause which was in existence when the first change was obtained. *Weare & Allison v. Williams*, 69 Id., 252. This section also forbids a change of venue from the county of a case on appeal from a justice of the peace. *Boileau v. The C., B. & Q. R'y Co.*, Id., 324.

SEC. 2592. [To what county or court.]—The place of trial shall be changed to some other county in the same district or circuit, unless the objections are to the judge, or the objections made appear from the affidavits to exist as to all the other counties in the district, and shall be to the most convenient county to which no objection is made. Whenever the change shall be granted on account of the prejudice or disability of the judge, the action shall be transferred to the district or circuit court of the same county, unless objections exist as to both the judges, in which case it shall be transferred to the most convenient county in some other district or circuit.

SEC. 2593. [How made during vacation.]—If an application for the change is made in vacation, five days' notice of the same, with a copy of the affidavit, shall be served on the adverse party or his attorney; and if the judge grant the change, he shall forthwith transmit his order to the clerk, together with all the papers used before him.

SEC. 2594. [When deemed perfected: consequences of failure.]—If the order for the change is granted in vacation, the same must be perfected by noon of the second day after the order is received by the clerk, and, if granted during term time, the same must be perfected by the morning of the second day thereafter or before the cause is reached for trial, if sooner reached, or such change, whether granted in term or vacation, will be deemed waived and the cause tried as though no such order has been granted. When the change has been perfected or agreed to by the parties, the clerk must forthwith transmit to the clerk of the proper court, strongly enveloped and sealed, a transcript of the record and proceedings, with all the original papers, having first made out and filed in his office authenticated copies of such original papers; but if less than all of several plaintiffs or defendants take such change, the original papers shall not be so transmitted, but a copy thereof. And as to those who take no change, the cause shall proceed as if none had been taken, except that if the place of trial is changed to a court in the same county, no transcript or copies shall be made out, but the original papers shall be transmitted.

The supreme court refused to interfere with an order of the court below overruling a motion to redocket a cause for a change of venue, on the ground that the transcript fees were not paid to the clerk within the time prescribed by the statute, when it did not appear affirmatively that such fees were not secured to the clerk. *Brown v. Jefferson County*, 16 Iowa, 339.

The provisions of the statute requiring the change to be perfected within the time specified therein, does not apply where a change is granted upon the agreement of the parties, and after such order the court making it has no further jurisdiction over the case. *Carroll County v. The American Emigrant Co.*, 37 Id., 371.

In a case where a change of venue was taken in term time it was held that the payment of the costs at any time during the day on which they were required to be paid was a sufficient compliance with the statute, provided such payment was made before the order for the change was vacated. *Bacon v. Black*, 38 Id., 162.

A garnishee occupies the relation of defendant to the principal action, and like the defendant therein may take a change of venue. When either of the parties has procured a transfer of the

cause, it will, nevertheless, proceed against the garnishee in the court where it was commenced, unless he applies for a change of venue. *Westphall, Hinds & Co., v. Clark*, 42 Id., 371.

Where a change of venue had been granted, and the costs were ordered to be paid by the applicant, upon whose failure to pay the same the order granting the change of venue was set aside and judgment by defendant rendered, it was *held*, that although the costs were subsequently retaxed, and their amount paid by the applicant, this did not entitle him to have the default set aside and a change of venue again granted. *Stryker v. Rivers*, 47 Id., 108.

SEC. 2595. [**Docketed.**].—Upon filing such transcript and papers in the office of the clerk of the court to which the same were certified, the cause shall be docketed without fee and proceeded in as though it had originated therein.

SEC. 2596. [**Costs of change.**].—Unless the change be granted under subdivisions two, four or five, of section two thousand, five hundred and ninety of this chapter, all costs caused thereby or that are rendered useless by reason thereof, shall be paid by the applicant, and the court, or judge, at the time of making the order, shall be designated in general terms such costs, and no change shall be deemed perfected until such costs are paid.

When the venue of an action is changed, the costs should be taxed as when a cause is continued. *Robbins et al. v. Neal et al.*, 10 Iowa, 560.

Where a change of venue had been granted, and the costs ordered to be paid by the applicant, upon whose failure to discharge the same the order granting the change was set aside and judgment rendered by default, it was *held* that although the costs were subsequently retaxed, and their amount paid by the applicant, he was not thereby entitled to have the default set aside and the change of venue again granted. *Stryker v. Rivers*, 47 Id., 108.

Where an order for change of venue was made upon condition of payment of all costs accrued up to date of order, including costs of a former term, it was held error. *Bannigan v. Central R'y Co.*, 58 Id., 671.

SEC. 2597. [**Jury to be paid by county from which change is taken.**].—

Where the place of trial in any civil action is changed to any county other than that in which the same was properly commenced, where the trial thereof takes place at a regular term, and occupies more than one calendar day, the judge trying said case shall certify the number of days so occupied, and the county in which the case was originally commenced shall be liable to the county where the same is tried for the sum of two dollars per day for each juryman engaged in the trial thereof.

SEC. 2598. [**In case special term is held.**].—Where a special term of any court is held for the trial of any action contemplated in the preceding section, the court trying the same shall make out and certify the amount of county expenses incurred in the trial of each case, and the same shall be a legal and valid claim against the county in which the same was properly commenced.

CHAPTER 6.

OF THE MANNER OF COMMENCING ACTIONS.

SECTION 2599. [**Original notice.**].—Actions in a court of record shall be commenced by serving the defendant with notice signed by the plaintiff or his attorney, informing the defendant of the name of the plaintiff, and that on or before a date therein named, a petition will be filed in the office of the clerk of the court wherein suit is brought, naming it, and stating in general terms the cause or causes of action, and if the action is for money, the amount thereof, and that unless he appears thereto and defends before noon of the second day of the term at which defendant is required to appear, naming it, or at such other time as may be by rule of such court prescribed, default will be entered against him and judgment rendered thereon. In all cases where the time for the commencement of the term

has been changed after the notice has been served, the defendant shall be held to appear at the time to which such term has been so changed.

An action in *personam* is commenced by delivering the original notice to the sheriff of the county with the intention that it be served immediately, or by the actual service thereof by another person. *Elliott v. A. J. Stevens & Co.*, 10 Iowa, 418.

The original notice must state both the amount of the plaintiff's demand, and the nature of his cause of action. *Moody v. Taylor*, 12 Id., 71.

The notice should designate by name the term at which the defendant is required to appear and answer; it is not sufficient to require the defendant to appear at "the next term" after service of the notice. *The Des Moines Branch of S. B. v. Van*, Id., 523; *Van Vark v. Van Dam*, 14 Id., 232; *Decatur County v. Clemens*, 18 Id., 536.

Where an original notice required the defendant to appear "on or before noon of the 29th day of September, 1864, being the second day of the next term of the district court," the 29th being in fact the fourth day of the term; it was held, that in the absence of a showing of prejudice there was no error in refusing to set aside a default granted on the day named. *Burr v. Wilcox*, 19 Id., 31.

An original notice which required the defendant to "appear and answer on or before noon" of a certain date, without naming the term, nor that such date was the second day thereof, was held sufficient under section 2812 of the revision, if the date thus named was in fact the second day of the term. *Knapp, Stout & Co. v. Haight*, 23 Id., 75. See also, *The F. Ins. Co. v. Highsmith*, 44 Id., 330.

The service of an original notice which does not state the place or time at which the defendant is required to appear and defend gives the court no jurisdiction of the defendant, and a judgment rendered upon such service is not binding on the parties, and may be attached collaterally. *Kitsmiller v. Kitchen*, 24 Id., 163.

A judgment for alimony in an action for a divorce, when prayed in the petition, is not void because the original notice contained no statement that alimony was claimed. The power to grant alimony is, at least under the statute, a mere incident to the power to grant a divorce between the parties. *McEuen v. McEuen*, 26 Id., 375.

If the notice be defective or the service imperfect merely, the jurisdiction is saved and the proceedings cannot be collaterally assailed, but it is otherwise where there has been no notice, or where the paper relied on as such is without the essential requirements of a notice. *Cooper v. Sunderland*, 3 Id., 114; *Boker v. Chapline*, 12 Id., 204; *Bonsall v. Isett*, 14 Id., 309; *Morrow v. Weed*, 4 Id., 77; *Ballinger v. Tarbell*, 16 Id., 498; *Shawhan v. Loffer*, 24 Id., 217; *Pursley v. Hayes*, 22 Id., 11; *Lyon v. Vannatta*, 35 Id., 521; *Haws v. Clark*, 37 Id., 355; *Woodbury v. Maguire*, 42 Id., 339.

An original notice, requiring the defendant to appear "on or before noon of the second day of the April term of the district court, to be begun on the 12th day of April, 1870," was held insufficient to require the defendant to appear when the term did not commence until the 18th of said month. *Boals et ux. v. Shules et al.*, 29 Id., 507.

Where an original notice stated that the plaintiff claimed the foreclosure of a mortgage, which was properly described, and other relief as prayed for in the petition, it was held, that it was sufficient to give the court jurisdiction over the person of the defendant and the subject matter in controversy, although it did not state how much was claimed. *York v. Boardman*, 40 Id., 57.

Where the original notice stated that the plaintiff claimed a certain sum of money and the foreclosure of a mortgage, but the petition failed to ask a foreclosure, it was held, that a judgment of foreclosure was not void, but voidable only, and might be set aside upon motion, but that the judgment for the money due on the note should not be disturbed. *O'Connell v. Cotter et al.*, 44 Id., 48.

Notwithstanding the provisions of this section the district court has power, under section 180, to make a rule requiring defendants to appear and plead before noon of the first day of the term, when so notified. *McGrew v. Downes*, 67 Id., 687.

An original notice required the defendants to appear at a term in July, which was, as then fixed by law, the next term, and in the mean time the law was changed, fixing the term in October. Held, that the defendants were bound to appear at the October term, without additional notice. *Peoria M. & Fire Ins. Co. v. Dickerson*, 28 Id., 274.

A notice of the commencement of an action served upon the defendant's wife, out of the state and duly published in a weekly newspaper requiring the defendant to appear at a time specified in the district court in Linn county, was held sufficient as to place, and conferred jurisdiction on the court to render a judgment *in rem* against property attached in the action. *Bond v. Epley*, 48 Id., 600.

An appearance by the defendant in an action operates as a waiver of any variances between the original notice and the petition; and after such appearance the statement of the petition and not

those of the notice govern as to the amount of the plaintiff's claim. *Holmes & Avery v. Budd et al.*, 11 Id., 186.

An appearance by a guardian *ad litem* whom the court has appointed, without service having been made upon a minor heir, in a proceeding to sell real estate, will not operate as a waiver of notice to the minor heir, and will not confer jurisdiction of his person, and the proceedings will be void. *Good v. Norley et al.*, 28 Id., 188.

A judgment will not be vacated on the ground that the attorney appearing for the defendant had no authority to do so, when there is doubt about that fact, and there are no allegations in the petition to vacate, showing a defense to the action in which the judgment was rendered. *Russell v. Pottawattamie County*, 29 Id., 256.

A judgment by default, rendered on an original notice which is merely defective, is not void for want of jurisdiction. The judgment in such case would be irregular, but the remedy would be by notice to correct in the court where it was rendered. *De Tar v. Boone County*, 34 Id., 488; *Pratt v. Western Stage Co.*, 27 Id., 363; *Newcomb v. Dewey*, Id., 381.

An action is commenced when the original notice is served upon the defendant, and not when it is placed in the hands of an officer for service. Section 2532 of the code, which provides that the delivery of the original notice to the sheriff, with intent that it be served immediately, is the commencement of the action, has reference to and was intended to determine the right of the parties under the statute of limitations. *Parkeyn v. Travis et al.*, 50 Id., 436.

An original notice which required the defendant to appear and "answer" on or before a certain day, was held sufficient to support a default entered for want of an appearance. *Lyman & Co. v. Bechtel & Ross et al.*, 55 Id., 437.

SEC. 2600. [Discontinuance.]—If the petition is not filed by the date thus fixed, and ten days before the term, the action will be deemed discontinued.

Unless the date is filed by the date fixed in the original notice, the action will be discontinued. *Hudson v. Blanford et al.*, 22 Iowa, 323; *Cibula v. Pitt's Son's Mfg. Co.*, 48 Id., 528.

And the appearance of the defendant for the purpose of presenting a motion to discontinue will not be a waiver of the defeat resulting from the failure to file the petition in time. *Id.*

It was held, under the code of 1851, that if the petition was not filed at the time named in the notice, it was sufficient if filed ten days before the commencement of the next term. *McCaffree v. Guesford*, 1 Id., 80; *Anderson v. Kerr*, 10 Id., 233; *Cheever v. Lane*, 3 Id., 296.

Insufficient service cannot have the effect of quashing the original notice and dismissing the action. *Cheever v. Lane*, 3 Id., 296.

The return of an officer showing service of process, by which the court assumed to obtain jurisdiction, may, in an action on the judgment, be contradicted by parol evidence. *Webster v. Hunter*, 50 Id., 215; *Lowe v. Lowe*, 40 Id., 220; *Pollard v. Baldwin*, 22 Id., 323; *Salladay v. Bainhill*, 29 Id., 555.

See *Clark et al. v. Stevens*, 55 Id., 361, noted under section 2537, *ante*.

The fact that the petition was filed in the circuit court, at the time stated in in the notice where the notice required the defendant to appear in the district court, and the petition was subsequently transferred to the district court, will not change the rule of the statute requiring the discontinuance of the action. *Morgan v. Small*, 33 Id., 118.

Where plaintiff filed his petition Thursday, Nov. 29, and the term began Monday, Dec. 10, held that the petition was filed ten days before the term, within the meaning of section 2600 of the code. *Conklin v. City of Marshalltown*, 66 Id., 122.

Where defendant objects to the petition, because not filed in time, as fixed by the notice, and his objection is overruled, the petition is still pending, and by answering, he waives the objection. *Paddleford v. Cook*, 38 N. W. R., 137.

SERVICE OF NOTICE.

SEC. 2601. [Who may serve.]—The notice may be served by any person not a party to the action.

The original notice in an action in the circuit court may be served by a constable, and he is entitled to receive, therefor, fifty cents and mileage, as fixed by section 3805 of the code, which may be taxed as part of the costs in the case. *DuBoise & Bro. v. Babcock et al.*, 42 Iowa, 233.

Service of notice of appeal upon the wife of the adverse party does not comply with the requirements of the statute and is not sufficient. *Draper v. Taylor*, 47 Id., 407.

The notice cannot be served by a party to the action. *Id.*

If a petition be on file at the time the original notice is in fact served, the action will not be deemed discontinued because the petition was not filed at the time specified in the notice. *Smith Bros. v. Shaw et al.*, 49 Id., 294.

SEC. 2602. [Defendant to appear, when.]—The defendant shall be held to appear at the next term after service, provided:

1. He be served within the county where suit is brought, in such time as to leave at least ten days between the day of service and the first day of the next term;

2. He be served without the county, but within the judicial district, so as to leave at least fifteen such days;

3. He be served elsewhere, so as to leave twenty such days for every one thousand miles, or fraction thereof, extending between the places of trial and service, which distance shall be judicially noticed by the court. If not so served, he shall be held to appear at the second term after service.

In the computation of time in the service of the original notice, both the day on which the service is made and the first day of the appearance term, are excluded. *Robinson v. Foster*, 12 Iowa, 186.

Service of the original notice beyond the limits of the state, upon a person who is neither a citizen nor resident of this state, confers no jurisdiction over either his person or his property; but when a court has, by attachment or otherwise, acquired jurisdiction *in rem* over the property of a non-resident, it may, by means of service by publication within, or actual service without, the state, perfect its jurisdiction or right to adjudicate upon and conclude the rights and interests of such persons in the property thus seized and held within the territorial jurisdiction of the court. *Darrence v. Preston*, 18 Id., 396; *Weil et al. v. Lowenthal*, 10 Id., 575; *Lutz et al. v. Kelley et al.*, 47 Id., 307.

SEC. 2603. The notice shall be served as follows:

1. By reading the notice to the defendant, or offering to read it in case he neglects or refuses to hear it read, and, in either case, by delivering him personally a copy of the notice, or if he refuses to receive it, offering to deliver it;

2. If not found within the county of his residence, by leaving a copy of the notice at his usual place of residence with some member of the family over fourteen years of age;

3. By taking an acknowledgment of the service indorsed on the notice, dated and signed by the defendant.

When the sheriff's return on an original notice shows that "the defendant was not found," it will be presumed that he could not be found in the sheriff's bailiwick. *Macklot & Corbin v. Hart*, 12 Iowa, 428.

A return on an original notice reads as follows: "Served the written notice by reading to, and leaving a copy of the same with the mother of the within named, she being a member of her family, and over fourteen years of age (at her residence), the within named defendant not being found." *Held*, insufficient in this: 1. It did not show the "usual place" of residence of defendant. 2. It did not give the name of the person with whom the copy was left. *Tavenor v. Reed*, 10 Id., 416.

Where the return reads as follows: "Served" (giving date) "by reading the same in the presence and hearing of the within named Louis and Clara Englest," *held*, that the service was defective in that it did not show that the notice was read to the defendants. *Hynek v. Englest*, 11 Id., 210. See also, *Farris v. Powell*, 10 Id., 558; *Hodges v. Hodges*, 6 Id., 78.

A waiver of service of notice by an indorsement on the back thereof, signed and dated as required by this section, is equivalent to an acknowledgment of service, and confers upon the court jurisdiction of the person of the defendant. *Johnson v. Monell*, 13 Id., 300.

The courts of this state cannot acquire jurisdiction of the person of the defendant in ordinary personal actions, so as to proceed to judgment against a non-resident by service of notice out of the state without more. *Bates v. The C. & N. W. R'y Co.*, 19 Id., 260; *Wiel v. Lowenthal*, 10 Id., 576; *Darrance v. Preston*, 18 Id., 396; *Hakes v. Shupe*, 27 Id., 465.

A purely technical defect in the return of service of the notice in a foreclosure case, upon the minor heirs of the mortgagor, which might have been held defective on appeal, cannot be made available in a collateral proceeding by such heirs to redeem the mortgaged premises, especially where several years have elapsed since the sale, and there are no supporting equities in the case. *Mooney v. Maas*, 22 Id., 380.

A return on an original notice that it was "personally served by reading in the hearing of the defendant and leaving a true copy with him," was *held*, good. *Grosvenor v. Henry*, 27 Id., 269. See, also, *Anderson v. Kerr*, 10 Id., 233.

The service of an original notice on the wife of one member of a partnership is not sufficient service on the firm. Subdivision 3 of this section does not apply to such case. *Brydolf v. Wolf, Carpenter & Co.*, 32 Id., 509.

It will be presumed, in the absence of allegations to the contrary, that the court, in rendering

judgment by default, passed upon the sufficiency of the service of the original notice. An erroneous ruling thereon is not void. *Muscatine Turn Verein v. Funck*, 18 Id., 469.

A return on an original notice reciting that it was served upon C. by copy left at his usual place of residence with Mrs. C., was held to be in compliance of the statute. *Wilson & Co. v. Call et al.*, 49 Id., 463.

The return need not specify that the defendant *could not* be found in the county to justify substituted service. *Id.*

The absence of a recital in the return of the place where the service is made is cured by a statement after the signature of the officer of the place of service. *Id.*

While the return should specify the date when service was made, yet a failure to incorporate the date will not render the judgment liable to collateral attack. *Id.*

SEC. 2604. [Return, when personally served.]—If served personally, the return must state the time and manner and place of making the service, and that a copy was delivered to defendant, or offered to be delivered. If made by leaving a copy with the family, it must state at whose house the same was left, and that it was the usual place of residence of the defendant, and the township, town, or city in which the house was situated, the name of the person with whom the same was left, or a sufficient reason for omitting to do so, and that such person was over fourteen years of age and was a member of the family.

A return that an original notice was “*duly served*,” is not sufficient. *Hodges v. Hodges*, 6 Iowa, 78.

It is the duty of the officer or person serving an original notice, to state in his return, all the acts by him done in order that the court may determine the sufficiency of the service. *Id. Farris v. Powell*, 10 Id., 553.

Where an original notice was addressed to Luther Bart, and the return showed service on “L. Burt;” it was held, that the court was authorized to infer that the person named in the return was the person named in the notice. *Davis v. Burt*, 7 Id., 56.

Where a defendant is not found, and service of the original notice is made by leaving a copy at his residence, the return should state at whose house, and the name of the person with whom the copy was left, or a sufficient reason be given for omitting to do so. *Id.*

A return showing service of the original notice, by leaving a copy at the defendant’s usual place of residence, must show that the person to whom the copy was delivered was a member of the defendant’s family. *Lyon v. Thompson*, 12 Id., 183.

A return on an original notice which shows an acknowledgment of service by the defendant shows a good service, that being one of the modes prescribed by the statute. *Libby v. McIntosh*, 60 Id., 329.

A return of service of an original notice should state the *time* as well as the manner and place of service. *Hakes v. Shupe*, 27 Id., 465.

A return of service of an original notice in the following form: “Served this notice on the within named J. F. by leaving a copy of the same at his usual place of residence in the village of Jessup, Buchanan county, Iowa, with M. F., a member of defendant’s family, over fourteen years of age, the defendant not being found,” etc., was held sufficient. *Farris v. Ingraham, Kennedy & Day*, 34 Id., 231; *Neally v. Redman*, 5 Id., 373.

Under the code of 1851, a return on an original notice which, in the absence of personal service, stated that a copy of the notice was left with a “member of his family over fourteen years,” was held to be defective in not stating: 1, that the defendant could not be found; 2, at whose house the copy was left; 3, the name of the person with whom the copy was left; 4, that the copy was left at the usual place of residence of the defendant. *Clark v. Little*, 41 Id., 497. See, also, *Converse v. Warren*, 4 Id., 158; *Davis v. Bush*, 7 Id., 36; *Crittenden v. Hobbs*, 9 Id., 417; *Tavenor v. Reed*, 10 Id., 416; *Sidles v. Reed*, Id., 589; *Eikenburg v. Barrett*, Id., 593.

Under the revision of 1860, it was held unnecessary to name the term in an original notice at which the defendant was required to appear; requiring the appearance at the next held sufficient. *The Farmers Ins. Co. v. Highsmith*, 44 Id., 330.

A judgment will not be set aside on the ground that the return on the original notice (where service was made on defendant’s wife) fails to state that the copy was left at the defendant’s usual place of residence, for the court having passed upon the sufficiency of the return in rendering judgment, that question cannot be renewed in collateral proceeding. *Ketchum v. White*, 72 Id., 193.

Sec. 2605. [Sheriff to note when received.]—If the notice is placed in the hands of a sheriff, he must note thereon the date when received, and proceed to serve the same without delay in his county, and must file the same with his return thereon in the office of the clerk, or return the same by mail or otherwise to the party from whom he received it.

The omission of the officer to indorse upon an original notice the time when he received it will not vitiate the service. *Cobb v. Neucomb*, 7 Iowa, 43.

If the time when the original notice came into the hands of the officer for service becomes important, the return may be amended, or the day of service may be taken as the time. *Id.*

That a writ of attachment one day before the original notice was placed in the hands of the sheriff is no ground for quashing the writ. *Hagen v. Burch*, 8 Id., 309.

A return of service indorsed upon the original notice by the deputy sheriff, or his affidavit thereto, is sufficient proof of the service. *Brandt v. The C. R. I. & P. R. Co.*, 26 Id., 114.

SEC. 2606. [Penalty for defective return: amendment of.]—If a notice be not duly filed or returned to the person from whom it was received by the sheriff, or if the return thereon is defective, the officer making the same may be fined by the court, not exceeding ten dollars, and shall also be liable to the action of any person aggrieved thereby. But the court may permit an amendment according to the truth of the case.

SEC. 2607. [How served on Sunday.]—Notice shall not be served on Sunday, unless the plaintiff, his agent, or attorney, make oath thereon that personal service will not be possible unless then made; and a notice indorsed with such affidavit shall be served by the sheriff, or may be served by another, as on a secular day.

SEC. 2608. [Notice of no personal claim.]—The plaintiff may set forth in the notice the general object of the action, a brief description of the property affected by it and that no personal claim is made against any defendant, naming him, and if such defendant unreasonably defends he must pay costs.

Where a subsequent purchaser of mortgaged property who, in an action to foreclose the mortgage and correct a mistake therein, was served with notice that no personal judgment was asked against him, and appeared and obtained time to plead, but made default, it was *held* that he was not concluded by the default, and that on petition, the judgment should be set aside and the party admitted to make defense. *Choate v. Sutton, Bell & Co.*, 39 Iowa, 308.

SEC. 2609. (As amended by ch. 77, 20th g. a.) [Return: how proven.]—If service be made within the state, the truth of the return is proven by the signature of the sheriff, or his deputy, and the court shall take judicial notice thereof. If made without the state, or by one not such officer within the state, the return may be proven by the affidavit of him making the same. [*Provided*, that the service may be made on any patient confined in the hospitals for the insane by the superintendent or assistant superintendent of such hospitals, and the certificate of such officer under the seal of such hospital shall be proof of such service.]

Where service of an original notice is made by any one not the sheriff of the county, it must be proved by the affidavit of the person making the same. *Moss Brothers v. Blinn*, 7 Iowa, 261.

Before an action can be maintained against a county upon an unliquidated demand, the same must be presented to the board of supervisors, and payment by them refused. *Cerro Gordo County v. Wright County*, 50 Id., 439.

SEC. 2610. [Service on county: how made.]—If a county is defendant, service may be made on the chairman of the board of supervisors or county auditor. But no action shall be brought against any county on an unliquidated demand, until the same has been presented to such board and payment demanded.

Where a creditor of a county presents his claim to the board of supervisors, and it is not allowed, after a reasonable time for deliberation, he may bring his action, and cannot be defeated therein by the failure or refusal of the board to make a record of their action, or to take any action in the premises. *White v. Polk County*, 17 Iowa, 413.

Where a claim against a county is presented and disallowed or reduced by the board of supervisors, the claimant is not limited to an appeal from the decision, but may bring and maintain an action against the county upon his claim. *Armstrong v. Tama County*, 34 Id., 309.

Before an action can be maintained against a county upon an unliquidated claim the same must have been presented to the board of supervisors, and payment demanded. *The County of Cerro Gordo v. The County of Wright*, 50 Id., 439.

This section requires that before any action shall be brought upon an unliquidated demand against a county, the same must be presented to the board of supervisors and payment demanded. It is not required as a condition precedent to the bringing of an action that the board shall act upon the claim. All that the claimant needs to do is to present his claim, and give the board a reasonable time to act. *Ferguson v. Davis County*, 57 Id., 601, 603.

In a proceeding by *certiorari* to test the legality of the establishment of a highway by the board

of supervisors where the county was not a party nor liable for costs, *held*, that the county auditor was not a proper person upon whom to serve notice of an appeal to bind the defendants in the proceeding, the action not being against the county. *Polk & Hubbell v. Foster*, 71 Id., 26.

ON CORPORATIONS.

SEC. 2611. [How served on railway corporations.]—If the action is against any corporation, or person owning or operating any railway, telegraph line, canal, stages, coaches, or cars or any express company, service may be made upon any general agent of any such corporation, or person wherever found, or upon any station, ticket or other agent of such corporation, or person transacting the business thereof in the county where the suit is brought; if there is no such agent in said county, then service may be had upon an agent thereof transacting said business in any other county.

The service of an original notice on the trackmaster of a railroad company, where it appears that the corporation has officers, is not sufficient to confer jurisdiction over the company. *Richardson & Co. v. B. & M. R. R. Co.*, 8 Iowa, 260.

The service of notice of appeal upon a director of a railroad company was sufficient service on the corporation under section 2825, of the revision. *Robertson v. The Eldora R. & C. Co.*, 27 Id., 245.

The return of the sheriff showing the service of an original notice upon the agent of a corporation "in the city of Waterloo, August 5, 1872," and that the agent refused to receive a copy, was *held* to be sufficient. *The Farmers' Ins. Co. v. Highsmith et al.*, 44 Id., 330.

In an action against a corporation service of notice may be made upon any agent, general or special, charged with the business of the corporation within the county where suit is brought, if it arises out of or is connected with the business of the agency in that county. *The Cen. Mutual Life Association*, 50 Id., 75.

If any notice is required to be given to a railway company to construct cattle-guards where land is inclosed after the railway is built, written notice served on a station agent is sufficient. *Haskett v. The Wabash, St. Louis & Pacific R'y Co.*, 61 Id., 467.

SEC. 2612. [On municipal.]—When the action is against a municipal corporation, service may be made on the mayor or clerk, and if against any other corporation, on any trustee or officer thereof, or on any agent employed in general management of its business, or on any of the last known or acting officers of said corporation, and if no person can be found on whom service can be made as provided in this and the preceding section, service may be made by publication as provided in other cases.

Where an agent is employed in the general management of the business of a private corporation, service of notice may be made upon him in all actions growing out of or connected with the business of his office or agency. *Pratt v. The Western Stage Co.*, 27 Iowa, 363.

The treasurer of a school district is an officer thereof, and service of an original notice upon him in an action against the district constitutes service on the district. *Kennedy v. The Ind. S. D. of Derby Grange*, 48 Id., 189.

In an action against a corporation service of the original notice may be made upon any agent, general or special, charged with the business of the corporation in the county where suit is brought, if it arises out of or is connected with the business of the agency in that county. *The M. L. Ins. Co. v. Walker et al.*, 50 Id., 75.

SEC. 2613. [Agents: service on.]—When a corporation, company, or individual, has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency.

A defendant cannot, after he has by his own act or that of his attorney, recognized the validity of service of notice upon his agent, object to the jurisdiction of the court. *Baker v. Kerr*, 13 Iowa, 384.

Service may be made upon a partnership by serving the notice upon an agent, in the general management of its business in the county, in actions growing out of or connected with the business of the agency within the county. *Pratt v. The Western Stage Co.*, 27 Id., 363.

Also service of notice upon one member of the partnership is sufficient service on the firm. *Id.* But service on the wife of a partner is not "service on the partnership." *Brydolf v. Wolf et al.*, 32 Id., 509.

This section requires the principal to respond to service of notice upon the agent only in mat-

ters connected with the agency. But the collection of a judgment which a third party had obtained against the agent, was not a matter pertaining to the agency; and upon execution on the judgment, notice served on the agent only, in proceedings whereby it was sought to hold the principal as garnishee, was not notice to the principal, and gave the court no jurisdiction to render judgment against him; and a judgment so rendered was properly vacated. *Upton Mfg. Co. v. Stewart Bros.*, 61 Id., 209.

This section does not authorize service of an original notice upon an agent in the same town growing out of a transaction with another and former agent in the same business, who conducted a different office in the same town; and a notice thus served did not give the court jurisdiction over the principal. *The State Ins. Co. v. Granger*, 62 Id., 272; *Philip v. Covenant Benevolent Ass'n*, Id., 634.

An agreement entered into for definite term, between a corporation created by one state and having chief place of business there, and an individual who is to sell upon commission in a certain county in another state such corporation manufactures, will constitute such individual the agent of the corporation within the meaning of this section of the code. *Gross v. Nicols et al.*, 35 N. W. R., 658.

Although the time mentioned in a contract of agency, between the defendant, a foreign corporation, and the agent on whom the original notice in the case was served, had expired prior to the service of the notice, yet, as the agency still in fact continued to exist, held that the service was sufficient to bind the defendant, where the action was for a breach of warranty of a machine sold to the plaintiff by the defendant through the agent on whom the notice was served. This section, (§ 2613) providing for such service is not limited in its application to domestic corporations. *Gross v. Nichols, Shepard & Co.*, 72 Id., 239.

MINORS—INSANE—PRISONERS.

SEC. 2614. [Minors: how served.]—When the defendant is a minor under the age of fourteen years, the service must be made on him, and also on his father, or mother, or guardian, and if there be none of these within the state, then on the person within this state having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed. When the minor is over fourteen years of age, service on him shall be sufficient.

Notice of appeal to the supreme court, given by publication in a newspaper to minors under the age of fourteen years, without more, will not give that court jurisdiction, on appeal as to such minors. *Barney v. Barney*, 14 Iowa, 189, 195.

Where there has been an original notice which the court has adjudged lawfully served, the proceedings cannot be treated as void for want of jurisdiction on account of irregularities appearing in the record which affect the service. The supreme court will presume that due proof of all matters necessary to be shown was made to the court upon which the adjudication of the sufficiency of the service was had. *Thorp v. Breneman*, 41 Id., 251, 254; *Shawhan v. Loffer*, 24 Id., 218; *Pursley v. Hays*, 22 Id., 11; *Cooper v. Sunderland*, 3 Id., 125; *Lyon v. Vanatta*, 35 Id., 521.

SEC. 2615. [Insane.]—When a defendant has been judicially declared to be of unsound mind, or who is confined in any state lunatic asylum, service may be made upon him and upon his guardian, and if he have no guardian, then upon his wife or the person having the care of him, or with whom he lives, or the keeper of the asylum in which he may be confined.

SEC. 2616. [When confined in state lunatic asylum.]—When it becomes necessary to serve personally with a notice or process of any kind, a person who is confined in any state lunatic asylum, the superintendent thereof shall acknowledge service of the same for such person, whenever, in the opinion of such superintendent, personal service would injuriously affect such person, which fact shall be stated in the acknowledgment of service. A service thus made shall be deemed a personal one on the defendant.

SEC. 2617. [Prisoner in penitentiary.]—When the defendant is a prisoner in the penitentiary, a copy of the petition must be delivered to the prisoner at the time the notice is served, and a copy of the notice must be delivered to the husband or wife of the defendant, if any such there be within this state.

SERVICE BY PUBLICATION.

SEC. 2618. [In what actions and when made.]—Service may be made by publication, when an affidavit is filed and personal service cannot be made on the defendant within this state, in either of the following cases:

1. In actions brought for the recovery of real property, or an estate or interest therein;

2. In an action for the partition of real property;

3. In an action for the sale of real property under a mortgage, lien, or other incumbrance or charge;

4. In actions to compel the specific performance of a contract of sale of real estate, or in actions to establish or set aside a will where, in such cases, any or all of the defendants reside outside of this state and the real property is within this state;

5. In actions brought against a non-resident of this state or a foreign corporation, having in this state property or debts owing to such defendant sought to be taken by any of the provisional remedies, or to be appropriated in any way;

6. In actions which relate to, or the subject of which is real or personal property in this state when any defendant has, or claims a lien of interest, actual or contingent therein, or the relief demanded consists wholly, or partly, in excluding him from any interest therein, and such defendant is a non-resident of this state, or a foreign corporation;

7. In all actions where the defendant being a resident of the state has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a notice, or keeps himself concealed therein with like intent;

8. Where the action is for a divorce, if the defendant is a non-resident of the state of Iowa, or his residence is unknown.

When a court has, by attachment or otherwise, acquired jurisdiction *in rem* over the property of a non-resident, it may by means of service, by publication, or personal service without the state, acquire jurisdiction to adjudicate upon and conclude the rights and interests of the defendant in the property thus seized and within the territorial jurisdiction of the court. *Darrance v. Preston*, 18 Iowa, 396. See, also, *Harshberger v. Harshberger*, 26 Id., 503; *Miller v. Davidson*, 31 Id., 435.

A non-resident minor may be served by publication the same and with like effect as a non-resident adult, and when thus served the court has authority to appoint a guardian *ad litem* to defend for him on the failure of his regularly appointed guardian to appear. *Judd v. Mosely*, 30 Id., 423.

It is essential to the validity of a service by publication that the affidavit constituting the basis of an order of publication should appear of record. *Beardsley v. Hines*, 33 Id., 157.

When, upon proper notice by publication, the district court obtained jurisdiction of an action for divorce, it thereby obtained jurisdiction of the cause for all purposes, including the allowance of alimony so far as the subject matter out of which such allowance was made was within the jurisdiction of the court. *Twigg v. O'Mera*, 59 Id., 325.

Where the officer's return on the original notice was "not found" in the county, and there was no affidavit that the defendant could not be found *within the state* prior to the order of publication, it was held that the publication was not authorized. *Clark & Kirkwood v. Huff et al.*, 12 Id., 606.

Where the statement in the affidavit, upon which the order of publication was made, was "that the defendant is not a resident of the state of Iowa," it was held sufficient without the statement that the defendant could not be found within the state. *Byrne v. Roberts et al.*, 31 Id., 319.

The courts of the state cannot in an ordinary personal action acquire jurisdiction of the person of a non-resident defendant, so far as to proceed to judgment when such defendant is, without more, served with notice out of the state. *Bates v. The C. & N. W. R'y Co.*, 19 Id., 260. Nor with notice by publication. *Lutz v. Kelly*, 47 Id., 307.

The case of *Billings v. Kothe*, 49 Id., 34, which held that notice by publication in a suit by attachment, made and completed before the filing of the petition, did not confer jurisdiction to render judgment directing the sale of the attached property, is overruled in *Foster et al. v. Henderson*, 54 Id., 220.

The affidavit required by this section as a basis for serving notice by publication, need not state that the defendant is a non-resident of the state. It is sufficient to follow the letter of the statute; and the fact of non-residence, though a jurisdictional one, may be shown by other evidence. *Taylor v. Ormsby Bros. et al.*, 66 Id., 109.

Where an original notice to a non-resident defendant is given by publication according to law, a judgment thereon will be valid, if the defendant is in fact a non-resident, and the action relates to some of the interests enumerated in subdivision 6, of section 2618 of the code, and the record shows the publication of the notice. It is not necessary that the fact of non-residence should be proved, or that the record show a determination of that fact. *Sweeley v. Van Steenburg*, 69 Id., 696.

An affidavit that "the defendant * * * has absconded, so that ordinary process cannot be served upon him in this state," is not sufficient, under section 2618 of the code, to justify service by publication, nor were the facts in the case such as to warrant service in that manner, and a judgment by default rendered thereon against defendant was held void for want of jurisdiction. *Fuller v. Biggs et al.*, 66 Id., 328.

SEC. 2619. [How made.]—The publication must be made by publishing the notice required in section two thousand five hundred and ninety-nine of this chapter, four consecutive weeks in some newspaper printed in the county where the petition is filed, and if there be none printed in such county, then in such paper printed at the next nearest county of this state, which paper shall, in either case, be determined by the plaintiff or his attorney.

It would seem that the publication of an original notice *published* in the county where the petition is filed, but *printed* in a different county, is not a compliance with section 2619 of the code, and does not confer jurisdiction upon the court. *Cooke v. Tallman*, 40 Iowa, 133.

Where no newspaper is printed and published in the county, publication may be made in a newspaper *printed* in either of the counties bordering upon the one in which the suit is brought, and this may be selected by plaintiff's attorney. *Id.*

The publication of an original notice in an action aided by an attachment, against a non-resident defendant, made and completed *before* the filing of the petition and the issuance of the writ of attachment, fails to confer jurisdiction to render judgment and to order the sale of the attached property. *Billings v. Kothe*, 49 Id., 34.

Where notice of a motion to vacate a judgment was not served on the plaintiff, but plaintiff appeared and moved to correct the record, his motion being sustained the day after the motion to vacate was filed, and he excepted to the ruling upon the latter motion, *held*, that he suffered no prejudice for the want of formal notice. *Id.*

SEC. 2620. [Defendant held to appear: proof of publication.]—When the foregoing provisions have been complied with, the defendant so notified shall be required to appear as if personally served within the county in which the petition is filed, on the day of the last publication. Proof thereof being made by the affidavit of the publisher or his foreman, and filed before default is taken.

Under the code of 1851 it was *held*, where the service of the original was by publication and there was no appearance for the defendant, to be irregular and illegal to render judgment against the defendant by default, without proof that a copy of the petition and notice had been directed to the defendant through the post-office at his usual place of residence, or that such residence was unknown. *Byington v. Crosthwaite et al.*, 1 Iowa, 148; *Broghill v. Lash*, 3 G. Greene, 357; *Lot Two, etc., v. Sweetland*, 4 Id., 465; *McCahen v. Carr*, 6 Iowa, 331; *Carr v. Kopp*, 3 Id., 80; *Tunis v. Withrow*, 10 Id., 305; *McCraney v. Childs*, 11 Id., 54; *Wheeler v. Edinger*, Id. 409; *Bristow v. Guess*, 12 Id., 404; *Hodson v. Tibbets*, 16 Id., 97.

A compliance with the requirements of the statute in respect to service by publication, is essential in order to confer jurisdiction, and such compliance should appear of record. *Id.*; *Abell v. Cross*, 17 Id., 171; *Woodward v. Whitescarver*, 6 Id., 1; *Foley v. Connelly*, 9 Id., 240.

SEC. 2621. [Actual service.]—Actual personal service of the notice, either within or without the state, supersedes the necessity of publication.

Actual personal service of an original notice without the state, supersedes the necessity of publication, and in such a case it is not necessary to file the affidavit that service cannot be made within the state, required by section 2618 of the code. *Miller v. Davidson*, 31 Iowa, 435. See, also, *Darrance v. Preston*, 18 Id., 396; *Bates v. The C. & N. W. R'y Co.*, 19 Id., 260.

(CHAPTER 124, LAWS OF 1880.)

TO LEGALIZE SERVICE OF ORIGINAL NOTICES BY PUBLICATION.

An Act to legalize the service of original notices by publication in cases where the petition has not been filed until after the publication of the original notice.

SECTION 1. [Where notice has been published prior to filing petition the court shall be deemed to have acquired full jurisdiction.]—*Be it enacted by the general assembly of the state of Iowa:* That in all cases where an action has been begun in any of the courts of record of this state by serving the original notice by publication as by law provided, and said publication of the original notice has been begun or completed prior to the time of the filing of the petition in the cause, that in each and all said cases, the court in which said cause or action is pending shall be deemed to have acquired as full and complete jurisdiction thereof as though said petition had been on file at the time said publication of the original notice therein was begun, or at the time the affidavit, provided for in section 2618 of the code of 1873, was filed, and the service of the original notice in all said causes shall be deemed a full compliance with said section 2618, and sections 2619, 2620 and 2621 of the code of 1873.

Approved March 25, 1880.

In *Foster v. Henderson*, 54 Iowa, 220 (June term, 1880), it was held not to be essential to the acquiring of jurisdiction in a case where service of the original notice is properly made by publication, that the petition should be filed before the publication is made. Overruling *Billings v. Kothe*, 49 Id., 34.

UNKNOWN DEFENDANTS.

SEC. 2622. [Petition verified: statement of.]—In actions where it shall be necessary to make an unknown person defendant, the petition shall be sworn to, and shall state what interest such person has or claims to have, how the same was derived or is claimed to have been derived, as exactly as possible, that the name and residence of such person is unknown to plaintiff, and that he had sought diligently to learn the same, and thereon proceedings may be had against such person without naming him, as follows:

In proceeding against unknown defendants the petition must be sworn to, the notice approved by the court before it is published and its publication must be ordered by the court in a newspaper therein designated. If these requirements are not complied with, the court acquires no jurisdiction of such defendants and the judgment will be void as to them. *Guise, Sr., et al. v. Early et al.*, 72 Iowa, 283.

SEC. 2623. [Court to approve notice.]—The court shall approve a notice collected from the averments of the petition, which notice shall contain the name of the plaintiff, a description of the property, and all the allegations of the petition concerning the interest of the unknown person, and the mode of devolution thereof, the relief demanded, also the name of the court and the term at which appearance must be made. Said notice must be entitled in the full name of the plaintiff against the unknown claimants of property, and shall be signed by the plaintiff's attorney.

SEC. 2624. [Make order of publication.]—The court, on its approval of said notice, shall endorse the same thereon, and order that the said notice be published in some newspaper of this state, designating such paper as shall be most likely to give notice to such unknown person.

SEC. 2625. [How, and for what time published.]—Such notice shall be filed in the cause, and its contents, without more, shall be published in the paper designated, at least weekly, for six successive weeks, and at the end of said time

service shall be deemed complete, and such unknown person in court at the next term thereafter.

APPEARANCE.

SEC. 2626. **The mode of appearance may be:**

1. By delivering to the plaintiff or the clerk of the court, a memorandum in writing to the effect that the defendant appears, signed either by the defendant in person, or his attorney, dated the day of its delivery, and to be filed in the case;

2. By announcing to the court an appearance, which shall be entered of record;

3. By an appearance, even though specially made, by himself or his attorney, for any purpose connected with the cause; or for any purpose connected with the service or insufficiency of the notice. And an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary; but may entitle the defendant to a continuance, if it shall appear to the court that he has not had the full timely notice required of the substantial cause of action stated in the petition.

[4. (*As amended by ch. 10, 15th g. a.*) No member of the general assembly shall be held to appear or answer in any civil action or special proceeding, in any court of record, or inferior court, while such general assembly is in session, nor shall any person be so held to answer or appear in any such court, on the 1st day of January, the 4th day of July, the 25th day of December, or on any day of thanksgiving appointed by the president of the United States or by the governor of this state.]

A memorandum in writing signed by the defendant, stating that he waives further notice and makes a voluntary appearance, is sufficient to confer jurisdiction upon the court. *Shaw v. The N'l St. B'k etc.*, 49 Iowa, 179.

It is competent for the court to render a decree on the same day that appearance is so entered. *Id.*

An appearance to object to the sufficiency of the original notice or to the service thereof, is an appearance in the case, but if the defendant has not been notified of the cause of action he may have a continuance as of course. When the defect complained of relates to the time for appearance and not the statement of the cause of action, a continuance can be had only for cause shown. *The Des Moines Br. S. Bank v. Van*, 12 Id., 523.

Where a court has jurisdiction of the subject-matter, a mere irregularity in the notice or in its service will not prevent its exercise where there is a voluntary appearance. By such appearance, the purpose and object of the notice is accomplished, and hence the notice is rendered unnecessary. *Wilgus v. Gettings*, 19 Id., 82, 84; *Post v. Brownell*, 36 Id., 497.

An appearance to object to the sufficiency of the notice and to cross-examine plaintiffs' witnesses is an appearance in the action, and renders the sufficiency of the notice immaterial. *Wisley v. Maynard*, 21 Id., 107; *Childs v. Limback*, 30 Id., 368, and cases cited; *Danforth v. Thompson*, 34 Id., 243; *Hale v. Van Saun*, 18 Id., 16.

But an appearance by motion to set aside a sheriff's sale on a judgment rendered against attached property is not "an appearance for any purpose connected with the suit" within the meaning of the provisions of this section. *Orsborn v. Cloud*, Id., 238.

The appearance of a defendant, who has not been served with notice, to testify as a witness in the case does not constitute an appearance so as to bring him within the jurisdiction of the court as a party to the action. *Nixon v. Downey et al.*, 42 Id., 78.

Where a defendant appears and pleads, he waives all defects in the process. *Bell & Pearson v. Achison*, Morris, 21; *Lorimer v. The Bk. of Ills.*, Id., 223.

Where a defendant appears by his attorney and consents that a judgment may be entered against him with stay of execution, etc., it is a waiver of objection to the jurisdiction of the court, and of any irregularity in the mesne process. *Switzer v. Gowdy*, Mor., 248.

The appearance of a defendant for the purpose of presenting a motion to discontinue the cause because the petition was not filed in time, will not operate as a waiver of the defect. *Cibula et al v. Pitts' Sons' Man. Co.*, 48 Iowa, 523.

An injunction will not be dissolved because it was served before the service of the original notice or the appearance of the defendant. *Dist. Tp. v. Dist. Tp. etc.*, 54 Id., 115.

Where a garnishee has not been legally served with notice of garnishment, a judgment by default against him is without jurisdiction and void, and the filing of a protest by the garnishee against the jurisdiction of the court is not an appearance under this section. *Padden v. Moore et al.*, 58 Id., 703.

WHEN ALL DEFENDANTS ARE NOT SERVED.

SEC. 2627. [**Mode of procedure.**]—When the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly, or jointly and severally, or severally liable only, he may, without prejudice to his rights in that or any other action against those not served, proceed against those served in the same manner as if they were the only defendants; if he recover against those jointly liable only, he may take judgment against all thus liable, which may be enforced against the joint property and separate property of those served, but not against the separate property of those not served, until they have had opportunity to show cause why judgment should not be enforced against their separate property; or,

2. The plaintiff may continue till the next term, and proceed to bring in the other defendants; but at such second term the suit shall proceed against all who have been served in due time, and no further delay shall be allowed to bring in the others, unless all that appear shall consent to such delay.

REAL ESTATE.

SEC. 2628. [**Pending of action: notice to third parties.**]—When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title, if the real property affected be situated in the county where the petition is filed.

The purchaser of real property at a foreclosure sale is charged with notice of the rights of the plaintiff in another proceeding to foreclose another mortgage on the same property, and is bound by the decree thereafter rendered, notwithstanding he was not a party thereto. *Cooley v. Brayton*, 16 Iowa, 10.

The doctrine of *lis pendens* has been enlarged by the statute. *Id.*

A pending action to foreclose a mortgage is, under the statute, constructive notice to the world of the interest of the mortgagor. *Knowles v. Rablin et al.*, 20 Id., 101; *Woodin v. Clemons*, 32 Id., 230.

A purchaser of lands at tax sale made after the commencement of an action to foreclose a mortgage on the same lands in favor of the university fund, acquires no interest in the premises as against such mortgage which would not be cut off or bound by the decree in favor of such fund. *Crum v. Cotting*, 22 Id., 411.

The doctrine of *lis pendens* does not apply where neither the vendor nor the purchaser are parties to the action. This rule is not changed by this section of the statute. *Parsons v. Hoyt*, 24 Id., 154.

The filing of a petition asking an attachment against the property of one defendant, and an injunction restraining a second defendant from disposing of a certain note and mortgage on property of the former defendant, will not discharge with notice of plaintiff's claims one who purchases and pays for and takes the note and mortgage after the filing of the petition and levy of the attachment on the mortgaged property, but before the service of the injunction. Such an action does not come within the provisions of section 2628 of the code. *Newcomb Bros. v. Nelson & Reed*, 54 Id., 324.

A purchaser of real property is deemed charged with constructive notice of the equities of one who is in actual possession of the premises at the time of his purchase. *Sears v. Munson*, 23 Id., 380.

Where a railway company procured a conveyance for the right of way over a tract of land which was encumbered by mortgage, during the pendency of an action to foreclose the mortgage, it was charged with notice of the action, without being made a party thereto, and was bound by the decree of foreclosure, and failing to redeem from the sale under the foreclosure, the sheriff's deed divested it of its title. *Jackson v. The Centreville M. & A. Ry Co.*, 64 Id., 292.

The pendency of an action affecting real property is sufficient to charge third persons, purchasing of one of the parties, with notice thereof. *Snowden & Co. v. Craig*, 26 Id., 156; *Blanchard et al. v. Ware*, 37 Id., 305.

The filing of a petition affecting real property creates a *lis pendens* under the statute. *Harshberger v. Harshberger*, 26 Id., 503.

Where land is sold in one county under an execution issued upon a judgment rendered in another county, the recording of the sheriff's deed will operate as constructive notice, although no transcript of the judgment was filed in the county where the land was situated. *Foreman v. Higham*, 35 Id., 382.

Where land is conveyed, after the commencement of an action to foreclose a mortgage thereon, the grantee will acquire no title to the land as against the adverse party to his grantor. *Stohl v. Roost*, 34 Id., 475, 477.

That a purchaser *pendente lite* was not informed by his grantor of the pendency of the action, or that he fraudulently concealed the fact, will be no ground for relief to such purchaser. *Blanchard et al. v. Ware*, 37 Id., 305.

To render a pending action notice *lis pendens*, it must be duly, constantly and continuously prosecuted. *Davis v. Bonar et al.*, 15 Id., 171.

In an action by a wife to recover for injuries caused by the sale of intoxicating liquors to her husband, in which the owner of the building occupied by the seller of the liquors is made a party and a lien asked against the building, the petition is one "affecting real estate" within the meaning of this section, and a purchaser of the premises, pending such action, is charged with notice thereof, and takes the property subject to any lien established thereon. *O'Brien v. Putney et al.*, 55 Id., 292.

A person purchasing real property will be charged with notice of the pendency of an action affecting the same, from the time the petition is filed, and the facts that the action was not properly indexed in the appearance docket, and that the notice was not served until after the purchase, is immaterial. The filing of the petition operates as notice under this section. *Haverly v. Alcott*, 57 Id., 171.

In a foreclosure suit, one who had title of record was made defendant. He was then in litigation with another over rights acquired in the property after the mortgage, held that, as the mortgagee in no way derived his title from them, the provisions of the statute did not apply to the purchaser at the foreclosure sale. *Sprague v. White*, 35 N. W. R., 751.

SEC. 2629. [When property is situated in another county.]—When any part of real property, the subject of an action, is situated in any other county than the one in which the action is brought, the plaintiff must, in order to affect third persons with constructive notice of the pendency of the action, file with the clerk of the district court of such county a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in the county affected thereby. and from the time of such filing only shall the pendency of the action be constructive notice to subsequent vendees or incumbrancers thereof, who shall be bound by all the proceedings taken after the filing of such notice, to the same extent as if a party to the action, and the clerk of such county must, immediately on receipt of such notice, index and record the same in the incumbrance book. And within two months after the determination of such action, there shall be filed with such clerk a certified copy of the final order, judgment, or decree, who shall enter and index the same in the manner as though rendered in that county, or such notice of pendency shall cease to be constructive notice.

CHAPTER 7.

OF JOINDER OF ACTIONS.

SECTION 2630. [Ordinary and equitable cannot be.]—Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same party, and against the same party in the same rights, and if suit on all may be brought and tried in that county, may be joined in the same petition; but the court, to prevent confusion therein, may direct all or any portion of the issues joined therein to be tried separately, and may determine the order thereof.

Under section 2630 of the code a cause of action arising from tort, may be joined with one arising on contract, when they are between the same parties, in the same right, and have the same

venue and where each may be prosecuted by the same kind of proceedings. *Turner v. The First N. Bk. etc.*, 26 Iowa, 562; *Reed v. Howe*, 28 Id., 250; *Hinkle v. Davenport*, 38 Id., 355.

A party who voluntarily intervenes in an action is estopped from subsequently denying the jurisdiction of the court. *Jack & Farner v. The D. M. & Ft. D. R. Co.*, 49 Id., 627.

This section does not apply to actions by a municipal corporation against lot owners upon an assessment for the construction of sidewalks. *The City of Des Moines v. Stephenson*, 19 Id., 507.

An action upon a promissory note against the maker and indorser, cannot be joined with an action on an account against the indorser only. *Thorpe Bros. & Co. v. Dickey et al.*, 51 Id., 676.

A joint action for trespass and damage to crops by stock cannot be maintained against the several owners of the stock. *Cogswell v. Murphy et al.*, 46 Id., 44.

The objection to such a misjoinder may be taken by answer and also by motion in arrest of judgment. *Id.*

In an action by a creditor to set aside a conveyance of land on the ground of fraud and subject it to the plaintiff's claim against the grantor, a money demand arising on contract cannot be joined. *Stevens v. Chance*, 47 Id., 602.

SEC. 2631. [Plaintiff may strike out cause.]—The plaintiff may strike from his petition any cause of action or any part thereof, at any time before the final submission of the case to the jury or to the court, when the trial is by the court.

Where an action has been commenced to foreclose a mortgage upon land lying in another county, the plaintiff may, after a motion to change the venue has been made, dismiss that part of his cause of action which asks a foreclosure, and take judgment for the amount due on the note, it being payable in that county. *Allen v. Bidwell et al.*, 35 Iowa, 218.

In an action against three persons as joint makers of three promissory notes, stated in three separate counts in the petition, where all of the defendants have been brought into court by the service of the notice, the plaintiff has the right to wholly dismiss one count of the petition, and proceed to trial on the remaining counts. *Dorothy v. Dicks*, 63 Id., 240.

SEC. 2632. [So may court.]—The court, at any time before the defense, shall on motion of the defendant, strike out of the petition any cause or causes of action improperly joined with others.

When a party has once plainly and clearly denied each of the averments of the petition essential to the recovery, he cannot do the same thing in several other counts and call each a defense, and if he does so the court will strike out these redundant counts. *Martin v. Swearingen*, 16 Iowa, 346, 348; *Davenport Gas L. & C. Co. v. The City of Davenport*, 15 Id., 6.

A misjoinder of causes of action is waived, unless assailed before defense is made by motion to strike out the cause or causes improperly joined. *Flynn et al. v. The Des Moines & St. Louis R'y Co.*, 63 Id., 490.

SEC. 2633. [Misjoinder waived.]—All objections to the misjoinder of causes of actions shall be deemed to be waived, unless made as provided in the last section.

Where there is a misjoinder of parties as well as of causes of action a failure to make the motion provided for in section 2633 will not operate as a waiver of the objections, but the same may be urged in a motion in arrest of judgment. *Cogswell v. Murphy et al.*, 46 Iowa, 44.

If there be any misjoinder of causes for action it is waived by a failure to object as provided for in this and preceding sections. *Knot v. Tincker*, 39 Id., 628.

SEC. 2634. [What done when dismissed for misjoinder.]—When a motion is sustained on the ground of misjoinder of causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs in its discretion, to file several petitions, each including such of said causes of action as might have been joined, and action shall be docketed for each of said petitions, and the same shall be proceeded in without the further service, and the court shall determine, by order, the time of pleading therein.

See notes to section 2510, *ante*, from *Sweetzer & Currier v. Harwick et al.*, 67 Iowa, 488.

CHAPTER 8.

OF PLEADING.

SECTION 2635. [**Demur or answer: when.**].—The defendant shall, in an action commenced in a court of record, demur, answer, or do both as to the original petition before noon of the second day of the term.

In the absence of a rule of court to the contrary, a default taken before noon of the second day of the term is premature and should be set aside on motion made before that time. *Huebner v. The Farmers' Ins. Co.*, 71 Iowa, 30.

SEC. 2636. [**Same.**].—Each party shall demur, answer or reply to all subsequent pleadings, including amendments thereto and substitutes therefor, before noon of the day succeeding that on which the pleading is filed. But all pleadings must be filed by the time the cause is reached for trial.

Strictly, a reply should be filed before noon of the day succeeding that on which the answer was filed, but the plaintiff may file a reply later than such time upon reasonable terms to be imposed by the court. *Williams v. The Niagara Fire Ins. Co.*, 50 Iowa, 561.

SEC. 2637. [**Time of pleading.**].—The day on which the judge actually opens court shall be, for the purpose of timing the pleading, considered the first day of the term.

SEC. 2638. [**Extension of.**].—The court may extend the time of filing any pleading beyond that herein fixed, but shall do so with due regard to making up issues at the earliest day possible.

An extension of time to file an answer does not extend the time to file a demurrer. The defendant, by asking and obtaining an extension of time to answer, does not waive his right to demur, but if he desires to demur he must do so within the time fixed by the statute, and if it be filed after such time it may be stricken from the files. *The District Township of Newton v. White et al.*, 42 Iowa, 608.

Where a motion is filed to strike a demurrer from the files, because not filed in time, and no extension of time has been granted and the court overruled the motion, the court in effect extends the time and grants leave to file the demurrer which it may do under this section. *Ramsey & Co. v. Robinson & Atherton*, 58 Id., 225.

SEC. 2639. [**Motions assailing pleading.**].—All motions assailing a pleading shall be in writing, and filed before an answer or reply has been filed to the pleading assailed, except as provided in section two thousand six hundred and fifty of this chapter, and shall specify the causes on which they are founded, and none other shall be argued or considered. But one motion and one demurrer assailing such pleading shall be filed, unless such pleading be amended after the filing of a motion or demurrer thereto.

A motion to dismiss an appeal from a justice's court, made on an imperfect record, will not preclude the party from making another motion for the same purpose upon an amended and perfected record. *Seacrist v. Newman*, 19 Iowa, 324.

A motion to dissolve an injunction which does not specify the grounds on which it is founded, should not be considered by the court. *Hall v. Crouse*, 14 Id., 487.

One who appeals from a judgment by default rendered against him by a justice of the peace, may file an answer in the appellate court under section 3596 of the code, but he can do so as a matter of right only before the cause is called for trial and where he makes no showing excusing his failure to answer in proper time, the court may properly deny him leave to file it after the time it is so called. *McDowell v. Booth*, 72 Id., 141.

SEC. 2640. A demurrer or motion assailing any pleading or count thereof, suspends the necessity of filing any other pleading to such pleading or count until the same has been determined, and the next pleading shall be filed by noon of the day succeeding such determination.

SEC. 2641. All motions and demurrers shall be argued and submitted when filed, unless the adverse party is absent or desires time, in which case it shall be

extended until the morning of the succeeding day unless the cause is sooner reached for trial.

Sections 2640 and 2641 apply only to motions assailing pleadings, and have no reference to a motion to dissolve an injunction. *Miller et ux. v. Felkner et al.*, 42 Iowa, 458.

Where a motion for a more specific statement in the petition was filed on the *third* day of the term, and on the same day an amended petition was filed, but no order was made respecting the motion until the morning of the *fourth* day, when the court made the entry "motion confessed," it was held that defendant had until *noon* of the *fifth* day to answer; that a default on the *morning* of the fifth day was erroneous and should have been set aside without any affidavits of merits. *Brandt v. Wilson*, 58 Id., 485.

SEC. 2642. [**Not withdrawn.**—A motion or demurrer once filed, shall not be withdrawn without the consent of the adverse party entered thereon, or of the court.

SEC. 2643. [**Appearance docket.**—The filing of a pleading or motion in the clerk's office during a term, and a memorandum of such filing made in the appearance docket within the time allowed, shall be equivalent to filing the same in open court.

When a pleading is delivered to the clerk, and a memorandum of the date of the filing thereof made in the appearance docket, it is considered filed. The indexing in the appearance docket is no part of the filing. *Haverly v. Alcott*, 57 Iowa, 171, 173.

SEC. 2644. [**Forms of action abolished.**—All technical forms of action and pleading, all common counts, general issues, and all fictions are abolished, and hereafter the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in this code.

All prior forms of actions and pleadings are abolished, and the rules of the code, and not those laid down by Stephen and Chitty, are the tests to determine the sufficiency of pleadings. Per DILLON, J., in *Taylor v. Adair et al.*, 22 Iowa, 279, 281.

Our system of pleading ignores all fictions and technical forms of actions and pleadings. The facts constituting the plaintiff's cause of action, stated concisely and in ordinary language, is all that is required. Per MILLER, J., in *Holloway v. Griffith*, 32 Id., 409, 413.

Under the statute all forms of action and pleadings are abolished, and the plaintiff recovers, if at all, on the facts stated and proved. *McGinn v. Butler*, 31 Id., 160, 163.

Under the code a cause of action may be stated in more than one count of the petition and while a statement therein that such counts are for the same cause of action is unnecessary, yet it will not vitiate the pleading. *Pearson v. The M. & St. Paul R. Co.*, 45 Id., 497.

SEC. 2645. [**Pleadings defined.**—Pleadings are the written statements by the parties of their respective claims and defenses, and are:

1. The petition of the plaintiff;
2. The demurrer and answer of the defendant;
3. The demurrer or reply of the plaintiff;
4. The demurrer of the defendant.

A demurrer is a pleading within the meaning of this section, and may be amended like any other pleading. *Morrison v. Miller*, 46 Iowa, 84.

PETITION.

SEC. 2646. **The petition must contain:**

1. The **name of the court** and county in which the action is brought;
2. The **names of the parties** to the action, plaintiffs and defendants, followed by the word "petition" if the proceedings are ordinary, and by the words "petition in equity" if the proceedings are equitable;
3. A **statement of the facts** constituting the plaintiff's cause of action.

The entire conversation in which slanderous words are spoken, constitutes but a single cause of action, although the words contain several distinct charges, either of which is actionable. *Cra-craft v. Cochran*, 16 Iowa, 301.

It is only the *ultimate* facts—the facts which the evidence will establish—that constitutes the cause of action, which should be stated, and not the circumstantial facts which go to prove them. *Brown v. Kingsley*, 38 Id., 220.

In an action of replevin, the wrongful detention is the gist of action, and a failure to allege it

in the petition may be taken advantage of by demurrer, in arrest of judgment or upon appeal. *Draper v. Ellis*, 12 Id., 816.

Under our code the word "petition" takes the place of the word "bill" as heretofore used in equity, and the word "declaration" as used at law. Per DILLON, J. in *Freiber v. Shafer*, 18 Id., 29, 32.

The evidence must correspond with the allegations of the pleading, and where the court finds a fact which was not in issue, and bases a judgment thereon, such judgment cannot be supported. *Wolsey v. Williams*, 34 Id., 413.

Where the petition fails to state a cause of action, and the defendant instead of demurring answers thereto he may move in arrest of judgment after a verdict against him. *Ederly v. The Farmers' Ins. Co.*, 43 Id., 587.

The plaintiff in an action cannot allege one contract in his pleading and recover upon another not alleged; nor can he allege performance of a contract and prove facts in excuse of performance. *Fauble & Smith v. Davis et al.*, 48 Id., 462.

This provision applies to a petition in equity as well as to a petition at law. The statement is required to be of the facts constituting the cause of action. When this is done a *prima facie* cause of action is shown, and that is all that it is necessary to state. *The First Nat. Bank v. Baker*, 57 Id., 197, 199.

4. A demand of the relief to which the plaintiff considers himself entitled and if such demand be for money, the amount thereof must be stated.

In equitable proceedings under a prayer or demand for general relief such a decree will be rendered as is warranted by the facts stated, beyond that specifically asked for. *Simplot v. Simplot*, 14 Iowa, 449; *Cassady v. Woodbury county*, 13 Id., 112.

A decree will not be rendered against a party against whom no relief is demanded in the petition. *Mobly v. Dubuque Gas L. & Coke Co.*, 11 Id., 71.

Nor, in an action to foreclose a mortgage, will the court make a decree against property not described in the petition, although it may be included in the mortgage on which the deed is brought. *Cerson v. Underwood*, 12 Id., 52.

Under a general prayer in the petition for interest it is proper to include in the judgment interest accrued since the petition was filed, although the aggregate amounts to a greater sum than was prayed for in the petition, but not greater than that sum with interest from such filing. *Dawson v. Graham*, 48 Id., 378.

Where the petition prays for judgment for the principal due on a promissory note, and for interest, interest can be recovered only from the commencement of the action. *Anderson v. Kerr & Lacy*, 10 Id., 136.

5. [Separate counts].—Where the petition contains more than one cause of action, each must be stated wholly in a count or division by itself, and must be sufficient in itself; but one prayer for judgment may include a sum based on all counts looking to a money remedy.

Each count must contain a statement of a cause of action as fully and sufficiently as if it was the only count in the petition. It cannot be aided by being stated in another count. *The National Bank of Mich. v. Green*, 33 Iowa, 140.

When the contract which is the basis of the action, is made by each of several defendants, the cause of action arising thereon should be stated in but one count of the petition; but where several defendants are liable to the plaintiff on different contracts for the same debt, as in the case of a maker and indorser of a promissory note, furnishing different causes of action against each, they must be stated in different counts. *Tucker v. Shiner*, 24 Id., 334; *Turner v. The First National Bank, S. C.*, 26 Id., 562.

While, under the statute, different causes of action may be joined in one action, yet they must be stated in separate counts or divisions of the petition; there is nothing in the code which countenances the mingling of separate causes of action in one and the same count. *Sands v. Wood*, 1 Id., 263; *Freeman v. Fleming*, 5 Id., 460.

But in *Stadler Bros. & Co. v. Parmlee & Watts*, 10 Id., 23, it was held that two causes of action of the same nature, on money demands, might be joined in one count. This ruling was followed in *Merrit v. Nihart*, 11 Id., 57.

Under the code the same cause of action may be stated in different counts of the petition, and while a statement therein that the counts relate to the same cause of action is unnecessary, yet it will not render the pleading bad. *Pearson v. The M. & St. P. R. Co.*, 45 Id., 497. To the same effect is *Van Brunt v. Mather*, 48 Id., 503.

When a petition contains more than one cause of action, each must be stated in a separate count, and must be sufficient in itself, but when this rule is violated the defendant must make his objection in the court below, and, if he fails to do so and goes to trial, he thereby waives the objection. *Craver v. The Chicago, Milwaukee & St. Paul R'y Co.*, 62 Id., 460. See also, *Jordan v. Kavanaugh*, 63 Id., 152.

6. In a petition by equitable proceedings, each division shall also be separated into paragraphs, numbered as such for more convenient reference, and each paragraph shall contain, as near as may be convenient, a complete and distinct statement.

SEC. 2647. [Amended before answer.]—The plaintiff may amend his petition without leave at any time before the answer is filed, without prejudice to the proceedings already had; but a notice of such amendment shall be served on the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto as he had to the original petition.

A plaintiff may amend his petition, without leave, at any time before answer is filed, upon giving proper notice thereof to defendant. Per BECK, Ch. J., in *Allen v. Bedwell*, 35 Iowa, 86, 88.

DEMURRER.

SEC. 2648. [Cause of.]—The defendant may demur to the petition only where it appears on its face, either:

1. That the court has no jurisdiction of the person of the defendant or the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same parties for the same cause; or,
4. That there is a defect of parties, plaintiffs or defendants; or,
5. That the facts stated in the petition do not entitle the plaintiff to the relief demanded;

6. That the petition, on the face thereof, shows that the claim is barred by the statute of limitations; or fails to show it to be in writing where it should be so evidenced; or, if founded on an account, or writing as evidence of indebtedness, and neither of such writings, account, or copy thereof is incorporated into or attached to such pleading, or a sufficient reason stated for not doing so.

A demurrer should employ such language as will point to the *fact*, upon which it is claimed the court has no jurisdiction, or that no sufficient cause of action has been stated; but it is not necessary to state the reasons which lead the mind of the pleader to this conclusion. *The Davenport G. L. & Coke Co. v. The City of Davenport*, 15 Iowa, 6.

That a pleading is argumentative is no ground of demurrer. *Davis v. Bonar*, Id., 171.

Where a demurrer to a petition at law stated two grounds: 1. That the matters set forth in the petition do not constitute any cause of action against the defendant; 2. That said petition does not show such a state of facts as will justify the court in granting any relief by judgment or otherwise to said plaintiff: it was *held*, that it should be disregarded by the court because the same was not sufficiently specific. *McKeller v. Stout*, 13 Id., 487.

That the action is brought by "ordinary" proceedings when it should be brought in equity, or *vice versa*, is not ground for demurrer. The cause should be transferred to the proper docket upon motion. *Conyngham v. Smith et al.*, 16 Id., 471; *Traer v. Lytle*, 20 Id., 301.

A demurrer will not lie for redundancy or irrelevant matter in a pleading. A motion to strike out is the proper remedy. *The School D. Tp., etc., v. Pratt*, 17 Id., 16; *Kinyon v. Kinyon*, 18 Id., 377.

A demurrer will not lie to a pleading because the prayer asks relief to which the facts stated in the pleading will not entitle the party. *Byers v. Rodabaugh*, 17 Id., 54.

When a defect of parties is apparent on the face of the petition it may be assailed by demurrer, but when it does not so appear the fact may be pleaded by answer. *Enders v. Beck*, 18 Id., 86. So, also, where the court has not jurisdiction. *Judd v. Mosely*, 30 Id., 423; *Childs v. Limback*, 30 Id., 398.

A demurrer to a petition in equity to compel the clerk to satisfy a judgment of record, on the ground that the plaintiff's remedy was by motion, should be overruled. *Traer v. Lytle*, 18 Id., 86.

Where, in an action on a judgment by the assignee thereof, it was alleged that the "judgment has now become the property of your petitioners," but no written assignment was alleged or shown, it was *held* that the allegation was bad, being a conclusion of law, but that it could not be attacked by demurrer, a motion being the proper remedy. *Thompson v. Cook*, 21 Id., 472; *Cottle v. Cole*, 20 Id., 481.

Where the plaintiff fails to annex to his petition, or set out therein, the original or a copy of a chattel mortgage, under which he claims possession of property, the objection must be taken by demurrer, if at all, and constitutes no ground of objection to the introduction of the writing in evidence on the trial. *Smith & Co. v. McLean*, 24 Id., 322.

A demurrer based upon a ground not included in the enumeration of causes of demurrer contained in the statute, should be overruled. *Orman v. Orman*, 26 Id., 361.

Alternative allegations in a pleading cannot be attacked by demurrer, but by motion. *Turner v. The First National Bank of Keokuk*, 26 Id., 562.

Where there is a defect (or non-joinder) of parties, a demurrer will lie, but where there is a misjoinder of parties the objection must be made by motion, and not by demurrer. *Id.* See, also, *The School District, etc., v. Pratt*, 17 Id., 16; *Byers v. Rodabaugh*, Id., 53; *Kenyon v. Palmer*, 18 Id., 377; *Dubuque County v. Reynolds*, 41 Id., 454; *King v. King*, 40 Id., 120; *Enders v. Beck*, 18 Id., 86; *Beckwith v. Dargets*, 18 Id., 303; *Mormon v. Carroll*, 35 Id., 22; *Dist. Tp. of White Oak v. Dist. Tp. of Oskaloosa*, 44 Id., 512; *Ind. School Dist., etc., v. Ind. School Dist., etc.*, 50 Id., 322.

A demurrer in a law action must specify the particular grounds of objection to the pleading assailed; and a demurrer to an answer in such a case, based on the ground that the facts therein stated do not constitute a defense to plaintiff's action, should have been overruled. *The Traders' Bank of Chicago v. Alsop*, 64 Id., 97.

A defect of parties apparent on the face of the pleading can be objected to only by demurrer, or it will be waived. *McCormick v. Blossom*, 40 Id., 256; *Ryan & Co. v. Muellinix*, 45 Id., 631.

A defect of parties not having been assailed by demurrer is deemed waived. *Bouton v. Orr et al.*, 51 Id., 473; *Melick v. The First National Bank of Tama City*, 52 Id., 94.

A demurrer to an entire answer, when it contains a general denial of the allegations of the petition, should be overruled. *Lake v. Gray*, 35 Id., 459.

That no bond was filed; that the writ directed the seizure of specific property, and that the relief asked in the petition was for the enforcement of a landlord's lien, are not objections that can be made by demurrer. *Brace v. Grady*, 36 Id., 352.

Where a pleading contains statements of evidence, or conclusions of law, the proper remedy is by motion to strike out, although it may also be assailable by demurrer. *The Iowa R. R. L. Co. v. Sac County*, 39 Id., 124.

In an action to compel a county treasurer to levy and collect a tax voted to aid in the construction of a railroad, an allegation that the plaintiff had made the required proof of compliance with all the conditions upon which the tax was to be paid, was held good on demurrer. *The B., C. R. & M. R. Co. v. Stewart*, 39 Id., 267.

That the petition does not state facts sufficient to constitute a cause of action, is too indefinite a ground of demurrer in an action at law. *Childs v. Limback*, 30 Id., 398; *Davenport G. L. & C. Co. v. City of Davenport*, 15 Id., 6.

It is not competent to assail the paragraphs of a pleading by demurrer; the demurrer must be to the whole pleading or to a court thereof. *The Delaware County Bank v. Duncombe*, 23 Id., 488; *Hayden v. Anderson*, 17 Id., 158; *The Dist. Tp., etc., v. The Dist. Tp.*, 44 Id., 512.

But if, through bad pleading, two distinct and independent causes of action or defense are stated in the same count or division of the pleading, a demurrer may be directed to one of them. *Wright v. Conner et al.*, 34 Id., 240.

A demurrer to a pleading admits the truth of the facts therein well pleaded, but not the law claimed by the pleader, nor the inferences and conclusions drawn by him. *Smith v. Henry County*, 15 Id., 385; *Games v. Robb*, 8 Id., 193.

A demurrer can be interposed only for objections appearing on the face of the pleading. *Polk County v. Heirb*, 37 Id., 361.

When the objections do not appear on the face of the pleading, they may be taken by answer. *Meunch v. Brietenbach*, 41 Id., 527.

Demurrer is the proper remedy where a petition asking a writ of *mandamus* shows that the plaintiff has a plain, speedy and adequate remedy by an ordinary action. A motion to dismiss will not lie. *Meyer v. Dubuque County*, 43 Id., 592.

In an equitable action improperly commenced in behalf of the "minor heirs" of a deceased devisee, instead of in behalf of the "heirs of her body," advantage may be taken of the defect by general demurrer, although the demurrer be not in the precise language of the code, the intention of the pleader to assail the defect being apparent. *Nanna v. Hawes et al.*, 45 Id., 437.

Where the petition shows on its face that its cause of action is barred by the statute of limitations, it may be assailed by demurrer. *Miller v. Dawson et al.*, 26 Id., 186; *Brown v. Rockhold*, 49 Id., 282.

A demurrer is proper where a pleading does not on its face show a sufficient cause of action or defense, and can be interposed only where the legal sufficiency of the entire count in the pleading is assailed. *Hayden v. Anderson*, 17 Id., 158.

A demurrer which strikes alone at the sufficiency of the account annexed to the petition, does not admit the truth of the other allegations therein, and upon failure of defendant to answer

over, the right of the plaintiff to judgment must be established by evidence, as upon a default. *Buehler v. Keed*, 11 Id., 182.

In a proceeding to set aside a confession of judgment on the ground of insufficiency of the statement on which it was rendered, it is not necessary to annex a copy of such statement to the petition as an exhibit. *Vannice v. Greene, Traer & Co.*, 14 Id., 262.

Where a pleading sets up, as a cause of action or counter-claim, the breach of covenants in a deed, a copy of the deed should be annexed to such pleading as an exhibit. *Nosler v. Hunt*, 18 Id., 212.

A demurrer admits the facts pleaded, but controverts their legal sufficiency. *Hayden v. Anderson*, 17 Id., 158.

To render a pleading demurrable on the ground that its cause of action is barred by the statute of limitations, it must affirmatively appear therefrom that its cause is so barred. *Moulton v. Walsh*, 30 Id., 361.

A demurrer never confesses an allegation which it appears upon the face of the pleading the pleader was estopped to make. *Schofield v. McDowell*, 47 Id., 129.

The objection that there is a defect of parties cannot be raised for the first time in the supreme court. *Melick v. The First National Bank of Tama City et al.*, 52 Id., 94.

In an action on an attachment bond the petition should set out the bond and the breach of its conditions and allege that the plaintiff in the attachment suit did not have sufficient reason for believing the alleged grounds for attachment to be true. *Hunt v. Rheum*, 52 Id., 619.

Where, after a demurrer is filed to a pleading, the pleading is amended, the effect is to submit to the demurrer. *The Dist. Tp. of White Oak v. The Dist. Tp. of Oskaloosa*, 44 Id., 512. If a demurrer be filed to the amended petition, the first demurrer will be considered waived. *Id.*

That several defendants have no community of interest is not ground for demurrer, but of a motion for misjoinder of parties. *Id.*

A motion to strike from the petition the name of a party improperly joined, is the proper remedy when one of several plaintiffs has no legal capacity to sue. *Id.*

It is not necessary that a copy of a written instrument, referred to in the petition, should be annexed thereto. This is required only when action is founded on the writing. *Barney v. Buena Vista County*, 33 Id., 261.

The statute does not contemplate that instruments of evidence merely which do not constitute the basis of the action or counter-claim, should be annexed to or copied in the pleading. *Taylor v. The Cedar Rapids & St. P. R. Co.*, 25 Id., 371.

Under section 3570 of the revision, it was held that a party to an action for the recovery of real property should annex the evidence of his title as exhibits to his pleading. *Boardman v. Beckwith*, 18 Id., 292.

Where the petition on its face showed that the contract sued on consisted of a written order, and a letter and the answer thereto in relation to such order, but failed to set out a copy of one of the letters, without giving any sufficient reason therefor, held, that a demurrer to the petition was properly sustained under this section of the code. *Johnson & Co. v. Tostevin & LeRoy*, 60 Iowa, 46.

The statute does not contemplate that instruments of evidence merely, which do not constitute the basis of the cause of action, or counter-claim, should be annexed to or set out in the pleading, in order to render them admissible in evidence. *Taylor v. C. R. & St. P. R. Co.*, 25 Id., 371.

The failure, in an action for damages for breach of contract, to state specifically the damages suffered by the plaintiff, cannot be objected to by demurrer, but is ground for a motion for a more specific statement. *McCormick v. Bassal*, 46 Id., 235.

In an action against a railroad company to recover double damages for killing stock, the objection that the petition failed to set out the notice served upon the company must be made by demurrer, or it will be held to be waived. *McKinley v. The C., R. I. & P. R. Co.*, 47 Id., 76.

Where an action is brought upon a judgment of a court of record of this state before the expiration of fifteen years from the date of its rendition, the petition will be demurrable, unless it alleges that leave of the court to bring the action has been obtained. *Watts v. Everett*, 47 Id., 269.

Where a petition shows affirmatively that its cause of action is barred by the statute of limitations, it may be assailed by demurrer. *Lawrence v. Sinnamon*, 24 Id., 80; *Miller v. Dawson & Conger*, 26 Id., 186; *Parsons v. Carey*, 28 Id., 431; *Lamb v. Withrow*, 31 Id., 164.

To be available, the statute of limitations must be pleaded either by answer or raised by demurrer. *Robinson v. Allen*, 37 Id., 27.

Under this section a petition in an action on account is bad on demurrer if a copy of the account is not embodied in or attached to the petition, even though the account is so simple and so fully stated in the petition that a copy might appear to be superfluous. *Winters v. Page County*, 70 Id., 300.

The question, whether an action is barred by the express terms of a policy of insurance, made part of the petition, may properly be raised on demurrer under subdivision 5 of this section of the code. *Moore v. State Ins. Co.*, 72 Id., 414.

SEC. 2649. [Specify causes and number.]—A demurrer must specify and number the grounds of objection to the pleading, or it will be disregarded; and it shall not be sufficient to state the objection in the terms of the preceding section, except that a demurrer to an equitable petition for the fifth reason of said section may be stated in the terms thereof.

Where the demurrer set forth in general terms that the petition does not state a cause of action or show such a state of facts as will justify the court in granting any relief, it should be disregarded because not sufficiently specific. *McKeller v. Stout*, 13 Iowa, 487.

A demurrer should use language which will point to the fact which renders the pleading bad, but need not give the reasons leading to this conclusion. *Davenport G. L. & C. Co. v. The City of Davenport*, 15 Id., 6; see, also, *Middletown Savings Bank v. The City of Dubuque*, Id., 394-403; *Allen v. Cerro Gordo County*, 34 Id., 54.

A demurrer should clearly point out the objection to the pleading, which is intended to be developed by the argument; when not thus specified it should be disregarded by the court. *Jones v. Brumskill*, 18 Id., 129; *Luse v. City of Des Moines*, per DILLON, J., 22 Id., 592; *Piper v. Newcomer & Campbell*, 26 Id., 221, 222; *Singer v. Calvers*, 26 Id., 178; *McGregor & S. C. R. R. Co. v. Birdsall*, 30 Id., 255; *Childs v. Limbach*, Id., 398; *McLaughlin v. Bascomb*, 36 Id., 593; *Hanna v. Hawes*, 45 Id., 437, 441.

In equitable actions a demurrer may properly state, in general terms, that the facts alleged in the petition do not entitle the plaintiff to the relief demanded. *Fisher v. Beard*, 32 Id., 346-348, per MILLER, J.; *Allen v. Cerro Gordo County*, 34 Id., 54; *Cowen v. Boone et al.*, 48 Id., 350.

Where a demurrer specifies the ground of objection it is sufficiently specific under the statute. *The M. & I. S. R'y Co. v. Hiams*, 53 Id., 502.

In an action at law a demurrer stating that "the facts * * * do not entitle the plaintiff to the relief demanded," is too general and should be overruled. *Hintrager v. Sumbargo et al.*, 54 Id., 604.

A demurrer is sufficiently specific when it contains unmistakable reference to the facts of the pleading demurred to. *Davenport v. Whisler & Shields*, 46 Id., 287.

Where a demurrer strikes at an entire pleading, one count of which is sufficient, it must be overruled. *Darr v. Lilley et ux.*, 11 Id., 4; *Edwards v. Cochran*, 12 Id., 488.

A demurrer in an action at law, which simply avers that "the allegations of the petition are insufficient to entitle the plaintiff to recover," is not sufficiently specific to be regarded by the court under this section. *Davidson v. Biggs*, 61 Id., 309.

Under section 3379, the action of mandamus is an ordinary action at law, so that by section 2649 a demurrer to a petition in such case, on the ground that "the facts stated therein do not entitle the plaintiff to the relief demanded," should be overruled because not sufficiently specific under this section. *Dist. Tp. of Eden v. The Ind. Dist. of Jesup*, 72 Id., 637.

SEC. 2650. [Waiver.]—When any of the matters enumerated as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer. If no such objection is taken, it shall be deemed waived. If the facts stated by the petition do not entitle the plaintiff to any relief whatever, advantage may be taken of it by motion in arrest of judgment, before judgment is entered.

An objection apparent on the face of a pleading, which might have been raised by a demurrer, will be waived by going to trial on the merits, and cannot be raised for the first time in an instruction. *Young v. Broadbent*, 23 Id., 539. So, also, when the plaintiff fails to annex to his petition either the original or a copy of an instrument which is the foundation of the action; if the objection is not made by demurrer, it will be waived. *Smith & Co. v. McLeans*, 24 Id., 322.

An objection that the petition in an action against a railroad company contains no allegation of the corporate character of the defendant, cannot be made on a motion in arrest of judgment, but should have been raised by demurrer. *Andre v. The C. & N. W. R'y Co.*, 30 Id., 107; see also *Byington v. M. & M. R. Co.*, 11 Id., 502.

Want of jurisdiction is ground for demurrer only when it appears on the face of the petition; a demurrer cannot be aided by extrinsic evidence. *Childs v. Limbach*, 30 Id., 398.

The statute of limitations, as a defense, is not available unless taken advantage of on demurrer or pleaded by answer. *Robinson v. Allen*, 37 Id., 27.

When a petition asking a mandamus shows on its face that the plaintiff has a plain, speedy and adequate remedy, it should be assailed by demurrer. *Meyer v. Dubuque County*, 43 Id., 592.

Where a petition is defective in substance and the defendant answers instead of demurring thereto, he may move in arrest of judgment after trial. *Edgerly v. The Farmers' Ins. Co.*, 43 Id., 587.

If a petition is not assailed by motion, demurrer, or in arrest of judgment, an objection which

might have been made by either of those methods, but was not, will be deemed to have been waived. *Murphy, Neal & Co. v. Creighton*, 45 Id., 179.

The objection that one who is a necessary party is not joined in the action, will be waived if not raised by demurrer. *Ryan & Co. v. Meulliniz*, Id., 631.

Where a party fails to take the objection, either by demurrer or answer, it will be waived. *Springer v. Bartle*, 46 Id., 688, 692.

Advantage may be taken of a misjoinder of parties by answer and by motion in arrest of judgment. *Cogswell v. Murphy*, Id., 44. See also, *Boude v. The M. E. Church*, 47 Id., 705, 707.

An objection to the sufficiency of a pleading must be taken by motion, demurrer, reply or in arrest of judgment. It cannot be raised for the first time by way of an instruction to the jury. *McIntire v. McIntire*, 48 Id., 511; *Nollen v. Wisner*, 11 Id., 191.

That the petition, in an action for selling liquor to a person in the habit of becoming intoxicated, did not show that the action was commenced by a citizen of the county, cannot be made for the first time in the supreme court. *Church v. Highman*, 44 Id., 482.

Where the jury returns a verdict for substantial damages for plaintiff when he is entitled to only nominal damages, it is reversible error for the court to sustain a motion for judgment for the defendant, notwithstanding the verdict. A motion for a new trial is the proper remedy in such case. *Carl v. The Granger Coal Co.*, 69 Id., 519. See, also, *Watson v. Van Meter*, 43 Id., 76.

Where the facts stated in the plaintiff's petition do not entitle him to any relief whatever, advantage may be taken of it by motion in arrest of judgment before judgment is entered. *Seymore v. Shay et al.*, 62 Id., 708, 712; *Cruver v. C., M. & St. P. R'y Co.*, Id., 462. See, also, *Wendall v. Osborne & Co.*, 63 Id., 99.

When the objection that there is a defect of parties is not taken by demurrer or answer it will be deemed waived. *Lillie v. Case*, 54 Id., 177.

To an action in equity to cancel the assignment of a contract, alleged to be fraudulent, both the assignor and the assignee are necessary parties, and either may insist, either on the trial below or on the trial *de novo* in the supreme court, that no decree shall be rendered against him until the other is brought into court. *Miller et al. v. Mahaffy et al.*, 45 Id., 289.

In an action upon a promissory note, commenced before the note matured, it was held competent for the court to instruct the jury to find for the defendant, although no demurrer had been interposed. *Seaton & Spaan v. Hinneaman*, 50 Id., 395. But see *Nollen v. Wisner and Van Vark*, 11 Id., 191; *McIntire v. McIntire*, 48 Id., 511.

Where there was a failure to aver a material condition precedent to the liability of the defendant, but the defect was not assailed by demurrer or other pleading, it was held not competent for the court to direct a verdict for the defendant on the ground that such condition precedent had not been established. *The Wrought Iron Bridge Co. v. Greene*, 53 Id., 562.

The filing of an answer after a demurrer to the petition has been overruled waives any error which might have been predicated upon the ruling on the demurrer. *Smith v. Warren County*, 49 Id., 336.

And where a party amends his pleading after a demurrer has been sustained thereto, he waives the right to object in the appellate court to any error in such ruling. *Duncan v. Hobart et al.*, 8 Id., 337; *Franklin v. Twogood*, 13 Id., 515; *The City of Muscatine v. The K. N. L. P. Co.*, 47 Id., 350; *Lane v. The B. & S. W. R. Co.*, 52 Id., 18; *Wilcox v. McCune*, 21 Id., 294; *Coakley v. McCarthy et al.*, 34 Id., 105; *Jones et ux. v. Marcey et al.*, 49 Id., 188; *Westphal, Hinds & Co. v. Henney et ux.*, Id., 542.

An objection apparent upon the face of a petition, which is not taken by demurrer, is to be deemed waived, except where the facts stated do not entitle the plaintiff to any relief. Advantage may be taken of this defect on motion in arrest before judgment. *Kendig v. Overhulser*, 58 Id., 195.

If the facts stated in the plaintiff's petition do not entitle him to any relief, and the defendant fails to demur, advantage may be taken of the defect by motion in arrest of judgment, or the court may at the trial direct the jury to find for the defendant. *Smith v. B., C. R. & N. R'y Co.*, 50 Id., 72.

Would it not be as well, and a saving of time, for the court to refuse a trial altogether?—ED.

A motion in arrest of judgment is provided where the facts stated in the petition do not entitle the plaintiff to any relief; but such a motion is properly overruled when based on the ground of want of evidence to sustain the verdict. A motion for a new trial is the proper remedy in that case. *Kirk v. Litterst*, 71 Id., 71.

SEC. 2651. The defendant may demur to one or more of the several causes of action alleged in the petition, and answer as to the residue.

The filing an answer with a demurrer is a waiver of the demurrer. The defendant may demur to one or more of several causes of action and answer as to the others, but he cannot do both to the same cause of action. *Fisher v. Scholte*, 30 Iowa, 221.

SEC. 2652. [**No joinder.**—The opposite party shall be deemed to join in a demurrer, whenever he shall not amend the pleading to which it is addressed.

SEC. 2653. [**Answer after.**—Upon a demurrer being overruled, the party demurring may answer or reply.

SEC. 2654. [**Failure to amend: effect of.**—Upon a decision of a demurrer, if the unsuccessful party fail to amend or plead over, the same consequences shall ensue as though a verdict had passed against the plaintiff, or the defendant had made default, as the case may be.

Upon the overruling of a demurrer to a petition, if the defendant fails to plead over, he should be regarded as in default, merely; and final judgment should not be rendered against him in behalf of the plaintiff without evidence sustaining the cause of action. *Musser & Co. v. Hobart*, 14 Iowa, 248.

Where the plaintiff demurred to defendant's answer, which set up a complete defense to the action, and upon the overruling of the demurrer, stood by his demurrer and refused to further plead, it was held not error for the court to render judgment for the defendant for costs without a trial of the issues of fact. *Simeral v. The Des Moines Fire Insurance Co.*, 18 Id., 319; *Brown v. Mallory*, 26 Id., 469, 472; *Bridge, Bach & Co., v. Livingstone*, 11 Id., 59.

A demurrer will not lie to a single paragraph or allegation of a pleading in an equitable action, when such paragraph or allegation, though deficient in itself, when taken with others in the pleading, they constitute a good cause of action or ground of defense. *Benedict v. Hunt*, 32 Id., 27.

Where a demurrer to an answer is overruled and judgment rendered against the plaintiff thereon upon his failure to plead over or prosecute his action, he will not, after appeal, be allowed to withdraw the demurrer and have a trial on the issues of fact. *Dunlop & Co. v. Cody*, 31 Id., 260; *Grimes v. Hamilton County*, 37 Id., 290.

A demurrer cannot properly be sustained to a whole pleading, one count of which is good as putting in issue material facts alleged in the petition. *McPhail & Co. v. Hyatt*, 29 Id., 137.

Where a party excepts to the overruling of his demurrer and takes time to answer, but does not answer, and allows judgment to be entered against him, he is presumed to stand upon the demurrer, and does not waive his objection to the ruling of the court thereon. *Watts v. Everett*, 47 Id., 269.

A judgment upon demurrer is a bar to another action between the same parties upon the same facts, the sufficiency of which was put in issue by the demurrer. *Felt v. Jurnure et al.*, 48 Id., 397; *Kater & Skinner v. Hock et al.*, 16 Id., 23.

ANSWER.

SEC. 2655. The answer shall contain:

1. **The name of the court** of the county, and of the plaintiffs and defendants, but when there are several plaintiffs and defendants, it shall only be necessary to give the first name of each class, with the words, and others;
2. **A general denial** of each allegation of the petition, or else of any knowledge or information thereof sufficient to form a belief.
3. **A specific denial** of each allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief;
4. **A statement of any new matter** constituting a defense;
5. A statement of any new matter constituting a **counter claim**;
6. [**Several defenses.**—The defendant may set forth in his answer as many causes of defense, counter-claim, whether legal or equitable, as he may have.

A denial in answer of any *information* sufficient to form a belief as to the truth of the matter alleged in the petition, raises no issue to be tried by a jury or otherwise. The denial must be of any *knowledge* as well as of any information. But both must be stated. *Manny & Co. v. French*, 23 Iowa, 250.

But when the denial is in this respect in the language of the statute it forms a material issue and cannot be stricken from the files as frivolous. *McFarland, Dodge & Co. v. Lester*, Id., 260; *McPhail & Co. v. Hyatt*, 29 Id., 137.

An equitable defense may be pleaded in an action at law, or by ordinary proceeding, for the recovery of the possession of real property. *Van Orman v. Stafford, Clarke & Co.*, 16 Id., 186; *Bosierz v. Van Dam*, Id., 175; *Raimer v. Conger*, Id., 434; *Byers v. Rodabaugh*, 17 Id., 53; per COLE, J., in *Thompson v. Hurley*, 19 Id., 335; *Shawhan v. Long*, 26 Id., 488; *Van Orman v. Merrill*, 27 Id., 476; *Hackett v. High*, 28 Id., 539.

The defendant may plead as many defenses, either legal or equitable, as he has. When the defense in a law action is equitable in its nature it is to be viewed in the same manner as to the substance, as if the same facts had been made the basis of a petition in equity for affirmative relief. *Penny v. Cook*, 19 Id., 538; *Thompson v. Harley*, Id., 335; *Rogers v. Gwinn*, 21 Id., 58; *Robert's v. Austin Corbin & Co.*, 26 Id., 315, 327.

In an action on a promissory note, an answer which merely denies, as a conclusion, that there is due upon the note the amount claimed in the petition, constitutes no substantial defense and may be assailed by demurrer. *Stuckslager v. Smith*, 27 Id., 286; 9 Id., 546.

There is no such thing as the general issue in pleading under the code, and a party is required to plead whatever defense he intends to rely upon. *Hagan v. Burch*, 8 Id., 309; *Scott v. Morse*, 54 Id., 732.

Where facts which constitute only a partial defense are pleaded as a full defense to the action, the allegations may on motion be stricken from the pleading as immaterial. *Peck et al. v. Parehen et al.*, 52 Id., 46; *Davenport Gas L. & C. Co. v. The City of Davenport*, 16 Id., 6; *Martin v. Swearingen*, 17 Id., 346.

No notice to the plaintiff is necessary to be given of the filing of an answer in the nature of a cross-bill in a suit brought in behalf of minors. *Treiber v. Shafer et al.*, 18 Id., 29.

A party must deny having either knowledge or information to form a belief as to the truth of a fact pleaded by the adverse party, in order to raise an issue by such denial under this section of the code. *Clafin v. Reese et al.*, 54 Id., 544.

Where the defendant denied the contract alleged in the petition and pleaded a different contract under which he alleged the services were performed for which suit was brought, it was held that the plaintiff might recover under the latter contract, if established by the evidence, the amount shown to be due him thereon. *Cook v. Smith*, 54 Id., 636.

An accord with tender of satisfaction may be pleaded by way of counter-claim for damages, resulting to him from the failure of the plaintiff to perform his part of the contract by refusing to accept what he agreed to receive in satisfaction. *Branner v. Piper*, 25 Id., 400.

Subdivision six of this section contemplates that the counter-claim shall be pleaded in or as part of the answer, and there is no provision of the statute requiring the pleadings to state in words that the matter set forth is pleaded as counter-claim. *The Union National Bank v. Carr*, 49 Id., 359, 360.

The defendant, in an ordinary or law action, may plead equitable matters in defense and have the issues thus presented tried in the manner provided for the trial of equitable actions; and the court should order, and the better practice would dictate, that these issues be first tried. *Hackett v. High*, 28 Id., 439; *Kramer v. Conger*, 16 Id., 434; *Byers v. Rodabaugh*, 17 Id., 53.

A counter-claim is an answer, and a suit for damages on an attachment bond, by the defendant in the main action, is a counter-claim; that the counter-claim is interposed merely for delay, and not in good faith, does not affect the legal rights of the parties. *Town v. Bringolf*, 47 Id., 133.

It is within the discretion of the court to permit an answer to be withdrawn and a demurrer filed, and the exercise of this discretion will not be reviewed by the appellate court unless an abuse of it be shown. *Byington v. Stone*, 51 Id., 317.

While, if new matter is pleaded as a defense by way of avoidance, there should be in the count a confession that but for such new matter the action could be maintained, yet such confession may be by implication as well as directly. *Morgan & Rogers v. The Hawkeye Ins. Co.*, 37 Id., 359; *Anson v. Dwight*, 18 Id., 247.

Where defendants answered that they had no knowledge or information as to whether the facts alleged in the petition of plaintiff were true or not and therefore denied them, held, that the allegations thus referred to were put in issue by the answer. *Tyner v. Fuller*, 67 Id., 188.

Where an action was founded upon contract, the execution of which was admitted in the answer, but the answer denied performance on the part of the plaintiff, and alleged an alteration of the instrument since its execution, held, that plaintiff had no need to introduce the contract in evidence, but only to prove performance on his part, and that the burden was on the defendant to establish the alteration alleged in the answer. *Wing v. Stewart et al.*, 68 Id., 13.

Where an answer denies knowledge or information sufficient to form a belief as to the truth of the material allegations of the petition, a demurrer to such answer cannot properly be sustained. *Carr v. Bosworth et al.*, 68 Id., 669.

SEC. 2656. [Of guardian.]—The guardian of a minor, or person of unsound mind, or attorney for a person in prison, must deny in the answer all the material allegations of the petition prejudicial to such defendant.

SEC. 2657. [Divisions of.]—Each affirmative defense shall be stated in a distinct division of the answer, and must be sufficient in itself, and must intelligibly refer to that part of the petition to which it is intended to apply.

A division of an answer which does not purport to relate to any particular count in the petition, will be considered with reference to the whole petition, and when such division is insufficient as

to any one count of the petition, it will be treated as insufficient as to all. *The Davenport G. L. & C. Co. v. The City of Davenport*, 15 Iowa, 6, 18.

Each count of an answer must be sufficient in itself for the purposes in which it is pleaded; otherwise, it is vulnerable to a demurrer; it cannot be aided by matter stated in another count. *The National Bank of Michigan v. Green*, 33 Id., 140.

Where new matter is pleaded in evidence, there should be in the same count a confession that but for such new matter the action would be maintainable; but such confession may be by implication as well as directly. *Morgan & Rogers v. The Hawkeye Ins. Co.*, 37 Id., 359; *Anson v. Dwight*, 18 Id., 241.

Several defenses cannot be pleaded in the same count or division of the answer. Each defense must be stated in a separate count. *Donahue v. Brosser & Jones*, 10 Id., 276; *Wright v. Connor et al.*, 34 Id., 240.

An instruction based upon the theory that a certain defense was set up in the answer, which was not set up in fact, unless the defensive portion of the answer be supplemented by allegations contained in other divisions stating counter claims, held erroneous; as each affirmative defense must be stated in a distinct division of the answer, and must be sufficient in itself. *Davis' Sons v. Robinson*, 67 Id., 355.

SEC. 2658. [No prayer in defense.]—In the defense part of an answer or reply, it shall not be necessary to make any prayer for judgment.

In an action in equity for the cancellation of a policy of insurance issued by the plaintiff, the defendant may by way of counter-claim set up a cause of action on the policy for loss of the property insured, such cause of action being "connected with the subject of the action," within the meaning of this section of the code. *Revere F. Ins. Co. v. Chamberlain et al.*, 56 Iowa, 508.

COUNTER-CLAIM.

SEC. 2659. [How stated.]—Each counter-claim, must be stated in a distinct division, and must be:

1. When the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court; or,

2. A cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition or connected with the subject of the action; or,

3. Any new matter constituting a cause of action in favor of the defendant, or all of the defendants, if more than one, against the plaintiff, or all of the plaintiffs, if more than one, and which the defendant or defendants might have brought when suit was commenced or which was then held, either matured or not, if matured when so pleaded.

Claims for damages arising upon torts, as well as for money due on contracts, may be pleaded by way of counter-claim. *Campbell v. Fox*, 11 Iowa, 318.

Where matter pleaded in an answer is not set up as a counter-claim, and is not stated as a defense in bar, it may be stricken from the answer. *Amsden v. The D. & S. C. R'y Co.*, 13 Id., 132.

Under our statute, fraud may be pleaded as a counter-claim, and when so pleaded, in addition to defeating plaintiff's action, it may entitle the defendant to an affirmative judgment; but this does not take away the common law right of relying upon the fraud as a defense in whole or in part. *Coe v. Lindley*, 32 Id., 437, 442.

A pleading setting up a counter-claim, which does not arise out of the contract or transaction set forth in the petition, and is not connected with the subject of the action, and does not contain new matter constituting a cause of action in favor of all the defendants against all the plaintiffs, may be stricken from the files. *Exline v. Lowrey*, 46 Id., 556.

A defendant may plead as a counter-claim against the plaintiff, a claim arising on contract, which would constitute in his favor a cause of action against the plaintiff and others jointly bound with him. *Redman & Fear v. Malvin & Cloud*, 23 Id., 296.

In an action against husband and wife jointly, the defendants cannot plead as a counter-claim, a cause of action against the plaintiff for a previous malicious prosecution of the wife alone; nor can the husband, in such case, set up by way of counter-claim, a claim for damages accruing to him for a malicious prosecution of himself or minor children by plaintiff. *Mussleman v. Galligher*, 32 Id., 333.

The revision of 1860 employed the terms "set-off," "counter-claim," and "cross-demand," and recognized a distinction between them. No such distinction is recognized by the code of 1851. The code of 1873 abolishes the distinction, the "counter-claim" embracing all of them. Per DAY, J., in *Reynolds v. Martin*, 51 Id., 324, 326.

Where an answer pleading a counter-claim fails to state that the cause of action pleaded as such counter-claim was held by the defendant at the time suit was commenced, it may be attacked by demurrer. *Rumsey & Co. v. Robinson & Atherton*, 58 Id., 225.

A surety may set up any defense that would be available to his principal, and so the principal and surety, when sued on their obligation, may set up, as a counter-claim, any demand which the principal, if sued alone, might plead as a counter-claim. This section does not apply to such a case. *Reeves v. Chambers et al.*, 67 Id., 81.

In an action by an administrator for money due to his intestate, a demand against the intestate acquired by the defendant after the death of the intestate, was held not pleadable as a set-off under the code of 1851. But it was held that the defendant might plead as a set-off an unsettled account against the intestate, which might before his death have been so pleaded. *Lucore, Adm'r, v. Kramer*, 22 Id., 387.

It was held under section 2886 of the revision that in an action to foreclose a mortgage the defendant might plead as a set-off an account against a firm of which the plaintiff was a member. *Allen v. Maddox*, 40 Id., 124.

In an action for divorce the defendant may set up any matters connected with the subject of the action, occurring after its commencement and constituting a cause of action against the plaintiff, upon which affirmative relief may be asked; such matter constitutes a counter claim. *Wilson v. Wilson*, 40 Id., 230.

Where judgment was recovered against the defendant in another state, and he had at the time an independent cause of action against the plaintiff which he might then have pleaded as a counter claim; held that he was not bound then to plead it, and that he might set it up as a counter-claim in an action against him in this state on the foreign judgment. *Folsom v. Winch*, 63 Id., 477.

Under a prayer for general relief a judgment may be granted without specific prayer therefor. *Pond v. The Waterloo A. Works et al.*, 59 Id., 596.

In an action on a promissory note a defendant may, by way of counter-claim, attack the validity of the note and ask affirmative relief in his behalf, and such counter-claim is not rendered inadmissible from the fact that it is in the nature of an action of replevin, in that it prays possession of the note, such relief being equivalent to its cancellation. *Sigler v. Hidy et al.*, 56 Id., 504.

The dismissal of an action on a promissory note without prejudice to the plaintiff, will not entitle him to a dismissal of a counter-claim asking a cancellation of the note. *Id.*

Where the plaintiff, as assignee, brought suit on an injunction bond executed by the defendant to one M., the defendant set up a certain promissory note made by M. to the defendant, and also a judgment against M. in favor of defendant, as counter-claims. *Held*:

1. That the counter-claims were properly pleaded as against the plaintiff as assignee of the bond.

2. That the plaintiff had the right to show that the note was obtained by duress, and that the judgment was void for want of jurisdiction in the court rendering it. That the plaintiff, as assignee, could assert the same defenses to said counter-claims that M. could have done. *Miller v. City of Centerville*, 57 Id., 640.

SEC. 2660. [**Equitable matter.**].—An equitable division must also be separated into paragraphs, and numbered as required in regard to an equitable cause of action in the petition.

SEC. 2661. [**Co-maker or surety.**].—A co-maker, or surety, when sued alone, may, with the consent of his co-maker or principal, avail himself by way of counter-claim, of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such co-maker, or principal, but the plaintiff may meet such counter-claim in the same way as if made by the co-maker or principal himself.

See note to section 2659, from *Reeves v. Chambers et al.*, 67 Iowa, 81.

SEC. 2662. [**New party.**].—When a new party is necessary to a final decision upon a counter-claim, the court may either permit such party to be made, or direct that it be stricken out of the answer and made the subject of a separate action.

SEC. 2663. [**Cross petition.**].—When a defendant has a cause of action affecting the subject matter of the action against a co-defendant, or a person not a party to the action, he may in the same action file a cross petition against the co-defendant or other person. The defendants thereto may be notified as in other cases, and defense thereto shall be made in the time and manner prescribed in regard to the original petition, and with the same right of obtaining provisional remedies applicable to the case. The prosecution of the cross petition shall not delay the trial

of the original action, when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross petition.

Where a defendant files a cross petition, under this section, against his co-defendant, the subsequent dismissal of the original petition will not necessarily operate to dismiss the cross petition. *Spearing v. Chambers et al.*, 25 Iowa, 99.

Where a defendant sets up a cause of action by cross bill against his co-defendant, notice of such action must be served upon the co-defendant, in order to give the court jurisdiction to render judgment against him on the cross bill. *Thode, Guardian, v. Spofford et al.*, 65 Id., 294.

SEC. 2664. [Demurrer to answer.]—When the facts stated in the answer, or any count or division thereof, are not sufficient to constitute a defense or counter-claim, the adverse party may demur, and shall be held to the same certainty in the statement of the grounds therefor as obtains in a demurrer to the petition.

An answer in order to be sufficient must either deny the allegations of the petition, or it must confess and avoid them. *The Davenport G. L. & C. Co. v. The City of Davenport*, 15 Iowa, 6.

A demurrer to an answer must be as specific as a demurrer to a petition. *Fockler v. Martin*, 32 Id., 117, 119; *McKellar v. Stout*, 13 Id., 487; *Jones v. Brunskill*, 18 Id., 129.

REPLY.

SEC. 2665. [When necessary.]—There shall be no reply except:

1. Where a counter claim is alleged; or,
2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense, by the reason of the existence of some fact which avoids the matter alleged in the answer.

Under the revision a reply was allowable only when allegations of counter-claims, set-off or cross-demand were pleaded in the answer. When no such allegations were contained in the answer, it was deemed controverted without further pleading, as upon direct denial, or confession, or avoidance; as the case required. *Smith v. Milburn*, 17 Iowa, 30; *Adams v. Peck*, 14 Id., 508; *Davenport S. F. & L. A. v. The North Am. F. Ins. Co.*, 16 Id., 74; *Clark v. Cress*, 20 Id., 50, 54; *Finley v. Brown*, 22 Id., 538; *Noble v. The S. B. N. Ills.*, 23 Id., 109; *Carleton v. Byington*, 24 Id., 172; *Allison & Crane v. King*, 25 Id., 56; *Hardin v. Branner*, Id., 364, 369; *Gwyer v. Higgins*, 37 Id., 517.

Under the code a reply is unnecessary where the answer does no set up a counter-claim, and the plaintiff has no new matter to plead in confession and avoidance. Nor is a reply allowable under such circumstances. *Davis v. Payne et al.*, 45 Id., 194. But if the plaintiff desires to prove matter in avoidance of the defense set up, he must plead it in a reply. *Id.*

Where the defendant pleads an assignment, and the plaintiff fails to reply thereto, he cannot introduce evidence to show the assignment to be a forgery, but the burden is upon the defendant to prove the genuineness of the assignment. *Hay v. Frazier*, 49 Id., 454.

Where the plaintiff in an action does not seek to avoid the allegations of an answer by new matter no reply is required or proper. The allegations of the answer are deemed denied. *University of Des Moines v. Livingston*, 57 Id., 307, 312; *Shaw v. Kendig*, Id., 390, 393.

The allegations of an answer, unless the same contains a counter-claim, are deemed to be denied without further pleading on the part of the plaintiff, and unless they are supported by evidence, the plaintiff is entitled to judgment upon proof of the statements of his petition. *Cassidy v. Caton*, 47 Id., 22.

The plaintiff may file a reply later than noon of the day succeeding that on which the answer is filed, upon reasonable terms to be imposed by the court. *Williams v. The Niagara F. Ins. Co.*, 50 Id., 561.

A failure to reply will not entitle the plaintiff to a judgment upon a claim for unliquidated damages, it being necessary that such damages should be assessed by a jury or by the court. *Yoe & Co. v. Nichols*, 51 Id., 330.

An allegation in an answer is to be taken as true when the plaintiff, in reply, pleads in confession and avoidance. *Clapp v. Cunningham*, 50 Id., 307.

It is not necessary for the plaintiff to reply, setting up the facts constituting an estoppel when they appear affirmatively from the answer, nor is it necessary for him to introduce evidence to establish such facts. *Scott v. Luther*, 44 Id., 570.

When no counter-claim is pleaded and the allegations of the answer are not such as to require a denial, the allegations are deemed controverted by operation of law and a reply is not necessary. *Brownlee v. Marion County*, 53 Id., 487, 488.

No reply is required to form an issue upon an answer pleading payment as a defense. *Kirk v. Woodbury County*, 65 Id., 190.

An answer which is not a counter-claim is considered a denial, and a reply denying such answer

is not allowed. And where a reply both denies the allegations of such answer, and pleads matter in avoidance thereof, the denial must be disregarded, and the matter in avoidance must be regarded as implying a confession of the answer. *Meadows v. Hawkeys Ins. Co.*, 62 Id., 337.

Where certain relief is prayed upon allegations made in the petition, the plaintiff cannot be awarded different relief upon other allegations made in the reply, as it is not the office of a reply to state a cause of action. *Marder, Luse & Co. v. Wright et al.*, 70 Id., 42.

Under this section, where, in an action to quiet a tax title, defendant alleged that the land was taxed to it at the time the deed was executed, and that no notice to redeem was served upon it. *held* that no denial by way of reply was necessary to put the allegation, that the land was taxed to the defendant, in issue. *Walker v. The B. C. & I. F. Iowa Lot Co.*, 65 Id., 563.

In an action to quiet a tax title where the answer denied the validity of the tax title, and then set up the facts relied on to show such invalidity, a reply was not necessary to put those alleged facts in issue; they were all in issue by the petition and the general denial of the answer. The pleading of the special facts in the answer did not amount to a counter-claim, for they did not present any new cause of action; and though the answer closed with a prayer for a cancellation of the tax title, and that the defendants title and right to redeem be established, all such relief would have resulted to defendant from a general judgment in his favor, without a special decree to that effect. *Walker v. The Sioux City & Iowa Falls Town Lot & Land Co.*, 66 Id., 751.

A reply which is not warranted by this section of the code, but which is in substance only a reiteration of one of the material allegations of the petition, should be stricken out on motion, but as it raises no new issue, a refusal to strike it out is not prejudicial error, and is therefore not grounds for reversal. *Bayliss v. Murray*, 69 Id., 290.

No reply is necessary to put in issue allegations in an answer which do not set up a counter-claim, not pleading matter to be avoided by new matter to be stated in the reply. *Mills County Nat. Bank v. Perry et al.*, 72 Id., 15.

SEC. 2666. [Statement of].—When a reply must be filed, it shall consist of:

1. A general or specific denial of each allegation or counter-claim controverted, or any knowledge or information thereof sufficient to form a belief; or,
2. Any new matter not inconsistent with the petition, constituting a defense to the matter alleged in the answer; or the matter in the answer may be confessed, and any new matter alleged, not inconsistent with the petition, which avoids the same.

Where a petition is defective in substance and the defendant fails to demur, but takes advantage of the defect by answer, the plaintiff may either amend his petition or reply by confessing, and avoiding the matter stated in the answer. *Edgerly v. The Farmers' Insurance Co.*, 43 Iowa, 587, 592.

This section, in providing that a reply must not be inconsistent with the petition, does not apply to an amendment to a petition after a petition of intervention has been filed, which is in effect an answer to the latter, and sets up a counter-claim, notwithstanding such amendment be inconsistent with the original petition. *Jack et al. v. The D. M. & Ft. D. R. Co.*, 49 Id., 627.

SEC. 2667. [Any number of defenses stated].—Any number of defenses, negative or affirmative, are pleadable to a counter-claim, and each affirmative matter of defense in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply. A division of equitable matter must also be separated into paragraphs and numbered as required in case of such matter in the answer.

SEC. 2668. [Demurrer to].—When the facts stated in the reply do not amount to a sufficient defense, the defendant may demur, subject to the same requirements of certainty in statements of grounds thereof as obtain in demurrer to the petition.

VERIFICATION.

SEC. 2669. [When verified subsequent pleadings must be].—Every pleading must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings, except demurrers, shall be verified also; and in all cases of verification of a pleading, the affidavit shall be to the effect that the affiant believes the statements thereof to be true.

An answer to a verified petition in an attachment suit, which was not sworn to as required by this section, was *held* properly stricken from the files, on motion of the plaintiff. *Harper v. Drake*, 15 Iowa, 157. See, also, *Brady v. Otis*, 40 Id., 97, 99.

The court may, after answer filed, permit the plaintiff to amend his petition, which is not sworn to, by adding a verification to the same; and after such amendment, if the defendant refuse to verify his answer, or to file a verified answer within the time allowed by law to plead, a default may be entered against him. *Wilson v. Preston*, Id., 246.

The certificate to the affidavit should state not only that the affidavit was subscribed in the officer's presence, but that it was sworn to before him. *Way v. Lamb*, Id., 79.

An affidavit of verification attached to a petition and referring to "the foregoing petition," is sufficient, notwithstanding it does not set out the names of the parties to the action. *Levy & Co. v. Wilson*, 43 Id., 605.

Where the affidavit is made in another state before the clerk of a court, an omission to state in the certificate that the court is a court of record is not fatal thereto; evidence *aliunde* may be given to show the character of the court. *Id.*

Where the affidavit annexed to a petition asking an attachment averred "that the facts set forth therein asking a writ of attachment are true," it was held equivalent to a statement that the allegations of the petition were true, and that it was sufficient. *Sherrill v. Fay*, 14 Id., 292.

An attorney for defendant is competent to verify statements in an answer, the truth of which he shows he has heard the plaintiff admit; but his knowledge that certain other facts pleaded in the answer were adjudicated between the parties in a former trial, does not qualify him to verify the statement of such facts. *Searle v. Richardson*, 67 Id., 170.

SEC. 2670. [**Corporation.**]

—Where a corporation is a party, the affidavit may be made by an officer thereof.

SEC. 2671. [**United interest.**]

—When there are several parties united in interest, the affidavit may be made by any one of them.

SEC. 2672. [**By agent or attorney.**]

—If the pleading be founded on a written instrument for the payment of money only, and such instrument be in possession of the agent or attorney, the affidavit may be made by such agent or attorney, so far as relates to the statement of the cause of action thereon; but when relief is asked other than a money judgment or decree of foreclosure, the affidavit must contain averments showing competency as herein provided.

An attorney who has full knowledge of the facts stated in the petition, where the plaintiff himself could have possessed no more complete or certain knowledge, is competent to verify the petition. *Brady v. Otis*, 40 Iowa, 97.

A pleading may be verified by an attorney who states in his affidavit that his knowledge of the facts therein stated is better than that of the party himself, and that he knows the facts thus stated to be true. *Yoe & Co. v. Nichols*, 51 Id., 330.

Where a pleading, requiring verification because the prior pleading is verified, is verified by the attorney, who does not set forth in his affidavit that he has any knowledge whatever of the truth of the allegations of the pleading, it may be stricken from the files. *Clute Bros. & Co. v. Hazleton*, 51 Id., 355.

SEC. 2673. [**By any person knowing the facts.**]

—If the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same.

In an action commenced by a partnership in the firm name of "S. G. L. Bro. & Co.," the petition was verified by the affidavit of I. L., the affidavit failing to show that he was a member of plaintiffs' firm, although an account annexed to the petition was sworn to by said I. L. as a member of the firm, it was held that in the absence of proof to the contrary it will be presumed that the petition was properly verified. *Lessom Bros. & Co. v. Wilson*, 43 Iowa, 488.

In action in which an attachment is asked, the affidavit of the attorney for the plaintiff to the effect that the facts set forth in the petition are better known to him than to the plaintiff, and that he knows them to be true, constitutes a sufficient verification. *Brusch v. Moore*, 48 Id., 611.

Where in an action by an indorsee upon an acceptance drawn by a corporation, the verification to a pleading was made by the secretary of the corporation who was also a member thereof, and showed that he was familiar with all the transactions between the corporation and the defendants, the verification was held sufficient. *First National Bank of Bellaire, Ohio, v. Mason & Co.*, 57 Id., 105.

SEC. 2674. [**Counter-claim may be.**]

—Where the petition is not verified, and the answer contains a counter-claim, the same may be verified apart from the defense part of the answer, and the foregoing provisions are applicable to the counter-claim as if the same were a separate pleading.

SEC. 2675. [**Guardian: executor: prisoner.**]—Verification shall not be required to any pleading of a guardian, executor, or prisoner in the penitentiary, nor to any pleading controverting the answer of a garnishee, nor to one grounded on an injury to the person or the character.

SEC. 2676. [**When cannot be required.**]—When it can be seen from the pleading to be answered, that an admission of the truth of its allegations might subject the party to a criminal prosecution, no verification shall be required.

SEC. 2677. [**Effect if not verified.**]—If a pleading be not duly verified, it may be struck out on motion; but such defect will be deemed waived if the other party respond thereto, or proceed to trial without such motion.

A defective verification to a pleading is waived by pleading thereto without objection. *Hughes v. Fetter*, 18 Iowa, 142.

SEC. 2678. [**When not amount claimed.**]—The verification of the pleading does not apply to the amount claimed, except in actions founded on contract, express or implied, for the payment of money only.

SEC. 2679. [**Proof.**]—The verification shall not make other or greater proof necessary on the side of the adverse party.

A verified answer does not make other or greater proof necessary than if the answer is not verified. *Sheppard v. Ford*, 10 Iowa, 502; *Mitchell v. Moore*, 24 Id., 394; *Robinson v. Lair*, 31 Id., 9, 11.

The old rule that, to overcome the effect of a sworn answer in chancery, two witnesses, or one witness and corresponding circumstances were necessary, has no existence under the practice in this state. *Smith v. Phelps*, 32 Id., 537; *Graves & Co. v. Alden*, 13 Id., 573.

SEC. 2680. [**Amendments not verified.**]—Courts may permit the amendments authorized by this chapter to be made without being verified, unless a new and distinct cause of action or counter-claim is thereby introduced.

The court may, under this section, allow no amendment to be made, without verification, to previous pleadings which have been verified. *Tegler & Co. v. Shipman*, 33 Iowa, 194.

SLANDER—LIBEL.

SEC. 2681. [**Statements of petition.**]—In an action for slanders or libel, it shall not be necessary to state any extrinsic facts for the purpose of showing the application to the plaintiff of any defamatory matter out of which the cause of action arose, or that the matter was used in a defamatory sense; but it shall be sufficient to state the defamatory sense in which such matter was used, and that the same was spoken or published concerning the plaintiff.

Under this section, if words published convey a libelous meaning upon their face, it is sufficient to set them out in the petition without any allegation of such meaning, and the court will determine whether the words are actionable or not. Where the words alleged to have been published are not actionable on their face, the plaintiff must show by proper allegation their defamatory sense, and that they were spoken of him in that sense, but it is not necessary to allege extrinsic facts showing their relation to the plaintiff, the defamatory sense when alleged, and the application to the plaintiff being material allegations of fact, must be proved. *Kinyon v. Palmer*, 18 Iowa, 377.

It is sufficient to allege generally that the words were used in a defamatory sense, and were spoken or published of and concerning the plaintiff. *Susarengen v. Stanley*, 23 Id., 115.

Where the words charged are actionable *per se*, it is not necessary to allege or prove any special damages, and in such a case the allegation of special damages to the plaintiff in his different relations of a citizen, a farmer and a church member, does not vary the rule, nor justify the court in sustaining a motion for a more specific statement of the particular items of damage sustained in each capacity. *Id.*

In an action of slander the defamatory words charged were as follows: "My table-cloths are gone, and you know where they are gone. If you will bring them back I will say nothing about it. You have got them. My husband has gone down town to get a warrant to search for the table-cloths and imprison you." *Held*, that the words imputed a crime and that it was not necessary for the plaintiff to prove that they were so understood by those who heard them. Where the meaning of slanderous words is not clear, such testimony is competent. *Hess v. Fockler*, 25 Id., 10.

It is not necessary, under this section, to set out extrinsic facts showing that the words charged

were used in a defamatory sense, but it is sufficient to set out the words themselves, and state the defamatory sense in which they were used. *Clarke v. Jones*, 49 Id., 474.

SEC. 2682. [Of answer in and for other torts.]—In an action brought to recover damages for an injury to person, character, or property, the defendant may set forth in a distinct division of his answer, any facts of which evidence is legally admissible to mitigate or otherwise reduce the damages, whether a complete defense or justification be pleaded or not, and he may give in evidence the mitigating circumstances whether he provoke the defense or justification or not, and no mitigating circumstances shall be proved unless plead, except such as are shown by, or grow out of, the testimony introduced by the adverse party; and in actions for slander or libel, an unproved allegation of the truth of the matter charged, shall not be deemed proof of malice, unless the jury on the whole case find that such defense was made with malicious intent.

The bad character may always be given in evidence in mitigation of damages in an action of slander. *Armstrong v. Pearson*, 8 Iowa, 29.

In an action of slander the plaintiff may show the pecuniary condition of the defendant in aggravation of damages, and the defendant may be permitted to show the same in mitigation of damages. *Karney v. Paisley*, 13 Id., 89.

On the trial of an action of slander, all circumstances cotemporaneous with the speaking of the alleged slanderous words which might have been given in evidence under the general issue of "not guilty" at common law, may be given in evidence under an answer in denial, but those which tend to show the truth of the charge must be pleaded before they can be given in evidence. *Beadsley v. Bridgman et ux.*, 17 Id., 290, 295.

Under section 2682, the defendant in an action for slander, may plead justification or in mitigation or both, and a failure to sustain a justification will not of itself be deemed proof of malice, neither will a failure to establish such a plea preclude evidence of mitigating circumstances. *Kinyon v. Palmer*, 18 Id., 377.

A defense alleging that the slanderous words charged were rumor repeated by the defendant is bad, even in mitigation of damages, in the absence of a showing that the words were repeated without actual malice. *Beadsley v. Bridgman*, 17 Id., 290.

In an action for slander, under this section, the defendant may, in his answer, allege circumstances in mitigation without confessing the speaking of the words, or averring his belief in their truth, or denying malice. *Desmond v. Brown*, 33 Id., 13.

In an action of libel or slander, the defendant cannot plead, either in defense or mitigation, that the plaintiff has been guilty of a specific crime in no way connected with the alleged defamatory words, or with the occasion on which they were written or spoken. *Fisher v. Tise*, 20 Id., 479.

In an action of slander the defendant may allege circumstances in mitigation without confessing the speaking of the words, or averring his belief in the truth, or denying malice. *Desmond v. Brown*, 33 Id., 13.

To constitute slander the alleged slanderous words must have been spoken in the presence and hearing of some person other than the plaintiff. *Id.*

And the words will be construed according to the sense in which they were intended by the defendant, and understood by those who heard them. *Id.* See also, *McCaleb v. Smith*, 22 Id., 242.

When mitigating facts are pleaded they must not be set up as a defense or justification, when they do not amount to that. They must be pleaded as mitigating circumstances, or as going to reduce the damages, and not as full defense. *Ronan v. Williams*, 41 Id., 680.

Under this section the same matters only can be pleaded in mitigation, in actions of slander, which are recognized as such by law, independent of the statute. *Marker v. Dunn*, 68 Id., 720.

While in one sense, facts pleaded in mitigation in an action for libel do not constitute a defense, yet, since under this section, such facts must be pleaded in order to entitle the defendant to introduce evidence of them, the plea must be regarded as tendering an issue which the court should present to the jury. *Mielenz v. Qausdorf*, 68 Id., 726.

Under section 2682, which provides that in an action for slander, "no mitigating circumstances shall be proved unless pleaded, except such are shown by or grow out of, the testimony by the adverse party," it is improper cross-examination, although plaintiff's reputation has been pleaded in mitigation, to ask plaintiff's witnesses regarding her reputation for chastity, they not having testified thereto on direct examination. *Hamers v. McClelland*, 37 N. W. R., 389.

INTERVENTION.

SEC. 2683. [Any person who has an interest may.]—Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding any thing adversely to both the plaintiff and defendant, either before or after issue has been joined in the cause and before the trial commences.

A purchaser of real property under a mortgage foreclosure, succeeds to the right of the mortgagee therein, and therefore has the right subsequently to intervene and be joined with the plaintiff in the foreclosure proceeding, which, after foreclosure and decree against the mortgagor, has been continued as to a defendant who purchased a part of the premises after the execution of the mortgage, and who contests the claim of plaintiff. *Dyer v. Harris*, 22 Iowa, 268.

The equitable owner of a promissory note may assert his rights thereto and obtain a recovery, by intervening in an action at law, commenced by the person having the possession and legal title to the note, against the maker. In such case the intervenors claim adversely to both plaintiff and defendant. *Taylor v. Adair et al.*, Id., 279.

Where a person intervenes in an action of replevin, and becomes the substantial defendant, the judgment therein designating the rights of the parties is conclusive upon all the parties, as well as between the plaintiff and the original defendant. *Witter v. Fisher*, 27 Id., 9.

In an action to enjoin the collection of a tax voted to aid in the construction of a railroad through a particular township, under the act for that purpose, the railroad company constructing the road through such township, and to be benefitted by such tax, may properly intervene for the purpose of interposing a defense. *Brown v. Bryan et al.*, 31 Id., 556.

When in an action against a county the board of supervisors conspire with the plaintiff to aid him in procuring a judgment, a taxpayer has such an interest in the litigation as entitles him to intervene and defend the action. *Greeley v. The County of Lyon*, 40 Id., 72.

Where the plaintiff and defendant in an action adjust and settle their respective claims by a voluntary agreement between them, and nothing remains but final judgment to determine the action, a third person, claiming an interest in the subject of litigation, cannot then intervene. *Henry, Lee & Co. v. The Cass Co. M. & E. Co.*, 42 Id., 33.

Where a person has or claims an interest in the matter in litigation adverse to one of the parties, he has a right to intervene. Per Beck, J., in *Young v. Tucker*, 39 Id., 596, 600.

Where a plaintiff, by garnishment proceedings, acquired only the title and interest in the property held at the time by the defendant in action, it was held that a prior lawful assignment would hold the property, and that persons having any interest in the property might intervene, whether the action be at law or in chancery. *Howe & Co. v. Jones et al.*, 57 Id., 130, 136.

In an action by taxpayers against the purchasers of a poor farm from the county, to set aside the sale on account of the inadequacy of the price, and other alleged illegalities, held that the county was entitled, under section 2653 of the code, to intervene and join the defendants in sustaining the sale, on the ground that it was advantageous to the county. *McConnell v. Hutchinson*, 71 Id., 512.

A party who has intervened in an action for the foreclosure of a mortgage, to which there are several parties defendant, will not, upon the rendering of a decree and the dismissal of all the parties save one, from whom the intervenor claims relief, lose his standing in the action. *The Joliet I. & S. Co. v. The C., C. & W. R. Co., et al.*, 51 Id., 300.

An intervenor cannot insist upon a change in the form of proceedings, or delay in the trial of the action, and it is error to allow an intervention which produces these results against the objection of parties. *Van Gorden v. Ormsby Bros. & Co. et al.*, 55 Id., 657.

This section does not give a person interested in the subject matter of the action the right to be substituted for either of the parties. He is given the right to unite with the party in whose success he is interested. *Britton v. D., M. O. & S. R'y Co.*, 59 Id., 540.

SEC. 2684. [Cannot delay main action.]—The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all costs of the intervention.

An intervenor cannot insist upon a change in the form of proceedings, or delay in the trial of the action, and it is error to allow an intervention which produces these results against the objection of parties. *Van Gorden v. Ormsby Bros. & Co. et al.*, 55 Iowa, 657.

SEC. 2685. [How affected.]—The intervention shall be by petition, which must set forth the facts on which the intervention rests, and all the pleadings therein

shall be governed by the same principles and rules as obtain in other pleadings provided for in this chapter. But if such petition is filed during term, the court shall direct the time in which an answer shall be filed thereto.

Pending an application to intervene and be substituted as a party, the applicant is not entitled to a change of venue. *Barkdull v. Callanan*, 33 Iowa, 391.

Intervention can only be by petition, and it is impossible by one petition to intervene in three distinct unconsolidated actions. Neither can one be bound by an adjudication upon a petition of intervention filed by another claiming to be his agent. *Rosenbaum Bros. v. Adams, Sheriff, etc.*, 61 Id., 322.

AMENDMENTS.

SEC. 2686. [**Variance.**—]No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown by proof to the satisfaction of the court, and such proof must also show in what respect he has been so misled, and thereupon the court may order the pleading to be amended upon such terms as may be just.

The right to amend a pleading is not an absolute, unconditional right, but is to be allowed by the court in "furtherance of justice" under a sound judicial discretion. *Brockman v. Berryhill*, 16 Iowa, 183.

A slight amendment allowed to make the pleading conform to the proof, and which could not have operated to surprise the adverse party, was *held*, not an abuse of discretion justifying a reversal of the judgment, although leave to amend was not granted until after the close of the evidence and arguments of counsel, and the amendment was not actually filed until after the return of the verdict. *Correll v. Glasscock*, 26 Id., 83.

An amendment after verdict, and pending a motion in arrest of judgment, curing a variance between the name of the defendant, as stated in the petition and as signed to the promissory note upon which suit was brought, was *held*, properly allowed without terms, it appearing that no prejudice could have resulted to the adverse party therefrom. *Thompson v. Wilson*, 26 Id., 120.

An amendment may be made during the trial by striking out the name of a party plaintiff. *Hinkle v. Davenport*, 38 Id., 355.

A party will not be allowed to file an amended pleading tendering a new issue after a referee's report has been made in the case, and thereupon have a resubmission to the referee, without at least offering a reasonable excuse for neglecting to file the amendment before the referee's report is made. *Newell v. The Mahaska County Savings Bank et al.*, 51 Id., 178.

In general, a party is not bound to prove number and price precisely as alleged; it is essential only that the substance of the issue be proved. If the objection to proof on the ground of variance is made in the court below, the court may allow an amendment of the pleading, but if no such objection be thus made, it cannot be urged in the appellate court. *Wilcox v. Jackson*, 57 Id., 278, 286.

Under this section, providing that no variance between the allegation and proof shall be material unless it be made to appear that the opposing party has been misled to his prejudice, an allegation that the section boss caused the engineer to increase the speed of the train while the plaintiff was endeavoring to get upon a car, is, in the absence of a showing as to prejudice, supported by evidence that the speed was increased by order of the conductor. *Rayburn v. Central Iowa R'y Co.*, 38 N. W. R., 520.

SEC. 2687. [**Same.**—]When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without costs.

SEC. 2688. [**When material.**—]When, however, the allegation of the claim or defense to which the proof is directed is unproved in its general meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

SEC. 2689. [**Amendments made at any time.**—]The court may, on motion of either party at any time, in furtherance of justice, and on such terms as may be proper, permit such party to amend any pleadings or proceedings by adding or striking out the name of a party, or by correcting a mistake in the name of a party.

or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceedings to the facts proved.

An amendment to a petition by the addition of another count, based upon the same state of facts on which the cause of action stated in the original petition is based, will not be regarded as the commencement of a new action. *Mather v. Butler County*, 16 Iowa, 59.

The right to amend is not an absolute, unconditional right, but it is to be allowed in "furtherance of justice," under a sound judicial discretion. *Brockman v. Berryhill*, 16 Id., 183; *Harvey v. Spalding*, 7 Id., 423.

It was held competent for the court to permit the plaintiff to file a new affidavit, properly stamped, to a petition for an injunction, when the first affidavit was defective because not properly stamped. *Hughes v. Feeter*, 18 Id., 142.

Where an action is brought upon a cause of action belonging to a partnership, in the name of one of the partners only, against one who was a partner of plaintiff, the court may at any time, in furtherance of justice, permit an amendment of the petition by inserting the name of the firm as plaintiff. *Dixon v. Dixon*, 19 Id., 512.

A motion for a new trial filed within the three days prescribed by statute, upon grounds other than newly discovered evidence, may, by leave of court, be amended at any time during the term, the amendment being germane to the grounds set out in the original motion. *Souden & Co. v. Craig*, 20 Id., 477.

The court may, in the exercise of the discretion vested in it, permit amendments to pleadings during the progress of the trial. *Arnold v. Arnold*, Id., 273.

In an action against an administrator by heirs for making fraudulent sales of real property for less than its value, which action was sustained upon a final hearing in the supreme court, and after the filing of the procedendo in the court below the defendant asked leave to file an amended answer, alleging that a certain amount was due him for fees and disbursements as administrator and as one of the heirs at law, and asking that the same be applied in cancellation of the judgment against him, *held*, that the pleading contained no matter that might not have been set up before the trial, and that the amended answer should not have been permitted to be filed. *Reed v. Howe*, 44 Id., 300.

A demurrer is a pleading within the meaning of section 2689, and may be amended like any other pleading. *Morrison v. Miller*, 46 Id., 84.

What may not come in by way of amendment or supplemental pleading, is the exception under the code, and that which may form the rule. Per WRIGHT, J., in *SeEVERS v. Hamilton*, 11 Id., 66.

The terms upon which amendments are allowed are within the sound discretion of the court. *Oliver v. Townsend*, 16 Id., 430; *SeEVERS v. Hamilton*, 11 Id., 66; *Glick v. Hartman*, 10 Id., 410; *Rees v. Leach*, 18 Id., 439; *Williams v. Miller*, 10 Id., 344.

The court may properly refuse to allow an amendment setting up a defense which cannot be made available, or which is a substantial repetition of a former pleading. *Abbott v. Chase*, 13 Id., 453; *Mayer v. Woodbury & Strohm*, 14 Id., 57.

An amendment to a petition after the evidence has been introduced is allowable, when it does not change the nature of the claim, and when the same evidence was admissible under the original petition as would have been under the amended one. *Hammond v. The S. C. & P. R. Co.*, 49 Id., 450.

The allowance or ejection of amendments is, to a very considerable extent, one of sound judicial discretion, and the ruling thereon will only be interfered with by the appellate court where substantial injustice has resulted to the party complaining. *Flumer v. Flumer*, 22 Id., 230; *SeEVERS v. Hamilton*, 11 Id., 66; *The State ex rel, etc., v. Mayor of Keokuk*, 18 Id., 388; *Hatfield v. Gano*, 15 Id., 177; *Dutton v. Thorington*, Id., 217; *Smith v. Howard*, 28 Id., 51; *Tegler & Co. v. Shipman*, 33 Id., 194.

The allowance of a slight amendment to meet the case made by the evidence, and which could not have operated to surprise the adverse party, *held*, not such an abuse of discretion as would justify a reversal of the judgment, although the leave was not granted until after the close of the evidence and arguments of counsel, and the amendment not actually filed until after the verdict. *Carroll v. Glasscock*, 26 Id., 83.

An amendment after verdict, and pending a motion in arrest of judgment, curing a variance between the name of the defendant, as stated in the petition and as signed to the promissory note sued on, was held properly allowed without terms, it appearing that no prejudice could have resulted to the defendant. *Thompson v. Wilson*, Id., 120. See also *Smith v. Howard*, 28 Id., 51; *Tegler & Co. v. Shipman*, 33 Id., 194.

The action of the court below in allowing an amendment without imposing terms, will not be disturbed, unless it be shown that there was an abuse of the discretion confided to the court in such cases. *Harrison v. Colton*, 31 Id., 16.

Where a decree in an equity case is, upon the merits, modified and affirmed on appeal to the

supreme court, and the cause remanded for the court below to enter and enforce the decree, the appellee will be allowed to amend his pleading, asking judgment for the value of the property adjudged by the decree to belong to him, but which the opposite party has converted to his own use. *Jones v. Clark & Clark*, Id., 497.

An amendment filed in vacation without notice to the other party and without leave of the court may be stricken from the files on motion. *Allen v. Bidwell*, 35 Id., 86.

An amendment may be made during the trial by striking out the name of a party plaintiff. *Hinkle v. Davenport et al.*, 38 Id., 355.

In an action before a justice of the peace, upon a draft, the name of the plaintiff was misspelled, and commissions to take depositions and other proceedings were had with the error uncorrected. Upon appeal to the circuit court and after a jury was impaneled it was held, the error might be corrected. *Adae & Co. v. Zangs*, 41 Id., 536.

Amendments in furtherance of justice may be made at any time, and it is competent to amend after judgment when no new cause of action is introduced, the granting of such amendment resting in the sound discretion of the court. *O'Connell v. Cotter et al.*, 44 Id., 48.

Where an amendment, setting up a new and different defense, is filed after a part of the evidence has been introduced, and the plaintiff does not at the time indicate an unwillingness to proceed in consequence thereof, he cannot be heard to complain after a verdict has been rendered. *Sheldon v. Booth*, 50 Id., 209.

When an action is brought upon a cause belonging to a partnership, in the name of one partner only, the court may, at any time, permit an amendment substituting the name of the partnership as plaintiff. *Hodges & Co. v. Kimball et al.*, 49 Id., 577.

Amendments to the pleadings in a law action may be allowed, in furtherance of justice, after the case has been remanded for a new trial by the supreme court, and exceptions to an order allowing such amendment will be waived unless excepted to. *Scott v. The County of Chickasaw*, 53 Iowa, 47.

Where an equity case is tried *de novo* in the supreme court, such trial is final, unless otherwise ordered for special reasons, and amendments to the pleadings are not allowable after the cause has been remanded to the court below. *Sexton v. Henderson et al.*, 47 Id., 131.

While the circuit or district court may, in the exercise of a proper discretion, and under a proper showing, allow amendments to pleadings after appeal from a justice of the peace, the parties cannot file them as a matter of right. *Pacard v. Snell, Aiken & Co.*, 35 Id., 80; *Stanton v. Warwick*, 21 Id., 76; *May v. Wilson*, Id., 79.

While the amendments of a petition, by reason of new matter stated therein, may afford grounds for a continuance of the cause, if the defendant is taken by surprise thereby, it is no ground for striking out the amendments. *Snediker et ux v. Poorbaugh*, 29 Id., 488; *Hays v. Turner*, 25 Id., 214; *Fulmer v. Turner*, 22 Id., 230, and cases cited, and also *Correll v. Glascock*, 26 Id., 83; *Avery v. Wilson*, Id., 574; *Hunt v. Hoover*, 24 Id., 230; *Nettman v. Schramm*, 23 Id., 521.

Amendments to pleadings should always be allowed, in furtherance of justice, within the sound discretion of the court. *Miller v. Perry & Townsend*, 38 Id., 301; *Seevers v. Hamilton*, 11 Id., 66; *Brockman v. Berryhill*, 16 Id., 183; *Floyd v. Mayor of Keokuk*, 18 Id., 388; *Pride v. Wormwood*, 27 Id., 257.

Where leave was granted to file an amended answer, setting up the statute of limitations, to which the plaintiff filed a reply, it was held that unless an abuse of discretion were shown the action of the court would not be reviewed, and that the filing of the reply was a waiver of any objection thereto. *The Phenix Ins. Co. v. Dankwart et al.*, 47 Id., 432.

A demurrer is a pleading within the meaning of section 2639 of the code and may be amended like any other pleading. *Morrison v. Miller*, 46 Id., 84.

An amendment may be allowed after all the evidence is received in order to conform the pleadings thereto. *Ellis v. Lindley et al.*, 37 Id., 334.

A party will not be allowed to file an amended pleading tendering a new issue after a referee's report has been made, and thereupon have a resubmission of the case to the referee, without at least offering a reasonable excuse for neglecting to file the amendment before the referee's report was made. *Newell v. The M. C. S. B. et al.*, 51 Id., 178.

The allowance of an amendment, after one trial was had, withdrawing the denial of the due execution and attestation of a will in a case in which its validity was contested on the ground of mental weakness and undue influence, and thereupon giving the affirmative of the issue and the right to open and close the case to the contestants, was not erroneous. *Bates v. Bates et al.*, 27 Id., 110.

A plaintiff cannot amend his petition and increase his claim for damages after appeal, and while the cause is pending in the appellate court. *Johnson v. Chaplin*, 28 Id., 570.

After a reversal in an equitable action which is remanded for further proceedings not inconsistent with the opinion of the court, the unsuccessful party may file an amended or additional pleading upon such a showing of newly discovered evidence as would entitle a party to a new trial in an action at law. *Adams County v. The B. & M. R'y Co.*, 44 Id., 335. But where a decree in a

equity cause is, upon its merits, modified and affirmed in the supreme court on appeal, and the cause remanded for the court below to enter and enforce the decree, the appellee will not be allowed to amend his pleading asking judgment for the value of the property adjudged by the decree to belong to him, but which the opposite party has converted to his own use. *Jones v. Clark et al.*, 31 Id., 407.

A party cannot, on appeal from a justice of the peace, file additional or new pleadings as a matter of right, but he may be allowed to do so upon proper terms, but not without satisfactory evidence excusing his failure to plead before the justice. *May v. Wilson*, 21 Id., 79. See, also, *Ruddick v. Vail*, 7 Id., 44; *Leftwick et al. v. Thornton*, 18 Id., 56; *Stanton v. Warrick*, 21 Id., 76; *Warren v. Scott et al.*, 32 Id., 22; *Ping v. Cockyne*, 37 Id., 211; *Griswold v. Bowman*, 40 Id., 367; *Clowz v. Murphy*, 52 Id., 695.

Where the petition in an action upon an order averred demand and notice, and an amendment filed after argument contained an allegation of waiver of demand and notice, it was held that the pleadings would sustain a finding of waiver. *Peck v. Shick & Co.*, 50 Id., 281.

Under the issues and circumstances in this case, an amendment conforming the allegations of the petition to the facts proved, though offered after the argument of counsel for defendant, was proper, and the court erred in refusing to allow it. *Tiffany v. Henderson*, 57 Id., 490.

An amendment to the petition, conforming the allegations thereof to the proofs in the case, and made after all the evidence has been introduced at the trial, may be properly allowed. *Thomas v. The Town of Brooklyn*, 58 Id., 438.

Where an action was brought in the name of a township as plaintiff, and on a demurrer to the petition on the ground that the plaintiff had no capacity to sue, was sustained, it was held not error, under this section, to allow an amendment to the petition by substituting the township clerk as plaintiff. *Wells v. Stomback et al.*, 59 Id., 376.

Ordinarily the supreme court has no power to remand an equity case triable *de novo*, but must try and determine it upon the record presented, but there are exceptions to the rule, and it has been held that the power to remand exists where it is necessary for the purpose of effectuating justice. Accordingly, where there was an evident mistake in the pleadings, which was not discovered until after the appeal, on account of which a judgment rendered upon record would be unjust; held that the cause could be remanded with leave to the parties to replead, and to introduce such further evidence as they might desire. *White v. Farlee et al.*, 67 Id., 628.

SEC. 2690. [**Error disregarded.**—The court must, in every stage of an action, disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

The objection that the petition in an action against a railroad company contains no averment of the corporate character of the defendant, comes too late after judgment, and constitutes no ground for a motion in arrest. *Andre v. The C. & N. W. R'y Co.*, 30 Iowa, 107.

A judgment will not be reversed upon the ground of defects in pleadings, when it is apparent, upon the face of the record, that the parties have had a full trial, that neither party has been prejudiced by reason of such defect, and that substantial justice has been done. *Doniphan et al. v. Street*, 17 Id., 317; *Smith v. Milburn*, 17 Id., 30; *Coates & Patchin v. The City of Davenport*, 9 Id., 227.

Under the provisions of this section of the code errors and defects in proceedings are not to be regarded or corrected, either in the trial court or appellate court, unless prejudice results therefrom to the rights of the parties complaining thereof. *Wetmore v. Mellinger*, 64 Id., 748.

SEC. 2691. [**Does not entitle party to continuance.**—When either party shall amend any pleading or proceeding, the case shall not be continued in consequence thereof, unless the court shall be satisfied by affidavit or otherwise, that the adverse party could not be ready for trial in consequence of such amendment. But if the court is thus satisfied, a continuance may be granted to some day in the same term, or the next term of said court.

This section authorizes the continuance of a cause upon the amendment of the pleadings, only when the court shall be satisfied that, by reason of the amendment, the other party could not be ready for the trial. *The State v. Tieman*, 39 Iowa, 474.

SEC. 2692. [**Amendments: how made.**—All matters of supplement or amendment, whether of addition or subtraction, shall not be made by erasure or interlineation of the original, or by addition thereto, but upon a separate paper which shall be filed and constitute, with the original, but one pleading. But if it be stated in such paper that it is a substitute for the former pleading intended to be amended, in that case, it shall be deemed such substitute, but the pleading superseded by the substitute shall not be withdrawn from the files.

A pleading which is filed as an amendment to a former pleading will not be construed as a substitute therefor unless it is therein so expressed, but both will constitute one pleading and be construed together. *Cooley v. Brown*, 35 Iowa, 475; *Pharo v. Johnson*, 15 Id., 560; *Kostendader v. Pierce*, 37 Id., 645.

While a pleading which is superseded by a substituted one, ceases to tender any issue, yet it remains part of the record of the case, and the opposite party may avail himself of a distinct admission of fact contained therein. *Mulligan v. Ill. Cent. R. Co.*, 36 Id., 181.

Amendments by erasure or interlineation are prohibited, and the court properly refused to allow an amendment of a sworn answer by striking out a word which occurred therein. *Simmons v. Rust*, 39 Id., 241.

An amendment to a petition is to be taken as part of and construed in connection with the original, and the prayer for relief in the original, applies to the amendment. *Montgomery v. Shockey et al.*, 37 Id., 107.

It is not erroneous for the court, on motion to strike from the files interrogatories filed by one party to be answered by the other at the time the cause is called for trial, the action having been pending several months. *Jones v. Berryhill*, 25 Id., 289.

INTERROGATORIES.

SEC. 2693. [May be annexed to pleading.]—Either party may annex to his petition, answer or reply, written interrogatories to any one or of the adverse parties concerning any of the material matters in issue in the action, the answer to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering.

Neither the interrogatories nor the answers thereto, provided for by this section will, on demurrer, aid a defective pleading. *Lane v. Krekel*, 22 Iowa, 399.

The court below may properly strike from the files interrogatories filed by the defendant to be answered by the plaintiff where they are not filed until the case is called for trial, where the action has been pending for several months. *Jones v. Berryhill*, 25 Id., 289.

Where the defendant annexes to his answer interrogatories to the plaintiff, under this section, both the interrogatories and the answers may be read to the jury; and an instruction that they should be considered as a part of the evidence in the case was held not erroneous, on the ground that the jury were thereby directed that the questions as well as the answers were to be regarded as evidence. *Clinton Nl. Bk. v. Lorrey*, 30 Id., 85.

A party answering interrogatories annexed to a pleading is not confined to answers merely responsive, but may state any new matter concerning the cause of action, and the same may be read by either party as a deposition in the case. *Gwyer v. Higgins et al.*, 37 Id., 517.

SEC. 2694. [What response must state.]—The party answering shall not be confined to responding merely to the interrogatories, but may state any new matter concerning the same causes of action, which shall likewise be read as a deposition.

A party answering interrogatories annexed to a pleading is not confined to answers merely responsive, but may state any new matter concerning the cause of action, and the same may be read by either party the same as a deposition taken in the case. *Gwyer v. Figgins et al.*, 37 Iowa, 517.

SEC. 2695. [Time of responding.]—The interrogatories shall be answered at the same time the pleading to which they are annexed is answered or replied to, unless they are excepted to by the adverse party; in which event the court shall determine as to the propriety of the interrogatories propounded, and which of them shall be answered, and within what time such answer shall be made.

A party is bound to take notice of the filing of interrogatories attached to the pleading of the adverse party, and will be in default for a failure to answer the same at the same time as for a failure to plead if any further pleading is required on his part, otherwise he will be entitled to such time as may be granted him by the court. *Garvin v. Cannon*, 53 Iowa, 716.

Where interrogatories annexed to an answer, to which no reply was required, were unanswered, but the defendant proceeded to trial, and at no time called the attention of the court to the omission, it was held that he could not take advantage of it on appeal. *Id.*

SEC. 2696. [To cause no delay, when.]—The trial of an action by ordinary proceedings, shall not be postponed on account of the failure to answer interrogatories, if the party interrogated is present in the court at the trial, so that he may be orally examined; nor in case of absence, unless an affidavit be filed showing

the facts the party believes will be proved by the answers thereto, and that the party has not filed the interrogatories for the purpose of delay; whereupon, if the party will consent that the facts stated in the affidavit shall be considered as admitted by those interrogated, the trial shall not be postponed for that cause.

Certain counts in an amended or supplemental answer, setting up an equitable defense, filed three years after the commencement of the action, and only three days before the trial, accompanied by interrogatories to persons not parties to the record, and showing no excuse for the delay, held, properly stricken from the files. *Courtright v. Deeds*, 37 Iowa, 503.

SEC. 2697. [**Particularity required.**.]—The party, in answering such interrogatories, shall distinguish clearly between what is stated from his personal knowledge, and what is stated from information or belief merely. An unqualified statement of a fact shall be considered as made of his personal knowledge.

SEC. 2698. [**How verified.**.]—The answer to the interrogatories shall be verified by the affidavit of the party answering, to the effect that the statements in them made of his own personal knowledge are true, and those made from the information of others he believes to be true.

The answers to interrogatories annexed to a pleading must be verified by the affidavit of the party answering. Where the *jurat* of the notary alone was attached to the answers, it was held that the provisions of this section of the statute was not substantially complied with, and that the answers should have been suppressed as incompetent. *Averill v. Boyles et al.*, 52 Iowa, 672.

SEC. 2699. [**Upon failure to answer when taken as true.**.]—Where a party filing interrogatories shall also file an affidavit that he verily believes the subject of the interrogatories, or any of them, is in the personal knowledge of the opposite party, and that his answer thereto, if truly made from such knowledge will sustain the claim of defense, or any part thereof, and the opposite party shall fail to answer therein within the time allowed therefor, or by the court extended, the claim or defense, or the part thereof, according to such affidavit, shall be deemed to be sustained, and judgment given accordingly.

This section establishes a rule of evidence merely, and while the interrogatories unanswered and the affidavit therein prescribed constitute proof of the claim upon which judgment may be rendered on the trial, they do not entitle the party to a judgment without trial, and immediately upon the filing of the affidavit and the failure to answer. *Perry v. Heighton*, 26 Iowa, 451.

The failure to reply to interrogatories annexed to an answer entitles the defendant to judgment under this section, but he cannot claim this right for the first time in the supreme court on appeal. He should have demanded judgment in the court below. *Sulley v. Wilson*, 44 Id., 394.

The plaintiff may dismiss his action after failure to answer the interrogatories and affidavit filed, notwithstanding the objection of the defendant. *Perry v. Heighton*, 26 Id., 451.

Where the party filing interrogatories fails to state in his affidavit what facts he expects to prove thereby, no facts can be treated as admitted by a failure to answer. *Hogaboom v. Price*, 53 Id., 703.

SEC. 2700. [**Answer compelled.**.]—The court may compel answers to interrogatories by process of contempt, and may, on the failure of the party to answer them, after reasonable time allowed therefor, dismiss the petition, or quash the answer of the party so failing.

A defendant who attaches interrogatories to his answer, to which no reply is required, is not entitled to a dismissal of the action for a failure of the plaintiff to answer such interrogatories until the expiration of a reasonable time, to be fixed by the court. *Hogaboom v. Price*, 53 Id., 703.

Where a number of the interrogatories so attached to a pleading were frivolous and immaterial a motion for an order requiring answers to all the interrogatories was held properly overruled *Id.*

GENERAL PRINCIPLES OF PLEADINGS.

SEC. 2701. [**Time: sum: quantity: place: denial of.**.]—In all cases in which a denial is made by answer or reply, concerning a time, sum, quantity or place alleged, the party denying shall declare whether such denial is applicable to every time, sum, quantity or place, and if not, what time, sum, quantity or place he admits.

SEC. 2702. [Time, when material: how stated.]—When time is material, the day, month and year, or when there is a continued act, its duration must be alleged. When time is not material, it need not be stated, and if stated, need not be proved.

SEC. 2703. [Place: allegation.]—It shall be necessary to allege a place, only when it forms a part of the substance of the issue.

SEC. 2704. [Evidence: denial of allegation.]—Under a denial of an allegation, no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove.

When a fact is alleged in a pleading in a manner subject to demurrer or a motion for a more specific statement it does not necessarily follow that the adverse party can take advantage of such insufficiency by objection to the evidence offered to sustain the allegation. *Oliver v. Depew*, 14 Iowa, 490.

Under a general denial no evidence is admissible which does not tend to negative some fact essential to be proved under the pleading denied. *Scott v. Morse et al.*, 54 Id., 732; *Patterson v. Clark et al.*, 20 Id., 429. See, also, *Dyson v. Ream*, 9 Id., 51; *Hagar v. Burch*, 8 Id., 310; *Hutchinson v. Sangster*, 4 G. Greene, 340.

Where an action is instituted to set aside a conveyance as fraudulent, and the answer was only a general denial, evidence which tended to prove that the defendant acquired title to the premises under the foreclosure of a valid mortgage given to a third person for a valuable consideration, the title to which he (defendant) acquired by lawful means, was admissible, without any special pleading of such facts, because it tended to negative allegations of the petition which plaintiff was bound to prove, and such facts did not constitute a special defense. *Johnson v. Pennell et al.*, 67 Iowa, 669.

In an action against a city for negligence in excavating a street so that the plaintiff in driving over it was injured, it was held under section 2704 of the code, which provides that, "under a denial of an allegation, no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove," the plaintiff was bound to prove himself free from negligence, and, therefore, that defendant was entitled under a general denial to introduce evidence of plaintiff's intoxication at the time of the accident. *Fernbach v. City of Waterloo*, 34 N. W. R., 610.

SEC. 2705. [Counts: divisions numbered.]—The counts of the petition must be consecutively numbered as such, and so must the divisions of the answer as such, and of the reply as such.

SEC. 2706. [Correction of bad pleading.]—If any pleading do not conform to the foregoing requirements as to form, divisions or numbering, or the distinct or separate statements of its cause of action or defense, the court may, on its own motion, or that of the adverse party, order the same to be corrected on such terms as it may impose.

The objection that more than one cause of action is stated in one, and not in separate counts must be taken by motion and not by demurrer. *Swords v. Russ*, 13 Iowa, 603; *Hayden v. Anderson*, 17 Id., 158; *Wright v. Connor*, 34 Id., 240.

SEC. 2707. [Sham defenses stricken out.]—Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may, in its discretion, impose.

A demurrer will not lie to purge a pleading, good in part, of redundant or irrelevant statements. A motion is the proper remedy. *Bolinger v. Henderson*, 23 Iowa, 165; *Douglass v. Bishop*, 27 Id., 214; *McGinn v. Butler*, 31 Id., 160, 162.

Paragraphs in an answer which constitute no defense to the action may be stricken out on motion as redundant or irrelevant matter. *Evans v. Robbins*, 27 Id., 472.

SEC. 2708. [Statute, how pleaded.]—In pleading a statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

SEC. 2709. [Rules of court.]—Every court of this state shall take judicial notice of the rules of any other court thereof, if published as directed by law.

SEC. 2710. [Inconsistent: defenses pleaded.]—Inconsistent defenses may be stated in the same answer or reply, and when a verification is required, it must be to the effect that the party believes one or the other to be true, but cannot determine which.

Contradictory defenses may be pleaded, but they must be set out in separate counts or divisions of the answer, and each must be sufficient in itself to present the defense intended to be pleaded. *Morgan v. The Hawkeye Ins. Co.*, 37 Iowa, 360.

The defendant may plead inconsistent defenses, and an instruction directing that the admissions in one defense rendered it unnecessary for the jury to consider the evidence in support of another, is erroneous. The defendant is entitled to the full benefit of each defense. *Barr v. Hack*, 46 Id., 308.

Under this section, a defendant may plead inconsistent defenses in the same pleading; and admissions made in one defense are not to be construed as affecting a different and inconsistent defense. *Heinrichs v. Terrell*, 65 Id., 25; *Barr v. Hack*, 46 Id., 308.

In an action by the mortgagee to recover for the wrongful seizure and conversion of mortgaged goods under a writ of attachment against the mortgagor, the defendant is estopped to set up for the purpose of invalidating the mortgage, that he was the owner of the goods by purchase from the mortgagor at the time the mortgage was made; for a party cannot be allowed to say that he has attached his own property. *Crawford, Trustee, v. Nolan et al.*, 70 Id., 97.

SEC. 2711. [Exceptions to general law stated.]—Whenever a party claims a right derogatory from the general law, or when his claim is founded upon an exception of any kind, he shall set forth such claim or such exception particularly in his pleading.

In an action to subject a homestead to the payment of a debt alleged to have been contracted prior to its purchase, the burden of proof to show that it was purchased with the proceeds of a sale of a former homestead, and therefore exempt, is upon the defendant. *The First National Bank, etc., v. Baker*, 57 Iowa, 97.

SEC. 2712. [Allegations not controverted admitted]—Every material allegation in a pleading not controverted by a subsequent pleading, shall, for the purposes of the action, be deemed true. But the allegations of the answer, not relating to a counter-claim, and of the reply, are to be deemed controverted. But an allegation of value, or amount of damage, shall not be deemed true by a failure to controvert it. A party desiring to admit any allegations, which by this section would be deemed controverted, may, at any time, file a written admission thereof.

Every material allegation in a petition undenied by the answer is taken as true. *Alexander v. Doran*, 13 Iowa, 283; *Bolanuer v. Atwell*, 14 Id., 35; *Lyon v. Northrup*, 17 Id., 314.

Under this section the allegation of new matter not in the nature of a counter-claim, is deemed denied without replication, as controverted by a general denial, and also under the revision, by matter in avoidance. *Davenport S. F. & L. A. v. The N. A. T. I. Co.*, 16 Id., 74.

An allegation of value in a pleading is not to be taken as true on account of a failure to controvert it. *The Chicago & S. W. R. Co. v. N. W. U. P. Co.*, 38 Id., 377.

Where in an action of replevin the allegation of value was not denied, held, not thereby admitted to be true. *Id.*

The allegations of pleading which are not answered or denied, being taken as true, no evidence will be admitted for the purpose of or tending to controvert them. *The Sugar Manufacturing Co. v. Billings*, 39 Id., 347.

The denial of a fact of which the court takes judicial notice cannot be well pleaded and is not admitted by demurrer. *Cooke v. Tallman*, 40 Id., 133.

Under this section as it stands in the code a reply is unnecessary where the answer does not plead a counter-claim and the plaintiff has no matter to plead in confession and avoidance of the answer. *Davis v. Payne et al.*, 45 Id., 194.

The allegation of the amount of damages sustained is not admitted by a failure to deny the same, and the damages must be proved or the party will be entitled to nominal damages only; and a judgment will not be reversed for a failure to assess mere nominal damages. *McIntosh v. Lee*, 57 Id., 356; *Shaw v. Kendig*, Id., 390, 392.

Where the petition in an action by a woman against the administrator of one deceased alleged a marriage between the plaintiff and the deceased in his lifetime, which allegation was not denied in the answer, the allegation of marriage was taken as true and evidence tending to prove it held immaterial. *In re Estate of Edwards*, 58 Id., 431.

The allegations of an answer unless the same contains a counter-claim are deemed denied without further pleading by the plaintiff, and unless supported by evidence the plaintiff is entitled to judgment upon proof of the allegations of the petition. *Cassady v. Caton*, 47 Id., 22.

Where a counter-claim is pleaded it will be deemed admitted unless denied in the reply. *The Union National Bank v. Carr*, 49 Id., 359, 361.

Under our system of pleading, the question of value must be determined by evidence. A party is not estopped from proving the true value when he has, by mistake, alleged it incorrectly, or where it has changed since the allegation was made. *Reilly v. Ringland et al.* 39 Id., 106.

A failure to deny an allegation in a pleading does not admit it, unless the matter of the allegation be well pleaded. *Alston v. Wilson et al.*, 44 Id., 130.

Where petitions for enjoining and abating of nuisances, kept in violation of the prohibitory liquor laws, contained the necessary averments, and no answers were filed, the averments of the petition stood admitted by operation of law, and no evidence was necessary on part of plaintiffs to entitle them to the relief demanded. *Bloomer v. Glendy et al.* and *Douglass v. Goetz et al.*, 70 Id., 757.

SEC. 2713. [Pleading made more specific: how.]—If a pleading is founded on an account, a bill of particulars thereof must be incorporated into or attached to such pleading, verified as the pleading, and deemed a portion thereof, subject to be made more specific on motion, and shall define and limit the proof, but may be amended as other pleadings. The items of such bill of particulars shall be consecutively numbered.

When the cause of action in a justice's court consists of a book account embracing several items the defendant is entitled to a bill of particulars or to have an entry of the several items entered upon the justice's docket upon demanding the same. *McKinley et al. v. Hopkins*, 20 Iowa, 495.

That a cause of action as stated in the alternative is not a ground of demurrer but of motion. *Turner v. First Nat. Bank of Keokuk*, 21 Id., 562; so also if the pleading is argumentative. *Davis v. Bonar et al.*, 15 Id., 171.

An action to recover money alleged to be fraudulently secreted and kept, and for expense, trouble, and inconvenience caused thereby, is an action upon tort to which this section has no application; and a motion to compel plaintiff to attach a bill of particulars to his petition, should be overruled. *McDonald v. Barnhill*, 58 Id., 669.

SEC. 2714. [Judgment: how pleaded.]—In pleading a judgment, or the determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.

The petition in an action on a recognizance need not aver the particular facts showing jurisdiction in the magistrate to take the bail—the existence of the facts necessary to confer jurisdiction; if the preliminary proceedings were not such as to authorize the taking of the recognizance the objection may be made by answer or may appear on the trial. *The State v. Hufford*, 23 Iowa, 579.

SEC. 2715. [Conditions precedent.]—In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part.

SEC. 2716. [When action is brought in a representative capacity.]—A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and where a defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way.

In an action by a school district it is not necessary to set out at length in the petition the manner in which the district was formed, and the legality of the acts leading to its formation cannot be questioned by demurrer. *Ft. Dodge School District v. The District Tp. of Waukansa*, 15 Iowa, 434.

An allegation in a petition that the defendant "is a corporation created by authority of the state of Iowa under the name and style of the city of Oskaloosa," is sufficient to charge the defendant in a corporate capacity. *Stier v. The City of Oskaloosa*, 41 Id., 353; see also, *The Home Ins. Co. v. The Northwestern Packet Co.*, 32 Id., 244.

In an action by a school district it is not necessary to set out at length in the petition the manner in which the district was formed, and the legality of acts leading to its formation cannot be raised by demurrer. *Ft. Dodge City S. D. v. The Dist. Tp. of Waukansa*, 15 Id., 434.

The petition in an action by a partnership or corporation should contain an averment of the capacity in which the suit is brought, otherwise it is subject to demurrer. *Sweet, Dempster & Co. v. Ervin & Co.*, 54 Id., 101; *Byington v. The M. & M. R. Co.*, 11 Id., 502.

When a city or town is incorporated by a special act of the general assembly, the court will take judicial notice of its incorporation, but when it is incorporated under the general law, the fact of its corporate character must be pleaded and proved. *Hard v. The City of Decorah*, 43 Id., 313.

The question of the corporate power of a party to an action cannot be raised for the first time on appeal, but must be specially pleaded. *Commercial Bank of Keokuk v. King et al.*, 47 Id., 64.

Where the plaintiff in his petition avers that he is the duly appointed, qualified, and acting administrator, etc., the averment is not put in issue by a general denial, but this can only be done by alleging the facts relied on to show that the averment is not true. And where in such a case a general denial only is pleaded the court may properly instruct the jury as to its legal effect; but an omission so to do is not reversible error, where other instructions given averted all danger of the jury being misled by the omission. *Mayers v. Farley*, 60 Id., 407.

SEC. 2717. [Facts must be stated.]—If either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated.

An answer denying the corporate capacity of the defendant must set out a specific statement of facts relied upon as a denial; and must deny such capacity as existing at the time the action was commenced. *Coates v. G. & C. W. R'y Co.*, 18 Id., 277.

When the petition alleges that the defendant is a corporation, duly organized under the laws of the state, such corporate existence cannot be put in issue by a general denial. *Blackshire v. The Iowa Homestead Co.*, 39 Id., 624; *Stier v. The City of Oskaloosa*, 41 Id., 353.

Where there is a general allegation of the consolidation of two railroad corporations, a general denial is sufficient. *Koons v. C. & N. W. R'y Co.*, 23 Id., 493.

Where it is alleged in the petition that the plaintiff "was duly appointed guardian," etc., a general denial in the answer will not put the fact of appointment in issue.

Where a defendant, sued as a corporation, answered, denying that it was a corporation, or ever had been organized or attempted to be organized as one, such denial was held sufficiently specific under this section of the code. *Fulson & Co. v. The Star Union Line Fast Freight Line*, 54 Id., 490.

And when it is claimed that a defendant, sued as a corporation, is estopped by its acts and course of dealing to deny its corporate character it must be specially pleaded. *Id.*

The validity of the appointment of a guardian cannot be tested in an action by the guardian, wherein the petition simply alleges that he was duly appointed and the answer denies this allegation. *Gates v. Carpenter et al.*, 43 Id., 152.

SEC. 2718. [Matters that must be specially pleaded.]—Any defense showing that a contract, written or oral, or any instrument sued on, is void or voidable; or that the instrument was delivered to a person as an escrow, or showing matter of justification, excuse, discharge, or release, and any defense which admits the facts of the adverse pleading, but by some other matter seeks to avoid their legal effect, must be specially pleaded.

In an action on a written contract, evidence was held inadmissible on behalf of the defendant, that the instrument was not stamped when made and delivered, when no such defense was specially pleaded, and there was no denial of the execution of the instrument. *Glidden v. Higbee*, 31 Iowa, 379. See, also, *Ricord v. Jones*, 33 Id., 26.

The statute of limitations is not available unless pleaded as a defense in the answer, or taken advantage of by demurrer. *Robinson v. Allen*, 37 Id., 27.

Matter in abatement must be specially pleaded in an answer. *Haynes v. S. A. & D. R'y Co.*, 38 Id., 253.

Before evidence of fraud can be legally admissible, the fraud must be specially pleaded. *Gray v. Earl*, 13 Id., 188; *Root v. Schaffner*, 39 Id., 375, 377.

Recovery on a contract cannot be defeated on the ground that it was made on Sunday, and is therefore void, unless that fact is specially pleaded. *Riech v. Bolch*, 68 Id., 526.

The defense of payment of interest due on a contract, to be avoidable must be specially pleaded. *Junge v. Bowman et al.*, 72 Id., 648.

SEC. 2719. [Irrelevant matter stricken out.]—The court may, on motion of any person aggrieved thereby, cause irrelevant or redundant matter to be stricken from any pleadings, at the cost of any party whose pleading contains them.

When matter in a pleading is insufficient, it should be attacked by demurrer; but when it contains redundant or irrelevant matter and the adverse party will be aggrieved by suffering it to remain, it may be stricken out on motion. *Childs v. Griswold*, 15 Iowa, 438; *The Davenport G. L. & C. Co. v. The City of Davenport*, 13 Id., 229; *Kinyon v. Palmer*, 18 Id., 377, 387; *Bolenger v. Henderson*, 23 Id., 165; *Douglass v. Bishop*, 27 Id., 214; *Evans v. Robbins*, 29 Id., 472; *McGinn v. Butler*, 31 Id., 162; *Hayden v. Anderson*, 17 Id., 153.

It is not error to refuse to strike out irrelevant or redundant matter from a pleading unless the party moving will be aggrieved thereby; and he will not be deemed aggrieved unless compelled

to traverse facts which are more properly evidence than substantive averments. *Cate v. Gilman*, 41 Id., 530.

In an action against a city and railroad company to prevent the occupancy of a street by the latter, and for any damages, it was *held*, that allegations in the petition to the effect that other streets were occupied by other railroad companies were immaterial, and properly stricken out on motion. *Davis v. The C. & N. W. R'y Co. et al.*, 46 Id., 389.

Any person who is required to answer a pleading containing irrelevant matter is aggrieved thereby, and is entitled to have the same stricken out on motion. *Johns v. Pattee*, 55 Id., 665.

SEC. 2720. [**When pleading made more specific.**]-When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may, on motion, require it to be made more definite and certain. No pleading which recites or refers to a contract shall be deemed sufficiently specific unless it states whether it is in writing or not. Such motion shall point out wherein the pleading is not sufficiently specific or it shall be disregarded, and if the reason for such demand exists outside of the pleadings, the motion must state the same and be supported by affidavit.

When the averments of a pleading are not sufficiently full and specific, or contains several causes of action in one count, it may be corrected on motion, but not by demurrer. *Hayden v. Anderson*, 17 Id., 158; *Barthol v. Blakin*, 34 Id., 452, 453; *Byington v. Woods*, 13 Id., 17; *McCormick v. Basal*, 46 Id., 235.

Where, in an action on a promissory note, the defendant pleads generally a want of consideration, without stating the facts of such defense, the answer may be assailed by a motion for a more specific statement, but not by demurrer. *Simpson Cen. Col. v. Bryan*, 50 Id., 293.

If the petition founded upon a breach of contract as its cause of action does not state whether the contract is in writing or oral, it may be made more specific on motion. *Barthol v. Blakin* 34 Id., 452, 453.

In an action for a breach of warranty of soundness in all respects, it was *held*, that an allegation that the horse was unsound, that he was unable, except once in a great while, to perform his duty as a stable horse, was sufficiently specific. *Schurtz v. Kleinmyer*, 36 Id., 392.

A motion for a more specific statement will not lie for any indefiniteness in the demand for judgment, but only when the facts on which the pleading is founded are stated in such a manner that the other party cannot intelligibly respond thereto. *The G. F. S. Co. v. Dugardin*, 38 Id., 403.

That an allegation in the statement of the cause of action is in the alternative, is not ground for demurrer, but must be attacked by motion. *Turner v. The First National Bank of Keokuk*, 26 Id., 562.

The right to object to the ruling of the court in overruling the motion for a more specific statement is waived by answering over. *Kline v. The K. C., St. J. & C. B. R. Co.*, 50 Id., 656; so, also, this rule applies in overruling a motion to have the allegations of the petition made more specific. *Coakley v. McCarty et al.*, 34 Id., 105.

SEC. 2721. [**Title of Cause not changed.**]-The title of a cause shall not be changed in any of its stages of transit from one court to another.

SEC. 2722. [**Judicial notice.**]-Matters of which judicial notice is taken need not be stated in a pleading.

Courts will take notice of the coincidence of days of the week with days of the month, as what days fall upon Sunday. Matters of which judicial notice is taken need not be pleaded. This was the rule at common law. *Clough v. Goggins*, 40 Iowa, 325, 326.

SEC. 2723. [**Conveyance: how pleaded.**]-When a party claims by conveyance, he may state it according to its legal effect or name.

SEC. 2724. [**Estate: how pleaded.**]-It shall not be necessary to allege the commencement of either particular or a superior estate, unless it be essential to the merits of the case.

SEC. 2725. [**Same as to goods.**]-In action for injuries to goods and chattels, their kind or species shall be alleged.

SEC. 2726. [**Same as to real property.**]-In actions for injuries to real property, the petition shall describe the property, and when the injury is to an incorporeal hereditament, shall describe the property in respect of which the right is claimed, as well as the right itself, either by the numbers by which the property is designated in the national survey, or by any name which it has acquired by reputation certain enough to identify it.

SEC. 2727. [**Malice.**—]—When a party intends to prove malice to effect damages, he must aver the same.

Where a party intends to prove malice, to affect the measure of damages, he must expressly allege the same in his pleading. *Johnson v. The C., R. I. & P R Co.*, 51 Iowa, 25.

In an action to recover for the wrongful disposition of the plaintiff of a dwelling-house, exemplary damages can only be recovered where malice is alleged and proved; such allegation must be contained in the petition, and is not sufficient in a reply. *Jones v. Marshall*, 56 Id., 739.

SEC. 2728. [**Bond: breaches of.**—]—In an action on a bond with conditions, the party suing thereon shall notice the conditions and allege the facts constituting the breaches relied on.

In action or counter-claim founded upon an attachment bond, the conditions of the bond, and the facts constituting the breach must be alleged. *Ryder v. Thomas*, 32 Iowa, 56

In an action on an attachment bond the petition should set out the bond and the breach of its conditions, and allege that the plaintiff in the attachment suit had no reasonable ground for believing the alleged grounds for attachment to be true. *Bunt v. Rheum*, 52 Id., 619. See, also, *Horne v. Harrison et al.*, 37 Id., 378.

SEC. 2729. [**Extent of proof required.**—]—A party shall not be compelled to prove more than is necessary to entitle him to the relief asked for, or any lower degree included therein, nor more than sufficient to sustain his defense.

Where a party is sued *in autre droit* and it appears from the allegations in the petition that the defendant is liable in his own right, the words "Executor &c." will be treated as surplusage, or as *descriptio personæ*, but where it appears from the record that they were not so treated by the parties, or either of them, in the court below, it will not be so considered on appeal in the supreme court. *Laverty v. Woodward*, 16 Iowa, 1.

A party is not compelled to prove more than is needed for his defense notwithstanding he has stated in his answer more than is necessary. *Arnold v. Arnold*, 20 Id., 273. See *Chamberlain v. Gage*, Id., 304.

Whenever a pleading alleges more than is necessary to entitle the party to the relief asked, such unnecessary allegation will be treated as surplusage and need not be proved. *Little v. McGuire*, 38 Id., 560.

A plaintiff failing to make a case entitling him to the entire amount of his demand, may still recover so much as he has shown himself entitled to have. *Doud v. Walker*, 48 Id., 634, 638.

SEC. 2730. [**When written instrument referred to in pleading deemed genuine.**—]—When a written instrument is referred to in a pleading, and the same, or a copy thereof, is incorporated in or attached to such pleading, the signature thereto, and to any indorsement thereon, shall be deemed genuine and admitted, unless the person whose signature the same purports to be, shall, in a pleading or writing filed within the time allowed for pleading, deny the genuineness of such signature under oath. If such instrument be not negotiable, and purport to be executed by a person not a party to the proceeding, the signature thereto shall not be deemed genuine or admitted, if a party to the proceeding, in the manner and within the time before mentioned, state under oath that he has no knowledge or information sufficient to enable him to form a belief as to the genuineness of such signature. The person whose signature purports to be signed to such instrument, shall, on demand, be entitled to an inspection thereof.

In an action on a promissory note, evidence of the genuineness of the signature of an indorser will not be required when the pleadings show that there was no direct issue joined thereon. *Manning et al. v. Perkins*, 16 Iowa, 71.

This section of the statute applies to written instruments made by trading and municipal corporations as well as to those made by individuals. *Clarke v. Polk County*, 19 Id., 248.

To cast upon the plaintiff the burden of proving the genuineness of the signature of the defendant to a written instrument upon which the action is founded, or to any writing referred to in the pleading, and the original or a copy thereof is set out therein, the genuineness of such signature must be denied in writing under oath by the defendant. *Hall v. The Etna Mfg. Co.*, 30 Id., 215; *Loomis et al. v. Metcalf et al.*, Id., 332.

The denial in such case, must be made by the party whose signature it purports to be, and it was accordingly held that a denial by the maker of the genuineness of the signature of the indorser is not sufficient to throw the *onus* on the plaintiff. *Robinson v. Lair*, 31 Id., 9; *Walker v. Sleight*, 30 Id., 310. See also, *Hall v. The Etna Mfg. Co.*, 30 Id., 215.

The defendant may, under the *plea of non est factum*, not under oath, show that he never signed the instrument sued on purporting to be, and as a note, by showing that it was changed or

altered to its present form from a receipt or the like. This section does not apply to such a case. *Lake v. Crukshank*, 31 Id., 395.

The denial, in order to cast upon the plaintiff the burden of proving the signature of the instrument sued on, must be of the genuineness of the signature thereto. A denial under oath of the execution of the instrument is insufficient. *Douglass v. Matheny*, 35 Id., 112; *Lomis & Leroy v. Metcalf et al.*, 30 Id., 382.

In an action upon a deed of a corporation, where the signatures of the officers signing it were not denied under oath, and the seal of the corporation appeared to be affixed, the instrument was held properly admitted in evidence without proof of the signatures. MILLER, Ch. J., dissenting. *Blackshire v. The Iowa Homestead Co.*, 39 Id., 624.

Where in an action upon a written instrument the signature of the defendant is denied under oath by him, the *onus* is upon the plaintiff upon all the whole case to establish the genuineness of the signature to the instrument. *Farmers and Merchants Bank v. Young*, 36 Id., 44.

In an action against an administrator on a promissory note made by the intestate in his life time, a denial of the execution of the note includes a denial of the genuineness of the signature. *Ashworth v. Grubbs*, 47 Id., 353.

Where the genuineness of the signature is denied, a preponderance of evidence is sufficient to invalidate it. *Id.*

In an action to foreclose a mortgage where copies of the note and mortgage are annexed to the petition as exhibits, and the signatures thereto are not denied under oath, the genuineness of the signatures will be deemed admitted, and it is wholly immaterial in such case whether the note and mortgage are formally introduced in evidence or not. *Henry v. Evans et al.*, 58 Id., 560.

Prior to the code, a denial under oath of sufficient "knowledge or information to form a belief," was held not sufficient to cast the burden of proving the signature upon the plaintiff. *Hall v. The Aetna Mf. Co.*, 30 Id., 215.

Where an assignment is not so incorporated into a pleading or attached thereto as to require it to be denied under oath, its genuineness must be proved by the party pleading it. *Hay v. Frazier*, 49 Id., 454, 455.

The genuineness of a signature may be proved by its similarity to an admitted signature and other circumstances. *McDonald & Co. v. Noonan*, 50 Id., 83.

In an action against a municipal corporation, upon warrants drawn on its treasury, if the warrants are set out in the petition by copy, and their execution is not denied under oath, they may be admitted in evidence without proof of the genuineness of the signature, or of the authority to issue the same. *Clark v. The City of Des Moines*, 19 Id., 199.

A party may put in issue the genuineness of his signature to a written instrument in a suit by a pleading not under oath, but the burden of proof upon such issue, under this section, devolves upon him in such case. *Brayley v. Hedges*, 52 Id., 623; *Sankey v. Gump*, 35 Id., 267; *Farmers' and Merchants' Bank v. Young*, 36 Id., 45; *Sully v. Goldsmith*, 49 Id., 690; *Robinson v. Lair*, 31 Id., 10; *Ashworth v. Grubbs*, 47 Id., 353.

Where the signature to a note sued on was denied under oath, the burden was on the plaintiff to prove it to be genuine. *Miller et al. v. House & Laub*, 67 Id., 737.

SEC. 2731. [Supplemental pleading defined.]—Either party may be allowed, on motion, to make a supplemental petition, answer, or reply, alleging facts material to the case, which have happened or have come to his knowledge since the filing of the former pleading; nor shall such new pleading be considered a waiver of former pleadings.

Where, in an action on a promissory note, the defendant answered, alleging that the maturity of the note was, by the contract of the parties, made contingent upon the payment of certain other notes, made by the payee to a third party, upon which the defendant was liable as an indorser, whereupon the plaintiff filed a supplemental petition, in which it was alleged that after the commencement of the action the note upon which the defendant was so liable as indorser was paid and his liability discharged, it was held that a demurrer to the supplemental was, under this section of the code, properly overruled. *The City of Davenport v. Mitchell*, 15 Iowa, 194.

Where an action was brought upon a case, and judgment and a landlord's lien were asked for an installment of rent due and one to become due, held, that after the last installment had become due, plaintiff was entitled to file a supplemental petition, setting up that fact and asking judgment for the same. *Sigler v. Gondon*, 68 Id., 441.

SEC. 2732. [Matter in abatement: how pleaded.]—Matter in abatement may be stated in the answer or reply, either together with or without causes of defense in bar, and no one of such causes shall be deemed to overrule the other; nor shall a party after trial, on matter of abatement, be allowed in the same action to answer or reply matter in bar.

Where a defect of parties is apparent on the face of the petition, it may be taken advantage of by demurrer; when not thus apparent, it may be set up by answer. When pleaded in the answer, it is a question for the jury, and cannot be determined by the court upon motion based upon but a part of the evidence. *Enders v. Beck*, 18 Iowa, 86.

The fact that the maker of a note has been garnished as a debtor of the payee, cannot be pleaded in bar to an action on the note by an assignee thereof, who received it after maturity and after the garnishment of the maker. But such fact may be pleaded in abatement, and the issue thereon submitted to a jury, and then on this issue and the judgment thereon be distinguished from issues on matters pleaded at bar. *Clise v. Fræborn*, 27 Id., 280.

Where want of jurisdiction does not appear upon the face of the petition, the objection should be made by pleading the facts in abatement. *Meunch v. Breitenbaugh*, 41 Id., 227.

A champertous contract between the plaintiff and his attorney in an action for damages is no ground for the abatement of the action. *Allison v. The C. & N. W. R. Co.*, 42 Id., 274.

A common law matter in abatement had to be pleaded before a plea in bar, and both could not be pleaded together. But under the code, matters in abatement and in bar may be set up in the same pleading. *Herriman v. McKee*, 49 Id., 185.

Where a defendant files a plea to the jurisdiction of the court which is held insufficient on demurrer, he has the right after such ruling to answer in bar of the action, the ruling on the demurrer not being a "trial" within the meaning of this section of the code. *Winet v. Berryhill*, 55 Iowa, 411.

SEC. 2733. [**Subsequent defense: how pleaded.**—Any defense arising after the commencement of any action, shall be stated according to the fact, without any formal commencement or conclusion, and any answer which does not state whether the defense therein set up arose before or after action, shall be deemed to be of matter arising before action.

SEC. 2734. [**Consolidation of actions.**—Whenever two or more actions are pending in the same court which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no sufficient cause be shown the same shall be consolidated.

An action at law to recover possession of land cannot, on motion of defendant, be transferred to the equity docket and consolidated with a suit brought in that forum by the defendant in the law action, to quiet the title to the same lands, before issue joined and it is shown upon the face of the pleadings that the defense is equitable in its character. *McHenry v. Sypher*, 12 Iowa, 585.

See *Viele v. Germania Ins. Co.*, 26 Id., 9, where the court was equally divided upon the question of the right of the defendant to have four actions brought by the same plaintiff against four insurance companies.

SEC. 2735. [**Lost pleading.**—If an original pleading be lost or withheld by any one, the court may order a copy thereof to be substituted.

SEC. 2736. [**Records cannot be altered.**—No record shall be amended or impaired by the clerk or other officer of the court, or by any person without the order of such court, or some court of competent authority.

CHAPTER 9.

OF TRIAL AND JUDGMENT.

SEC. 2737. [**Issues: law and fact.**—Issues arise in the pleadings, where a fact or conclusion of law is maintained by one party and controverted by the other.

They are of two kinds:

1. Of law;
2. Of fact.

There are but two kinds of issues, one of law and the other of fact, whether the action be ordinary, equitable or in the nature of a special proceeding. *Sisters, etc., v. Glass et al.*, 45 Iowa, 154.

A proceeding for the probate of a will is not an equitable action triable *de novo* in the supreme

court, but a special proceeding triable in the circuit court as a law action, and is governed by the same rules as law actions as to mode of appeal and trial in the supreme court. *Id.*

The finding of the court in ordinary actions and special proceedings stands as the verdict of a jury, and will not be set aside if there is any evidence by which it can be supported. *Id.*

SEC. 2738. An issue of facts arises:

1. Upon a material allegation of fact in the petition denied by the answer;
2. Upon a material allegation of new matter presented in the answer and denied by the reply;
3. Upon allegations of new matter in the reply, which shall be considered as controverted by the opposite party without further pleading. Any other issue is one of law.

Generally an issue arises upon a material allegation of fact in a petition or answer, and is denied by answer or reply. The object of a trial is to judicially examine the issue thus made. Per *WRIGHT, J.*, in *Wilkins v. Treynor*, 14 Iowa, 391.

A general denial puts in issue all the facts averred. Per *MILLER, J.*, in *Benedict v. Hunt*, 32 *Id.*, 31.

ISSUES—HOW TRIED.

SEC. 2739. Issues of law must be first tried. A trial is a judicial examination of the issues in an action, whether they be issues of law or of fact.

SEC. 2740. Issues of fact, in an action in an ordinary proceeding, must be tried by jury, unless the same is waived. All other issues shall be tried by the court, unless a reference thereof is made.

Issues of fact are to be tried by a jury, unless a jury trial is waived. *Wilkins v. Treynor*, 14 Iowa, 393.

Under the revision of 1860, in the trial of an equitable action triable by what was called the second method, either party was entitled to have the issues of fact tried by a jury. *Benedict v. Hunt*, 32 *Id.*, 27.

In an action for divorce commenced before the code took effect, but tried afterward, either party had the right to a jury trial. *Wadsworth v. Wadsworth*, 40 *Id.*, 448.

Under the code the action for divorce is an equitable action, and is not triable on appeal in the supreme court upon errors alone, but must be tried *de novo* regardless of section 2747 of the code. *Sherwood v. Sherwood*, 44 *Id.*, 192.

In special proceedings issues of law are triable as in ordinary actions. *Sisters, etc., v. Glass et al.*, 45 *Id.*, 154.

Under this section either party may waive a trial by jury, in a civil action. *The State v. Carman*, 63 *Id.*, 130.

Where a promissory note stipulated for "attorney's fees, and other costs and charges, if the same is not paid when due," such attorney's fees should be treated as a part of the costs in the case, and the defendant is not entitled to a jury upon a denial of the reasonableness of the amount claimed therefor. *Meusser v. Crum*, 48 *Id.*, 52, *SEEVERS* and *DAY, JJ.*, dissenting.

An issue of fact in action for divorce cannot be submitted to a jury for determination, and a subsequent adoption of the decision of the jury by the court will not cure the error of such submission. *Hobart v. Hobart*, 51 *Id.*, 512.

An action by a wife against two defendants to recover against them jointly for injuries to her from the sale of liquors to her husband, and to charge the premises on which the liquors were sold with a lien of the judgment, is triable as an action at law against both defendants, and either party is entitled to a jury; the lien following as a matter of law upon the finding of the facts requisite under the statute in favor of the plaintiff. *Loan v. Hiney and Etzell*, 53 *Id.*, 89.

SEC. 2741. (As substituted by ch. 83, 18th g. a.) [On oral evidence.]—All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as now provided by law; and, upon appeal, no evidence shall go to the supreme court except such as may be necessary to explain any exception taken in the cause, and such court shall hear and try the case only on the legal errors so presented.

Prior to the enactment of chapter 145 of laws of the seventeenth general assembly, it was held, that under the code *all actions* were triable in the district and circuit courts upon oral evidence, and it devolved upon either or both the parties, in order to secure the right of trial *de novo* in an equitable action in the supreme court, to move for and obtain an order of court for a trial upon written evidence. *Finch v. Hollinger*, 47 Iowa, 173; *Fuller v. Schwartz*, *Id.*, 711; *Walker v. Plummer*, 41 *Id.*, 697; *McCloy v. Bunkers*, 46 *Id.*, 700; *Altman v. Farrington*, 45 *Id.*, 620.

Under the revision of 1860 equitable actions, triable by the first method were tried *de novo* in the supreme court on all the evidence in writing. *Robb v. Dougherty*, 14 Id., 379; *Cooper v. Skeel*, Id., 578; *Ticonic Bank v. Harvey*, 16 Id., 141; *VanOrman v. Spofford et al.*, Id., 186; *Kellogg v. Kelsey et al.*, Id., 288; *Byers v. Rodabaugh*, 17 Id., 53; *Manning v. Horr*, 18 Id., 117; *Cole v. Cole*, 23 Id., 433; *Snowden v. Snowden*, Id., 457; *Krapfel v. Pfiffner*, 24 Id., 176; *Chambers v. Ingham*, 25 Id., 222; *Lynch v. Lynch*, 28 Id., 326; *Hackworth v. Zollars*, 30 Id., 433.

A party in an equitable action cannot, as a matter of right, demand that the issues be tried by a jury. The provisions of our statute denying this right are not in conflict with the state constitution guaranteeing the right of trial by jury. *The State of Iowa v. Orwig*, 25 Id., 280; *Dove v. The Ind. S. D. of K. et al.*, 41 Id., 689.

The supreme court will not try a divorce case *de novo* on appeal where it was tried below before a referee, even if all the evidence is before the court. *Hobart v. Hobart*, 45 Id., 501.

SEC. 2742. (As substituted by ch. 35 19, g. a. r. § 300.) [Equitable issues tried on written evidence.]—But in equitable actions wherein issue of fact is joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party may, at pleasure, take his testimony, or any part thereof, by deposition. All the evidence so taken shall be certified by the judge at any time within the time allowed for the appeal of said cause, and be made a part of the record, and go on appeal to the supreme court, which shall try the cause anew.

It is only in equitable actions that the supreme court will try the cause anew on appeal. *Dove v. The Ind. School Dist. of Keokuk*, 41 Iowa, 689; *Blake v. Blake*, 13 Id., 40. See, also, *Hammersham v. Fairall*, 45 Id., 462.

Under section 2472 of the code, prior to its amendment by chapter 145 of the laws of 1878, to entitle a party to a trial *de novo* in the supreme court, in an equity action, he was required to move at the appearance term in the trial below that all the evidence be taken down in writing. *Richards v. Hintrager*, 45 Id., 253; *Altman & Co. v. Farrington*, Id., 620; *Moses v. The C. Ins. Co.*, 40 Id., 440; *Walker v. Plummer*, 41 Id., 691; *Hammersham v. Fairall*, 44 Id., 462; *Clark & Haddock v. Reynolds*, Id., 674; *Stoddard v. Hardwicke*, 46 Id., 160; *Bird v. Bird*, 49 Id., 693; *Trescott v. Barnes et al.*, 46 Id., 644; *Lutz v. Heltry*, 47 Id., 311, 312; *Lentzinger v. Hershey*, Id., 696; *Fueller v. Schwartz*, Id., 712; *Twogood & Elliott v. Reilly et al.*, 48 Id., 546; *Knox v. Hanlon*, Id., 252, 254; *Gow v. Tidrick*, Id., 284; *Borland v. McNally*, Id., 440; *Speidel v. Smith*, Id., 700; *Twogood et al. v. Riley*, 48 Id., 546.

Where in an equitable action the abstract recites that the evidence was by order of the court reduced to writing and made a part of the record of the case, and purports to contain all the evidence given on the trial, the case is triable *de novo* in the supreme court. *Stoddard et al. v. Hardwicke et al.*, 46 Id., 160.

The appearance term contemplated by section 2742, of the code before amended, held, to be the term where it first becomes apparent there is for trial and determination any issue of fact. *Vinsant v. Vinsant*, 47 Id., 594.

In an equity case, triable *de novo* in the supreme court, the certificate of the trial judge in the court below must recite that the abstract contains, not simply the material portions, but all the evidence. *Andrews v. Kerr et al.*, 49 Id., 680; See, also, *Enderly v. Enderly*, Id., 694.

Where either party elected to take the testimony in an equitable action in the form of depositions under section 2742 of the code, as amended by chapter 145 laws of 1878, the appearance term cannot be the trial term for actions to foreclose mortgages and other actions embraced in the exceptions contained in section 2745 of the code. *Holbrook v. Feyhey et al.*, 51 Id., 406.

Before the modification of section 2142 of the code, a case was not triable *de novo* in the supreme court unless a motion or order for a trial upon written evidence was made at the appearance term. *Reichaff v. Brecht et al.*, 51 Id., 633.

Where a case has been set down for trial upon written evidence, in pursuance of section 2742 of the code, oral evidence is not admissible. *Harlin v. Porter et al.*, 50 Id., 446.

Prior to the taking effect of chapter 145 acts of 1878, a compliance with section 2742 of the code was essential to secure a trial *de novo* in the supreme court. *The Joliet Iron & Steel Co. v. The C. C. & W. R. Co. et al.*, 50 Id., 455.

Chapter 145 laws of 1878, enacting a substitute for section 2742 of the code, applies only to cases tried in the court below since that statute took effect. *Simondson v. Simondson*, 50 Id., 110.

The consent of parties to the entry of an order in the court below, that the case be tried upon written evidence, obviates the necessity of a motion for that purpose, and entitles either party to a trial *de novo* in the supreme court on appeal. *Robinson v. The First National Bank of Cedar Rapids*, 48 Id., 354.

Where an action was not set down for trial on written evidence in the court below it was held not triable *de novo* in the supreme court. *Jones et ux. v. Marcy*, 49 Id., 188; *Brewer v. Stoddard*, Id., 280.

Where the certificate of the judge that the record contained "all the evidence used on the trial" but did not show that no other evidence was offered and rejected, it was held to be a certificate of the evidence received only, and not sufficient to authorize a trial *de novo* in the appellate court. *Hart v. Jackson et al.*, 57 Id., 75.

Where the certificate does not purport to be attached to any evidence, and does not properly identify the evidence, it is fatally defective. *Alexander v. McGrew*, Id., 287.

The appellee may supply evidence omitted in appellant's abstract, and still insist upon the insufficiency of the certificate; and specific objections to the certificate need not be set out. *Id.*

A certificate to the evidence, signed by the trial judge after his term of office has expired, will be disregarded; but where the cause was submitted on depositions and documentary proofs, the certificate of the clerk that the depositions and papers on file are contained in the record will be sufficient, even if not certified until a term of court has intervened. *Cross v. The B. & S. W. R. Co.*, et al., 58 Id., 62.

Where a party in an equity case stands upon the ruling on a motion, and appeals therefrom, exceptions should be taken and errors assigned. *Powers et al. v. O'Brien County et al.*, 54 Id., 501. See, also, *Jordan v. Wirner et al.*, 45 Id., 65.

Upon appeal, in an equity cause, all the evidence offered on trial should be certified to the supreme court. An abstract certified to contain all the evidence introduced in the trial is insufficient to authorize a trial *de novo* by the appellate court, *Taylor & Co. v. Kier et al.*, 54 Id., 645.

Neither the allowance of amendments to pleadings after decree, nor the improper admission of evidence in the court below, are grounds for refusal in a case triable *de novo* by the supreme court. *Tabor v. Floy*, 56 Id., 539.

A certificate of the trial judge that the record contained all the evidence "adduced" on the trial was held insufficient to authorize a trial *de novo* in the supreme court where the record showed that evidence offered on the trial had been excluded, and was not contained therein. *Tuttle v. Story County*, 56 Id., 316.

A cause tried as an equitable one in the court below will be reviewed in the supreme court under the rules and practice applicable to equity causes regardless of the character of the case and of the relief sought. *Blough v. Van Hoorbeke*, 48 Id., 40; *Richmond v. The D. & S. C. R. Co.*, 33 Id., 422; *Van Orman v. Merrill*, 27 Id., 476.

Where a case is tried *de novo* in the supreme court such trial is final, unless otherwise ordered for special reasons, and amendments to the pleadings are not allowable after the case is remanded to the court below. *Sexton v. Henderson et al.*, 47 Id., 131.

It was held, prior to the amendment of this section, that an action of divorce is an equitable action, and not triable in the supreme court on errors alone, but must be tried *de novo*, regardless of the provisions of section 2742 of the code. *Sherwood v. Sherwood*, 44 Id., 192. This ruling seems to have been approved and followed in *The Howe Machine Company v. Woolly*, 50 Id., 549, 552; but in *Hobart v. Hobart*, 51 Id., 514, Mr. Justice DAY says: "What is said is a mere repetition of the *dictum* in the case of *Sherwood v. Sherwood*."

Neither the allowance of amendments to pleadings after decree, nor the improper admission of evidence in the court below, are grounds for reversal in a case triable *de novo* in the supreme court. *Tabor v. Floy*, 56 Id., 539.

But where evidence is so taken down by order of the court, made on motion of one of the parties, and such party makes no objection to the manner in which it is taken, he waives the right to insist on the statutory provision, and is not entitled to an order of court requiring the reporter to file a long-hand copy of his notes, as a part of the record, without providing for payment for making such copy. *Id.*

Where a party in an equity case stands upon the ruling on a motion, and appeals therefrom, exceptions should be taken and errors assigned. *Powers et al. v. O'Brien County et al.*, 54 Id., 501. See, also, *Jordan v. Wirner et al.*, 45 Id., 65.

Upon appeal, in an equity cause, all the evidence offered on the trial should be certified to the supreme court. An abstract certified to contain all the evidence introduced in the trial is insufficient to authorize a trial *de novo* by the appellate court. *Taylor & Co. v. Wier et al.*, 54 Id., 645.

A certificate of the trial judge that "the above and foregoing evidence is all that was offered, adduced and introduced" is sufficient under this section on the appeal in an equitable action. *The City of Marshalltown v. Forney*, 61 Id., 578.

On the appeal of an equitable cause, where a trial *de novo* is sought, a certificate of the trial judge which states that the cause was submitted upon the following testimony, being all the evidence submitted in the cause; held sufficient—the word "submitted" when so used being equivalent to offered. *Miller v. Wolf*, 63 Id., 233.

A case will not be tried *de novo* in the supreme court unless all the evidence in the case is presented on appeal, and so certified by the judge of the court below. *Walker et al. v. Beaver et al.*, 50 Id., 504.

The repeal of section 2742 of the code respecting trials *de novo*, pending the appeal of a case,

did not entitle the appellant to a trial *de novo* where the case was tried below on oral evidence. *Trebon v. Zuraff et al.*, Id., 180.

Where the evidence consists of depositions and papers on file, and the abstract states: "This is all the evidence in the case," it will be held sufficient in the absence of a showing that it was not correctly abstracted, or that other evidence was offered or received. *Cross v. The B. & S. W. R'y Co.*, 58 Id., 62.

It is within the discretion of the trial court after all the testimony has been taken in form of depositions, and read on the trial and the cause finally submitted, to permit a party to be called as a witness and give oral testimony for the purpose of correcting an alleged mistake in his written deposition. *Eggspiller v. Nockles*, Id., 649.

Where a decree in equity was entered April 4, 1881, and the evidence certified August 1, 1881, being within the time allowed for taking an appeal, held that the evidence was certified in time, under this section, as amended by chapter 35 of the nineteenth general assembly, the cause being submitted on appeal after that act took effect. *Starr et al. v. Case et al.*, 59 Id., 491.

This section as amended by chapter 145 of laws of 1878, being a substitute for the same section as it stood in the code, relates to the manner of trial of equitable actions, and does not apply to actions commenced before its enactment. *Schmeltz v. Schmeltz*, 52 Id., 512.

The taking of stenographic notes of the oral testimony offered upon the trial of an equitable action is not a compliance with this section as amended by chapter 145 laws 1878. *Godfery v. McKean*, 54 Id., 127.

Where the parties have, by argument, in an equity cause reduced the facts to writing, such statement takes the place of the depositions or oral evidence reduced to writing as contemplated by this section, and a cause tried in the court below upon such a statement is triable *de novo* in the supreme court on appeal. *Williams v. Wells*, 62 Id., 740.

Where the court, on the trial of an equity cause, orders the evidence to be taken down in short hand, and it is so done, and the shorthand report is properly certified by the judge, and made part of the record, and it is afterwards transcribed by the reporter, together with the judge's certificate, and the transcript certified by the reporter to be correct and complete, held, that this is a compliance with the provisions of the statute requiring the evidence to be taken down in writing, and upon evidence a trial *de novo* may be had on appeal. *Ross v. Loomis*, 64 Id., 432.

A trial judge has no power to certify to the supreme court the evidence in an equity case after the expiration of six months from the date of the judgment appealed from. *Hartnett et al. v. Sioux City*, 66 Id., 253.

A trial *de novo* cannot be had in the supreme court unless the evidence is certified within the time allowed for an appeal, in the absence of an agreement that the abstract contains all the evidence offered on the trial. *Preston v. Hale et al.*, 65 Id., 409.

Where a cause is tried as an equitable action no order by the court that it be tried on written evidence is necessary. All that is required in that respect for a trial *de novo* in the supreme court is that the evidence be in fact taken down in writing and certified by the judge. *Howe & Co. v. Jones et al.*, 66 Id., 156.

When an equity cause has been tried before a referee to find the facts and law, and to report, he must in some way identify the evidence on which his findings are based, for the information of the court to which he is to report; but his certificate is not sufficient to identify the evidence for the purposes of an appeal. This section requires it to be certified by the judge. *Porter v. Everett et al.*, 66 Id., 278.

A trial *de novo* cannot be had in the supreme court unless it affirmatively appears by the certificate of the trial judge, in some form, that the evidence set out in the abstract is all the evidence which was offered or introduced on the trial. *Polk et al. v. Sturgeon et al.*, 71 Id., 395.

Where the judge of the district court failed to certify that all the evidence offered on the trial of an equitable action before him is in the record, the certificate was insufficient, and the judgment was affirmed. *Groneweg & Schoentgen v. Barnum*, 70 Id., 763.

Where, in an equity cause, the evidence is not certified within six months from the date of the judgment appealed from, it is too late to secure a trial *de novo* in the supreme court. *The Wis., Iowa & Neb. R'y Co. v. Braham et al.*, 71 Id., 484; *Wise v. Usry*, 72 Id., 74.

To entitle an equity case to be heard *de novo* in the supreme court, the evidence must be certified by the judge within six months from the rendition of the decree; and the rule requires that the written transcript of the short-hand notes be so certified, for it alone, and not the original, constitute the evidence. But where the judge in due form certifies the short-hand notes as containing all the evidence, and the reporter within six months files a transcript thereof, properly certified by himself, the judge's certificate attached to the notes may be regarded as sufficient. *Merrill v. Brown*, 69 Id., 653.

So, also, where the original certificate of the trial judge to the evidence was insufficient to entitle the appellant to a trial *de novo* on appeal, an amendment supplying the defect, made after the expiration of the time of taking an appeal, was no part of the record, and could not be considered. *Lewis v. Markle et al.*, 71 Id., 652. See, also, *Wise v. Usry*, 72 Id., 74.

Where an interlineation amending a judge's certificate to the evidence was apparent on the

face of the original paper, submitted with the cause in the supreme court, it was competent to show by a subsequent certificate of the judge that the interlineation was made by him more than six months after the judgment appealed from was rendered. *Id.*

Where an order had been made at defendant's request for the trial of a cause on depositions, but no depositions were taken, and a like order was refused when made by defendants at a subsequent term, *held*, that the request was properly refused, and that at all events, the granting of the order rested in the sound discretion of the court, under section 2742 of the code. *Mills County Nat'l Bank v. Perry et al.*, 72 *Id.*, 15.

A certificate that the cause was submitted on packages of depositions filed at a certain date, does not sufficiently identify the evidence to allow it to be considered on appeal under section 2742 of the code, on a trial *de novo*. *Runge v. Hahn*, 38 *N. W. R.*, 389.

SEC. 2743. [Court to find facts.]—In all trials of fact by the court, other than those contemplated in the preceding section, the court shall, if either party request it, give his decision in writing, stating, separately, the facts found and the legal conclusion founded thereon; and the whole decision shall be a part of the record, and the finding shall have the effect of a special verdict.

No error can be assigned upon a failure of the court to find upon any particular fact when no request therefor has been made by either party. *Ruble v. Atkins*, 39 *Iowa*, 694.

Where the court makes a special finding of facts under this section, such finding has the effect of a special verdict. *Chapman v. Ransom*, 44 *Id.*, 378; *Leighton v. Orr*, *Id.*, 679; *Watson v. Hoag*, 40 *Id.*, 143.

A finding of facts may be made by the court on its own motion, and when so made has the same force and effect as though made at the request of the parties. *Jennings v. Jennings*, 56 *Id.*, 288.

Findings of fact or law made by the court will be presumed to have been made in compliance with the provisions of the statute authorizing such findings, unless the contrary is shown. *McCue v. Wapello County*, *Id.*, 693.

SEC. 2744. [Tried at first term.]—Except where otherwise provided, causes shall be tried at the first term after legal and timely service has been made.

This section does not apply to nor purport to change or alter the length of service required, but only to fix the time for trial when due legal and timely service has been made. *Per* *COLB* in *Footo v. Beckwell*, 34 *Iowa*, 492.

SEC. 2745. [Exceptions as to equitable issues.]—The appearance term shall not be the trial term for equitable actions, except those brought for divorce, to foreclose mortgages and other instruments of writing whereby a lien or charge on property is created, or to enforce mechanics' lien.

Under this section actions for the foreclosure of mortgages, are triable at the appearance term, unless the court orders the evidence, or a part of it, to be taken in the form of depositions, or one of the parties elects to take his evidence in that form, in which case the cause must be continued. *Lombard v. Thorp et al.*, 70 *Iowa*, 220.

SEC. 2746. [Separate trials: when granted.]—The court may, in its discretion, allow separate trials between the plaintiff and any defendant, or of any cause of action united with others, or of any issue in an action; and such separate trials may be had at the same or different terms of the court as circumstances may require.

The granting of separate trials where there are several parties with different interests rests largely within judicial discretion, and where there is no abuse of sound discretion and no prejudice resulting from a refusal to grant separate trials, the ruling will not be disturbed on appeal. *Kilbourne, Jenkins & Co. v. Jennings & Co.*, 40 *Iowa*, 473.

Orders of the court below, made in connection with granting a motion for plaintiff to sever the causes of action united in his petition, will not be disturbed by the supreme court unless a clear abuse of discretion is shown. *Blades et ux. v. Walker*, 36 *Id.*, 266.

Where the service of the original notice is by publication only, and there has been no appearance for the defendant, parties legally representing him may have a retrial of the case upon application made therefor within two years after the judgment. In this case involving the title to land, the widow and children of the defendant were held entitled to such retrials. *Williamson et al. v. Wachenheim et al.*, 62 *Id.*, 196.

SEC. 2747. [Callendar and arrangement of.]—The clerk shall keep a calendar, distinguishing first criminal causes, and next civil causes, and arranging each in the order of their commencement, and shall, under the discretion of the court or judge, apportion the same to as many days as is believed necessary, and, at the

request of any party to a cause, or his attorney, shall issue subpoenas accordingly. The clerk shall furnish the court and the bar with a sufficient number of printed copies of the calendar.

A bar docket is not a part of a court record, and is not available on appeal to show that a case was disposed of out of its order, unless duly incorporated in, or sufficiently identified by a bill of exceptions. The book contemplated by this section and section 197, subdivision 7, is the appearance docket. *Gifford v. Cole*, 57 Iowa, 272.

CONTINUANCES.

SEC. 2748. [When time is asked to apply for.]—When time is asked for making application for continuance, the cause shall not lose its place on the calendar, or it may be continued at the option of the other party, and at the cost of the party applying therefor; for which cost, judgment may at once be entered by the clerk unless the contrary be agreed between the parties.

SEC. 2749. [Not granted when party in fault.]—A continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor; subject to this rule, it may be allowed for any cause which satisfies the court that substantial justice will thereby be more nearly obtained.

Subject to the rule that a continuance will not be granted for any cause growing out of the negligence or fault of the party applying therefor, it may be allowed for any cause which satisfies the court that substantial justice will be more nearly attained. *The State v. Rorabacher*, 19 Iowa, 154; *State v. Tilghman*, 6 Id., 496.

Much is left to the sound discretion of the court in passing upon applications for continuance, but the ruling must not be arbitrary or in violation of the rights of the parties. The appellate court will interfere only in cases of manifest injustice. *Id.* See, also, *State v. Cox*, 10 Id., 351; *Childs v. Heaton*, 11 Id., 271; *State v. Cross*, 12 Id., 66; *State v. Accola*, 11 Id., 246; *Frank v. Purington*, 5 Id., 345; *Blythe v. Blythe*, 25 Id., 266; *Connor v. Griffin et al.*, 27 Id., 248; *Snediker v. Poorbaugh*, 29 Id., 488; *State v. Rorabacher*, 19 Id., 154; *Boone v. Mitchell*, 33 Id., 45.

The granting of a continuance for the reason that the reply, which was not filed until the trial term, presented a new issue, rested within the discretion of the court, and an abuse of discretion alone would justify an interference with the ruling. *Williams v. The Niagara F. Ins. Co.*, 50 Id., 561.

An application for a continuance, based upon sickness in the family of the defendant's attorney, which, it was alleged, would prevent his attendance, and upon the fact that such attorney was in possession of papers material to the defense, was held not sufficient, because it did not show, with particularity, the nature of such papers, nor where the attorney resided, nor show with sufficient precision how long defendant had been aware of the illness, to enable the court to determine whether diligence had been used to procure the papers. *Finch v. Billings*, 22 Id., 228.

Where in a criminal case the defendant makes application for a continuance on account of popular excitement and prejudice, under this section, and supports his application by affidavits, the application is addressed to the sound discretion of the court, and it may properly allow the state to file counter-affidavits. *State v. Wells*, 61 Id., 639.

When the party applying for a continuance has been negligent the supreme court will sustain the order refusing the continuance, even where it would have been no abuse of discretion to have granted the application. *Walker v. Scofield*, 39 Id., 666.

The continuance of a cause at the request of a guardian *ad litem* who has just been appointed, to enable him to prepare for trial, is not an abuse of judicial discretion. *Blythe v. Blythe*, 25 Id., 266.

The absence of defendant's attorney, for any cause, is not good ground for a continuance of a criminal action where sufficient time is given to procure another attorney, and enable him properly to prepare the defense for the trial. *The State v. Ostrander*, 18 Id., 435.

Where a party asks for the continuance of a cause, on the ground of the absence of a witness whose residence he does not know, he should show, either that he has not had time to ascertain the residence of the witness, or that he has used due diligence to ascertain his residence. *James v. Arbuckle*, 8 Id., 272.

In order to show due diligence in an application for a continuance, it is not sufficient to state generally that due diligence has been used; but the applicant should state specifically what he has done, so that the court may judge of the diligence. *Brady v. Malone*, 4 Id., 146.

What is or is not due diligence is a question for the court upon the facts stated, and not for the applicant. *Id.*

Affidavits for a continuance should be construed strictly, and most strongly against the applicant. *Id.*

An application for a continuance because of the absence of witnesses, which does not show that any effort has been made to procure their attendance, nor any excuse for the want of diligence, which the law requires, is insufficient. *Winder v. Hunt*, Id., 325.

In the absence of a party there is no reason why an affidavit for a continuance may not be made by the attorney, if the interest of his client requires it, but the absence of the client should be shown in the affidavit. *Id.*

It is not competent for an attorney to swear to facts which are solely within the knowledge of his client, unless the client be absent. *Id.*

SEC. 2750. [For want of evidence: affidavit: statement of.]—Motions for continuance on account of the absence of evidence, must be founded on the affidavit of the party, his agent, or attorney, and must state:

1. The name and residence of such witness, or, if that be not known, a sufficient reason why not known, and also, in either case, facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term;

2. Efforts, constituting due diligence, which have been used to obtain such witness, or his testimony;

3. What particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proved.

An affidavit for a continuance on the ground of absence of witnesses, or for the reason that there has not been sufficient time to take their depositions, which does not state the names and residence of the witnesses, nor what facts the applicant expects to prove by them, or show some excuse therefor, is fatally defective. *The State, ex rel. The Attorney-General, v. Tilghman*, 6 Iowa, 496.

It is not sufficient in an application for a continuance on the ground of the absence of a witness for the party to state that he has used due diligence to obtain the testimony, but what he has done must be set out in the application, that the court may judge of the diligence. *Thurston v. Cavenor*, 8 Id., 155.

When a continuance is asked on the ground of the absence of a witness, whose residence is not known to the applicant, it should be shown that the party has not had time to ascertain the residence of the witness, or that he has used proper diligence to ascertain it. *James v. Arbuckle*, 8 Id., 272.

Where there is no defense made no object is to be gained by a continuance in behalf of the defendant, on account of a witness, and it should be refused. *Id.*

An application for continuance consists of three essential and material parts. 1. The name and residence of the witness and the facts showing the probability of procuring his testimony at the next term. 2. The facts showing due diligence. 3. The facts to be proved by the witness. *The State v. Shupe*, 16 Id., 36.

An affidavit for a continuance must state facts showing reasonable ground of belief that the attendance or testimony of the witness will be procured by the next term. A mere statement of a belief is insufficient. *The State v. Rorabacher*, 19 Id., 154.

An application for a continuance, on the ground of the absence of witnesses, should state their residence, the particular facts expected to be proved by them, and that the applicant knows of no other witness by whom the facts can be so fully proved. *The State v. Sater*, 8 Id., 420.

Where the affidavit, after stating the names of the witnesses, stated that the applicant expected to prove by said witnesses that he did not steal the horse, as charged in the indictment; that at the time said horse was stolen, he was at another and different place; that he expected to prove by them other facts which would establish his innocence, and that he could not prove said facts so fully by any other witnesses, which application was overruled. *Held*, properly overruled. *Id.*

The death of a party plaintiff and the substitution of his administrator, do not constitute sufficient grounds for the continuance of the action on application of the defendant. *Masterson v. Brown*, 51 Id., 442.

The fact that the court has granted one more adjournment than is authorized by statute, and that the time is extended beyond the period therein fixed, constitutes a mere irregularity, which can only be taken advantage of upon a showing of prejudice therefrom. *Reese v. Dobbins*, 51 Id., 282.

A motion for a continuance based upon the absence of a witness, filed after the second day of the term, should be supported by an affidavit showing that the motion was made as soon as the party learned of the absence of the witness, and that he desired his evidence. *Bays v. Herring*, 51 Id., 286.

An affidavit for a continuance on the ground of the inability of a witness to be present at the trial, should show that a knowledge of such inability was not known to the party asking the con-

tinuance before the commencement of the term, and in time to have taken the testimony by deposition. *Winder v. Hunt*, 4 Id., 355.

An application for a continuance showed that a witness, whose evidence was material, was a resident of the county in which the cause was pending; that he was in attendance at a previous term of the court, at which the cause was set for trial, but was not tried; that he was then absent from the state, but had promised the applicant to be present at the term of the court: *Held*, insufficient in that it did not show a diligent use of the means given by the state to procure the attendance of the witness, or secure his deposition. *The State v. Cross*, 12 Id., 66.

A party applying for a continuance on the ground of the absence of a witness must not only show that he made proper efforts to obtain the testimony of the witness, but also that he was reasonably diligent in the use of proper exertions to discover the existence of the evidence. *The State v. Bell*, 49 Id., 440, 441.

An application for a continuance in a prosecution for murder, based on the ground of absence of a witness by whom the applicant expects to prove that the witness did the killing, and other facts showing that he, and not the defendant, is guilty thereof, should not be overruled on the presumed improbability that the witness would not thus criminate himself. *The State v. Farr*, 33 Id., 553.

For a cause of sufficiency of statement of facts to entitle the party applying thereto for a continuance, see *The State v. Scott*, 44 Id., 93.

An application for a continuance on the ground of the absence of witnesses must state the particular facts expected to be proved by the witnesses; otherwise it is insufficient. *Jackson v. Boyles et al.*, 64 Id., 428.

SEC. 2751. [**Overruled or party may admit facts.**—] If the application is insufficient, it shall be overruled; if held sufficient, the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated.

If the state, in order to avoid a continuance, applied for by the defendant in a criminal case on account of the absence of a witness, admits that the absent witness would, if present, swear to the facts stated in the affidavit for continuance, such statements acquire the character of the witness' evidence, and cannot be impeached by showing that he has made statements out of court different from those in the affidavit. The same rule applies as if the witness had testified in open court, and no foundation laid to impeach him. *The State v. Shannehan*, 22 Iowa, 435.

Where the facts stated in an affidavit for a continuance on the ground of the absence of witnesses, are admitted by the state and read on trial as the evidence of the absent witnesses, in order to avoid a continuance, such affidavits are not admissible on a second trial of the cause at a subsequent term. *The State v. Feller*, 32 Id., 49.

SEC. 2752. [**Motion for: when filed.**—] The motion must be filed on the second day of the term, if it is then certain that it will have to be made before the trial, and as soon thereafter as it becomes certain that it will so need to be made, and shall not be allowed to be made when the cause is called for trial, except for cause which could not, by reasonable diligence, have been before that time discovered, and if made after the second day of the term, the affidavit must state facts constituting an excuse for the delay in making it. If time is taken when the case is called to make such motion, the motion shall be made and determined as soon as the court opens after the next ordinary adjournment.

Under this section an application for a continuance should be overruled if not made the second day of the term, or fails to state facts constituting a sufficient excuse for not doing so. *Lucas v. Cassady et al.*, 12 Iowa, 567; *Woolheather v. Risley*, 38 Id., 486.

Where an application for a continuance has been overruled in the court below, the ruling will be presumed correct, and error must be affirmatively shown. *Woolheather v. Risley*, 38 Id., 486.

Where motion for a continuance on the ground of the absence of a witness was filed after the second day of the term, and it appeared from the record that whatever necessity there was for a continuance existed and was known the day before, it was held that the motion was properly overruled under this section. *State v. Bouge*, 61 Id., 658.

A motion for a continuance on account of the absence of witnesses, when filed after the second day of the term, without sufficient cause for the delay should be overruled. *Bell v. The C., B. & Q. R'y Co.*, 64 Id., 321.

The continuance of a cause and the time in which pleadings must be filed are not "rights accrued" within the meaning of section 50 of the code, which cannot be affected by the repeal of existing statutes. *Brotherton v. Brotherton*, 41 Id., 112.

An application for continuance which fails to show due diligence in preparing the case for trial should be overruled. *Id.*

An application for a continuance, based upon the filing of a deposition after the commencement of the term, which the applicant expects to be able to record, must state the facts to which the absent witness will testify. *The C. & S. W. R'y Co. v. Heard*, 44 Id., 358.

A motion for a continuance, based upon the absence of a witness, filed after the second day of the term, should be supported by an affidavit showing that the motion was made as soon as the applicant learned of the absence of the witness, and that he desired his testimony. *Bays v. Herring*, 51 Id., 286. To the same effect is *Randall v. Fockler et al.*, 52 Id., 618.

SEC. 2753. [**Amendment.**].—The application shall be amended but once, unless by permission, to supply a clerical error.

SEC. 2754. [**Written objections to.**].—To such motion, both as original and as amended, the adverse party may, at once, or within such reasonable time as the court shall allow, file written objections stating wherein he claims that the same is insufficient, and on such motion and objections no argument shall be heard unless the court desire it.

SEC. 2755. [**Part of record.**].—Such motion and objections shall be a part of the record, and error in refusing a continuance or in compelling an election, may be reviewed.

SEC. 2756. [**Notice book.**].—No copy need be served of a motion for continuance or of objections thereto, but a notice of such motion shall be entered on the notice book.

SEC. 2757. [**Costs.**].—Every continuance granted upon the application of either party, shall be at the costs of such party, unless otherwise ordered by the court.

SEC. 2758. [**Parties may agree.**].—The court shall grant continuance whenever the parties agree thereto, and provide as to costs as may be stipulated.

SEC. 2759. [**Case remains on docket.**].—A case continued remains for all purposes except a trial on the facts.

SEC. 2760. [**One of several parties.**].—Where the defenses are distinct, any one of the several defendants may continue as to himself.

SELECTION OF JURY.

SEC. 2761. **When a jury trial is demanded**, the clerk shall select twelve jurors by lot from the regular panel.

Where a cause is tried, and a verdict rendered by a jury of only eleven men, but without this defect being known to either party, the defect is fatal, and on motion the verdict will be set aside and a new trial granted. *Cowles v. Buckman & Son*, 6 Iowa, 161.

Such a defect may be waived, but before a waiver can be inferred, it must appear, at least, that the party must have knowledge of its existence. *Id.*

If a party accepts a jury knowing that one member is incompetent, he thereby waives the defect; but such knowledge must appear before a waiver will be inferred. *The State v. Groome*, 10 Id., 308.

The law tenders a party a jury for the trial of his cause, and he is not to be charged, as with a fault, if the proper officer has not performed his duty in calling the full number. *Cowles v. Buckman & Son*, 6 Id., 161.

SEC. 2762. **A challenge** is an objection made to the trial jurors, and is of two kinds:

1. To the panel;
2. To an individual juror.

Where the clerk of the city court of Dubuque issued a venire for fifteen jurors instead of twenty-four, required by the statute creating that court, for the panel for a term, held, that a challenge to the panel should have been sustained. *Baker & Griffin v. The Steamboat Milwaukee*, 14 Iowa, 214.

SEC. 2763. [**Parties cannot sever in.**].—Where there are several parties plaintiffs or defendants, and no separate trial is allowed, they are not allowed to sever their challenges, but must join in them.

SEC. 2764. [**To the panel.**].—A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury.

SEC. 2765. [**When made.**].—A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying plainly and distinctly the facts constituting the ground of challenge.

SEC. 2766. [**How tried.**].—A challenge to the panel may be taken by either party, and upon the trial thereof, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of challenge.

SEC. 2657. [**Allowance of: discharge of jury.**].—If the facts of the challenge be allowed by the court, the jury must be discharged and its members disqualified from sitting as jurors so far as the trial in question is concerned; if it be disallowed, the court shall direct the jury to be impaneled.

SEC. 2768. [**To jurors.**].—A challenge to an individual juror is either peremptory or for cause.

SEC. 2769. [**When made.**].—It must be taken when the juror appears and before he is sworn, but the court may, for good cause, permit it to be taken, at any time before the jury is completed.

SEC. 2770. [**Peremptory.**].—A peremptory challenge is an objection to a juror for which no reasons need be given, but upon which the court shall exclude him.

SEC. 2771. [**Number of: how made.**].—Each party shall have the right to challenge peremptorily, five jurors and no more; and the parties shall challenge alternately, commencing with the plaintiff, and the challenges for cause being first exhausted or waived, the parties shall then, in turn, in the same order, exercise the right of peremptory challenge.

In the formation of the jury the challenges should alternate between the parties, the plaintiff having the first challenge. *Davenport G. L. & C. Co. v. The City of Davenport*, 13 Iowa, 229.

Where a challenge to a juror for cause is overruled, and the defendant not having exhausted his peremptory challenges fails to challenge the juror peremptorily, the ruling of the court upon the challenge for cause, if erroneous, is error without prejudice. *The State v. Elliott*, 45 Id., 486; *Barnes v. The Incorporated Town of Newton*, 46 Id., 567.

A waiver by a party, in the first instance, to exercise a peremptory challenge, does not estop him from challenging a juror after the opposite party has challenged one. It seems that in such a case, the waiver would count one in reckoning the number of challenges. *Fountain v. West*, 23 Id., 9.

SEC. 2772. [**Cause of: passed: filled after each challenge.**].—After each challenge, the vacancy shall be filled before further challenges are made, and any new jurors thus introduced may be challenged. A challenge for cause is an objection to a juror, and may be for any of the following causes:

1. A conviction for felony;
2. A want of any of the qualifications prescribed by statute to render a person a competent juror;
3. Inability to understand the English language, unsoundness of mind, or such defects in the faculties of mind or organs of the body as render him incapable of performing the duties of a juror;
4. Consanguinity or affinity within the ninth degree to the adverse party;
5. Standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or being a member of the family, or in the employment of the adverse party.
6. Being a party adverse to the challenging party in a civil action, or having complained against, or been accused by him in a criminal prosecution;
7. Having already sat upon the trial of the same issues;
8. Having served as a grand or trial juror in a criminal case based on the same transaction;

9. When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict;

10. Being interested in a like question with the issue to be tried.

In an action to which an incorporated city is defendant, it was held no abuse of the "sound discretion" vested in the court to exclude from the jury tax payers in such city. *Dively v. The City of Cedar Falls*, 21 Iowa, 565.

Questions as to qualifications of jurors are by the statute left to the sound discretion of the court trying the cause, and its ruling will be reversed by the supreme court only when an abuse of such discretion is made manifest. *Anson v. Dwight*, 18 Id., 241; *Davenport G. L. & C. Co. v. The City of Davenport*, 13 Id., 229; *Dively v. The City of Cedar Falls*, 21 Id., 565, 567; *May v. Elam*, 27 Id., 365.

A challenge to a juror "for cause," which does not state the ground on which it is based, is too indefinite and should be overruled by the court. *Bonny v. Cocke*, 61 Id., 303.

A juror cannot be said to have formed an unqualified opinion who states that the opinion which he has formed is based upon hearsay, and not upon statements made by any one claiming to have personal knowledge, and that he still thinks that he can render a true verdict. *The State v. Ormiston et al.*, 66 Id., 143.

When the trial court, by its ruling upon a challenge compels a party to submit his cause to a juror who is prejudiced against him, he has good ground of complaint. But when the court sustains a challenge, and the adverse party goes to trial with a jury formed without him exhausting the peremptory challenges allowed him by law, the supreme court will require to be well satisfied that the challenge was sustained without any cause, in order to justify a reversal on that ground; and will not reverse when the record does not show that the challenge complained of may not have been sustained for a sufficient cause. *Wishart v. Dietz*, 67 Id., 121.

SEC. 2773. [**Challenge: how tried.**—Upon a trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon; and other evidence may also be heard.

SEC. 2774. [**Same.**—In all challenges, the court shall determine the law and the fact; and either allow or disallow the challenge.

The court is made the trier of the challenge. *May v. Elam*, 27 Iowa, 265.

SEC. 2775. [**Talesmen.**—When the requisite number of jurors cannot otherwise be obtained, the sheriff shall select talesmen to supply the deficiency from the body of the county.

Where, after all the regular jurors but one had been excused by the court, a party demanded a jury trial, and insisted on having the regular jury, and the court ordered the sheriff to fill up the panel with talesmen, and the cause was tried by a jury composed of the one regular juror and eleven talesmen, held, no such abuse of the discretion vested in the court, as to the manner of obtaining the requisite number of petit jurors as to warrant the interference of the appellate court. *Ennrick v. Sloan*, 18 Id., 139.

SEC. 2776. [**Persons who keep the seventh day of the week as Sunday protected.**—A persons whose religious faith and practice are to keep the seventh day of the week as a day set apart by divine command, and dedicated to rest and religious uses, cannot be compelled to attend as a juror on that day, and shall, in other respects, be protected in the enjoyment of his opinions to the same extent as those who keep the first day of the week.

SEC. 2777. [**Exemption not cause of challenge.**—An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

SEC. 2778. [**Majority verdict: struck jury.**—The parties may at any time, either before the jury is sworn, or after, agree to take the verdict of the majority, which agreement being stated to the court and stated on the record to have been made, shall bind the parties, and, in such case, a verdict signed by any seven or more and duly rendered, when read and not disapproved by said majority, shall in every particular, be as binding as if made by the full jury; or, when both parties require it, a struck jury may be ordered, whereupon eighteen jurors shall be called into the box, and the plaintiff first and then the defendant, shall strike out one

juror in turn until each has struck out six, and the remaining six shall try the cause.

ORDER OF TRIAL.

SEC. 2779. [**Procedure after jury is sworn.**—When the jury has been sworn, the court shall proceed in the following order:

1. The party on whom rests the burden of proof, may briefly state his claim and the evidence by which he expects to sustain it;

2. The other party may then briefly state his defense, and the evidence by which he expects to sustain it;

3. The party on whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party must then produce his evidence;

4. The parties then will be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence in their original case;

5. But one counsel on each side shall examine the same witness, and upon inter-locutory questions, the party moving the court or objecting to testimony shall be heard first, the respondent may then reply by one counsel, and the mover rejoin, confining his remarks to the points first stated, and a pertinent answer to respondent's argument. Debate on the questions shall then be closed, unless the court request further argument.

After the party adverse to the one on whom rests the burden of proof has produced his evidence, the other is confined to rebutting evidence, but the court may, for good reasons, in furtherance of justice, permit him to offer original testimony. *Hubbell & Brother v. Ream et al.*, 31 Iowa, 289.

It seems that the whole subject of the examination of witnesses, and the order in which the evidence shall be produced, rests very largely in the discretion of the trial court. *Id.* See also, *Crane v. Ellis*, Id., 510; *Boals et al. v. Shields et al.*, 35 Id., 231.

And although the action of the court below in admitting evidence not rebutting will not ordinarily be disturbed by the appellate court, neither will the rejection of such evidence be reversed. *Id.*

In an action upon a judgment, which is admitted by the pleadings but alleged to have been rendered without jurisdiction of the person of the defendant, the defendant has the affirmative of the issue and the *onus* is upon him. *Lowe v. Lowe*, 40 Id., 220.

Questions leading in form, intended to direct the attention of the witness to the subject matter of his testimony, are competent. *Id.*

Allowing or disallowing the introduction of evidence out of its regular order, is largely within the discretion of the court trying the case, and unless an abuse of discretion and prejudice are shown, such action of the court furnishes no ground for reversal. *Hess v. Wilcox et al.*, 58 Id., 380.

If, under the state of the pleadings and admissions, the plaintiff is not entitled to recover without evidence the burden of proof is upon him, and he will be entitled to open and close the trial. *Viele v. Germania Ins. Co.*, 26 Id., 9; *Vieths v. Hagge*, 8 Id., 192. See also *Hallowell v. Fawcett*, 30 Id., 491.

Where it is apparent upon the principal and material issues that the defendant has the burden of proof, the action of the court in giving him the opening and close of the case cannot be assigned as error. *The Del. Co. Bk. v. Duncombe*, 48 Id., 488.

The action of the court below in limiting the number of witnesses upon a given point, and refusing further testimony thereon, will not be disturbed on appeal, unless it appears that there has been an abuse of the discretion confided to the trial court in such cases. *Kesee v. The C. & N. W. R'y Co.*, 30 Id., 78.

The court may in its discretion, limit the number of witnesses introduced for the purpose of impeaching a witness. *Bays v. Herring*, 51 Id., 286.

The court, in the exercise of its discretion, may permit a party to introduce evidence omitted by inadvertence, mistake or ignorance, after he has rested his case. *McNichols v. Williams*, 42 Id., 385.

To justify a reversal because the party not having the burden of proof is given the opening and close in the introduction of evidence and the argument to the jury, it must appear that prejudice has resulted from the error. *Ashworth v. Grubbs*, 47 Id., 353.

SEC. 2780. [**Argument: order of.**]—The parties may then either submit or argue the case to the jury. In the argument, the party having the burden of the issue, shall have the opening and closing, but shall disclose in the opening all the points relied on in the cause; and if in the close he should refer to any new material, point, or fact, not relied upon in the opening, the adverse party shall have the right of reply thereto, which reply shall close the argument in the case.

While the right to review the question as to which party holds the affirmative of the issue, and has the right of opening and closing the argument, is not absolutely denied, yet there must be a clear case of prejudice to justify a reversal upon this ground, after trial on the merits. *Preston v. Walker*, 26 Iowa, 205.

A motion for continuance, being a part of the record, may be commented upon by opposite counsel without it having been formally offered in evidence. *Cross v. Garrett*, 35 Id., 480.

SEC. 2781. [**Waiver of opening.**]—If the party holding the affirmative waive the opening, he shall be limited in the close simply to a reply to his adversary's argument, otherwise the other party shall have the concluding argument.

SEC. 2782. [**Number of Attorneys allowed: court to arrange order.**]—Every plaintiff or defendant shall be entitled to appear by one attorney, and if there be but one plaintiff or defendant, he may appear by two, and where there are several defendants having the same or separate defenses and appearing by the same or different attorneys, the court shall, before argument, arrange their order.

SEC. 2783. [**Argument restricted.**]—The court may restrict the time of any attorney in any argument to itself, but shall not do so in any case before a jury.

INSTRUCTIONS.

SEC. 2784. [**To be in writing.**]—When the argument is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked, and the charge of the court shall be in writing.

When any part of the charge given by the court to the jury is correct, a general exception to the whole charge presents no question for review in the appellate court. *Loomis, Conger & Co. v. Simpson*, 13 Iowa, 532; *The Davenport G. L. & C. Co. v. The City of Davenport*, Id., 229; *Wilhelmi v. Leonard*, Id., 330.

These instructions on the part of the defendant were passed up to the court during the opening, and only argument made in the case: held error to refuse to give them on the ground that they were submitted in the cause that could not be examined, without keeping the jury in waiting. *McCaleb v. Smith*, 22 Id., 242.

It is not a good reason for refusing to give instructions that they are unnecessarily lengthy. *Id.*

The requirement of this section that all instructions asked shall be in writing, is sufficiently complied with when such instructions are written in pencil. *Harvey v. Tama County*, 53 Id., 223. And a general exception to the refusal of the court to give instructions asked is sufficient. *Id.*

SEC. 2785. [**Modification of: how done.**]—If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as "changed thus," which words shall themselves indicate that the same was refused as demanded.

When the ruling of the court upon instructions is noted on the margin thereof, with exceptions thereto, in accordance with sections 2786 and 2787, they become part of the record, and may be reviewed on appeal without a formal bill of exceptions, but a bill of exceptions is preferable. *Cadwallader & Co. v. Blair et al.*, 18 Iowa, 420.

A statement by the clerk that certain instructions were given is not sufficient. *Id.*

See also, to the same effect, *Phillips v. Starr & Co.*, 26 Id., 349.

Where an instruction asked is so modified by the court as to clearly indicate the part given and the part refused, the provisions of this section are complied with. *Ham v. The W., I. & Neb. R'y Co.*, 61 Id., 720.

SEC. 2786. [**Only those given to be read: how given or refused.**]—The court must read over all the instructions which it intends to give, and none other, to the jury, and must announce them as given, and shall announce as refused,

without reading to the jury, all those which are refused, and must write the words "given" or "refused," as the case may be, on the margin of each instruction.

SEC. 2787. [No reason stated.]—If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become a part of the record.

The modification of instructions should not be by erasure or interlineation. *Phillips v. Starr & Co.*, 26 Iowa, 349.

Instructions which are not embodied in a bill of exceptions nor identified thereby, and which are not marked excepted to on the margin, will not be regarded in the appellate court. *Aliter*, if the ruling upon the instructions with the exceptions thereto are noted on the margin. *Phillips v. Starr & Co.*, 26 Id., 349; *Davenport G. L. & C. Co. v. Davenport*, 13 Id., 229.

It is not error to refuse to give an instruction, although embodying a correct statement of the law applicable to the case when its substance has been given in another instruction. *Cramer v. City of Burlington*, 42 Id., 315; *Todd v. Branner*, 30 Id., 439; *State v. Hockenberry et al.*, 11 Id., 269; *Trustees, etc. v. Hill*, 12 Id., 462; *Peck v. Hendershott*, 14 Id., 40; *Brudskoff Bros. v. Barrett*, Id., 101; *Cousins v. Wescott*, 15 Id., 254; *Denton v. Lewis*, Id., 301; *Nason v. Woodward*, 16 Id., 216; *State v. Korabacker*, 19 Id., 154; *Smith v. Gamble*, 14 Id., 430; *Payne v. Billingham*, 10 Id., 360.

An exception to instructions between certain numbers given, and "each of them," is sufficiently specific when the objection is made as the instructions are given. *Mann v. The S. C. & P. R. Co.*, 46 Id., 637.

A general exception to the giving of each of "the instructions embraced in the charge of the court," where the charge involves several propositions of law, any one of which is correct, presents no question for review on appeal. The same rule applies to a general exception by one party to the giving of instructions asked by the other; but when instructions are asked and refused, and such refusal is noted on the margin of each instruction, a general exception presents a question upon each instruction so refused. *The Davenport G. L. & C. Co. v. City of Davenport*, 13 Id., 229; *Loomis, Conger & Co. v. Simpson*, 13 Id., 533; *McCaleb v. Smith*, 24 Id., 591.

A general exception to the refusal of the court to give instructions asked is sufficient. *Harvey v. Tama County*, 53 Id., 228; *Davenport G. L. & C. Co. v. The City of Davenport*, 13 Id., 229; *Williamson v. Railroad*, 53 Id., 126, 143.

When instructions are excepted to at the time they are given no reason need be given therefor. *Johnson v. The C., R. I. & P. R. Co.*, 51 Id., 25, 30; *Williamson v. The Same*, 53 Id., 126, 143; *Van Pelt v. The City of Davenport*, 42 Id., 308, 314.

A skeleton bill of exception must identify the papers to be inserted therein by the clerk so as to leave nothing to his discretion. *Wells v. B., C. R. & N. R. Co.*, 56 Id., 520.

Since the enactment of this section an exception to instructions given, if taken at the time when given, may be made to the whole charge, without specifying the particular instruction in which the errors relied on occurs. The rule was different under section 3059 of the revision. *Hawes v. The B., C. R. & N. R'y Co.*, 64 Id., 315.

SEC. 2788. [Charge of the court.]—After argument the court may, also, of its own motion, charge the jury. Such charge shall be written in consecutively numbered paragraphs; and no oral explanation thereof shall be allowed. The provisions of this section shall also apply to the instructions asked by the parties.

It is not error for the court to orally refuse to instruct the jury upon the matters not pertinent to the case, and to direct them orally to proceed to determine the case on the instructions already given. *Sullivan v. Collins*, 18 Iowa, 228.

Under this section a charge should be wholly in writing; but if a pleading is read as a part of it, though not included in it, the error is not prejudicial when the charge contains full instructions as to the issues. *Hall v. Carter et al.*, 37 N. W. Rep., 956.

SEC. 2789. [Exceptions to: how and when taken.]—Either party may take and file exceptions to the charge or instructions given, or to the refusal to give any instructions offered within three days after the verdict, and may include the same in a motion for a new trial, but in either case the instructions shall specify the part of the charge or instruction objected to and the ground of the objection.

Exceptions to the giving or refusal of instructions must be taken at the time the jury is charged, or within three days after the verdict, or errors assigned thereon will not be considered in the appellate court. *Harrison v. Charlton*, 42 Iowa, 573.

The bill of exceptions may be signed by consent of parties after the adjournment of the term. *Id.*

When the defendant fails to except to the instructions of the court, relying upon a practice

that all instructions are to be regarded as excepted to, the practice should be stated in the abstract to be of avail to the appellant. *Steyer v. Curran*, 48 Id., 580.

An exception to instructions after verdict, which specifies them by number, is sufficiently definite as to the part objected to, but, as to the ground of objection, is not explicit enough in stating "they are not applicable to the case." *Miller v. Gardner et al.*, 49 Id., 234.

A bill of exceptions signed by the circuit judge, cannot properly recite what occurred in the district court prior to a change of venue therefrom. *Ferguson v. Davis County*, 51 Id., 220.

The party resisting a motion for a change of venue does not waive an objection to the ruling of the court granting the change by appearing in the court to which the change is made and stipulating for a trial at a fixed time, or by moving for a new trial after verdict. *Id.*

The fact that the party objecting has had a fair trial before an unprejudiced jury does not render an error in granting the change of venue error without prejudice. *Id.*

Exceptions to instructions which are not taken at the time the instructions are given, must be filed within three days after verdict or they cannot be considered. *Brant v. The City of Lyons*, 60 Id., 172.

Exceptions must be taken to the giving of instructions in order to secure their review by the supreme court. *Betts v. The City of Glenwood*, 52 Id., 124.

An exception to an instruction, taken and filed after verdict, specifying that the court "misdirected the jury in a matter of law," is too general, and will not be considered. *Benson v. Lundy et al.*, 52 Id., 265.

An exception first taken three and a half months after the decree is settled, signed and entered of record, does not furnish any basis for a review of a cause in the supreme court. *The Joliet Iron & Steel Co. v. The C., C. & W. R. Co.*, 50 Id., 455.

The giving of instructions to the jury involves a question of power. It is done in the exercise of judicial functions, and is conferred by statute upon the district and circuit courts. It is not conferred upon justices of the peace. *St. Joseph Mf. Co. v. Harrington*, 53 Id., 380, 381.

It is the province of the jury to determine the weight of evidence, and this should not be assumed by the court in giving instructions. *Napper v. Young*, 12 Id., 450.

Exceptions to a decision must be taken at the time it is made, except that, under this section, exceptions to instructions to the jury may be taken within three days after the verdict. *Nagle v. Guittar*, 62 Id., 510.

An exception to an instruction not shown to have been taken when the instruction was given; not specifically stated, with the grounds therefor, in the motion for a new trial will be disregarded. *Stevens v. Taylor*, 58 Id., 664.

The supreme court will not review rulings upon instructions which were not excepted to either at the trial or within three days after verdict. *Maxon v. The C., M. & St. P. R'y Co.*, 67 Id., 226.

Instructions need not be excepted to when given. It may be done within three days after verdict, in a motion for a new trial as provided in this section. *Parker v. Middleton*, 65 Id., 200.

Where the instructions given were not excepted to at the time, and the exceptions set out in the motion for a new trial were not sufficiently specific, they are not reviewable in the supreme court. *Parsons et al. v. Parsons et al.*, 66 Id., 754.

Exceptions to instructions, in order to secure consideration on appeal, must be taken, either when the instructions are given, or within three days after verdict, as provided in this section. *Watson v. Stotts et al.*, 68 Id., 659.

This section requires that exceptions to instructions, when made in a motion for a new trial, shall specify the part of the charge objected to, and the ground of the objection. *Patterson v. The C. M. & St. P. R'y Co.*, 70 Id., 593.

RULES REGARDING JURIES.

SEC. 2790. [View by jury.]—Whenever, in the opinion of the court, it is proper for the jury to have a view of the real property which is the subject of controversy, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place which shall be shown to them by some person appointed by the court for that purpose; while the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.

The object of this section is to enable the jury the better to apply the evidence given on the trial, and not to base their verdict in any degree upon the examination of the premises, itself, or to become silent witnesses as to facts in relation to which neither party has an opportunity to cross examine. *Close v. Samm*, 27 Iowa, 503.

This section leaves it to the discretion of the trial court whether or not the jury shall view the

premises in controversy, and the supreme court cannot interfere with the exercise of such discretion. So held in an appeal from an award of commissioners of damages for a railroad right of way. *Claxton v. The C. I. & Dakota R. R. Co.*, 67 Id., 238.

SEC. 3791. [**Kept together in charge of officer.**—When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire, they shall be kept together, under charge of an officer until they agree upon a verdict, or are discharged by the court. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict; unless by order of the court, and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

A verdict was agreed upon after the adjournment of the court, in the night, and was, *without the consent of parties*, sealed up by the jury, and by them placed in the hands of the bailiff, to be by him delivered to the clerk, whereupon the jury separated. Held, that the irregularities were not sufficient to invalidate the verdict. *Heiser v. Van Dyke, Martin & Co.*, 27 Iowa, 359; *Cook & Owsley v. Walters*, 4 Id., 72.

SEC. 2792. [**Court to advise jury when separating.**—If the jury are permitted to separate during the trial, they must be advised by the court that it is the duty of each one of them not to converse with any other of them, or with any person, nor to suffer himself to be addressed by any person on any subject of the trial, and that during the trial it is the duty of each one of them to avoid, as far as possible, forming any opinion thereon until the cause is finally submitted to them.

SEC. 2793. [**Juror sick: when discharged.**—If, after the impaneling of the jury and before verdict, a juror becomes sick so as to be unable to perform his duty, he may be discharged. In such case the trial shall proceed with the remaining jurors, provided the number has not been reduced below ten, or the court may, in its discretion, order the jury to be discharged.

The jury contemplated by the constitution is the jury recognized by the common law, which is constituted of twelve men. It follows that a verdict rendered by a jury of less than twelve men is of no effect unless the objection is waived, and that this section of the code authorizing a verdict from ten or eleven jurors, when the jury has been reduced to that number by sickness, is in conflict with the constitution. *Eshelman v. The C., R. I. & P. R'y Co.*, 67 Id., 269. Following *Cowles v. Buckman*, 6 Id., 161. This doctrine approved and followed in *Kelsh v. The Town of Dyersville*, 68 Id., 137; and it was further held in the case that a municipal corporation has an equal right with a natural person to raise the objection.

SEC. 2794. [**Discharge: when.**—The jury may be discharged by the court on account of any accident or calamity requiring their discharge, or by the consent of both parties, or, when on an amendment a continuance is ordered, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

SEC. 2795. [**Cause re-tried: when.**—In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may then direct.

SEC. 2796. [**Adjournment after trial begun.**—The court may also, at any time after having entered upon the trial of any cause, where it may deem it right for the purposes of justice, order an adjournment for such time within the term, and subject to such terms and conditions as to costs and otherwise, as it may think just.

SEC. 2797. [**What jury may take with them.**—Upon retiring for deliberation, the jury may take with them all books of accounts, and all papers which have been received as evidence in the cause, except depositions, which shall not be so taken, unless all the testimony is in writing, and none of the same has been ordered to be struck out.

Where a jury upon retiring to consider upon their verdict, took with them a deposition which had not been read upon the trial, and read and considered the same in making up their verdict, it was held, that as the deposition was favorable to the party for whom the verdict was rendered, the

verdict should be set aside and a new trial granted. *Stewart v. The B. & M. R. R. Co.*, 11 Iowa, 62.

Where a deposition is taken by the jury on their retirement, with the knowledge of the appellant and without objection on his part at the time, the judgment will not be reversed, in the absence of a showing that he was prejudiced thereby. *Shields v. Guffey*, 9 Id., 322; *State v. Accola*, 11 Id., 246; *Turner v. Kelly*, 10 Id., 573; *Davenport v. Cummings*, 15 Id., 219.

The jury may take the instructions given by the court with them when they retire to consider upon their verdict. *Head & Metzger v. Langworthy & Bros.*, 15 Id., 235.

Where a jury, on retiring, took with them a deposition which had not been read in evidence but was material to the case, without the knowledge or consent of the parties, the verdict should be set aside and a new trial granted. *Coffin v. Kephart*, 18 Id., 256.

Where, in an action to recover the value of a lot of wheat, alleged to have been sold by the defendant, copies of a daily commercial price current were admitted in evidence, it was held, that these papers might properly be taken by the jury to their room upon retiring to consider upon their verdict; and that having retired without them it was not erroneous for the court to send them to their room, on a request from the jury to that effect. *Peterson v. Haugen*, 34 Id., 395.

Where, after the jury had retired for deliberation, the short-hand reporter, under order of the court, but in the absence of court and counsel, and without the knowledge of the appellant or its counsel, went into the jury room and read from his notes such portions of the evidence as the jury called for, it was held that the proceeding was without warrant, and that on account thereof a new trial should have been granted on the defendant's motion. *Fleming v. The Town of Shenandoah*, 67 Id., 505.

The practice of permitting persons who sue for personal injuries to exhibit to the jury their wounds or injured limbs has been too long sanctioned in this state to be now called in question. *Barker v. The Town of Perry*, 67 Id., 146.

There is no impropriety in allowing the jury to take to their room a photographic view introduced in evidence on the trial. *Id.*

SEC. 2798. [Court always open until verdict.]—When the jury is absent, the court may adjourn from time to time in respect to other business, but it is to be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged.

SEC. 2799. [Further testimony to correct mistake.]—At any time before the cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake, but terms may be imposed upon the party obtaining the privilege.

This section was intended to prevent the unjust determination of a cause, on account of an accidental or inadvertent omission of a party to call a witness, or to ask a question on some given point; and was not intended to be limited in its application to the period of examining witnesses. *McManus v. Finnan*, 4 Iowa, 283.

To correct an oversight or mistake, evidence may be allowed to be introduced by a party, after the argument of one of the counsel of the opposite party to the court has closed. *McCormick & Bros. v. Holbrook*, 22 Id., 487.

This section which authorizes the reception of evidence to correct an evident oversight or mistake at any time before the cause is finally submitted, does not deny to the court the power to receive, in its discretion, any evidence out of its usual order, where there is no surprise to the opposite party, and justice is thereby promoted. *Huey v. Huey*, 26 Id., 525.

While it seems that this section applies alone to civil causes, yet, under some circumstances and for some purposes, in criminal trials, a witness may properly be recalled after the evidence is closed, as where a difference of opinion and misunderstanding as to what the witness testified to exists. *The State v. Shean*, 32 Id., 88.

Where during the trial of a cause a party went in search of witnesses, whom he found and brought into court, but not until the attorney for the adverse party was addressing the jury, it was held that the testimony of the witnesses should have been then offered before the case was submitted to the jury, and not having been so offered its existence would constitute no ground for a new trial. *Dettman v. Zimmerman*, 53 Id., 709.

Accidental delay of a witness in reaching the place of trial in time may be sufficient to entitle a party to have his evidence given at any time before the final submission of the cause, and a refusal to allow it would be error. *Smith v. The State Ins. Co.*, 58 Id., 487.

SEC. 2800. [Information given after retirement of.]—After the jury has retired for deliberation, if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, which he shall do, when the information required shall be given in the presence of, or after notice to, the parties or their council.

Instructions to the jury should always be given in open court. *O'Connor v. Guthrie & Jordan*, 11 Iowa, 80. See, also, *Davis v. Fish*, 1 G. Greene, 410; *Cole v. Swan*, 4 Id., 33.

SEC. 2801. [**How given.**—Such information shall be in writing, and shall be held approved unless it be excepted to in the same way as the charge, and no discussion thereon shall be allowed to either party.

SEC. 2802. [**Food and lodging.**—If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court order them to be provided with suitable food and lodging, they must be provided by the sheriff, at the expense of the county.

The defendant in a criminal proceeding may, with the consent of the district attorney and the court, waive his right to a trial by twelve jurors and be tried by a less number. *The State v. Kaufman*, 51 Iowa, 578.

VERDICT.

SEC. 2803. [**How signed and rendered.**—The verdict must be written and signed by a foreman chosen by the jury itself, and when agreed, the jury must be conducted into court, their names called, and the verdict rendered by him and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again, but if no disagreement is expressed and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case.

A judgment will not be reversed because the verdict is not signed by the foreman of the jury when returned by the jury into court. This section is directory and not imperative. *Morrison v. Overton*, 20 Iowa, 465.

It is not error to permit a jury, after it has returned a sealed verdict into court, to correct an error in the verdict which has occurred through inadvertance only. *Hamilton v. Barton*, Id., 505.

The party against whom a verdict has been rendered cannot complain of the ruling of the court permitting the jury to reduce the amount of the verdict, when the record shows no exceptions taken on the trial, no evidence preserved, and no other steps taken by which he could have escaped the payment of the entire verdict. *Id.*

In the absence of any showing to the contrary, it will be presumed that the court followed the directions of this section of the statute, and that upon the reading of the verdict to the jury, and inquiry is made of them as to whether it is their verdict, there was no disagreement thereto. *Bayliss v. Davis*, 47 Id., 340.

In an action for the recovery of several articles of personal property a verdict declaring that the plaintiff was "entitled to the following property described in the petition," but failed to enumerate the articles, was held to be so indefinite and uncertain that no judgment could be rendered thereon. *Richardson v. McCormick*, 47 Id., 80.

Where the verdict was that "the jury in the above case find for the plaintiffs the amount of the note and interest," it was held sufficient to justify the court in ordering the clerk to assess the amount in rendering judgment on the verdict—the form of the verdict sufficiently expressed the intention of the jury, even if objected to at the proper time. *McGregor et al. v. Annell*, 2 Id., 29; *Sterens v. Campbell*, 6 Id., 538.

In an action upon a note, the parties consented that upon the agreement of the jury as to their verdict after the adjournment of court, they might seal and return it to the clerk which was done. The verdict, on being opened the following morning, was found to read, "We the jury find for the plaintiff." Whereupon the court ordered the jury recalled, and instructed them to put their verdict in form, which they did by adding, "for the sum of \$590.40"—that being the amount of note with interest. There was no controversy as to the amount. It was held that there was no error in this action of the court. *Higley & Co. v. Newell*, 28 Id., 516.

Where a jury returned a general verdict and in response to certain special interrogatories as to material facts, answered that they "did not know," held that motion for a new trial should have been sustained. *Darling v. West et ux.*, 51 Id., 259.

The court may put the verdict in form when the meaning is not thereby changed. *Armstrong v. Pierson*, 15 Id., 476; *Gordon & Washburn v. Higley*, Morris 13. The technical phraseology of the verdict is not material, if the intention of the jury is plain. *Harrell v. Stringfield*, Id., 18.

When a verdict is informal the court may instruct the jury as to the proper form and direct them to retire for that purpose. *Bars v. Hanson*, 9 Iowa, 563.

A verdict defective in form may be corrected by the court, but not to supply an omission of the amount by reference to outside evidence. *Fromme v. Jones*, 13 Id., 474.

To justify a court in reforming the verdict, the data must be unmistakable. *Edwards v. McCadden*, 20 Id., 520.

When in an action of replevin the ownership and rights of possession of personal property was in issue on the allegations of the plaintiff's petition, the defendant setting up no special property, and the jury returned the following verdict: "We find the ownership in the plaintiff, and assess the value of the mare at \$75, and the damage for the wrongful detention at \$25," the form of the verdict of the jury was *held* sufficient and judgment properly entered thereon. *Cassel v. The Western Stage Co.*, 12 Id., 47.

Where the verdict in replevin was, "We, the jury, find the right of property in the plaintiff, except one hundred which was not covered by the mortgage," it was *held*, that the court erred in reforming the verdict and in rendering judgment for a return by the plaintiff to the defendant of one hundred dollars' worth of property, and in ordering in default thereof, execution for that sum. *Moore v. Devol et al.*, 14 Id., 112.

SEC. 2804. [**Polled: how done.**].—When the verdict is announced, either party may require the jury to be polled, which shall be done by the court or clerk, asking each juror if it is his verdict. If any one answer in the negative, the jury must be sent out for further deliberation.

SEC. 2805. [**Sealed verdict: effect of.**].—When, by consent of the parties and the court, the jury have been permitted to seal their verdict and separate before it is rendered, such sealing is equivalent to a rendition and a recording thereof in open court, nor shall such jury be polled or permitted to disagree thereto, unless such a course has been agreed upon between the parties in open court and entered on the record.

If a jury separate after agreeing upon a verdict without the permission of the court and without the consent of the parties, it may amount to misconduct on their part, for which they may be punished; but such separation does not necessarily render the verdict void, or so taint it as to prevent its reception by the court. *Cook et al. v. Walters*, 4 Iowa, 75; *Heiser v. Van Dyke, Martin & Co.*, 27 Id., 359.

Where it is agreed that if the jury shall agree before the opening of court the following morning, they may seal their verdict, deliver it to the bailiff and separate, which is accordingly done, this is equivalent to the rendition of the verdict and the recording thereof in open court, and the jury cannot be polled or permitted to dissent therefrom. *Bingham v. Foster*, 37 Id., 339.

It is not error to permit a jury, after it has returned a sealed verdict into open court, to correct an error in the verdict which has occurred through inadvertence merely. *Hamilton v. Barton*, 20 Id., 505; *Higley & Co. v. Newell*, 28 Id., 516.

The words "open court," is to be understood as conveying the idea that the court must be in session, organized for the transaction of business. Per BECK, J., in *Hobart v. Hobart*, 45 Id., 501, 504.

SEC. 2806. [**May be general or special.**].—The verdict of a jury is either general or special. A general verdict is one in which they pronounce generally for the plaintiff or for the defendant upon all, or upon any of the issues.

When the jury return special findings, without any general verdict, the court may render judgment on such special findings when the amount to which the plaintiff is entitled under the law is clear therefrom. *Helphrey v. The C. & R. I. R. Co.*, 29 Iowa, 480.

It is not necessary for the jury to find specially on a counter-claim pleaded by the defendant. A general verdict for the plaintiff involves and disposes of all issues. *Stepanck v. Kula*, 36 Id., 563.

SEC. 2807. [**Special defined.**].—A special verdict is one in which the jury finds facts only; it must present the ultimate facts as established by the evidence to prove them, so that nothing remains to the court but to draw from them its conclusions of law.

SEC. 2808. [**Interrogatories: how and when submitted.**].—In all actions, the jury, in their discretion, may render a general or special verdict; and in any case in which they render a general verdict, they may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact to be stated to them in writing, which questions of fact shall be submitted to the attorneys of the adverse party before the argument to the jury is commenced.

This section has reference to trials in civil actions only. *The State v. Ridley et al.*, 48 Iowa, 370.

The refusal of the trial court to require the jury to return a special verdict upon an immaterial fact is not erroneous. *Bonham v. The Central Ins. Co.*, 25 Id., 328.

The refusal of the court to submit to the jury for special finding thereon interrogatories asked

by a party, which are not ultimate in their nature, and which are so framed as that the jury could not well consider or answer them without great danger of confusion and misapprehension, is no ground for the reversal of the judgment. *Phoenix v. Lamb et al.*, 29 Id., 352.

Interrogatories propounded to a jury, which, when answered, are designed to be in the nature of a special verdict, should be in such form that they may be answered by *yes* or *no*, or in some other brief and pertinent way. *Marshall v. Blackshire*, 44 Id., 475.

This section does not require the court to submit to the jury special questions as to immaterial facts. *Lawson v. The C., R. I. & P. R'y Co.*, Id., 672.

The refusal of the court to direct the jury to find specially, not as to a single fact, but upon a conclusion based upon many facts, and involving the issue to be tried, is not erroneous; such a course is not contemplated by this section of the statute. *The Home Ins. Co. v. The N. W. Packet Co.*, 32 Id., 223.

A party if not deprived of his right to a judgment on the verdict of a jury in his favor by the fact that special interrogatories were erroneously submitted to the jury by the court, where the answers to such interrogatories in no manner conflict with the general verdict, and their submission could not have been prejudicial. *Petrie v. Boyle et al.*, 56 Id., 163.

It is the right of a party to have special finding of the jury, upon specific questions of facts, to be stated in writing. They must, however, present specific questions of fact, and must not call for conclusions based upon facts, requiring the jury to enter into statement of the grounds upon which the conclusions are based. *Lewis v. The C., M. & St. P. R. Co.*, 57 Id., 127, 129.

In an action by one who fell into a cellar-way in the night time the defendant asked the court to submit to the jury the following question: "Was there sufficient light at the cellar opening in question at the time of the alleged injury to enable a person of ordinary sight, and using ordinary care to see the cellar opening?" *Held* error in refusing to submit it. *Day v. The City of Mount Pleasant*, 70 Id., 193.

This section does not require special interrogatories submitted to the jury on the court's own motion to be first submitted to adverse counsel. *Clark v. Balls et al.*, 71 Id., 189.

SEC. 2809. [Special controls general.]--When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

To entitle a party to judgment on a special verdict against a general one in favor of the other party, the special findings must be inconsistent with the general one, and must of themselves, or when taken together with the facts admitted by the pleadings, be sufficient to establish or defeat (as the case may be) the right to recover. *Hardin v. Branner*, 25 Iowa, 364; *Lomb v. The First P. S. of Marshalltown*, 20 Id., 127; *Bills v. City of Ottumwa*, 35 Id., 107; *Mershon v. N'l Ins. Co.*, 34 Id., 87.

When a jury, being instructed to find a special verdict upon three separate issues submitted, returned a special and general verdict, and the special verdict as to one issue was inconsistent with the general verdict, and as to another was equivocal and doubtful, it was *held*, that the court below did not err in setting aside the general verdict, and in overruling a motion for judgment on both the special and general verdict. *Davenport S. F. & L. Ass. v. The N. & F. Ins. Co.*, 16 Id., 74.

The failure or refusal of the jury to answer any one of the special questions submitted to them constitutes no ground for a reversal of the judgment. *Garretty v. Brazil*, 34 Id., 339.

The refusal of the jury to answer definitely an immaterial question submitted to them affords no ground for a new trial. *Rogers v. Hanson & Co.*, 35 Id., 233.

A party is entitled to a special verdict only upon material facts upon which issue has been joined by the pleadings in the case; and it should be in such form as not to involve a statement of evidence or conclusions of law. *Hatfield v. Lockwood*, 18 Id., 296.

When the court may instruct the jury to find a special verdict, see *Careleton v. Byington*, Id., 482.

After the argument to the jury has commenced, it is too late to present special findings to be submitted with the case to the jury. *Hopper v. Moore & Co.*, 42 Id., 563.

If the jury fail to agree in a special finding submitted to them, their answer showing such disagreement is the same as no answer, and can have no effect in the case. *Hardin v. Branner*, 25 Id., 364.

To justify the court in setting aside a general verdict on the ground that it is inconsistent with the special findings, the conflict must be irreconcilable. *Bills v. The City of Ottumwa*, 35 Id., 107.

Where a general verdict with special findings is returned and judgment entered upon the general verdict, a judgment may, on motion of the other party and in a proper case, be rendered on the special findings, without first setting aside the judgment rendered on the general verdict. The sustaining of the motion and rendering judgment on the special findings has the effect to set aside the former judgment. *Mornyer v. Cooper*, 35 Id., 257.

In order for a special verdict to defeat the general one, it must be inconsistent with it; and such

inconsistency will not be presumed, but must affirmatively appear. *Bonham v. The Iowa Central Ins. Co.*, 25 Id., 328.

Although a special verdict may not be warranted by the evidence, yet if the general verdict is sustained by sufficient evidence the judgment will not be disturbed. *Phoenix v. Lamb et al.*, 29 Id., 352.

Where the jury returned a general verdict and in response to certain special interrogatories as to material facts, answered that they "did not know," it was held that a motion for a new trial should have been sustained and a new trial granted. *Darling v. West et ux.*, 51 Id., 259. See, also, *Clark v. Warner*, 12 Id., 219.

Sections 2806-2809 of the code relate alone to civil cases. They do not authorize special verdicts in criminal cases. There can be no such verdicts in criminal cases. *The State v. Fooks*, 65 Id., 196.

Where the action was based on slanderous words which clearly imported a charge of larceny, and there was a general verdict for the plaintiff, but the jury found specially that the words as spoken, and as understood by the hearers, did not charge larceny, held, that the general verdict was properly set aside, and judgment rendered on the special verdict. *O'Donnel v. Hastings*, 68 Id., 271.

When the special findings of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly. But where the general verdict is set aside and judgment rendered the other way upon the special findings, the inconsistency should be so distinct and exercise findings so explicit as to lead to the conclusion that under them no judgment could be authorized upon the general verdict. *Hammer v. The C., R. I. & P. R'y Co.*, 61 Id., 56.

SEC. 2010. [Money: amount of assessed.]—When, by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of such recovery.

SEC. 2811. [Joint or several verdicts.]—Where there are several plaintiffs or defendants, whether the pleadings are joint or several, the verdicts shall be moulded according to the facts and to suit the exigencies of the case.

SEC. 2812. [Form of.]—The verdict shall be sufficient in form if it expresses the intention of the jury.

If the verdict is defective in form merely, and no objection is made to it at the time of its rendition in the court below, the objection cannot be made on appeal to the supreme court. *McGregor et al. v. Armill*, 2 Iowa, 30.

The court may put the verdict in form when the meaning is not thereby changed. *Armstrong v. Pierson*, 15 Id., 476.

Where the verdict read "we the jury find for the plaintiff, for the note and interest," it sufficiently indicates the intention of the jury, and the reference thereof by the court to the clerk for the purpose of computing the amount is but a reduction of the verdict to form and is proper. *Stevens v. Campbell*, 6 Id., 538.

When the verdict is informal the court may instruct them as to the form and have them retire to put it in form. *Bass v. Hanson*, 9 Id., 563; and this may be done after the jury have returned a sealed verdict and separated. *Lee & Co. v. Broadway*, 25 Id., 216; *Higley & Co. v. Newell*, 23 Id., 516.

To justify a court in reforming a verdict the data must be unmistakable. *Edwards v. McFadden*, 20 Id., 320.

A verdict defective in form may be corrected by the court, but not to supply an omission as to the amount by reference to outside evidence. *Fromme v. Jones*, 13 Id., 474.

SEC. 2813. [Entered of record.]—The verdict shall in all cases be filed with the clerk and entered upon the record, after having been put into form by the court, if necessary.

SEC. 2814. [Waiver of trial by.]—Trial by jury may be waived by the several parties to an issue of fact in the following cases:

1. By suffering default or by failing to appear at the trial;
2. By written consent, in person or by attorney, filed with the clerk;
3. By oral consent in open court, entered in the minutes.

An agreement between the parties that an ordinary action and an equitable action shall be tried by the court at the same time and upon the same evidence, will operate as a waiver of a jury trial in the law action, but will not have the effect to change the character of the actions. *Leighton v. Orr*, 44 Iowa, 679.

Where the defendant fails to appear at the trial he will be deemed to have waived a jury. *Gifford v. Cole*, 57 Id., 272.

REFERENCE.

SEC. 2815. [**Consent of parties required.**].—All or any of the issues in an action, whether of fact or of law, or both, may be referred upon the consent of the parties, either written or oral, in court entered upon the record.

It is the general rule in this state that all actions may be referred by consent, and equity cases, wherein issues of fact arise, without consent; but actions for divorce are excepted from the operation of this rule by section 2222 of the code and cannot be referred even by consent, but must be publicly tried in open court. *Hobart v. Hobart*, 45 Iowa, 501.

The fact that exceptions to the report of the referee in such case is filed and argued before the court does not constitute a trial in open court within the meaning of the statute. Nor does an adoption of the finding of the referee by the court comply with this provision. *Id.*

An issue of fact in an action of divorce cannot be submitted to a jury for determination and a subsequent adoption by the court of the finding of the jury will not cure the error of such submission. *Hobart v. Hobart*, 51 Id., 512.

The reference of the cause, by consent of parties, estops either from afterwards claiming a jury. *Hewett v. Egbert*, 34 Id., 485.

SEC. 2816. [**When done without consent.**].—When the parties do not consent, the court may, upon the motion of either, or upon its own motion, direct a reference in either of the following cases:

1. When the trial of an issue of fact shall require the examination of mutual accounts, or when, the account being on one side only, it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account, in which case the referee may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein; or,

2. When the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect; or,

3. When a question of fact shall arise in any action by equitable proceedings, in which case the court in the order of reference shall prescribe the manner in which the testimony shall be taken on the trial.

Where an action involves matter of purely equitable cognizance, although there is also sought, in the same action, other relief not of an equitable character, the court has the power, under the statute, as well as under the former equity practice, to refer the cause to a referee or master, without the consent of the parties. *The State for the use, etc., v. Orwig et al.*, 25 Id., 230.

A party in an equitable action, cannot as a matter of right, demand that the issue shall be tried by a jury. *Id.*

The court has no power under this section to order a reference of a cause where the parties do not consent thereto, in cases not cognizable in courts of equity. The exercise of such power would violate the right of trial by jury guaranteed by the constitution. *McMartin v. Bingham*, 27 Id., 234.

Courts of equity have not jurisdiction of actions upon accounts, except where there are mutual accounts, or where the accounts are on one side only and discovery is sought, but not when the account is on one side and no other relief is prayed, nor where there is a single matter on one side and a set-off on the other. *Id.*

Where a contract between the parties has been established or admitted, and there remains thereunder a series of calculations which are necessary to the establishment of the rights of the parties, it is within the province of the court to order a compulsory reference. *The Blair Iowa Lot & L. Co. v. Walker*, 50 Id., 376.

Where there is perplexity in the accounts between the parties to an action for the establishment of a claim against an estate, and an examination of the accounts by a jury is impracticable, the cause is a proper one for equitable cognizance and under section 2816 of the code, the court may, on its own motion refer such a case to a referee to report the testimony, the facts found, and the conclusions of law; and such procedure is not in violation of the guaranty in section 9 of article I of the constitution. *Burt v. Harrah, Adm'r.*, 65 Id., 643.

SEC. 2817. [**Majority may decide.**].—Where not otherwise declared in the order of reference, all the referees must meet to hear proofs, arguments, and to deliberate, but a decision by the majority shall be regarded as their decision.

SEC. 2818. [**Vacancies.**].—When appointed by the court, the judge thereof may fill vacancies in vacation.

SEC. 2819. [Stand in place of court.]—The referee shall stand in the place of the court, and shall have the same power, so far as necessary, to discharge his duty.

The presumptions which obtain in favor of the regularity of proceedings in court apply also to proceedings before referees appointed by the court. *Oliver v. Townsend*, 16 Iowa, 430.

The court may refuse to review the finding of facts made by a referee, when the evidence upon which it is based is not contained in the record. *Id.*

The finding of a referee stands like the verdict of a jury or the finding of the court, and will be reversed by the appellate court on the ground that it is against the evidence, only, when it is manifest that the ground is well taken. *Childs v. Shower*, 18 Id., 261.

A party may dismiss his action after the cause has been submitted to a referee, and he has prepared, but not filed, his report. Such a case does not fall within the terms of subdivision 1, of section 2844 of the code respecting the right of a party to dismiss before the final submission to the court or jury. *Belzor v. Togan et al.*, 22 Id., 322.

SEC. 2820. [Trial by: power of.]—The trial by referee shall be conducted in the same manner as a trial by the court. He shall have the same power to summon, and enforce by attachment, the attendance of witnesses, to punish them as for a contempt for non-attendance or refusal to be sworn or to testify, and to administer all necessary oaths in the trial of the case, to take testimony by commission, allow amendments to pleadings, grant continuances, preserve order, and punish all violations thereof.

See cases cited in note to section 2819.

SEC. 2821. [Report: judgment.]—The report of the referee on the whole issue, must state the facts found and the conclusions of law, separately, and shall stand as the finding of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court; the report may be excepted to and reviewed in like manner.

Issues in equitable actions are tried in the supreme court *de novo* on the merits, and not upon the finding of facts made by a referee. *Cooper v. Skeel*, 14 Iowa, 578.

The finding of a referee, in the consideration of a motion for a new trial, in the appellate court, stands upon the same ground as the verdict of a jury, and will not be disturbed unless it is manifestly against the evidence. *Whicher et al. v. The Steamboat Ewing*, 21 Id., 240.

That the report of a referee was filed, and judgment rendered thereon in vacation, constitutes sufficient cause for not excepting thereto, nor will it prevent the application of the rule that the supreme court will not review the action of the lower court unless excepted to. *Roberts v. Cass*, 27 Id., 228.

Where the parties agreed upon a reference, with the stipulation that either should have thirty days, after the report of the referee should be made, to file exceptions thereto, and the referee reported in vacation without consent of parties, *held*, that in a legal sense the report was not in court until the first day of the following term, and that a motion to set aside the report could then be made. *Michael v. Longman*, 42 Id., 484.

It is competent for the court to refer a case back to a referee for further report upon the facts with reference to particular issues which are not fully reported upon. *Sage et al. v. Nichols et al.*, 51 Id., 44.

The authority of the referee in such case, however, is limited to reporting upon the particular matters specified in the order of the court. *Id.*

In order that the report of a referee may be received on appeal, it is necessary that exceptions be taken thereto in the court below. An exception taken to the judgment rendered upon such report is not sufficient under this section, to bring up for review in the appellate court alleged error in the report itself. *Brauder v. Hinkley*, 60 Id., 185.

To secure a review of the findings and conclusions of a referee, it is not essential that the exceptions thereto be taken and noted before the report is signed; they may be taken and made to the court after the report is filed. *Edwards & Beardsley v. Cottrell et al.*, 43 Id., 194.

The report of a referee may be assailed by a motion to set it aside or by proper exceptions thereto, filed upon the coming in of the report, and it is not essential that exceptions be taken to errors occurring on the trial before him, if such errors appear of record. Exceptions need be taken before the referee only when it is necessary to make that of the record which otherwise would not so appear. *Washington County v. Jones*, 45 Id., 260, 262.

The presumptions which obtain in favor of the regularity of proceedings of courts apply also to proceedings before referees appointed by the court. *Oliver v. Townsend et al.*, 16 Id., 430.

It is not error for the court to refuse to review the finding of a referee upon the facts, when the evidence is not presented in the record. *Id.*

Where the record showed the finding and report of the referee was set aside, and the cause

tried by the court, without setting out the evidence submitted to either the referee or the court, the judgment was affirmed. *Inman v. Jamison*, 18 Id., 22. See, also, *Smith & Crittenden v. Harlan*, 49 Id., 101.

After a report of a referee has been confirmed, and a judgment rendered thereon, it is too late, several months after the filing of the report, to move that the referee be required to certify up the evidence. *Smith et al. v. Harlan et al.*, 49 Id., 101.

A party will not be allowed to file an amended pleading tendering a new issue after the referee's report has been made, and thereupon have a re-submission of the cause to the referee, without at least offering a reasonable excuse for neglecting to file the amendment before the report of the referee is made. *Newell v. The Mahaska Co. S. B'k et al.*, 51 Id., 178.

The report of a referee in an action upon an account, finding that several items thereof were furnished under a contract between the parties, is not objectionable on the ground that it finds upon an issue not submitted to the referee, since it is competent to recover upon an account though the items thereof were furnished under a contract. *Haywood v. Woods*, 28 Id., 563. Nor would the report be objectionable because it failed to give the precise terms of such contract, or to find as to each item contained in a long account. *Id.*

The report of a referee stands like the verdict of a jury, and will not be reviewed unless all the evidence is contained in the record. *Id.*; *Taylor v. The French L. Co.*, 47 Id., 662.

The report of a referee, like the verdict of a jury, will be sustained unless there is such an absence of evidence as to authorize the conclusion that it was not the result of the exercise of an honest, intelligent and unprejudiced judgment. *Id.*

SEC. 2822. [**Finding of facts.**—When the reference is to report the facts, the report shall have the effect of a special verdict.

In ordinary actions the finding of a referee has the effect of a special verdict, and will be only disregarded where palpably against the weight of the evidence; but in equitable actions, it is the duty of the appellate court to adjudicate the case *de novo* on the evidence. *Wilgus et al. v. Gettings et al.*, 21 Id., 178.

SEC. 2823. [**To sign bill of exceptions.**—The referee shall sign any true bill of exceptions taken to any ruling by him made in the case whereto any party demands a bill of exceptions; and the party shall have the same rights to obtain such bill as exist in the court, and such bill shall be returned with the report.

SEC. 2824. [**Parties may agree on.**—In all cases of reference, the parties, except when a minor may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be persons free from exception, or the court may allow each party to select one, and itself to select a third.

SEC. 2825. [**Appointed in vacation: how.**—A judge of the court, when a case is pending, may, in vacation upon the written consent of the parties, make an order of reference. In such case the order of reference shall be written in the written agreement to refer, and shall be filed with the clerk of the court with the other papers in the cause.

SEC. 2825. [**Must be sworn.**—The referee must make affidavit well and faithfully to hear and examine the case, and make a just and true report thereon according to the best of his understanding. The affidavit shall be returned with the report.

Where objection is made that the report of the referee is not accompanied by his official oath, evidence that the oath was made and afterwards lost shows a sufficient compliance with the statute. *Sears v. Sellew*, 28 Iowa, 501.

The failure to file the oath of the referee with his report is not a fatal objection where the report recites that he was duly sworn before proceeding to the discharge of his duties. *Shindler v. Luke*, 43 Id., 89.

SEC. 2827. [**Issues must be made up: court to make order as to procedure.**—The order shall not be made until the case is at issue as to the parties whose rights are to be examined on the reference. The order may direct when the referee shall proceed to a hearing, and when he shall make his report; but in the absence of such direction, he shall do so on the morning of the tenth day after the day on which was made the order of reference, and shall file his report as soon as done; of the time thus fixed or determined the parties shall take notice,

and non-attendance of either party within an hour of such time shall be attended with like consequences as if the case were in court, which consequences shall be reported as any other fact or finding of the referee.

Where by agreement a pending cause was submitted to arbitrators, who were, by the order made, given authority to fix the day of hearing, it was held that this was not an absence of direction as contemplated by this section, and that the arbitrators might rightfully fix the time of hearing beyond the ten days prescribed in the section for cases where there is no direction given as to the time of hearing. *Corbitt v. Nealy*, 29 Iowa, 445.

An action is not ripe for reference until the issues are made up. *Townsend v. Wisner*, 62 Id., 672.

SEC. 2828. [**Must accept: record made of.**—The referee must be called on by the court to accept or refuse the appointment, and his acceptance shall be entered of record; and he shall be under the control of the court, who may, on the motion of either party, make proper orders with a view to his proceeding with all due dispatch, and the court or judge may, on his motion, on good cause shown, enlarge the time for making his report.

SEC. 2829. [**Issue process: administer oath.**—Any one of such referees may issue and sign subpoenas and other process, and administer oaths necessary for the discharge of their duties and the full exercise of all their powers.

SEC. 2830. [**Mode of procedure in court obtains.**—The form of procedure which in the court itself regulates service, pleading, proof, trial, and the preparation, progression, and method of each of these, shall obtain before the referee; and in every incident of the proceeding before him, the rights and responsibilities of parties, and of their attorneys, and of the referee, shall be the same as if the referee was the court engaged in the same manner.

The method of determining the correctness of an account involved in a controversy which has been submitted to the referee, rests within his discretion. *Keokuk County v. Howard*, 43 Iowa, 354.

SEC. 2831. (*As amended by ch. 209, 18th g. a.*) [**What and when taken.**—[An exception is an objection taken to a decision of the court, or a party acting as the court, on matter of law. The party objecting to the decision must do so at the time the same is made (but if decision is on motion, demurrer, or judgment, exception may be taken within three days), and embody his objection in a bill of exceptions to be filed during the term or within such time thereafter as the court may fix; but in no event shall the time extend more than thirty days beyond the expiration of the term, except by consent of parties or by order of the judge. But in an equitable action tried as such, no bill of exceptions shall be required.]

Exceptions to the ruling of the court trying the cause must be taken at the time the rulings are made, and when the record does not show affirmatively that exceptions were thus taken, the supreme court will not review the rulings of the court below. *Beason v. Johnson*, 14 Iowa, 399; *Brewington v. Patton & Swan*, 1 Id., 121; *Rawlens v. Tucker*, 3 Id., 213; *The State v. Burge*, 7 Id., 255; *Davenport S. F. Association v. N. A. Ins. Co.*, 16 Id., 74; *Corner & Co. v. Gaston*, 10 Id., 512; *Gordon v. Pitt*, 3 Id., 385; *Hall v. Denise*, 6 Id., 534; *State v. Ostrander*, 18 Id., 435; *Young & Sargent v. Peet*, Id., 574; *Daniel v. M. McDaniel*, 16 Id., 589; *Perkins v. Whittam*, 14 Id., 596; *Cain v. Story*, 15 Id., 378; *Dudley v. Ried*, Id., 597; *Brown v. Webster*, 16 Id., 589; *Linn County v. Day*, 18 Id., 581; *Hamline v. Beck*, 13 Id., 602; *Thomson v. Wilson*, 26 Id., 120; *Moore v. Daniels*, 20 Id., 596; *Appanoose County v. Walker*, 23 Id., 26; *Soup v. Smith*, 26 Id., 472; *Snyder v. Eldridge*, 31 Id., 129; *Eaton v. Gester*, 31 Id., 475.

If a bill of exceptions is not signed within the time prescribed by the statute, and there is no agreement of the parties extending the time, it may be stricken from the record in the supreme court on motion. *Lynch v. Kennedy*, 42 Id., 220.

The court may on the trial of a cause, refuse to stop the trial to enable a party to prepare a bill of exceptions, if a reasonable time is given for that purpose after the conclusion of the hearing. *Anson v. Dwight*, 18 Id., 241.

Where by agreement of parties, a verdict is returned and judgment rendered in vacation, the bill of exceptions must be presented at the time the judgment is rendered, or within the time which may be stipulated for between the parties, and cannot be presented afterwards if the opposite party objects. *Lloyd v. Beadle*, 43 Id., 659.

Bills of exception, in the absence of any order or agreement must be settled and filed during the term. *The State v. Orwig*, 36 Id., 112.

A bill of exceptions may, by consent of parties, be signed after the adjournment of the term. *Harrison v. Carleton*, 42 Id., 573; *Gibbs v. Buckingham*, 48 Id., 96, 98.

A certificate of the trial judge, made a year after the trial, to the effect that the evidence contained in the abstract was all the evidence submitted on the trial, is not a compliance with the statute, and the bill of exceptions may, on motion, be stricken from the record. *Gibbs v. Buckingham*, 48 Id., 96.

That a bill of exceptions was made and filed by the judge of the court at his own instance, and not on the motion of either party, does not affect its conclusiveness as a part of the record. *Shepherd v. Brenton*, 15 Id., 84.

An exception first taken three and one-half months after the decree is settled, signed and entered of record does not furnish any basis for a review of the cause. *The Joliet I. & S. Co. v. The C. C. & W. R. Co. et al.*, 50 Id., 455.

Where the time for settling a bill of exceptions is extended for a definite period beyond the term, it must be settled within the time fixed, or shown that the party excepting made proper effort to have it done. *St. John v. Wallace*, 25 Id., 21. If the bill of exceptions be not filed within the time fixed it will be stricken from the files on motion. *Parmenter v. Elliott et al.*, 45 Id., 317.

Where time beyond term was given to settle and file a bill of exceptions, within which the judge signed the bill and ordered it made part of the record, but it was not filed with the clerk until the time expired, it was held invalid, the extension beyond the term being presumed to have been without the consent of the adverse party, and the judge having no power to make the bill a part of the record and waive a strict compliance with the terms of the extension. *Cobb v. Chase et al.*, 54 Id., 196.

Where a party in an equity cause stands upon the ruling of the court upon a motion or demurrer, and appeals therefrom, exceptions should be taken to the ruling, and errors assigned thereon in the supreme court. *Powers v. The County of O'Brien et al.*, Id., 501.

The special term of court provided for in chapter 89, laws of 1878, is a distinct term, and cannot be regarded as a continuation of the preceding regular term for the purpose of settling bills of exceptions under section 2831 of the code. *Dryden v. Wyllis*, Id., 667.

Where the plaintiff was allowed by the court sixty days in which to settle a bill of exceptions, it was held that under this section, the bill must not only be settled but filed also, within the sixty days, and that if filed at a later date, it should on motion of the defendant, be stricken from the record. *Hahn v. Miller*, 60 Id., 96.

Where the trial court allowed defendant ninety days within which to prepare and file his bill of exceptions, but the bill, as shown by the record, was not signed by the trial judge nor filed within ninety days, held that it could not be regarded, and that errors assigned, but not shown by the record, after excluding the bill of exceptions, could not be considered. *Mineral Ridge Coal Co. v. Smith*, 68 Id., 561.

This section which provides that in equitable actions tried as such, no bill of exceptions shall be necessary, refers to trials *de novo* in the supreme court; but where a party stands the ruling upon a motion or demurrer, and appeals therefrom, he should except to the ruling and assign errors. *Hodgin v. Foler et al.*, 70 Id., 21. Following *Powers v. O'Brien Co.*, 54 Id., 501.

An exception can be preserved only by having it embodied in a bill of exceptions, or by having it noted in the record of the decision to which it relates. And a party who would save his exceptions by the first method must have his bill of exceptions signed and filed during the term at which the decision objected to was made, or within such time thereafter as the court shall fix; and where the court did not fix any such time, held that a bill of exceptions signed and filed at the next term must be disregarded on appeal, even though it embodies the several rulings of the court, and recites that the appellant excepted to each of them. *The State ex rel Littleton v. Leach et al.*, 71 Id., 54.

SEC. 2832. [No stated form of.]—No stated form of exception is required. If the exception is to the admission or exclusion of evidence, oral or written, the ground of the objection must be also stated, and no other shall be regarded.

An exception to the admission of evidence will not be considered where the ground of the objection is not stated. *Carleton v. Byington*, 18 Iowa, 482; *Childs v. McChesney*, 20 Id., 431; *Davidson v. Smith*, Id., 466; *Kilburn v. Mullen*, 22 Id., 498; *O'Hagan v. Clingensmith*, 24 Id., 249; *Peck v. McKean*, 45 Id., 18; *Gelpcke, Winslow & Co. v. Lovell*, 18 Id., 17; *Keough v. Scott County*, 28 Id., 337.

Where the certificate of the judge trying the cause shows the rulings made during the trial, and states that the same were duly excepted to, such certificate is a sufficient compliance with the statute. *The State v. Fay*, 43 Id., 651.

The statute provides that no stated form is required for a bill of exceptions; and if the certificates of the short hand reporter and the trial judge appended to a transcript of the reporter's

notes in the case were conceded to answer all the purposes of a bill of exceptions and to amount to such a bill in substance, yet not being filed within the sixty days allowed for that purpose, cannot be considered as a bill of exceptions on appeal. *McCarthy v. Watrous & Co.*, 69 Id., 260.

SEC. 2833. [Noted at end of decision.]—When the decision objected to is entered on the record, and the grounds of the exception appear in the entry, or when any error appears of record, the exception may be taken by the party causing to be noted at the end of the decision, or in connection therewith, that he excepts.

An oral exception to an order or decision is sufficient, where the decision is entered of record, and the grounds of the exception appear in the entry at the end of the decision. *Cramer v. White*, 29 Iowa, 3.6.

SEC. 2834. [Bill of: what to contain.]—An exception, when presented for signature, need not include therein, spread out at length, any writing filed in court, but may incorporate the same by any unmistakable reference thereto; and the clerk, in making a transcript of the bill of exceptions, shall write therein at length all of such writing included therein by reference.

The appellate court will not review instructions given by the court below, to which no specific exception was taken at the time. *Armstrong v. Pierson*, 15 Iowa, 476; *Lyons v. Thompson*, 16 Id., 62.

Under the code of 1851 it was held that the supreme court would not consider a certificate by a clerk showing the evidence received on the trial of a law action, but that it should be embodied in a bill of exceptions signed by the court. *Jordan & Miller v. Quick*, 11 Id., 9; *Garber v. Morrison & White*, 5 Id., 476.

So, also, it was held that in order to bring before the supreme court, and make it part of the record, any paper used or proceedings had in the court below, which is not made part of the record by statute, it must be embodied in a bill of exceptions, or so plainly identified therein that there can be no possibility of mistake as to what is referred to; and that to refer in a bill of exceptions to a motion or instruction as "marked A—here insert," is not sufficiently certain. *Harmon v. Chandler*, 3 Id., 150. See, also, *Lyons v. Thompson et al.*, 16 Id., 62.

Where appellant's abstract shows that the papers set out in the additional transcript and amended abstract filed by appellees were introduced in evidence, and that sufficient reference thereto by their dates and designation, by marks, as exhibits, are found in the record, this is sufficient, under code, section 2834, to identify the papers and make them a part of the record, and to entitle them to be certified to this court on appeal. *McDonald & Co. v. Farrell et al.*, 60 Id., 335.

Where a bill of exceptions referred to the evidence as follows: "The following testimony and rulings were had and reduced to writing by said reporter, being all the testimony on said trial. (Here insert evidence in full)." Held, a sufficient and unmistakable reference to the testimony taken down by the reporter, and by him duly certified and filed in the clerk's office. *Wilson v. Church*, 60 Id., 112; *McDonald v. Farrell*, Id., 335.

Under this section a bill of exceptions which does not embody the evidence and instructions but contains the directions, "here insert evidence in full," "here insert instructions," without attempting to identify the evidence or instructions, fails to make the evidence and instructions part of the record. *Wilson v. Tenct et al.*, 61 Id., 194.

SEC. 2835. [Judge to sign: on refusal other persons may.]—When the decision is not entered on the record, or when the grounds of objection do not sufficiently appear in the record, the party excepting must reduce his exception to writing and present it to the judge for his signature. If he deems it true he shall sign it. If the judge refuses to sign it, the party may procure the signature of two bystanders, attesting that the exception is true and that the judge has refused to sign the same, and the bill of exceptions shall then be filed with the clerk and shall become a part of the record. But the truth of such exception may be controverted and maintained by affidavits, not exceeding five on each side, which shall become part of the record. All affidavits impugning the exceptions must be filed within three days from time of filing the bill of exceptions, and all affidavits sustaining the same within two days thereafter.

Where the judge refuses to sign the bill of exceptions, it is not competent for one of the attorneys of the party excepting, to sign the bill as one of the bystanders. *Id.*

Affidavits impugning the correctness of a bill of exceptions signed by the judge will not be considered by the supreme court unless they are presented to sustain a bill of exceptions purporting to contain a correct statement of the evidence, and signed by two bystanders. *Woodworth v. Byerly*, 43 Id., 106.

A bill of exceptions which embraces all the rulings and decisions of the court on the trial, which are complained of and shows that the several exceptions were taken in fact at the proper time, is unobjectionable. It is not necessary that each ruling complained of should be the subject of a separate bill of exceptions. *Anderson v. Ames & Co.*, 6 Id., 486.

The refusal of a judge to sign a bill of exceptions may be shown by the certificate of attorneys of court. It is not necessary that the judge should certify to his refusal to sign the bill. *Craig v. Andrews*, 7 Id., 17.

Under chapter 148 of the law of 1855, it was held that attorneys of parties taking bills of exceptions were not authorized to sign the same, where the court had refused to sign, but that a bill of exceptions refused by the court and signed by two or more attorneys or officers of the court not interested in the cause wherein the same is taken might be admitted of record under that act. *Simons v. Weigel*, 10 Id., 515.

When the time for settling a bill of exceptions is, by agreement of parties, extended for a definite period beyond the term, it must be settled within the time fixed, or a showing must be made that the party excepting made proper efforts to have it done. *St. John v. Wallace*, 25 Id., 21.

SEC. 2836. [**Must be on material point.**—No exception shall be regarded in the supreme court unless the ruling has been on a material point and the effect thereof prejudicial to the rights of the party excepting.

No error should be regarded by the supreme court, where it does not affect the substantial rights of the appellant. *DeMoss v. Haycock*, 15 Iowa, 149.

On an appeal to the supreme court, the complaining party must not only show error in the ruling of the court below, but error prejudicial to his substantial rights. *Colden & Co. v. Cole*, 19 Id., 565; *Smith v. Milburn*, 17 Id., 30; *Donophan & Hughes v. Street*, Id., 317; *Fulmer v. Fulmer*, 22 Id., 280; *Johnson v. Chase*, 30 Id., 307; *Allison v. Barrett*, 16 Id., 278; *Jones v. Hockman*, Id., 487; *Ticonic Bank v. Harvey*, Id., 141; *Greither v. Alexander*, 15 Id., 470; *McKay v. Leonard*, 17 Id., 569; *Bradley v. Cavanagh*, 12 Id., 273; *Oliver v. Depew*, 14 Id., 490; *Andrews v. Woodcock*, Id., 397; *Drath v. Dietz*, 15 Id., 436; *Campbell v. Chamberlain*, 10 Id., 337; *Cadwallader & Co. v. Blair*, 18 Id., 420; *Wolverton v. Ellis*, Id., 413; *Wile v. Wright*, 32 Id., 451; *Bradley v. Ross*, Id., 505; *Baker v. Kuhn*, 38 Id., 392; *Chicago S. S. W. R'y Co. v. N. W. U. P. Co.*, Id., 377.

See note of decision in *Wetmore v. Mellinger et al.*, 64 Id., 741, noted under section 2690, *ante*.

But the fact that a party has had a fair trial before an unprejudiced jury does not make an error in granting a change of venue error without prejudice. *Ferguson v. Davis County*, 51 Id., 220.

It is not competent for the court, by reference to matters *not of record*, to leave it in the power of the party taking a bill of exceptions to insert in it matters not of record, nor on the files of the court. Per BECK, J., in *Love v. Love*, 52 Id., 220, 225.

The supreme court will not disturb a judgment of a lower court in overruling a motion for a new trial in a law action, based upon the insufficiency of the evidence to sustain the verdict, unless the bill of exceptions purports to embody all the evidence; and the statement, in a bill of exception, that certain witnesses were introduced and testified "substantially as follows," and concluded "that the above was substantially all the evidence introduced in the cause," was held insufficient. *Lea v. Roads*, 22 Id., 408. To the same effect are the following: *McKenzie v. Kitler*, 27 Id., 254; *Jameson v. Gray*, 29 Id., 537; *The State v. Lyon*, 10 Id., 340; *Winslow v. Turner*, 20 Id., 294; *Davis et al. v. Card*, 33 Id., 592.

NEW TRIALS.

SEC. 2837. [**For what causes granted.**—A new trial is a re-examination in the same court of an issue of fact, or some part or portions thereof, after verdict by a jury, report of a referee, or a decision by the court. The former report, verdict, or decision, or some part or portion thereof, shall be vacated and a new trial granted on the application of the party aggrieved for the following causes affecting materially the substantial rights of such party:

1. **Irregularity in the proceedings** of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial;

A new trial will not be granted for irregularities in the proceedings, unless to correct some substantial injury sustained by the complaining party. *Speers v. Fortner*, 6 Iowa, 553.

If justice has been done and a new trial would result in the same verdict, a new trial should not be granted for errors or irregularities committed during the trial. *Dawson v. Wisner*, 11 Id., 6; *Pelemourges v. Clark*, 9 Id., 1; *Woodward v. Hurst*, 10 Id., 120; *Raney v. Paisley*, 13 Id., 89.

It is perfectly competent for the court below to order a new trial, when satisfied that an error has been committed, to the prejudice of either party, whether exceptions were taken to the action of the court at the time or not. *Farr v. Fuller*, 8 Id., 347.

The supreme court will not interfere with the exercise of discretion by the court below in granting a new trial unless it is made to appear that such discretion has been abused to the injury of the appellant. *Caffrey v. Groome*, 10 Id., 548.

Where on an application for a new trial on the ground of newly discovered evidence, it appeared that the applicant had not exercised proper diligence to discover the evidence in time for the first trial, the motion was properly overruled. *Lindauer Bros. & Co. v. Hay*, 61 Id., 663.

The question of granting a new trial rests in the sound discretion of the court, which will not be interfered with unless it is shown to have been abused. *The First Nt. Bk. etc. v. The W. St. L. & P. R'y Co. et al.*, 61 Id., 700; *Hill v. Denslinger*, Id., 241.

Where in an action for damages for personal injury a motion asking the court to direct a verdict for defendant on the ground of contributory negligence on the part of the plaintiff was overruled, and a verdict for plaintiff was subsequently set aside on motion of defendant upon the same ground, it was held that the defendant by filing the latter motion waived the error, if any, in the ruling on the former motion. *Laverenz v. The C., R. I. & P. R. Co.*, 53 Id., 321.

When under the evidence the court might properly, as a matter of law, have rendered judgment for the defendant, it was held not to be prejudicial error to direct a verdict in his favor after the jury had returned one verdict and had separated. *Allen v. Wheeler et al.*, 54 Id., 628.

A party who files a motion for a new trial, in compliance with this and the following section (2837, 2838) of the code, is entitled to have it determined on its merits, and a rule of court requiring a bill of exceptions to be prepared and presented for signature before the hearing of such motion, and providing that in case of failure to present such bill of exceptions the motion shall be overruled, is inconsistent with the statute. *Emery et al. v. Emery et al.*, Id. 106.

Where the court has jurisdiction to grant a new trial, it is immaterial whether granted under this section or under section 3154 of the code. The order in either case, however erroneous, would not be a nullity. *Loomis v. McKenzie*, 57 Id., 77, 82.

2. Misconduct of jury or prevailing party.

A verdict which is against the instructions of the court should be set aside and a new trial granted, even when the law was erroneously given to the jury. *Gaffrey v. Groome*, 10 Iowa, 548; *Savery v. Busick*, 11 Id., 487; *Jewett & Root v. Smart et al.*, Id., 505; *Taylor v. Cook*, 14 Id., 501; *Farley, Norris & Co. v. Budd*, Id., 289; *Porter v. Thompson*, 22 Id., 391.

Where a new trial has been granted on the ground that the jury disregarded the instructions, the supreme court will not review the instructions, but affirm the ruling of the court. *Porter v. Thompson*, 22 Id., 391.

Where the jury in arriving at their verdict, in pursuance of an agreement among themselves, each mark down the amount he is willing to return, and the sum of the amounts divided by twelve produced a quotient which they returned as their verdict, it is misconduct on their part and the verdict will be set aside. *Manix v. Maloney*, 7 Id., 81; *Denton v. Lewis*, 15 Id., 301; *Scanlan v. Porter*, 7 Id., 482; *Ruble v. McDonald*, Id., 90; *Barton v. Holmes*, 16 Id., 252; *Hendrickson v. Kingsbury*, 21 Id., 379.

But where the jurors, without any previous agreement to be bound by the result, each mark down the amount he is willing to find and the aggregate of these sums divided by twelve and the quotient is then agreed upon and returned as the verdict, the verdict will not be held to be improperly found. *Barton v. Holmes*, 16 Id., 252.

The affidavits of jurors may be received by the court to show that a verdict was ascertained in an improper manner, and also to show upon what grounds the verdict was rendered. *Manix v. Maloney*, 7 Id., 81; *Butt v. Tuthill*, 10 Id., 585; *Stewart v. The B. & M. R. R. Co.*, 11 Id., 62.

The affidavit of jurors may be received for the purpose of avoiding their verdict by showing any matter occurring at the trial or in the jury room which *does not necessarily inhere in the verdict itself*, as misconduct of jurors or a party or the attorney of one of the parties, that the verdict was determined by lot or by a game of chance or other artifice or improper manner, but they are not admissible to show any matter which necessarily inheres in the verdict, as that a juror did not assent to it, that he misunderstood the instructions or charge of the court, the testimony, or the pleadings in the case, that he was unduly influenced by his fellow jurors, or mistaken in his calculations or judgment, or other matters resting a one in the breast of the juror. *Wright v. The Ills. & Miss. Tel. Co.*, 20 Id., 193; *Davenport v. Cummings*, 15 Id., 219; *Shepherd v. Brenton*, Id., 84; *Jack v. Naber*, Id., 450; *Moffit v. Rogers*, Id., 453; *Barton v. Holmes*, 16 Id., 252; *Dunlavy v. Watson*, 38 Id., 398; *Bingham v. Foster*, 37 Id., 339.

Misstatements of the counsel in their arguments to the jury may be ground for setting aside a

verdict, but a presumption will obtain in favor of the action of the trial judge in refusing a new trial therefor. *Wickersham v. Timmons*, 49 Id., 267.

Prejudice must be shown to have resulted from the misconduct of counsel in addressing the jury to entitle the innocent party to a new trial therefor. *Hammond v. The S. C. & P. R. Co.*, 49 Id., 459.

Affidavits of jurors cannot be received to impeach their verdict; but may be considered for the purpose of showing misconduct in finding the same. *Stewart v. The B. & M. R. Co.*, 11 Id., 62; *Mnix v. Malony*, 7 Id., 81; *Rable v. McDonald*, Id., 90; *Schauler v. Porter et al.*, Id., 482; *Hall & Co. v. Robinson*, 25 Id., 91; *Darland v. Wade*, 48 Id., 547; *The State v. Douglass*, 7 Id., 413; *Cowles v. The C. R. I. & P. R. Co.*, 32 Id., 515; *Brown v. Cole et al.*, 45 Id., 601; *Ward v. Thompson*, 48 Id., 588; *The State v. McConkey*, 49 Id., 499.

The affidavits of jurors may be received for the purpose of showing that the amount of the verdict was reached by dividing the sum of the amounts suggested by all the jurors by twelve. *Darland v. Wade*, 48 Id., 547.

The finding of the court below as to alleged misconduct of the jury in arriving at their verdict, under conflicting affidavits will not be disturbed in the appellate court unless clearly wrong. *Todd v. Branner*, 30 Id., 439.

The mere fact that one of the jurors in the case, in pursuance of a previous invitation, took dinner and supper with one of the attorneys of the successful party, during the progress of the trial, will not vitiate the verdict. *Koester v. The City of Ottumwa*, 34 Id., 41.

The misconduct of a juror in holding conversation with an attorney respecting the law of the case after the conclusion of the arguments of counsel was held sufficient ground for granting a new trial. *Oleson v. Meader*, 40 Id., 662. And that the attorney applying for a new trial in such case, knew of the misconduct of the juror before the rendition of the verdict and remained silent will not be held to be negligence unless it be made to appear that after that time the prejudice might have been avoided. *Id.*

None of the provisions of section 2837, can be so construed as to authorize a new trial on account of the destruction or loss, after trial and judgment in the court below, of the written evidence upon which the case had been tried, or for the loss of any other part of the record. *Loomis v. McKenzie*, 48 Id., 416, 419; *Fuller v. The C. & N. W. R'y Co.*, 31 Id., 211; *Thompson v. Perkins*, 26 Id., 486; *Hamilton v. The Des Moines Valley R. R. Co.*, 36 Id., 31; *Merserve v. Shine*, 37 Id., 253; *Deppe v. The C., R. I. & P. R. Co.*, 38 Id., 592. Nor will the verdict in such case be valid by the fact that after a verdict had been arrived at by lot the jury took a vote as to the verdict, and that all voted for the party in whose favor the lot had resulted, when it is shown that this vote was but a declaration of the willingness of the jurors to stand by the result of the lot. *Thompson v. Perkins*, 26 Id., 286.

Nothing short of a free and deliberate finding made upon the conscientious conviction of the judgments of all the jurors will satisfy the law. *Merserve v. Shine*, 37 Id., 253.

Deppe v. The C., R. I. & P. R. Co., 38 Id., 592; *Hamilton v. The Des Moines Valley R. Co.*, 36 Id., 31.

Where a verdict has been arrived at by each juror marking and dividing the aggregate by twelve in pursuance of a prior agreement, is only void in part, as where it appeared that by the agreement the verdict should not be less than a certain sum agreed upon, the valid portion will be permitted to stand on the party entering a remittitur as to the excess. *Fuller v. The C. & N. W. R'y Co.*, 31 Id., 211.

Where a juror, pending the trial, took a small quantity of intoxicating liquors for medicinal purposes at night, it was held that this did not constitute ground for granting a new trial. *O'Neal v. The K. & D. M. R. Co.*, 45 Id., 546.

The use of intoxicating liquors by members of the jury pending the trial, and before the final submission of the case, in the absence of a showing that a prejudice to the defendant resulted therefrom, will not vitiate their verdict. *The State v. Bruce*, 43 Id., 530.

The drinking of two glasses of beer by a juror pending a trial, after adjournment of the court, and eleven hours before another session, was held not to vitiate the verdict. *Van Buskirk v. Daugherty*, 44 Id., 42.

Where the jury had retired to consider of their verdict, one of their number left the jury room in charge of the sheriff and went to a grocery store, where he procured and drank a glass of ale or lager beer, after which he returned to the jury room and participated in finding the verdict, it was held that this was misconduct and constituted sufficient ground for setting aside the verdict and granting a new trial. *The State v. Baldy*, 17 Id., 39. Approved and followed in *Bryan et al. v. Harrow et al.*, 27 Id., 494.

The court cannot set aside a verdict and order a rule to issue against the jurors to compel them to disclose the manner of arriving at the verdict. *Crumley v. Adkins*, 12 Id., 363.

3. Accident or surprise, which ordinary prudence could not have guarded against.

A mistake made by a third person in selecting a paper to be used as documentary evidence in the trial of an action to recover lands, when not discovered in time to correct the mistake before

the conclusion of the trial, may be good cause for a new trial. *Floyd et al. v. Hamilton*, 10 Iowa, 552.

To entitle a party to a new trial, on the ground of surprise, he must show that he is prejudiced by the judgment rendered on the former trial, that he was prevented by reason of such accident or surprise from properly defending that action, and that he has material evidence which he could not, by the exercise of reasonable diligence have discovered and produced on the trial. *Richards v. Nuckolls*, 19 Id., 555.

A new trial will not be granted on the ground of surprise of the unsuccessful party, when his want of preparation was the result of his own negligence. *Keys v. Francis*, 28 Id., 321; *Dunlavy v. Watson*, 38 Id., 398.

The proper relief for a party surprised by the disclosure of evidence on the trial, is in an application for a continuance, and if he fails to make such application, a new trial will not be granted on the ground of surprise. *Id.*

In an application for a new trial, based upon the ground of the sudden illness and consequent unavoidable absence of the party, who it is claimed is a material witness in his own behalf, it must be shown that the party and his attorney have not been guilty of any negligence in the premises. *Whitworth et al. v. Murphy*, 29 Id., 470.

While under this section misconduct of the jury is made a ground for granting a new trial, yet the granting or refusing of new trials is left so largely to the sound discretion of the trial court, that the refusal of such court to grant a new trial, for alleged misconduct of the jury, will not be overruled by the supreme court, unless it clearly appears that the court below has abused its discretion. *Perry v. Cottingham et al.*, 63 Id., 41.

4. Excessive damages, appearing to have been given under the influence of passion or of prejudice.

When the jury, in the light of all the facts, has returned a verdict estimating the damages sustained by a personal injury, which the court below has refused to set aside, the supreme court will not interfere unless in case of a manifest abuse of discretion. *Brown v. Jefferson County*, 16 Iowa, 339; *Brockman v. Berryhill*, Id., 118; *Rowell v. Williams*, 29 Id., 210.

Exemplary damages can be properly awarded only in cases in which the evidence shows malice, fraud, gross negligence, or oppression. *Williamson v. The Western Stage Co.*, 20 Id., 177; *Coltins v. Council Bluffs*, 35 Id., 432; same case, 32 Id., 325.

A verdict of five hundred dollars in an action for malicious prosecution is not so great as to warrant the court in setting it aside as excessive. *Paukett v. Livermore*, 5 Id., 277.

A verdict for damages for a personal injury sustained by reason of the negligence of a common carrier, will not be disturbed by the appellate court on the ground that it is excessive unless it is manifestly and clearly so. *Russ v. Steamboat War Eagle*, 14 Id., 363; *Huntingdon v. Howe*, 15 Id., 606.

Where the verdict in an action for damages is deemed by the court to be excessive, it may impose upon the successful party the alternative of accepting a reduced amount or of submitting it to a new trial. *Noel v. Dubuque, B. & M. R. Co.*, 44 Id., 293. See, also, *Brockman v. Berryhill*, 16 Id., 183.

5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property.

A judgment in the court below, claimed to be excessive, will not be revived in the appellate court until after a motion to correct the judgment has been made and overruled in the court below. *Dickey v. Harmon*, 26 Iowa, 501.

Where the judgment is excessive, the supreme court may, on the filing of a remittitur, render judgment for the amount actually due. *Anderson v. Herr & Lacy*, 10 Id., 236.

Where the verdict or judgment is for a larger amount than is claimed in the petition, it is erroneous. *Stadler Bros. & Co. v. Parmelee & Watts*, 10 Id., 23.

6. [Verdict against the evidence or law.]—That the verdict, report, or decision, is not sustained by sufficient evidence, or is contrary to law.

There can be but two modes of trial in the supreme court; one is *de novo*, which obtains in equity causes, and the other is the one which has uniformly prevailed in actions at law, in which, unless satisfied that the verdict or finding is the result of passion or prejudice, the supreme court will not interfere.

The verdict of a jury will not be disturbed by the appellate court on the ground that it is not sustained by the testimony, unless it is so manifestly against the weight of evidence as to show it to have been the result of passion or prejudice. *Koester v. The City of Ottumwa*, 34 Iowa, 41. To the same effect are the following cases: *Fawcett v. Woods*, 5 Id., 400; *McKay v. Thorington*, 15 Id., 25; *Russ v. War Eagle*, 14 Id., 363; *Shepherd v. Brenton*, 15 Id., 84; *Wise v. Cassidy*, Id., 607; *Heenan v. M. S. M. Ins. Co.*, 12 Id., 126; *Jones v. Jones*, 19 Id., 236; *Crabtree v. Messersmith*, Id., 179; *Belamy v. Doud*, 11 Id., 235;

Harper v. Moffit, Id., 527; *Morrison v. Myers & Farner*, Id., 538; *Gamble v. Ackley*, 12 Id., 27; *Pilmer v. The Branch S. B., at Des Moines*, 19 Id., 112; *State v. Funk*, 17 Id., 365; *Miller v. Boone*, 19 Id., 571; *Freeman v. Rich*, 1 Id., 135; *Schumaker v. Gelpcke*, 11 Id., 84; *Martin v. Orndorff*, 20 Id., 217; *Pierce v. Walker*, 23 Id., 424; *Ayers v. The Hartford Ins. Co.*, 21 Id., 193; *Peck v. Hendershott*, 14 Id., 40; *Barker v. Brown*, 15 Id., 70; *Goldsmith v. Boersch*, 28 Id., 351; *Worthington v. Olden*, 31 Id., 419.

Where the evidence is conflicting, and the court below has overruled a motion for a new trial based upon the ground that the verdict is against the evidence, the supreme court will not interfere. *Hall v. Hunter*, 4 Id., 439; *Gordon v. Pitt*, 3 Id., 385; *Brockman v. Berryhill*, 16 Id., 183; *Pilmer v. The Branch of S. B., at Des Moines*, 19 Id., 112; *Donaldson v. The M. & M. R. Co.*, 18 Id., 280; *Jones v. Jones*, 19 Id., 236; *Eason v. Webster*, 20 Id., 591; *Reeves v. Reeves*, Id., 597; *McCabe v. Knapp et al.*, 23 Id., 308; *Garland v. Wholeham*, 26 Id., 185; *Hull & Co. v. Alexander*, Id., 569; *Smith & Co. v. McLean*, 24 Id., 322; *Smith v. Williams*, 23 Id., 28; *Crawford v. Wolf, Carpenter & Co.*, 29 Id., 567; *Stark v. Noble & Bro.*, 24 Id., 71; *Snyder v. Eldridge*, 31 Id., 129; *Snyder v. Neilson*, Id., 238; *Bates v. Bates*, 27 Id., 110; *Todd v. Branner*, 30 Id., 439; *Lester & Bro. v. Sallaek*, 31 Id., 477; *McNorton v. Akers*, 24 Id., 369; *Callanan v. Shaw*, Id., 441; *Schrimper v. Heilman*, Id., 505; *Sperman v. Western Stage Co.*, Id., 515; *Ellwood et al. v. Wilson*, 21 Id., 523; *Saunders v. Clark*, 32 Id., 275.

The fact that there is a strong preponderance of evidence against the verdict will not justify the supreme court in ordering a new trial unless it appears that the verdict was not the result of a sound, unbiased and intelligent exercise of judgment on the part of the jury. *Garretty v. Brazell*, 34 Id., 100.

When the verdict is clearly against the evidence and manifest judgment of the case, it is the duty of the judge before whom the trial took place, unhesitatingly to set it aside; but not when the evidence is conflicting, and the jury have passed upon its weight and credibility. *Smith v. Williams*, 23 Id., 28.

The rule acted upon by the supreme court, that it will not interfere where the court below has overruled a motion for a new trial, grounded upon the insufficiency of the evidence, does not apply to the district and circuit courts. These courts should independently exercise their power in this respect, without restraint from the rule which governs appellant tribunals, and, taking care not to invade the legitimate province of the jury, grant new trials whenever they believe substantial justice has not been done between the parties. *Dewey v. The C. & N. W. R'y Co.*, 31 Id., 373.

The sufficiency of evidence to sustain a finding and judgment, discussed and determined in *The County of Keokuk v. Alexander*, 21 Id., 377; *Anderson v. Simpson*, Id., 399.

The supreme court will not interfere with an order of the court below granting a new trial, on the ground that the verdict is not sustained by the evidence, unless there is a clear and manifest preponderance in support of the verdict. A stronger case must be made to authorize a reversal in such case than where a new trial is refused. *Shepard v. Brenton*, 15 Id., 84; *Ruble v. McDonald*, 7 Id., 90; *Newell v. Sanford*, 10 Id., 396; *Burlington Gas Light Co. v. Thomas & Co.*, 21 Id., 335; *Ackley v. Berkey*, 22 Id., 226; *Jenkins v. The C. & N. W. R'y Co.*, 32 Id., 97; *Roberts & Bro. v. Jones*, 30 Id., 525; *White v. Poorman*, 24 Id., 108; *Tegler & Co. v. Jones*, 33 Id., 234; *Robinson v. Bacon & Strohm*, 24 Id., 409; *Sanders v. Clark*, 22 Id., 275; *Garretty v. Brazell*, 34 Id., 100; *White v. Poorman*, 24 Id., 108.

The supreme court will not disturb the action of the court below in overruling a motion for a new trial based upon alleged insufficiency of evidence, unless the record purports to contain all the evidence. *Lea v. Roads*, 22 Id., 408; *Rindskoff Bros. & Co. v. Lyman*, 16 Id., 260; *State v. Lyon*, 10 Id., 340; *State v. Hockenberry*, 11 Id., 269; *Walker v. Plumer*, 41 Id., 698; *Schermer v. Gendt*, 52 Id., 742; *Booth & Graham v. Small & Small*, 25 Id., 226; *Ackley v. Berkey*, 22 Id., 226; *Burlington Gas Light Co. v. Greene, Thomas & Co.*, Id., 508.

Unless the record purports to contain all the evidence given on the trial below, the supreme court will not grant a new trial on the ground of insufficiency of the evidence. *McCool v. Galena & Chicago W. R. Co.*, 17 Id., 461; *Parsons v. Chapman et al.*, 11 Id., 294; *Curtis v. Scoles*, 1 Id., 472; *Robst v. Thompson*, 4 G. Greene, 135; *Rowan v. Lamb*, Id., 468; *The State v. Burge*, 7 Iowa, 255.

The jury must be governed by the law as given in the instructions of the court; and the supreme court will not review instructions when the verdict is inconsistent therewith. *Savery v. Busick*, 11 Id., 437; *Jewett & Root v. Smart & Gillett*, Id., 505; *Farley, Norris & Co. v. Budd et al.*, 14 Id., 289; *Taylor v. Cook et al.*, Id., 501; *Caffrey v. Groome*, 10 Id., 548.

7. Newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial.

A new trial will not be granted on the ground of newly discovered evidence, unless the party asking it shall show to the court that he has been diligent in his efforts to obtain the evidence prior to the trial. *Fisher v. Pratt*, 9 Iowa, 59; *Aiger v. Merrit*, 16 Id., 121; *Richards v. Nuckolls*, 19 Id., 555; *Mather v. Butler County*, 33 Id., 250; *Dunlavy v. Watson*, 38 Id., 398.

Mere belief that new evidence may be obtained does constitute knowledge of such evidence within the meaning of the statute, making newly discovered evidence ground for a new trial. *Alger v. Merritt*, 16 Id., 121.

A new trial will not be granted on the ground of newly discovered evidence, when such evidence is merely cumulative in its character. *Keyes v. Francis*, 28 Id., 321; *Manix v. Maloney*, 7 Id., 81; *Sturgeon v. Herron*, 14 Id., 160; *Wilhelmi v. Thorington*, Id., 537; *McDaniels v. Van Fosen*, 11 Id., 195; *Stineman v. Beath*, 36 Id., 73; *Shepherd v. Brenton*, 15 Id., 84; *Alger v. Merritt*, 16 Id., 121.

But while a new trial will not be granted on the ground of newly discovered evidence which is merely cumulative, it may be thought in some respects cumulative, if it has, in any degree, an independent and distinct bearing on the issue. *Stineman v. Beath*, 36 Id., 73.

In an application for a new trial upon this ground, the petition need not set out the evidence introduced on the trial. It need only show the facts upon which the new trial is asked, the same as in other cases, and the issues thereon are to be tried as in ordinary proceedings. *Id.*

It is not required that the highest degree of diligence in endeavors to procure testimony shall be shown; reasonable diligence is all that is required. *Id.*

A new trial will not be granted for newly discovered evidence, where such evidence tends only to contradict, or impeach, the evidence of a witness who testified on the trial. *Pelamourges v. Clarke*, 9 Id., 1.

Admissions made by a party after the trial of the cause, and coming within the rule of newly discovered evidence for the other side, affords sufficient ground for a new trial. *Hoskins v. Hattenback et al.*, 14 Id., 314; *Alger v. Merritt*, 19 Id., 121.

A new trial will not be granted on the ground of newly discovered evidence, unless it be shown that the applicant has used due diligence to obtain, or could not by the exercise of such diligence have obtained the evidence on the former trial. *Kilburn v. Muller*, 22 Id., 498; *Richards v. Nuckolls*, 19 Id., 555; *Fisher v. Pratt*, 9 Id., 59; *Hesser v. Doran*, 40 Id., 468; *Sulley v. Ruhl*, 30 Id., 470; *Hopper v. Moore & Co.*, 42 Id., 563.

A general allegation of diligence is insufficient. The party must show what he did before the trial to obtain the evidence in order that the court may judge whether diligence has been used. *Carson v. Cross*, 14 Id., 463; *Darrance v. Preston*, 18 Id., 396.

When the witness relied on for the newly discovered testimony was subpoenaed and in court on the trial of the cause, it will require a very strong showing to justify the granting of a new trial on this ground. *Darrance v. Preston*, 18 Id., 396.

What constitutes diligence will depend upon the circumstances of each case. *Hopper v. Moore*, 42 Id., 563.

A new trial will not be granted on the ground of newly discovered evidence unless it is shown that the applicant exercised reasonable diligence to discover the evidence before the trial, nor where the evidence is cumulative. *May v. Wissman*, 36 Id., 305; *Kilburn v. Mullin*, 22 Id., 498; *Bingham v. Foster*, 37 Id., 339.

The application for a new trial on the ground of newly discovered evidence must show meritorious grounds. *Manix v. Maloney*, 7 Id., 81; *Alger v. Merritt*, 16 Id., 121; *McLean v. Lawson*, 25 Id., 277.

An application for a new trial on the ground of newly discovered evidence, should be accompanied with the affidavit of the newly discovered witness, where it can be procured, in which should be stated the facts to be shown by his testimony, in order that the court may judge whether the new facts are so material as to influence the verdict and produce a different result on a second trial. *Manix v. Maloney*, 7 Id., 81; *McLain v. Lawson*, 25 Id., 277; *McManus v. Finn*, 4 Id., 283.

In an application for a new trial the affidavit of the attorney of the party that certain evidence has been discovered since the trial is not sufficient ground for granting the application, when it is not shown that the party himself may not have known of its existence at that time. *Roziene v. Wolf*, 43 Id., 393.

If objections to the sufficiency of newly discovered evidence, and to the affidavits embodying the same are not presented in the court below on the hearing of the application for a new trial they will not be regarded in the appellate court. *Darrance v. Preston*, 18 Id., 396.

The admission of a party is not evidence of the same character as the testimony of other witnesses, and therefore, not cumulative, although relating to the same controverted fact. *Wayt v. The B., C. R. & M. R. Co.*, 45 Id., 217.

Where the application for a new trial on this ground shows that the evidence is material and not cumulative, and that reasonable diligence has been used to discover it, a new trial should be granted. *Id.*

If newly discovered evidence is material, and it is made to appear that the applicant did not know of the evidence before suit was brought, and could not, by the use of reasonable diligence have sooner discovered it, a new trial should be granted, though the evidence is, in some degree, though not wholly, cumulative. *Hambel v. Williams*, 37 Id., 224. See *Eckel v. Walker*

et al., 48 Id., 225, where facts are considered which are held to constitute reasonable diligence in producing newly discovered evidence.

A new trial will not be granted for the purpose of impeaching a witness with whose testimony the applicant claims he was surprised. *Wise & Hanslip v. Bosley*, 32 Id., 34.

In an application for a new trial, upon the ground of newly discovered evidence, the facts showing that diligence has been used to ascertain the existence of such evidence must be set out, and, when practicable, the affidavit of the witness should accompany the application. *Sulley v. Kuehl*, 30 Id., 275; *Manix v. Malony*, 7 Id., 81; *Carson v. Cross*, 14 Id., 463; *Lisher v. Pratt*, 9 Id., 59; *Pelamorges v. Clark*, Id., 1; *Bailey, Wood & Co. v. Landingham et al.*, 52 Id., 415; *The F. N. Bank etc., v. The Charter Oak Ins. Co.*, 40 Id., 572.

But evidence which, although it tends to establish an issue controverted on the trial, yet introduces a new and distinct fact, is not merely cumulative. *German v. Maquoketa Savings Bank*, 38 Id., 368; *Keys v. Francis*, 28 Id., 321.

Cumulative evidence is additional testimony of the same kind bearing on the same point: it does not necessarily include all evidence which tends to establish the ultimate or *principally controverted* fact. *Able & Co., v. Frazier*, 43 Id., 175.

Where the judge before whom the cause was tried certifies, in connection with the overruling of a motion for a new trial made on the ground of newly discovered evidence, that such evidence was merely cumulative, such statement of the judge will be treated as a verity in the absence of the certification of the evidence upon which the case was tried. *Seymour v. Hoyt & Tabor*, 23 Id., 19.

A new trial should not be granted on the ground of newly discovered evidence, unless the application be accompanied with a showing of diligence to produce it on the trial, and unless, also, it be made to appear to the satisfaction of the court that a different result might probably be expected if the application is granted and the case again tried. *The State v. Bowman*, 45 Id., 418; *Comish v. The C., B. & Q. R'y Co.*, 49 Id., 378; *Carpenter v. Broen*, 50 Id., 451; *Millard v. Singer*, 2 G. Greene, 144.

Effect of granting new trial.—The granting of a new trial operates to vacate the judgment rendered on the former trial, although it has been formally entered of record. *Low et al. v. Fox*, 56 Id., 221.

8. [Error of law.]—Error of law occurring at the trial, excepted to by the party making the application.

A new trial was refused on appeal by the supreme court on the ground that a receipt admitted in evidence was not stamped, as required by the revenue laws—it appearing that the receipt was merely cumulative. *Hatfield v. Lockwood*, 18 Iowa, 296.

When the refusal to give an instruction asked may have been based upon the ground that it was not pertinent to any evidence before the court and jury, and the evidence is not contained in the record, the appellate court will not order a new trial. *Wilcox v. McCune*, 21 Id., 294.

The judgment below will not be reversed for an error in admitting evidence on the trial below when the record shows that, subsequently competent evidence was admitted establishing the same fact. *The City of Des Moines v. Cassidy*, Id., 570.

The action of the court below, in overruling a motion for a new trial, based upon the ground that the verdict is against the evidence and in disregard of the instructions of the court, will not be disturbed, when such instructions are erroneous, and substantial justice has been done between the parties by the verdict. *Allison & Crane v. King*, 25 Id., 56.

The fact that a witness who gave material testimony in behalf of the party calling him was not sworn, does not entitle the adverse party as a matter of right to a new trial, when it is not shown but that he or his attorney knew of the omission before the verdict was returned. *Riley v. Monohan*, 26 Id., 507.

Whether a party is entitled to a new trial upon the grounds shown, is a matter of law purely and not of discretion, and the action of the court below will be reviewed on appeal with the same freedom and upon like principles as upon any other question of law. *Riley v. Monohan, Stewart v. Ewbank*, 3 Id., 191; *Ruble v. McDonald*, 7 Id., 90; *Shepherd v. Brenton*, 15 Id., 84.

The court below may properly refuse to grant a new trial on the ground that one of the jurors sat in a previous trial of the same case, when it is not shown that the attorneys of the applicant as well as the applicant himself were ignorant of the fact until after the return of the verdict and discharge of the jury, and especially where it does not appear that any inquiries were made of the juror before he was sworn, and the record entry states "that both parties consented to the jury." *Hurt v. Weines*, 27 Id., 134.

The rejection of evidence which has in substance already been given to the jury in a prior stage of the proceedings or is afterward admitted does not constitute sufficient ground for reversing a case by the appellate court. *Smith v. Howard*, 23 Id., 51; *Mitchell v. The Home Ins. Co.*, 32 Id., 421; *Brayley v. Ross*, 33 Id., 505.

The action of the court below in refusing a new trial, on the ground that the verdict is against the evidence, will not be disturbed where several trials resulting in the same verdict have been

had, except in an exceedingly strong case of abuse of judgment on the part of the jury, and of discretion on the part of the court in refusing another trial. *Bur. Gas L. Co. v. Greene, Thomas & Co.*, Id., 289.

Where an erroneous instruction was, by mistake handed by the court to the jury, and by them taken to their room, and there was no showing that they did not read and consider it a new trial was ordered. *Carlin v. The C. R. I. & P. R. Co.*, 31 Id., 370.

An error in an instruction which is fully cured by a subsequent one furnishes no ground for a new trial. *Maxwell & Downs v. Gibbs*, 32 Id., 32.

So also the refusal of an instruction, though abstractly correct, but not applicable to the facts disclosed in the evidence, could work no prejudice to the party complaining and affords no ground for granting a new trial. *Messer v. Requinmitter*, Id., 312.

It is not a sufficient reason for setting aside the verdict of a jury, and ordering a new trial, that some or all of the jurors, supposed that their verdict, if for the defendant, would not be a bar to a subsequent action by the plaintiff for the same cause of action. *Minter v. Hite*, 4 Id., 583.

If the court below in ruling on a motion for a new trial mistakes or misapplies a legal proposition it will be reviewed by the supreme court with the same freedom as if made at any other stage of the trial. *Shepard v. Brenton*, 15 Id., 84.

SEC. 2838. [When to be made.]—The application must be made at the term and within three days after the verdict, report or decision is rendered, except for the cause of newly discovered evidence; must be by motion upon written grounds, and if for the causes enumerated in subdivisions two, three and seven of the preceding section, may be sustained and controverted by affidavits.

An application for a new trial upon grounds other than for newly discovered evidence, filed within three days as prescribed by the statute, may be amended, by leave of court, at any time during the term, the amendment being germane to the grounds set out in the original motion. *Snowden & Co. v. Craig*, 20 Iowa, 477.

The grounds relied upon as the basis of a new trial must be set out in the motion therefor, or they will not be considered; and affidavits will not be received in support of the same unless thus stated. *Beal v. Stone*, 22 Id., 447.

A motion for a new trial, based upon the ground that the verdict is against the evidence and instruction, should embody the instructions and all the evidence. *Id.*

Where it appears from the record in a case that a motion for a new trial was not made within three days from the rendition of the verdict, the recitals of the record on appeal are conclusive. If the record is erroneous it should be corrected in the court below by proper proceedings. *Stiles & Winter v. The Estate of Botkin, deceased*, 30 Id., 60.

Where a motion for a new trial on any other ground than newly discovered evidence is not filed within three days after the verdict or decision, it should be overruled. *Boardman v. Beckwith*, 18 Id., 392; *Clinton National Bank v. Graves*, 48 Id., 228, 230.

In the case of newly discovered evidence if by the use of reasonable diligence a party is unable to make the discovery, prepare and present his application for a new trial on that ground within three days or at the same term of the court, he may make the application afterwards. *Alger v. Merritt*, 16 Id., 121.

The application for a new trial must be by motion. *Perkins v. Jones & League*, 55 Id., 211, 212.

The statute in allowing affidavits of jurors to be used in applications for new trials is an innovation upon the common law. It only permits such affidavits to be so used, but it is not designed to compel jurors to give affidavits for that purpose, and they cannot be compelled to do so. *Forshee v. Abrams et al.*, 2 Id., 571, 578; *Grady v. The State*, 4 Id., 461.

A motion for a new trial must be filed at the same term, and within three days after the verdict. And the fact that the court is not in session for a few days after the verdict, in the midst of the term, will not prolong the time for filing the motion. *Ewaldt v. Farlow*, 62 Id., 212.

The affidavit of jurors may be received for the purpose of showing that the amount of the verdict was reached by dividing the sum of the amounts suggested by all the jurors by twelve. *Darland v. Wade*, 48 Id., 547.

Affidavits of jurors cannot be received to impeach their verdict; but may be considered for the purpose of showing misconduct in finding the same. *Stewart v. The B. & M. R. Co.*, 11 Id., 62; *Manic v. Maloney*, 7 Id., 81; *Ruble v. McDonald*, Id., 90; *Schauler v. Porter et al.*, Id., 482; *Hall & Co. v. Robinson*, 25 Id., 91; *Darland v. Wade*, 48 Id., 547; *The State v. Douglass*, 7 Id., 413; *Cowles v. The C., R. I. & P. R. Co.*, 32 Id., 515; *Brown v. Cole et al.*, 45 Id., 601; *Ward v. Thompson*, 48 Id., 588; *The State v. McConkey*, 49 Id., 499.

This section does not apply to the case of a motion to reinstate a cause dismissed for want of prosecution, and such motion need not be made within three days after the dismissal. *Byington v. Quincy*, 61 Id., 480.

This section does not require a motion for a new trial on the ground of newly discovered evidence to be filed within three days. *Van Horn v. Redmon et al.*, 67 Id., 690.

If a motion for a new trial is not filed within the time prescribed by the statute, it should be for that reason overruled. The same result will follow when the filing is not within the time fixed by agreement of the party, there being nothing waived by the agreement except as to the time of filing. *Beems, Adm'r, v. The C., R. I. & P. R. Co.*, 58 Id., 152, 153.

SEC. 2839. [Not granted on account of smallness of damages.]—A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, where the damages equal the actual pecuniary injury sustained.

While it is provided by this section that "a new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, where the damages equal the actual pecuniary injury sustained," yet a court is not required thereby to grant a new trial in every case where the damages are less than the actual pecuniary injury, and where the jury return a verdict for a nominal sum, as for one dollar, a motion for a new trial may be properly overruled. *Hubbard v. The Town of Mason City*, 64 Iowa, 245.

SEC. 2840. The costs of all new trials shall either abide the event of the suit or be paid by the party to whom such new trial is granted, according to the order of the court, to be made at the time of granting such new trial.

SEC. 2841. [Court may grant on conditions.]—The court may determine not to grant a new trial, unless certain terms or conditions named by the court shall be agreed to by the opposite party; in the event of his agreement, to which the terms or conditions named shall be entered on the record, and no new trial shall be granted if the party refuse to agree to the terms or conditions upon which a new trial shall be awarded.

The court may impose conditions upon the successful party to avoid granting a new trial in actions upon either contracts or torts. *Brockman v. Berryhill*, 16 Iowa, 183; *Dawson v. Wisner*, 11 Id., 6.

The court, under this section, may make the filing of a bond in a sum equal to the amount of the verdict, conditioned for the payment of the judgment and costs, the condition of granting a new trial. *Loring v. Holt*, 39 Id., 574.

SEC. 2842. [If not omitted statement that alone may be tried.]—Upon any motion for a new trial in arrest of judgment, or for judgment, notwithstanding the verdict, by reason of the non-averment of some material fact, the party whose pleading is thus alleged defective may, if the court deem it necessary, file a statement of the omitted fact which, if true, would remedy the alleged defects, and such statements shall be filed before hearing of the motion and shall suspend the same. If the facts thus stated would not, if proved, defeat the object of the motion, it shall be granted. If such new averments would, if proved, defeat the object of the motion and be not admitted, they must be denied or confessed, and avoided by the opposite party within such time as the court shall direct unless the same are denied by legal operation, and in such case the law of pleading and of procedure applicable to actions and pleadings of that kind shall obtain, except that the party stating the new fact shall be held the plaintiff therein, and the statement and response shall not need to be verified.

The "practice is quite common to allow amendments after verdict and before judgment, for the purpose of conforming the pleadings to the proof. That such amendments are contemplated by the code is very clear." Per *SEEVERS*, Ch. J., in *O'Connell v. Cotter*, 44 Iowa, 48, 50.

While under this section if the plaintiff's petition fails to state facts entitling him to any relief whatever, advantage may be taken of such defect by motion in arrest of judgment, yet in such case the plaintiff has the right to file an amended pleading, and thus avoid the motion. *Wetmore v. Mellinger*, 64 Id., 751.

See note of decision in *The Dist. Tp. of Eden v. The Ind. Dist. etc.*, 72 Id., 687, noted under section 2649, *ante*.

SEC. 2843. [Same.]—If the facts thus stated be admitted or found to be true, the party stating the same shall be entitled to such judgment as he would have been entitled to if such facts had been stated in the original pleading and admitted as proved on the trial, together with the costs of and occasioned by the new pleading and the proceedings therein; but if the fact be found untrue, the opposite party

shall be entitled to his costs of and occasioned by the new pleading and the proceedings therein, in addition to any other costs to which he may be entitled.

A motion in arrest of judgment may be made for a misjoinder of parties, and on such motion the plaintiff may dismiss as to all those not properly joined and take judgment against those who are jointly liable. *Cogswell v. Murphy et al.*, 46 Iowa, 44.

DISMISSAL OF ACTION.

SEC. 2844. [When done without prejudice.]—An action may be dismissed, and such dismissal shall be without prejudice to a future action:

1. By the plaintiff before the final submission of the case to the jury, or to the court when the trial is by the court;

2. By the court, when the plaintiff fails to appear when the case is called for trial;

3. By the court, for want of necessary parties, when not made according to the requirement of the court;

4. By the court, on the application of some of the defendants when there are others whom the plaintiff fails to prosecute with diligence;

5. By the court, for disobedience by the party of an order concerning the pleadings or any proceeding in the action.

The plaintiff cannot dismiss his action after the case has been fully submitted to the court or jury. *Hays v. Turner*, 23 Iowa, 214; *Mansfield v. Wilkerson*, 26 Id., 482.

The plaintiff may, in an action appealed from a justice of the peace, in the circuit court, dismiss his action without prejudice at any time before final submission, the same as if the action had been originally brought in that court. *Harris v. Laird*, 25 Id., 143.

The plaintiff may dismiss his action after he has failed to answer interrogatories filed by the defendant with his answer, and after the filing of the affidavit provided for in section 2699 of the code, and against the objection of the defendant. *Perry v. Heighton*, 26 Id., 451.

The plaintiff may, before the action is finally submitted, dismiss his action as to one of several causes upon which it is founded. *Ballinger v. Davis*, 29 Id., 512.

A plaintiff may dismiss his action after the case has been finally submitted to a referee and before he has filed his report therein. *Belzor v. Logan et al.*, 32 Id., 322.

A case is not finally submitted to a jury within the meaning of this section until they have been directed to proceed to the consideration of their verdict, and it may be dismissed without prejudice after the completion of the charge of the court. *Harris v. Beam*, 46 Id., 118.

In a suit in equity in the circuit court of the United States, the defendant answered to the merits without interposing any technical objections; the plaintiff's attorneys having withdrawn their appearance the court dismissed the bill, reciting in the decree that the cause had been submitted upon the "pleadings and proofs." *Held*, that the decree was a bar to an action upon the same cause of action in the state court, upon the ground that the record showed a submission and determination of the case on the merits. *Scully v. The C. B. & Q. R'y Co.*, Id., 528.

Where a counter-claim is embraced in the issue when the cause is finally submitted and judgment is rendered on the issue, the plaintiff is entitled to immunity from any further action thereon. *Gunsaulus v. Cadwallader*, 48 Id., 48.

A cause is not finally submitted to the jury until they are directed to enter upon the consideration of the case, and where a party offered to dismiss his action before the jury were instructed, but after the court had indicated what the instruction would be, the offer should have been allowed and the case dismissed. *Millen v. Peck*, 57 Id., 430.

Where there is no evidence tending to establish the plaintiff's case, or there are essential ultimate facts to be found in order to entitle him to recover, and there is no evidence tending in that direction, the court may direct the jury as to their verdict. But where there is evidence in any degree tending to establish the cause of action, the case must be left to the determination of the jury. *Way v. The Ill. Cent. R. Co.*, 35 Id., 585; *Muldowney v. The Same*, 32 Id., 178; *Napper v. Young*, 12 Id., 450; *Keenan v. The Mo. St. M. Ins. Co.*, Id., 126; *Russ v. The Steamboat War Eagle*, 9 Id., 374; *Same v. Same*, 14 Id., 363; *State v. Turner*, 19 Id., 144; *State v. Rorabacker*, Id., 154; *Allen v. Pegram*, 16 Id., 164; *Murphy v. The C. R. I. & P. R. Co.*, 45 Id., 661.

These provisions apply equally to actions at law and suits in equity, and it is not competent for the court, on its own motion, to dismiss a cause in equity without prejudice, after it has been finally submitted on the evidence. In such case the defendant is entitled to a decision upon the merits, so that the judgment may bar another action for the same cause. *Forsythe v. McMurty et al.*, 59 Id., 162.

Before a case has been finally submitted, the plaintiff has the right, under this section, to dis-

miss it without prejudice to a future action; and a case is not *finally* submitted when, after being once submitted, the court permits an amendment raising a new issue. *Jones et al. v. Currier*, 65 Id., 533.

This section in permitting the plaintiff to dismiss his action without prejudice to a future action, does not have the effect to enlarge the statute of limitations as to such action. *Archer v. The C. B. & Q. R'y Co.*, Id., 611.

SEC. 2845. [**On the merits.**].—In all other cases upon the trial of the action, the decision must be upon the merits.

SEC. 2846. [**Counter-claim tried.**].—In any case, when a counter-claim has been filed, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear.

Where on plaintiff's motion an action of replevin is dismissed, and is again reinstated on defendant's motion, for the assessment of damages, the plaintiff is treated as a party in default and cannot demand a jury. *Wilkins v. Treynor*, 14 Iowa, 391.

Where the plaintiff dismisses his action the defendant has the right to proceed and prove up his counter-claim. And where, after the evidence in support of a counter-claim has been introduced, the court dismisses the same, the party prejudiced by such ruling is entitled to have everything on which his right to recover depends, which the evidence tended to prove, regarded as established. *Welch v. Jones*, 58 Id., 694, 695.

By the provisions of this section "in any case where a counter-claim has been filed, the defendant shall have the right to proceed to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear." But the statute does not contemplate that the defendant may, by pleadings subsequent to the dismissal, introduce causes of action not before involved in the case. *Page et al. v. Sackett et al.*, 69 Id., 226.

The defendant has the right to proceed with the trial of the cause upon his own cross-bill, notwithstanding the plaintiffs have dismissed their action. *Foster & Co. v. Ellsworth*, 71 Id., 262.

SEC. 2847. [**Or dismissed.**].—The defendant may, also, at any time before the final submission of the cause to the jury, or to the court when the trial is by the court, dismiss his counter-claim without prejudice.

Where a counter-claim was embraced in the issue in an action at the time of final submission and judgment, the plaintiff is entitled to immunity from further action thereon; and the withdrawal of such claim after judgment cannot affect the status created by the judgment. *Gun-saulis v. Cadwallader*, 48 Iowa, 48.

SEC. 2848. [**Dismissal in vacation: costs: judgment.**].—Any party to any claim may dismiss the same in vacation, and the clerk shall make the proper entry of dismissal on the record, and, if the costs are not paid, may enter judgment against such party therefor in favor of the party entitled thereto, and issue execution therefor at the order of such party. The party so dismissing shall be liable for no costs made by the other party after notice to him of such dismissal.

JUDGMENT.

SEC. 2849. [**Every final adjudication is.**].—Every final adjudication of the rights of the parties in an action, is a judgment; and such adjudication may consist of many judgments, one of which judgments may determine for the plaintiff or defendant on the claim of either as an entirety; or when a claim consists of several parts or items, such judgment may be for either of them on any specific part or item of such aggregate claim, and against him on the other part thereof; or a judgment may, in either of these ways, determine on the claims of co-parties on the same side against each other.

Under the statute a judgment is a final adjudication of the rights of the parties in an action. Per BALDWIN, CH. J., in *Beall v. West*, 13 Iowa, 61, 65, and per MILLER, J., in *Wagner v. Tice*, 36 Id., 599, 602.

A final decree in equity is a "judgment" within the meaning of this section of the code. *Wagner v. Tice*, 36 Id., 599, 602.

A judgment rendered in vacation, without consent of parties, and in the absence of any order made during the term providing therefor is invalid. *Spear v. Fitchpatrick*, 37 Id., 127; *Townsley v. Morehead*, 9 Id., 565.

A decree signed by the judge in vacation and entered of record by the clerk, constitutes a valid judgment although the record is not signed by the judge. *Traer Bros. v. Whitman*, 56 Id., 443.

The allowance of a claim, filed in the county court, against an estate, and ordering the payment there, was *held*, not to constitute a judgment within section 2740 of the revision, limiting actions on judgments of courts not of record, to ten years. *Smith, Murphy & Co. v. Shawhan, Adm'ss.*, 37 Id., 533.

In a criminal case an intermediate order or decision on a demurrer, *held*, not to be a final judgment, from which an appeal can be taken to the supreme court. *The State v. Swearengen*, 43 Id., 336. Overruling *The State v. Brandt*, 41 Id., 593.

SEC. 2850. [**May be for and against same party.**—Any party who succeeds in part of his cause, or in part of his causes, and fails as to part, may have the entry in such case express judgment for him for such part as he succeeds upon, and against him on the other part.

Under this section it is competent for the supreme court, in reversing a case, to order that the new trial shall extend only to the defendant's cross-action, in connection with which the error occurred, and that the judgment establishing the plaintiff's claim remain undisturbed. *McAferly v. Hale*, 42 Iowa, 355.

In the case of tenants in common any one may bring a separate action respecting his interest in lands, or they may all join in one action, and the court may render judgment for or against one or more of them. *Peter v. Jones*, 35 Id., 512, 520.

SEC. 2851. [**Abatement: how distinguished.**—Where matter in abatement is plead in connection with other matters not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar, and the judgment must, if it is rendered on the matter in abatement, and not on the merits, so declare.

When a defect of parties is apparent on the face of the petition it may be taken advantage of by demurrer; when not thus apparent it must be pleaded in the answer. When thus pleaded it is a matter of fact for the consideration of the jury, and cannot be decided by the court on motion based upon part of the evidence. *Enders v. Beck*, 18 Iowa, 86.

A judgment for the defendant in an action upon a guaranty of a promissory note, which recites the ground upon which the judgment is based to be that the plaintiff has not sufficiently exhausted his remedy against the maker, is a judgment in abatement, and not an adjudication upon the validity of the guaranty, which can be pleaded in bar of another action thereon after execution against the maker has been returned unsatisfied. *Boyer & Barnes v. Austin*, 54 Id., 402.

The pendency of a garnishment proceeding against the maker of a promissory note, cannot be pleaded in bar to an action on the note by an assignee thereof who received it after maturity and after garnishment of the maker. But such garnishment may be pleaded in abatement; and the issue thereon should be submitted to the jury that their verdict and the judgment may be distinguished from those upon the matter pleaded in bar. *Clise v. Freeborne*, 27 Id., 280.

Under this section, where matter in abatement is pleaded in connection with other defenses, the finding of the court or jury must distinguish between matter in abatement and matter in bar, and the judgment when rendered upon the matter in abatement, and not on the merits, must so declare. *Atkins v. Anderson*, 63 Id., 739, 742.

SEC. 2852. [**When special execution desired.**—Where any other than a general execution of the common form is required, the party must state in his pleading the facts entitling him thereto, and the judgment may be entered in accordance with the finding of the court or jury thereon.

In an action against several defendants, judgment may be rendered in favor of the plaintiff against one of them alone, and also against the plaintiff in favor of the remaining defendants, for costs. *Eyre v. Cook et al.*, 9 Iowa, 135.

In an action on a joint and several promissory note, judgment may be rendered against one party and the action continue as to others, and the judgment will be a bar to the plaintiff's cause of action against the others. *Smith, Twogood & Co., v. Coopers & Clark*, Id., 376.

SEC. 2853. [**Several plaintiffs and defendants.**—In an action by several plaintiffs, or against several defendants, the court may, in its discretion, render judgment for or against one or more of them whenever a several judgment is proper, leaving the action to proceed as to the others.

SEC. 2854. [**When all not served proceed against those served.**—Though all the defendants have been served with notice, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against such defendants if the action had been against such alone.

SEC. 2855. [**Relief asked, or that is consistent granted.**].—The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his petition. But in any other case, the court may grant him any relief consistent with the case made by the petition and embraced within the issue.

Where an answer is filed, the plaintiff is not limited to the relief asked in his petition, but may have "any relief consistent with the case made by the petition and embraced within the issue." *Wilson v. Miller et al.*, 16 Iowa, 111, 115.

Where the original notice stated plaintiff's claim to be a sum of money due on a note and the foreclosure of a mortgage, but the petition, which described the mortgage, failed to ask a foreclosure thereof, *held*, that a judgment of foreclosure, rendered in the case, was not void, but voidable only, and might be set aside on motion, but that the judgment for the money due on the note should stand. *McConnell v. Cotter et al.*, 44 Id., 48.

SEC. 2856. [**When part controverted.**].—If only part of the claim is controverted by the pleading, judgment may at any time be rendered for the part not controverted.

A party is not entitled, on motion before trial, to judgment for part of his claim, under this section, unless such part is clearly not controverted. *King v. Howell*, 28 Iowa, 65.

In an action against a partnership, one partner filed an answer admitting a part of the plaintiff's claim and denying the remainder, after which a motion for a continuance was made on the ground that the partner not answering was in the military service of the United States; *held*, that a continuance as to one partner operated as a continuance as to both, and that judgment could not be rendered for the amount admitted to be due. *Butler et al. v. McCall & Sypher*, 15 Id., 430. WRIGHT, J., dissenting.

Where a petition consists of several counts, stating different causes of action, and to some of the counts there is no answer or other pleading interposed, judgment may properly be rendered thereon. *Musser v. Crum*, 48 Id., 52, 53.

Where, in an action brought to recover taxes of several years alleged to be due and unpaid, the defendant, in answering, confessed that part of the taxes claimed were due and unpaid, and tendered judgment therefor, it was held proper for the court below to render judgment upon the answer for the taxes admitted. *The City of Davenport v. The C., R. I. & P. R. Co.*, 38 Id., 633.

SEC. 2857. [**Judgment on verdict.**].—When a trial by jury has been had, judgment must be entered by the clerk in conformity with the verdict, unless it is special or the court orders the case to be reserved for future argument or consideration.

SEC. 2858. [**When verdict is special.**].—When the verdict is special, or when there has been a special finding on particular questions of fact or issues, or when the court has ordered the case to be reserved, it shall order what judgment shall be entered.

SEC. 2859. [**Judgment notwithstanding verdict.**].—When, by the statements of the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party, unless the other party proceed as provided in section two thousand eight hundred and forty-two of this chapter.

Where the defendant has pleaded a tender, thereby admitting a certain sum to be due the plaintiff, and the jury returned a general verdict for the defendant, it was *held*, that the court was authorized under this section to render judgment for plaintiff for the sum tendered by defendant. *Sheriff v. Hull*, 37 Iowa, 174.

When the allegations of a pleading are not answered or denied, it is the duty of the court to render judgment in accordance with the admissions of the pleadings. *The Singer Mf. Co. v. Billings et al.*, 39 Id., 347.

Where defendant admitted that a certain amount was due plaintiff, but when plaintiff moved for judgment for that amount, defendant asked and obtained leave to amend his answer, *held* that the court properly refused to enter judgment on the motion until after the amendment was filed. *Snyder v. Phillips*, 66 Id., 484.

SEC. 2860. [**Judgment for excess of counter-claim.**].—If a counter-claim, proved, exceed the plaintiff's claim so established, judgment for the defendant must be given for the excess; or, if it appears that the defendant is entitled to any other affirmative relief, judgment must then be given therefor.

SEC. 2861. [**Judgment by Agreement.**—Any judgment in a case pending other than for divorce, which may be agreed upon between the parties interested therein, may, at any time, be entered and if not done in open court, the judgment agreed to shall be in writing, signed and filed with the clerk, who shall thereupon enter the same accordingly, and execution thereon may issue forthwith unless therein otherwise agreed upon between the parties.

An agreement between the parties to an action stipulating the terms upon which a decree shall be rendered, when filed in open court becomes a part of the record as a pleading, and cannot, unless for good cause shown, be stricken from the files, or withdrawn upon the motion of a party. *Vail v. Stone et al.*, 13 Iowa, 233.

But where such agreement for judgment has been entered into corruptly, with the view to avoid the statute against usury, and to enable the plaintiff to take judgment for unlawful interest, the defendant is not estopped, before judgment entered, to plead the usury which is the basis of the agreement. *Lyon v. Welsh et al.*, 20 Id., 578.

SEC. 2862. [**No distinction between debt and damages.**—In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages.

SEC. 2863. [**Provisions as to juries to govern court.**—The provisions of this chapter relative to juries, are intended to be applied to the court when acting as a jury on the trial of a cause so far as they are applicable and not incompatible with other provisions herein contained.

In ordinary actions tried by the court, without a jury, the finding has the same degree of conclusions as the verdict of a jury, and are governed by the same rules on appeal. *Woods v. Gevecke*, 28 Iowa, 561; *Byington v. Woodward*, 9 Id., 360, 366; *Snell v. Kimbell*, 8 Id., 281.

Where a cause at law is heard by the court instead of a jury, exceptions may be taken to this admission or rejection of evidence. *Williams v. Soutter et al.*, 7 Id., 435.

CLERK.

SEC. 2864. [**Judgments and orders entered of record.**—All judgements and orders must be entered on the record of the court and must specify clearly the relief granted, or order made in the action.

It is essential to the validity of a judgment that it be entered upon the record book of the court, provided for in sub-division I, of section 197 of the code, that being the book in which, in contemplation of the statutes all the proceeding of the court are recorded, and from which the entries in the judgment docket, and other books required to be kept, are made, and where the record entry of judgment is for a blank amount of damages and a specified amount of costs, such judgment can only be enforced to the amount of such costs, although the judge's calendar contained the direction, "clerk to assess," and the judgment docket showed a judgment for both damages and costs. *Case v. Plato et al.*, 54 Iowa, 64.

It is not competent to prove a judgment in any other way than by the production of the proper record thereof. Oral testimony and memoranda entered upon the books are not intended to preserve the records of judgments, and are not competent. *Case v. Plato*, 54 Id., 64; followed in *Balm v. Nunn*, 63 Id., 641.

SEC. 2865. [**Satisfaction of to be entered by clerk.**—Where a judgment is satisfied or satisfied by execution or otherwise, the clerk shall at once enter a memorandum thereof on the column left for that purpose in the judgment docket.

A party paying off a judgment is not bound to take the receipt of the attorney, but may insist upon going to the records and having the satisfaction entered there. *Fisher v. The City of Oskaloosa*, 28 Iowa, 331.

Money paid to the clerk of the district and circuit courts, upon a judgment entered in the records in his office, is received by him in virtue of his office, and upon his failure to pay over the same to the judgment creditor, an action may be maintained upon his official bond therefor. *Morgan v. Long*, 29 Id., 434.

SEC. 2866. [**Complete record in land cases made.**—In cases where the title to land is involved and expressly settled or determined, the clerk shall make a complete record of the whole cause and enter it in the proper book. But in no other case need a complete entry be made except at the request of a party who will pay the expense of such record.

This section does not apply to an action to charge land in the hands of a grantee with debts of his grantor, where the title is in no other respect questioned. In cases where this section does apply, the record should contain only the original notice and return, the pleadings and the judgment or decree; the evidence should not be recorded. *Smith v. Cummins & Co.*, 52 Iowa, 143.

DISCHARGE OF JUDGMENT.

SEC. 2867. [May be done on motion.]—A defendant against whom a judgment has been rendered, or any person interested therein, having some good matter of discharge which has arisen since the judgment, may, upon motion, in a summary way, have the same discharged either in whole or in part, according to the circumstances.

In some cases the controversy may be settled upon motion as contemplated by this section, others, involving the consideration of much testimony, oral and documentary, might most appropriately belong in chancery. Per WRIGHT, J., in *Traer v. Lyttle*, 20 Iowa, 301.

In the absence of statutory authority, a court has no jurisdiction to cancel a judgment on motion based upon grounds existing prior to its rendition, and section 2867 of the code does not give such authority. *Brett v. Myers*, 65 Id., 274.

SEC. 2868. [Fraudulent assignment of.]—The court shall have power, on motion, to inquire into the facts attending or connected with the assignment of a judgment, or the entry of the same for the use of any party, and to strike out such use, or to declare such assignment void either in whole or in part, whenever such assignment or use shall be determined to be inequitable or fraudulent, or in bad faith.

DEFAULT.

SEC. 2869. [When made and entered.]—If a party fail to file or amend his pleading by the time prescribed by the rules of pleading, or, in the absence of rules, by the time fixed by the court; or if, having plead, his answer or reply on motion or demurrer is held insufficient or is struck out, and he fail to amend or to answer or reply further, as required by the rules of or by the court, or if he withdraw his pleading without authority or permission to replead, judgment by default may be rendered against him on demand of the adverse party made before such pleading is filed.

It was held, under the revision of 1860, that where a demurrer to an answer was sustained, a default should not be granted for want of further answer, in the absence of any rule or order of court fixing the time within which such answer must be filed. *Rollins v. Coggshall*, 29 Iowa, 510; *Wright v. Howell*, 24 Id., 150.

Where an amended answer is held insufficient on motion or demurrer, a judgment by default cannot properly be entered against the defendant for his failure to further plead, in accordance with the ruling of the court, if the original answer remains on file and unaffected by such ruling. *Crafts v. Clark*, 31 Id., 77.

A judgment by default may be entered against a party who appears in an action before a justice of the peace, but fails to plead. *McFarland v. Lowrey*, 40 Id., 467; *Parke v. Ratcliffe*, 42 Id., 42.

In an action against two defendants on a contract, in which one leaves the action undefended by making default, and the other files an answer, making a defense, it is not the practice to enter judgment on the default before the issue raised by the answer is disposed of. A motion made by a defendant for a judgment against himself, was held properly overruled. *Greenough, Cook & Co. v. Thelden et al.*, 9 Id., 503.

It is erroneous to enter judgment, by default, against a party after he has answered and while his answer remains on file. *Arbuckle v. Bowman et al.*, 6 Id., 70; *The Canal Bank of Cleveland v. Newberry*, 7 Id., 4.

A default may be granted and judgment entered thereon before a cause is reached in its regular order on the docket. *Brenner & Co. v. Gundershiemer*, 14 Id., 82.

Where an amended answer is successfully assailed by motion or demurrer, a judgment by default cannot properly be entered against the defendant for his failure to further plead, in accordance with the ruling of the court, if the original answer remains on file unaffected by the ruling. *Crafts v. Clark*, 31 Id., 77.

SEC. 2870. [Notice.]—Where no appearance is made, default shall not be had until the court determines from an inspection of the record that notice has been given as required by this code.

It will be presumed, in the absence of allegations to the contrary, that a court, in rendering judgment by default, passed upon the sufficiency of the service of notice. An erroneous decision upon the sufficiency of such service is not void. *Muscatine Turn Verein v. Funck*, 18 Iowa, 469.

A judgment by default will not be reversed in the supreme court unless a motion to set it aside has been made and overruled in the court below. *Decatur County v. Clements*, 18 Id., 563; *Pigman v. Denney et al.*, 12 Id., 396; *McKinley v. Bechtel*, Id., 561, *Downing v. Harmon*, 13 Id., 535; *Bethel v. Leay*, 14 Id., 592; *Leonard v. Hallem*, 17 Id., 564; *Pratt v. Western Stage Co.*, 27 Id., 363; *Berryhill v. Jacobs*, 19 Id., 346; *De Tar v. Boone County*, 34 Id., 488.

The same rule applies where the judgment by default is rendered by a justice of the peace; a writ of error will not lie, until after a motion before the justice to set aside the judgment has been overruled. *Leonard v. Hallem*, 17 Id., 564.

Where an appeal is taken to the supreme court from a judgment by default on service by publication, and the judgment is affirmed for the reason that no motion to set aside the judgment had been made in the court below, the defendant is not estopped from afterwards moving for a re-trial of the action. *Berryhill v. Jacobs*, 20 Id., 246.

This section (2870) is directory merely and not jurisdictional, and where service has been actually made and the court grants a default and renders judgment thereon, the fact that return of service had not been made at the time will not have the effect to render the judgment void. *Lawrence v. Showell*, 52 Id., 62.

The supreme court will not review the action of the court below in rendering judgment by default upon a return of service that is merely defective, until a motion to correct the irregularity has first been made and overruled in the lower court. *Pratt v. The Western Stage Co.*, 27 Id., 363.

The action of the court below, in refusing to grant a default for want of an answer, will not be interfered with unless an abuse of discretion be shown. *Walker v. Hutchinson et al.*, 50 Id., 364.

SEC. 2871. **Default may be set aside** on such terms as the court may deem just among which must be that of pleading issuably and forthwith, but not unless an affidavit of merits be filed and a reasonable excuse shown for having made such default, nor unless application therefor be made at the term in which default was entered, or if entered in vacation, then on the first day of the succeeding term.

A naked default on which no judgment has been rendered, may be set aside at any time on proper grounds. The discretion of the court in this is not limited as to time. But when a judgment has been entered on it, a motion to set it aside must be made at the same term. *Harper v. Drake*, 14 Iowa, 534.

The court has a large discretion in acting upon motions to set aside defaults, and its action thereon will not be disturbed except in a clear case of abuse of discretion. *Marsh v. Cooley*, 36 Id., 603; *Bolander v. Atwell*, 14 Id., 35; *Kreisinger v. I. C.*, 16 Id., 586; *McNulty v. Everett*, 17 Id., 581.

During the term the record is under the control of the court, a judgment of nonsuit, or by default may be set aside at the term at which it was rendered, for good cause shown. *Taylor v. Lusk*, 9 Id., 444.

Pleadings filed by a defendant while he is in default should on motion of the plaintiff be stricken from the files. *Brayton v. Delaware County*, 16 Id., 44.

A defendant in default, before a justice of the peace, will not be permitted to plead until the default has been set aside by a compliance with section 2871 of the code. *Id.*

A default will not be set aside, especially at a subsequent term, unless a sufficient excuse for the default be shown, accompanied by an affidavit of merits. *McDonald v. Donaghue*, 30 Id., 568; *Harper v. Drake*, 14 Id., 533; *Stone v. Brown*, Id., 595.

Where judgment by default has been entered without legal authority (as upon an insufficient notice) the court may set the same aside without any showing on the part of the defendant, or affidavit of merits, as prescribed in this section. This section has reference to cases where the court has authority to enter the default. *Boals et ux. v. Shules et al.*, 29 Id., 507.

Where in an action against executors the original notice was served upon one of four executors eight months after he had resigned, it was held that such service conferred no jurisdiction to enter judgment by default. *The United States Rolling Stock Co. v. Potter*, 48 Id., 56.

An application to set aside a default granted for want of an answer, should be accompanied by an answer, or some sufficient excuse given for not presenting it. *Thacher v. Hann et al.*, 12 Id., 303.

A default which is the consequence of the negligence of the party against whom it is rendered, should not be set aside on his application. *Id.*

Where a party ruled to answer by a particular day, has for his failure to do so a good and valid excuse, he is not thereby released from answering *after* the time fixed, and before the next term (if the rule day extends into vacation) unless for such continued default he has sufficient excuse.

Id.

The action of the court below, in entering default for failure to answer after appearance made, will not be disturbed, where no affidavit of merits is filed, although defendant's attorney was honestly mistaken as to the time he was ruled to answer. *Smith v. Watson*, 23 Id., 218.

Section 2871 of the code does not apply where a default has been entered without legal authority, where the court has not acquired jurisdiction of the defendant. *The W. S. R. S. Co.*, 48 Id., 66, 67.

A default will not be waived, nor the rule, requiring a showing of merits and an excuse for the default, be changed, by a subsequent amendment of the petition, merely bringing in new parties, and which in no manner affects the cause of action against, or the rights of the defendants in default. *McDonald v. Donaghue*, 30 Id., 568.

In *Ordway v. Suchard et al.*, 31 Id., 481, it was held, that, recognizing the rule that the discretion vested in the trial court in applications to set aside defaults should not be exercised in behalf of a party in default in consequence of his own negligence or that of his attorney, where it was made to appear by affidavit of defendant's attorneys that the reason why they did not appear and file an answer was on account of an accidental misplacement of the petition and notice handed them by the plaintiff, whereby the case was overlooked by them in examining their papers at the beginning of the term, in order to ascertain what cases they had to attend to, that the case did not fall within the rule recognized, and that a judgment by default therein rendered should be set aside, all the other requirements of the statute having been complied with.

Where an application to set aside a judgment by default was made at the same term the judgment was rendered, and was accompanied with an affidavit of merits and an excuse for making default, and it did not appear that the discretion of the court below had been unreasonably exercised in granting the application, the ruling was affirmed. *Coenen v. McAfee*, 38 Id., 555.

Where, in an action, against a corporation, the petition failed to allege the corporate character of the defendant, and judgment by default is rendered, the error is such as will justify the setting aside of the judgment on motion therefor. *The Savings Bank, &c., v. Horn*, 41 Id., 55.

Where a judgment by default is rendered against a garnishee, a motion to set it aside must be made at the same term the judgment by default is entered. *Schamahorn v. Scott*, 42 Id., 529.

In such case it is an error in the court below after the garnishee has appeared and judgment by default was entered, to order a suspension of execution and allow the garnishee time to answer. *Id.*

Where an application for a change of venue on account of prejudice of the judge was filed by defendant, which was withdrawn from the files by the plaintiff's attorney, and the court, without knowledge of the application rendered judgment by default, *held*, that the default should have been set aside without requiring a showing of a meritorious defense, and the change of venue should have been considered by the court. *Beasley v. Cooper*, 42 Id., 542.

A motion to set aside a default, if not accompanied with an affidavit of merits and an excuse for the default, will be overruled. The affidavit will not be considered if not presented until after the motion is overruled. *Thompson v. Savage et al.*, 43 Id., 398.

It is not sufficient to aver the existence of a meritorious defense. The facts whereon is based the claim of the existence of a meritorious defense must be set out in the affidavit. *Jager v. Evans*, 46 Id., 188; *King v. Stewart*, 48 Id., 334.

Where the defendants are in default they cannot maintain a motion to dismiss the petition. *The District Tp. of Newton v. White*, 42 Id., 603, 614.

Where defendant's demurrer to the petition is overruled, and he fails to answer over, there must be an assessment of damages, as well as where no appearance is made or pleading filed, and it is error in the court to render judgment in an action on an account without proof of the items. *Musser & Co. v. Hobart* 14 Id., 248.

The court below may impose the conditions upon which it will set aside a default, and its action therein will not be reviewed in the supreme court unless an abuse of discretion is shown. *Blough v. Van Hoorebeke*, 48 Id., 40.

A judgment by default cannot be set aside without an affidavit of merits on the part of the defendant. But such affidavit must set out the facts constituting the defense, and not the affiant's mere conclusion that he has a good defense. *McGrew v. Downs*, 67 Id., 687; *Palmer v. Rogers*, 70 Id., 381.

Under this section of the code, prescribing the terms upon which a judgment by default may be set aside, unless the motion to set aside is accompanied by the filing of an answer, and an affidavit of merits, it must be overruled. *Brunson v. Nicols*, 34 N. W. R., 289.

The action of the court below, in refusing to grant a default for want of an answer, will not be interfered with unless an abuse of discretion be shown. *Walker v. Hutchinson et al.*, 50 Iowa, 364.

Where judgment by default has been entered without legal authority, (as upon an insufficient

notice) the court may set the same aside without any showing on the part of the defendant, or affidavits of merits, as prescribed in this section. This section has reference to cases where the court has authority to enter the default. *Boals et ux. v. Shules et al.*, 29 Id., 507.

Where in an action against executors the original notice was served upon one of four executors eight months after he had resigned, it was held that such service conferred no jurisdiction to enter judgment by default. *The United States Rolling Stock Co. v. Potter*, 48 Id., 56.

An application to set aside a default granted for want of an answer, should be accompanied by an answer, or some sufficient excuse given for not presenting it. *Thatcher v. Hann et al.*, 12 Id., 303.

A default which is the consequence of the negligence of the party against whom it is rendered, should not be set aside on his application. *Id.*

Where a party ruled to answer by a particular day, has for his failure to do so a good and valid excuse, he is not thereby released from answering *after* the time fixed, and before the next term (if the rule day extends into vacation) unless for such continued default he has sufficient excuse. *Id.*

The action of the court below, in entering default for failure to answer after appearance made, will not be disturbed where no affidavit of merits is filed, although defendant's attorney was honestly mistaken as to the time he was ruled to answer. *Smith v. Watson*, 28 Id., 218.

That the defendant's attorney, after his employment, was so ill that forgetfulness of the fact could not be imputed to negligence, constitutes good ground for vacating a judgment by default. *Montgomery County v. The Am. Em. Co.*, 47 Id., 91.

When an affidavit of merits under section 2871 of the code on an application to set aside a judgment by default, shows a defense good in law, it must in that proceeding be so accepted, and its truth left for determination on the trial of the action. *Joerns v. Nicca*, 38 N. W. R., 129.

An affidavit of merits under this section, which shows that the amount for which the judgment was rendered is largely in excess of that to which the plaintiff is entitled, discloses a good defense to the action. *Id.*

SEC. 2872. [When clerk to compute amount.]—When the action is for a money demand, and the amount of the proper judgment is a mere matter of computation, the clerk shall ascertain the amount, but no fee shall be charged therefor. When long accounts are to be examined, the court may refer the matter. In other cases the court shall assess the damages, unless a jury be demanded by the party not in default. The proper amount having been ascertained by either of the above methods, judgment shall be rendered therefor.

A party who has dismissed his action, or is in default, is not entitled to a jury to assess damages. *Wilkins v. Treynor*, 14 Iowa, 391.

A failure to reply will not entitle the defendant to a judgment on a claim for unliquidated damages, such damages *must* be assessed by the court or jury. *Yoe & Co. v. Nichols*, 51 Id., 330.

Where the plaintiff is in default for want of a reply, he cannot waive a jury upon the cause of action contained in his petition and demand one on the counter-claim. *Clute Bros. & Co. v. Hazelton*, Id., 335.

Where the court ordered judgment on a promissory note, the amount of which the clerk was directed to assess, and the clerk made a judgment entry, leaving a blank for the amount, which blank remained for fourteen months, and was then filed by the clerk in vacation, this was held a mere irregularity which could not be inquired into in a collateral proceeding. *Lind v. Adams*, 10 Id., 398.

In a suit in equity against several defendants, some of whom deny the right of the plaintiff to the relief sought while others make default, the plaintiff is entitled to a decree against those in default, unless he establishes his right to the relief demanded against those who have answered. *Pierson v. David*, 4 Id., 410.

Where default is made in an equity action and the petition taken as confessed, all distinct and positive allegations are to be taken as true, without proof; but if the allegations are indefinite, or the demand of the plaintiff is in its nature uncertain, the certainty necessary to a proper decree must be furnished by proofs. *Harrison v. Kramer et al.*, 3 Id., 543; *Bolander v. Atwell*, 14 Id., 35.

A default, is a confession of the plaintiff's cause of action, and that something is due and payable, but not a confession of any fact necessary to be proved on the assessment of damages. *The B. & M. R. Co. v. Shaw*, 5 Id., 463; *Whitney v. Douge*, 9 Id., 597.

In cases of judgment by default, where the action is for a money demand, and the amount is a mere matter of computation, the clerk may make the assessment of the amount of the judgment. In other cases of judgment by default the court must assess the damages unless a jury be demanded by the party not in default. *The B. & M. R. Co. v. Marchand*, Id., 468.

When a party is in default the court is empowered to assess the damages, without a jury, unless one is demanded by the party not in default. *Preston v. Wright*, 60 Id., 351.

SEC. 2873. [**Witness cross-examined.**]—The party in default may appear at the time of the assessment and cross-examine the witnesses against him, but for no other purpose.

By suffering default for want of an answer a party admits that something is due the plaintiff, and he has no other right than to cross-examine the plaintiff's witnesses on the assessment of damages. *Toeber v. Delahaye*, 7 Iowa, 478; *Cook et al. v. Walters*, 4 Id., 72; *Keeny v. Lyon*, 10 Id., 546; *Wilkins v. Treynor*, 14 Id., 392; *Carleton v. Byington*, 17 Id., 579; *The District Tp. of Newton v. White*, 42 Id., 608, 614.

A party in default cannot demand a jury. *Wilkins v. Treynor*, 14 Id., 392; *Carleton v. Byington*, 17 Id., 579; *Armstrong v. Catlin*, Id., 581.

A defendant in default for want of an answer, cannot introduce evidence, or object to the admissibility of plaintiff's witnesses, or controvert the averments of plaintiff's petition, or ask instructions, or complain of the refusal to give instructions. *Carleton v. Byington*, 17 Id., 579; *McLott v. Savery*, 11 Id., 323; *Pfrantz v. Culver*, 13 Id., 312. See, also, *Buchler v. Reed*, 11 Id., 182.

A party in default can only appear for the purpose of cross-examining the plaintiff's witnesses, and cannot object to the introduction of evidence. *Wright v. Lacy*, 52 Id., 248; *Clute Bros. & Co. v. Hazleton*, 51 Id., 355.

SEC. 2874. [**In equitable proceeding.**]—When the action is of an equitable character, the court, upon hearing of the pleadings and proofs, and hearing the testimony offered, shall render such judgment as is consistent with the rules of equity.

If one of several defendants, in an equitable action, makes default, and the plaintiff's action is not sustained as to those who have appeared, default cannot be entered and judgment rendered against the party failing to appear, and the petition should also be dismissed as to him. *Curtis v. Smith*, 42 Iowa, 665.

SEC. 2875. [**When no personal service.**]—A defendant served by publication alone, shall be allowed at any time before judgment to appear and defend the action, and upon a substantial defense being declared, time may be given on reasonable terms to prepare for trial.

A debt which is not in existence at the time of garnishment is not a debt "to become due," in the contemplation of this section, hence wages earned after the service of garnishment process are not held thereby. *Thomas v. Gibbons et al.*, 61 Iowa, 50.

The notice required by this section to be served on the principal defendant in garnishment cases must be served ten days before the trial of the issue in the case; or, if there be no issue, ten days before judgment is rendered against the garnishee. This notice is essential to the jurisdiction of the court to render such judgment, and where judgment was rendered without such notice, it was proper for the court to make an order setting it aside as premature, and to continue the cause for such proceedings as either party might be advised to pursue. *Williams v. Williams*, 61 Id., 612.

SERVICE BY PUBLICATION.

SEC. 2876. [**Plaintiff required to give security.**]—When judgment by default is rendered against a defendant who has not been personally served, the court, before issuing process to enforce such judgment, may, if deemed expedient, require the plaintiff to give security to abide the future order of the court as contemplated in the following section.

SEC. 2877. [**May move for new trial after judgment.**]—When a judgment has been rendered against a defendant or defendants served by publication only and who do not appear, such defendants, or any one or more of them, or any person legally representing him or them, may, at any time within two years after the rendition of the judgment, appear in court and move to have the action re-tried, and, security for the costs being given, they shall be admitted to make defense; and thereupon the action shall be re-tried as to such defendants as if there had been no judgment; and, upon the new trial, the court may confirm the former judgment or may modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it and yet remaining in his possession, and pay to the defendant the value of any such property which may have been taken in attachment in the action or under the judgment and not restored.

The supreme court will not review the finding of the court appealed from, upon the sufficiency of a service of notice by publication, in an equitable action, when the record does not show that it embraces all the evidence submitted in the court below. *Moon v. Moon*, 19 Id., 130.

A defendant who has been served by publication only, cannot appeal from the judgment rendered upon such service before moving for a re-trial in the court below, as provided in this section. *Berryhill v. Jacobs*, 19 Id., 346.

This section has no application to a decree of divorce rendered upon service of publication only. *Gilruth v. Gilruth*, 20 Id., 225.

Where judgment by default has been upon a service of publication only, and the defendant has appealed to the supreme court, where the case is affirmed because no motion for a re-trial was made in the court below, the defendant still has the right to make such motion, within the time prescribed by the statute. *Berryhill v. Jacobs*, 20 Id., 246.

Where a judgment by default on a promissory note has been set aside, and a re-trial ordered under this section, it is not necessary on the re-trial to again introduce the note in evidence. If no sufficient defense to the action be found, the original judgment is simply confirmed and continued in force. *Morton v. Coffin*, 29 Id., 235.

The filing within the time specified, of a motion in the clerk's office, by a defendant served by publication only, to have the case re-tried is a sufficient compliance with this section, which provides that the defendant may, at any time within two years from the date of the judgment, "appear in court, and move to have the action re-tried." *Conkling v. Johnson*, 34 Id., 266.

Where, in an action for partition of lands, judgment and sale were had upon service by publication, defendant appeared within two years, and moved to have the judgment and sale set aside, alleging as one cause therefor, fraud on the part of the purchaser at the sale, who was the plaintiff; and the court allowed a re-trial of the cause, and affirmed its former judgment, it was held, in a subsequent action in equity to set aside the sale for fraud, that the plaintiffs were not concluded thereon by the judgment in the re-trial, for the reason that the defendant, having been served by publication only, was entitled to a re-trial under the statute (section 2877) independent of the charge of fraud. *Fleming's Heirs v. Hutchinson*, 36 Id., 519.

Where an attorney appears for an absent defendant, and the latter, in a proceeding to vacate the judgment, alleges that the appearance was unauthorized, he has the burden to establish the fact by a preponderance of evidence. *Bond v. Epley*, 48 Id., 600.

Where a defendant is served personally with the original notice out of the state and makes default, he is not entitled to a new trial under the provisions of this section, which applies only to cases of service by publication. *McBride v. Horn*, 52 Id., 79.

A judgment *in rem* of a justice's court entered upon service by publication, and without an appearance by the defendant, may be set aside, and the cause retried, upon proper application made within two years, under this section. Section 3543 applies only to cases where there has been personal service. *Taylor & Farley Organ Co. v. Plumb*, 57 Id., 33.

Where the service of the original notice is by publication only and there has been no appearance for the defendant, parties legally representing him may have a retrial of the cause, upon application made therefor within two years after the judgment. In this case involving the title to land, the widow and children of the defendant were held entitled to such retrial. *Williamson v. Wachenheim*, 62 Id., 196.

It is only a defendant served by publication, or some one legally representing him, as agent, attorney, or possibly administrator, who has a right to appear within two years and demand a new trial under this section of the code. The assignee of such a defendant has no right thus to appear and demand a retrial on his own account. *Parsons v. Johnson*, 66 Id., 455.

Where a judgment has been rendered upon notice by publication only, the theory of this section of the statute, is, that the case remains virtually in court for two years for the purpose of a motion for a retrial, if any defendant shall see fit to make it; and the court has jurisdiction during such time to hear and pass upon such motion without notice thereof to the plaintiff. But the court should in such case, in the exercise of a proper discretion, allow the plaintiff a reasonable opportunity to appear and prepare for trial. *Pollock et al. v. Simpson*, 67 Id., 519.

Where the defendant was served personally with the original notice out of the state made default, held, that he was not entitled to a new trial under the provisions of this section, which apply to cases of service by publication. *McBride v. Horn*, 52 Id., 79.

In a proceeding for the sale of real property by an executor, wherein the probate court prescribes the same notice as in an ordinary proceeding, a defendant in the proceeding who has been served by publication only, is entitled to avail himself of the provisions of this section, and may have the order of sale, made on default, set aside on motion at any time within two years after the making of such order. *Huston v. Huston*, 29 Id., 347. See, also, *White v. Watts*, 18 Id., 74.

Where a judgment by default in an action on a promissory note has been set aside and a re-trial ordered under this section, it is not necessary on the re-trial to again introduce the note in evidence. No sufficient defense to the action being found, the original judgment is simply confirmed. *Morton v. Coffin*, 29 Id., 235.

SEC. 2878. [**Title to property not affected.**].—The title of a purchaser in good faith to any property sold under attachment or judgment, shall not be affected by the new trial permitted by the preceding section, except the title of property obtained by the plaintiff and not bought of him in good faith by others.

Where the purchaser at a partition sale, upon a judgment rendered upon service by publication, is the plaintiff in the case, and has made no sale to others, he will not be protected against the consequences of a re-trial. *Fleming's Heirs v. Hutchinson*, 36 Iowa, 519, 525.

SEC. 2879. [**Copy of judgment served on defendant.**].—The plaintiff may, at any time after the judgment, cause a certified copy thereof to be served on a defendant served by publication only, whereupon the period in which such defendant is allowed to appear and have a new trial shall be reduced to six months after such service.

Where a defendant served by publication only, and who has made no appearance, fails to apply for a new trial after being served with a copy of the judgment, such judgment becomes an adjudication binding upon him. *Everhart v. Holloway et al.*, 55 Iowa, 179.

SEC. 2880. [**Manner of.**].—The service of the copy of the judgment shall be, whether made within or without the state, actual and personal by delivery of copy, and made and returned as in case of original notice.

SEC. 2881. [**Personal judgment: when rendered.**].—No personal judgment shall be rendered against a defendant served by publication only who has not made an appearance. But a personal judgment shall be rendered against a defendant, whether he appear or not, who has been served in any mode in this code provided other than by publication, whether served within or without this state.

The courts of this state, have no power, in an ordinary personal action without more, to render a personal judgment, by default when the defendant is a non-resident of the state and has been served with notice out of the state or by publication. *Bates v. N. W. R'y Co.*, 19 Iowa, 260; *Darrance v. Preston*, 18 Id., 396; *Weil v. Lowenthal*, 10 Id., 576; *Stockdale v. Buckingham*, 11 Id., 45; *Einstein v. Ocks*, Id., 165.

When a court has, by attachment or otherwise, acquired jurisdiction *in rem* over the property of a non-resident, it may by means of service by publication, or personal service without the state, perfect its jurisdiction or right to adjudicate upon and conclude the rights and interests of the defendant in the property thus seized and held within the territorial jurisdiction of the court. *Darrance v. Preston*, 18 Id., 396; *Bates v. The C. & N. W. R'y Co.*, 19 Id., 268.

In an action by attachment, when the defendant has not been personally served with notice, the judgment should be *in rem* only, and not in *personam*. *Smith v. Griffin et al.*, 59 Id., 409, 410.

LIENS.

SEC. 2882. (*As amended by sec. 1, ch. 129, 17th g. a.*) [**Of judgments.**].—Judgments in the supreme, district or circuit court of this state, are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire for the period of ten years from the date of the judgment.

By our law judgment in the supreme, district or circuit courts are liens upon the real estate of the defendant, and by real estate is meant all right thereto, and interest therein, *equitable* as well as legal. *Harrison v. Kramer*, 3 Id., 543, 561; *Cook & Sargent v. Dillon*, 9 Id., 407, 411; *Denegre v. Haun*, 13 Id., 240; *Lathrop v. Brown*, 23 Id., 40.

But if there is a sale under a subsequent judgment to a *third person*, for value without notice, the rights of the purchaser take priority over those of the grantee in an unrecorded deed or mortgage. *Evans v. McGlasson*, 18 Id., 150.

An attachment or judgment lien does not hold over a prior unrecorded deed. *Norton, Jewett & Bushby v. Williams*, 9 Id., 528; *Evans v. McGlasson*, 18 Id., 150.

When a judgment is affirmed in the supreme court, and a procedendo issues, the lien of the judgment attaches and continues from the date of the judgment in the court below; but when a new judgment is rendered in the supreme court against the appellant and his sureties on his appeal bond, the judgment of the court below is merged therein and the lien discharged; that of the supreme court, dating only from the rendition of the judgment in that court, being a lien on the real estate of the defendant. *Swift v. Conboy et al.*, 12 Id., 444.

The judgment, when rendered, becomes a lien on whatever interest the defendant has in real estate, whether such interest appear of record or not. *Denegre v. Haun*, 13 Id., 240.

But the lien of a judgment will not attach to a naked legal title where the holder thereof has no equitable interest in the land. *Blaney v. Hanks*, 14 Id., 400.

A judgment is not a lien upon an equitable interest in real property in such a sense as to change or affect a subsequent *bona fide* purchaser without notice. *Bridgman & Co. v. McKissick & Bone* 15 Id., 260; *Hultz et al. v. Zollars et al.*, 39 Id., 589.

A judgment rendered against the holder of a mortgage on real property does not create a lien upon the mortgaged property, such mortgage being personal property. *Scott v. Mewhuter et al.*, 49 Id., 487.

A judgment against a partnership, in the firm name, is not a lien upon the real property of the individual partners. *Stadler Bro. & Co. v. Allen et al.*, 44 Id., 193.

The lien of a junior judgment for an individual debt does not take priority over the lien of a judgment first rendered against the same person upon a partnership debt. *Gillaspie v. Peck et al.*, 46 Id., 461.

The lien of a subsequent judgment creditor, in this state, is not paramount to the lien or equity of a prior mortgagee, as to lands intended to be mortgaged, but which, by accident or mistake, were misdescribed. *Welton v. Tizzard et al.*, 15 Id., 495.

After the head of a family acquired the title to real property, but before its actual occupation, he contracted debts on which judgments were rendered after the occupation of the land, *Held* that the judgments became liens thereon, for which it was liable to be sold on execution. *Hale v. Heaslip et al.*, 16 Id., 451.

A judgment against a city is not a lien upon real property owned by it and used for hospital purposes. *The City of Davenport v. The P. M. & T. Ins. Co.*, 7 Id., 276.

The lien of a judgment is not superior or paramount to a prior unrecorded conveyance. The creditor who obtains a judgment, which takes effect as a lien on the lands of his debtor, is not regarded in the light of a purchaser, nor is he entitled to a preference over their prior equities and unrecorded conveyances. *Parker v. Pierce*, 16 Id., 227, 232, and cases cited.

Although a vendor's lien is an equitable interest in real estate, yet it is but an incident merely to the debt of the purchase money, and can be subjected to the satisfaction of a judgment against the vendor only by garnishment, or equitable proceedings. *Baldwin v. Thompson*, 15 Id., 504.

A judgment lien upon real estate is not affected by a sale thereof under a junior judgment. *Lathrop v. Brown*, 23 Id., 40.

A general judgment ceases to operate as a lien on real estate after ten years from the date of the judgment. *Hendershott v. Ping*, 24 Id., 134.

A judgment is a lien on a leasehold interest in lands of two years or more, and such lien takes precedence of subsequent conveyances or transfers of the lease by the judgment defendants. *The First N'l B'k of Davenport v. Bennett*, 40 Id., 537.

In case of judgment rendered in a proceeding to foreclose a mortgage, the lien of the mortgage continues until the judgment is paid, or barred by the statute of limitations. *State v. Roost*, 34 Id., 475; *Hendershott v. Ping*, 24 Id., 134.

A judgment in an action on a promissory note secured by mortgage, is a lien on the mortgaged property only from the date of its rendition, when it does not order a foreclosure. *Wilhelmi v. Leonard*, 13 Id., 330.

A judgment lien attaches only to the actual interest of the debtor in the land. If he has no interest there is nothing upon which the lien can operate, though he may seem to have from the assignment to him of a contract on file, which in fact he had transferred to another before the rendition of the judgment. *Churchill v. Morse*, 23 Id., 229.

An unrecorded deed will have priority over a judgment or attachment lien; nor is the case varied by the fact that the deed is without a proper acknowledgment. *Hoy v. Allen et al.*, 27 Id., 208; *Norton et al. v. Williams* 9 Id., 529; *Churchill v. Morse*, 23 Id., 229; *Bell v. Evans*, 10 Id., 354; *Jones v. Jones et al.*, 13 Id., 276; *Blaney v. Hanks*, 14 Id., 400; *Parker v. Pierce*, 16 Id., 227; *Seevers v. Delashmutt*, 11 Id., 174; *Welton v. Tizzard*, 15 Id., 495; *Hays v. Wade*, 18 Id., 52.

A judgment lien is not affected by a sale of the land under a junior judgment. *Lathrop v. Brown*, 23 Id., 40.

A general judgment ceases to be a lien on real property after the expiration of ten years from the date of its rendition. *Hendershott v. Ping*, 24 Id., 134.

It has also been held that the rendition of a judgment does not merge or destroy the lien of a mortgage; that the lien exists until the debt is paid or discharged. *Hendershott v. Ping*, Id; *Shearer v. Mills*, 35 Id., 499. But see *Tuttle v. Dewey*, 44 Id., 306, which seems to hold a different doctrine.

(CHAPTER 129, LAWS OF 1878.)

LIENS ON REAL ESTATE BY JUDGMENTS IN UNITED STATES DISTRICT AND CIRCUIT COURTS.

An Act in relation to liens on real estate, of judgments in the district and circuit courts of the United States. Amending code, title XVII, chapter 9: "Of trial and judgment."

SECTION 1. [Code § 2882, part repealed.]—*Be it enacted by the general assembly of the state of Iowa*, That the words "or in the district or circuit court of the United States, if rendered within this state," in section 2882 of the code, are hereby stricken out.

SEC. 2. [How judgment may be made a lien.]—Judgments in the district or circuit court of the United States, if rendered in this state, may be made liens upon the real estate owned by the defendant, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment, by filing an attested copy of the judgment in the office of the clerk of the state district court of the county in which the land lies; and no lien shall attach to the lands in any county of this state until the date of filing such transcript, except in the county wherein the judgment was rendered, in which case the lien shall attach from the date of such rendition.

SEC. 3. [Duty of clerk.]—The clerk shall, on the filing of such transcript in his office, immediately proceed to docket and index the same in a separate book kept for that purpose, in the same manner as though rendered in the court of his own county, and he shall be allowed to charge and receive the same fees as provided by law for like service.

SEC. 4. [Satisfaction of judgment.]—When the amount due on any judgment is paid off or satisfied in full, the plaintiff, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the judgment, or by execution of an instrument in writing, referring to the judgment, and have it duly acknowledged and filed in the office of the clerk of the district court in every county where the judgment is a lien. If he fails to do so within sixty days after having been requested in writing so to do, he shall forfeit to the *plaintiff* (defendant) the sum of fifty dollars.

Approved March 25, 1878.

It was held by the United States circuit court for the district of Iowa, at the October term, 1877, at Des Moines, that a judgment rendered in that court became a lien upon the real property of the judgment debtor wherever situated within the state, without the filing of a transcript in the county where the land was situated. See *Kinzie v. Elliott*.

[The above statute seems to have been passed to reverse that decision.—ED.]

SEC. 2883. [When attach.]—When the lands lie in the county wherein the judgment was rendered, the lien shall attach from the date of such rendition.

SEC. 2884. [In another county how effected.]—If the lands lie in any other county, the lien does not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies.

A transcript of a judgment, rendered in the district court of one county, filed in the clerk's office in another county, operates only as a lien upon the real estate of the defendant in the county in which it is filed. It does not empower the clerk of such county to issue execution thereon. *Seaton & Son v. Hamilton & Co.*, 10 Iowa, 394.

The lien attaches from the date of rendition or filing. *Hendershott v. Ping*, 24 Id., 134, 136.

SEC. 2885. [Duty of clerk.]—Such clerk shall, on the filing of a transcript of the judgment in his office, immediately proceed to docket and index the same in the same manner as though rendered in the court of his own county.

CONVEYANCE BY COMMISSIONER.

SEC. 2886. [**When made.**].—Real property may be conveyed by a commissioner appointed by the court:

1. Where, by judgment in an action, a party is ordered to convey such property to another;
2. Where such property has been sold under a judgment or order of the court, and the purchase money paid.

SEC. 2887. [**Reference to judgment in.**].—The deed of the commissioner shall refer to the judgment, orders, and proceedings authorizing the conveyance. This section authorizes a retrial of a cause within two years, in all cases where judgment by default has been rendered against a defendant served by publication only, but has no application to the case of a judgment void for want of jurisdiction to render it, as where a personal judgment was rendered where the court had jurisdiction only to render a judgment *in rem*. *Smith v. Griffin et al.*, 59 Iowa, 409.

SEC. 2888. A conveyance made in pursuance to a judgment shall pass to the grantee the title of the parties ordered to convey the land.

SEC. 2889. [**Title.**].—A conveyance made in pursuance of a sale ordered by the court, shall pass to the grantee the title of all the parties to the action or proceeding.

SEC. 2890. [**Approval by court.**].—A conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance and record with it.

SEC. 2891. [**Form of conveyance.**].—It shall be necessary for the conveyance to be signed by the commissioner only, without affixing the names of the parties whose title is conveyed; but the name of such parties shall be recited in the body of the conveyance.

SEC. 2892. [**Recorded.**].—The conveyance shall be recorded in the office in which, by law, it should have been recorded had it been made by the parties whose title is conveyed by it.

SEC. 2893. [**Judge may approve conveyances.**].—In all cases under this code, whenever by law it is permitted or required that judicial or other sales and conveyances of land may or shall be confirmed and approved by a court, it shall be lawful for the judge of the court, in vacation, to confirm or approve the same, and to cause the proper entry or entries thereof to be made required by law and the rules of such court.

CHAPTER 10.

OF JUDGMENT BY CONFESSION.

SECTION 2894. [**Clerk may enter.**].—A judgment by confession without action may be entered by the clerk of the district or circuit court in the manner hereinafter prescribed.

SEC. 2895. [**Can only be for money.**].—Such confession can be only for money due, or to become due, or to secure a person against contingent liabilities on behalf of the defendant, and must be for a specified sum.

SEC. 2896. [**Verified statement filed with clerk.**].—A statement in writing must be made and signed by the defendant and verified by his oath to the following effect, and filed with the clerk:

1. If for money due, or to become due, it must state concisely the facts out of which the indebtedness arose, and that the sum confessed therefor is justly due, or to become due, as the case may be.

2. If for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting such liability, and must show that the sum confessed therefor does not exceed the same.

SEC. 2897. [**Judgment: execution.**].—The clerk shall thereupon make an entry of judgment in his court record for the amount thus confessed and costs, and shall issue execution thereon as in other cases.

A judgment by confession entered by the clerk in vacation, as authorized by the statute, if founded upon a sufficient written statement of the party, verified by his oath, and filed with the clerk, becomes, when read, approved and signed by the judge, at the next term of the court, the judgment of the court. *Edgar v. Greer*, 7 Iowa, 136.

To authorize the clerk to enter a judgment by confession, the provisions of the statute must be strictly complied with. And such judgment, though entered by the clerk, is deemed the judgment of the court. *Id.*

The written statement of the defendant upon which the judgment is to be entered must state the manner in which the indebtedness arose. It is not sufficient to describe the note which is the evidence of the debt, and state the amount due thereon. *Id.*

The defendant on appeal from a judgment in conformity with a written confession, may object that the written statement made by him is insufficient to authorize the clerk to enter judgment thereon. *Id.*

An appeal will lie from a judgment by confession. *Troxel v. Clark*, 9 Id., 201.

Where the statement for a confession of judgment recited that the indebtedness was for a promissory note "given in good faith for a debt justly due the plaintiff, and that the same is unpaid," it was held that this was not a sufficient statement of the facts out of which the indebtedness arose. *Kennedy v. Lowe*, 9 Id., 580.

A confession of judgment by one member of a partnership, for the firm, is valid only against the partner making it. *North & Scott v. Mudge & Co.*, 13 Id., 496; *Christy v. Sherman*, 10 Id., 535; *Edwards v. Pitzer*, 12 Id., 607.

A judgment by confession is void when the power authorizing the entry thereof is not in strict conformity with the requirements of the statute. *Edgar v. Greer*, 10 Id., 279; *Bernard & Co. v. Douglass & Watson*, Id., 370.

Where the statement for a judgment by confession which recites that the consideration of the demand on which it is based is a promissory note, which "was given the plaintiff for a balance due on settlement," is insufficient, and a judgment entered thereon is void. *Bernard & Co. v. Douglass & Watson*, 10 Id., 370.

An invalid judgment by confession may be set aside on the motion of a junior judgment creditor, after notice to the plaintiff. *Id.*

A statement for a judgment by confession, on a promissory note, which sets up the note and states that the consideration thereof "was money loaned by the plaintiff to the defendant," is sufficiently specific in its statement of the facts out of which the indebtedness arose. *Vanfleet v. Phillips*, 11 Id., 558.

That the verification of the statement for a judgment by confession was made before a notary public who was acting as one of the plaintiff's attorneys, will not of itself render the judgment invalid or justify the court in setting it aside. *Id.*

Where the record of a judgment by confession, entered by the clerk in vacation, was not read, signed and approved at the term following such entry, held, that such failure did not void the judgment. *Id.*

A statement for a judgment by confession, showing that the indebtedness was for "sundry articles of dry goods," and "a bill of groceries," without further detail, was held sufficient in this respect. *Daniels & Co. v. Clafin*, 15 Id., 152.

A statement for judgment by confession does not estop the defendant from pleading usury in the debt before the judgment is entered on the statement. *Lyon v. Welsh*, 20 Id., 578.

But a judgment by confession duly entered and regular in all its parts, is, in the absence of fraud, or other special ground of equitable relief, conclusive against the defense of usury, as well as every other defense existing when the judgment was rendered. *Twoood & Elliott v. Pence*, 22 Id., 543.

A judgment entered in vacation, by confession, upon a statement made by the debtor, of all which the creditor had no knowledge, and to which he did not assent, was vacated on the motion of the creditor. *Furners & Mechanics Bank v. Mather*, 30 Id., 283.

Where the sworn statement for judgment shows that a certain sum is due from the party making the same to the party to whom it is made, for which it is consented that judgment shall be entered, such statement is sufficient as between the parties, and the defendant is estopped from impeaching the same on the ground that it does not sufficiently set out the facts out of which the indebtedness arose. *Bruchett v. Casady*, 18 Id., 342.

A judgment by confession, not entered within a reasonable time after filing the statement, is

not void as between the parties, but voidable only, and cannot be impeached collaterally by either of the parties. *Id.*

A confession of judgment, in consideration of the extention of a note, made to evade the law against usury, will be regarded as invalid. *Ohm v. Dickerman*, 50 Id., 671.

A statement for judgment of confession "that the consideration of this judgment of confession is for borrowed money, and that there is now due the said C, the above stated sum with interest," is sufficiently specific. *Miller v. Clarke*, 37 Id., 425.

The statement for a confession of judgment may be amended after judgment is entered by the clerk, by attaching the seal of the notary thereto inadvertently omitted. *Thorp v. Platt*, 34 Id., 314.

A confession pertains to the remedy, and is therefore governed by the law of this state. A contract made in another state authorizing a confession to be made by an attorney will not be enforced here. *Hamilton v. Schoenberger*, 47 Id., 385.

SEC. 2898. [Offer to confess before action: effect and procedure.]—Before an action for the recovery of money is brought against any person, he may go before the clerk of the courts of the county of his residence, or of that in which the person having the cause of action resides, and offer to confess judgment in favor of such person for a specified sum on such cause of action as provided for in the foregoing sections. Whereupon, if such person, having had the same notice as if he were defendant in an action, that the offer would be made, of its amount and of the time and place of making it, refuses to accept it, and should afterwards commence an action upon such cause and not recover more than the amount so offered to be confessed, he shall pay all the costs of action; and on the trial thereof, the offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff was entitled, nor be given in evidence.

SEC. 2899. [Same: after action brought.]—After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. Whereupon, if the plaintiff, being present, refuses to accept such confession of judgment in full of his demands against the defendant in the action, or, having had three days' notice that the offer would be made, of its amount and of the time of making it, fails to attend and on the trial does not recover more than was offered to be confessed, such plaintiff shall pay the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action, or amount to which the plaintiff was entitled, nor be given in evidence upon trial.

Where, after an appeal to the circuit court from an award of damages by commissioners for the taking of property for a right of way for a railroad, the defendant filed an offer to confess judgment for a stated sum, and the plaintiff failed to recover more, it was held, that the costs accruing after such offer should be taxed against him. *Harrison v. The Iowa Midland R. Co.*, 36 Iowa, 323.

Where a defendant in his answer does not controvert a part of plaintiff's claim, but confesses the same to be due and payable, and offers judgment therefor, the case does not come within the provisions of this section, but it is proper for the court to render judgment on the amount thus confessed under section 2856 of the code. *The City of Davenport v. The C., R. I. & P. R. Co.*, 33 Id., 363.

Pending an action before a justice of the peace, the defendant offered to confess judgment for a part of the claim, which was less than the amount for which judgment was rendered by the justice, but equal to the sum recovered on appeal to the circuit court. Held, that, under section 3404 of the revision, the plaintiff was liable for all costs incurred after the offer to confess was made. *Watts v. Lambertson*, 39 Id., 272.

An offer to confess judgment in a pending action carries with it as an incident, if accepted, a liability for all the costs accrued in the case up to the time the offer is made. *Manning v. Irish*, 47 Id., 650.

To entitle a defendant to costs by reason of an offer to confess judgment, under this section of the code, the offer must be confined to the matters in suit. *Phillips v. Shearer*, 56 Id., 261.

An offer to confess judgment under this section may be made orally, and there is no provision requiring it to be made of record. And where a question afterwards arises as to the amount of the offer, the court may properly hear parol evidence on the question. *Barlow, Adm'r, v. Buckingham et al.*, 68 Id., 169.

CHAPTER 11.

OF AN OFFER TO COMPROMISE.

SECTION 2900. [By allowing judgment to be taken for a certain sum.]—The defendant in an action for the recovery of money only, may, at any time after service of notice and before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum of money, or to the effect therein specified with costs. If the plaintiff accept the offer, and gives notice thereof to the defendant or his attorney within five days after the offer is made, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance with a copy of the offer verified by affidavit; and in either case, the offer and acceptance shall be entered upon record and judgment shall be rendered by the court accordingly. If the notice of acceptance is not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he cannot recover costs, but shall pay the defendant's costs from the time of the offer.

Where the person whose name is signed to a promissory note, denied the execution of it, a letter written by him to the holder, offering to pay an amount which he admitted to be due on the note, was properly admitted against him to rebut his denial. Such a letter was not an offer to compromise, to be excluded under section 2900 of the code. *Bayliss v. Murray*, 69 Iowa, 290.

Where the defendant offered to confess judgment for a certain amount, but the offer was not accepted, and the plaintiff's attorney referred to it on the trial in the presence of the jury, contrary to the provisions of this section of the code, it was the defendant's duty then to object and ask the court to discharge the jury, or for other appropriate relief. But as he proceeded without objection to try the cause to the jury, held that he could not, after verdict, demand a new trial on the ground of such misconduct. *Riech v. Bolch*, 68 Id., 526.

An offer in writing, by the defendant, to pay a certain sum of money and costs of suit if the plaintiff will dismiss his action, will not entitle the defendant to the benefit of this section of the code. The offer must be to allow judgment to go against him. *Quinton v. Van Tuyl*, 30 Id., 554.

Where the plaintiff fails to give notice of his acceptance of an offer made by the defendant within the time prescribed, the offer is presumed to have been withdrawn, and the plaintiff cannot avail himself of it after the trial. *Holmes v. The City of Hamburg*, 47 Id., 348.

In proceeding to assess the damages to real property by reason of a street thereon, an offer of the town to let judgment be entered against it for a certain amount will not, in a case of a verdict for a smaller sum, authorize the court to tax the costs to the land-owner under this section, it not being applicable to such proceedings. *The Town of Cherokee v. The S. C. & I. F. Town Lot and Land Co.*, 32 Id., 279.

SEC. 2901. [Same: conditional offer.]—In an action for the recovery of money only, the defendant, having answered, may serve upon the plaintiff or his attorney an offer in writing, that if he fails in his defense the amount of recovery shall be assessed as a specified sum. If the plaintiff accepts the offer, and gives notice thereof to the defendant or his attorney within five days after it was served, or within three days if served in term time, and the defendant fails in his defense, the judgment shall be for the amount so agreed upon. If the plaintiff does not so accept the offer, he shall prove the amount to be recovered as if the offer had not been made, and the offer shall not be given in evidence or mentioned on the trial. And if the amount recovered by the plaintiff does not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in the defense, and in respect to the question of amount, to be taxed under the direction of the court.

SEC. 2902. [No cause for continuance.]—The making of any offer pursuant to the provisions of this chapter, shall not be a cause for a continuance of an action or a postponement of a trial.

CHAPTER 12.

OF RECEIVERS.

SECTION 2903. [**When and how appointed.**—On the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to, or interest in any property which is the subject of the controversy, and that such property, or its rents or profits, are in danger of being lost or materially injured or impaired, and on such notice to the adverse party as the court or judge shall prescribe, the court, or, in vacation, the judge thereof, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and coerce the delivery of it to him. Upon the hearing of the application, affidavits and such other proof as the court or judge deems proper, may be introduced, and upon the whole case such order made as will be for the best interest of all parties concerned.

The appointment of a receiver may be made upon the petition of a party in interest, showing a probable right to the property in controversy, or to a portion thereof, and that it is in danger of being lost, or materially injured or impaired. *Saylor v. Mockbie*, 9 Iowa, 209.

The court has power to appoint a receiver to take charge of partnership assets, to collect debts and convert property into money, and to exercise general control over the same, under the direction of the court. *Id.*

When property placed in the hands of a receiver as partnership assets, is found upon the hearing to be the individual property of one of the members of the partnership, it will be restored to him. *Id.*

The appointment of a receiver to take charge of mortgaged property after a final decree of foreclosure, is unusual, and, if allowable at all, should be supported by a strong showing of facts. *Adair et al. v. Wright*, 16 Id., 385.

A receiver will not be appointed on the application of the mortgagee to take possession of the mortgaged premises, where it does not clearly appear that the whole of the mortgaged premises are insufficient in value to pay the debt, or that the court should take control of the estate to protect the rights of a party who has a clear, strong claim against it. *Callanan & Ingham v. Shaw et al.*, 19 Id., 183.

When the bond or mortgage pledges the income, rents or profits to the payment of the debt, the creditor need not conclusively establish his right to recover before he has a right to ask for the appointment of a receiver; it is sufficient if he shows a probable right. *The Des Moines Gas Co. v. West*, 44 Id., 23.

If the debtor is insolvent, in such case the appointment follows as a matter of course. *Id.*

To show that a stock of merchandise is being sold by a mortgagee who is garnisheed, "in the usual way of merchants" does not show that the property is "in danger of being lost or materially injured or impaired," which is essential under this section to entitle a party to ask for the appointment of a receiver of the property. *Silverman et al. v. Kuhn*, 53 Id., 436, 452.

Whether in any case a receiver should be appointed to take charge of the mortgagor's homestead pending proceedings to foreclose, *query?* *Id.*

An appeal may be taken from an order appointing or refusing to appoint a receiver. *Id.*

The court has power under the statute to appoint a receiver in an ordinary law action. *Jones v. Graves*, 20 Id., 596.

A judge of the district court was held to have the power to appoint a receiver in vacation, in a case where it was proper that such an appointment should be made, but not without notice to the opposite party, unless the particular facts and circumstances rendering such a course proper were set forth in the petition. *French et al. v. Gifford et al.*, 30 Id., 148.

The appointment of a receiver in vacation, and without notice to the adverse party, is erroneous, and will not be sustained. *Howe & Co. v. Jones*, 57 Id., 130, 142.

Where the mortgagee in a chattel mortgage had been garnisheed by creditors of the mortgagor, had brought his action in equity to foreclose the mortgage, which by its terms gave him the right to take possession of the goods whenever he should choose to do so and sell the same to pay the amount due, or to become due, with costs, etc., it was held that under this section he was entitled to the appointment of a receiver to take possession of the goods and to sell them in the ordinary course of business. *Maish v. Bird*, 59 Id., 307.

A mortgagee has a right to the appointment of a receiver for the property on which his mortgage

is a lien, and then only when there is danger of its being lost or materially injured or impaired in value. He is not entitled to a receiver to take charge of the crops upon the mortgaged premises. *White v. Greggs et al.*, 54 Id., 650; *Meyton v. Davenport*, 51 Id., 583.

To entitle one claiming to be a partner to the appointment of a receiver to wind up the partnership affairs, it must appear that there was a completed partnership, at least so far as to entitle him to a participation in the profits of the business. An agreement of partnership which has not been executed to this extent is not sufficient. *Hobart v. Ballard*, 31 Id., 521.

The rule that the compensation of a receiver appointed to take charge of assets and wind up the affairs of a partnership or corporation should be retained from, and paid out of, the funds coming into his hands, generally applies to those cases where the receiver closes up the business and settles his accounts in pursuance of his appointment, and not to cases where the order appointing the receiver is set aside as improperly made before such time. *French v. Gifford*, 31 Id., 428.

It was held that where the adverse party is out of the jurisdiction of the court, and cannot be served, or cannot readily be served with notice, the court may, under some circumstances, under this section, appoint a receiver, without notice. *Id.*

Where the circuit court making certain orders had jurisdiction of the defendants in the action and of the subject matter involved therein, which included property which a receiver by order of the court authorized and required to take into his possession, the receiver was, under the order, authorized to take the property. *The State v. Rivers et al.*, 64 Id., 735.

SEC. 2904. [**Oath and bond of.**—Before entering on the discharge of his duties, he must be sworn faithfully to discharge his trust to the best of his ability, and must also file with the clerk a bond with sureties, to be by him approved, in a penalty to be fixed by the court or judge, and conditioned for the faithful discharge of his duties and that he will obey the orders of the court in respect thereto.

SEC. 2905. [**Power of.**—Subject to the control of the court or judge, a receiver has power to bring and defend actions, to take and keep possession of property, to collect debts, to receive the rents and profits of real property, and, generally, to do such acts in respect to the property committed to him as may be authorized.

As a general rule, a receiver has no powers except those conferred upon him by the order of his appointment, but where certain "mills and block" were committed to the care of a receiver, it was held that he was thereby authorized to prosecute an action relating to a private wharf which was connected therewith, and which was primarily and principally constructed for the purpose of more conveniently carrying on said mill. *Grant v. City of Davenport*, 18 Iowa, 179.

The fraudulent acts or neglect of a receiver of an insolvent corporation constitute no defense to an action against a stockholder for contribution. *Stewart v. Lay*, 45 Id., 604.

Any irregularities in the pleadings of a receiver can be corrected only by the court which appointed him, and his conduct will not be reviewed in an action in another forum. *Id.*

CHAPTER 13.

OF SUMMARY PROCEEDINGS.

SECTION 2906. [**Judgments on motion in certain cases.**—Judgments or final orders may be obtained on motion by sureties against their principals, by sureties against their co-sureties, for the recovery of money due them on account of payments made by them as such; by clients against attorneys; plaintiffs in execution against sheriffs, constables, and other officers, for the receiving of money or property collected for them, and damages, and in all other cases specially authorized by statute.

A motion under this section, to compel an attorney to pay over money collected for his client, is heard and disposed of without written pleadings. *Mansfield v. Wilkerson*, 26 Iowa, 482. See section 2910.

Where money is paid to the clerk of a third party in pursuance of a decree of court, such third party has no right to object to the disposition of such money on the ground that he had no notice of the action in which the decree was rendered. If the decree was invalid, it could not be attacked in an answer and cross-bill in a proceeding to compel the clerk to pay the money in accordance with the decree. *Elliott v. Jones*, 47 Id., 124.

This section has no application to sureties on official bonds; such sureties can only be subjected

to liability for a judgment against their principals when they are regularly brought into court as defendants, and have an opportunity to contest the claim made by the plaintiff. *Bitting v. Moore et al.*, 53 Id., 593.

SEC. 2907. [**Notice: service.**].—Notice of such motion shall be served on the party against whom the judgment or order is sought at least ten days before the motion is made.

SEC. 2908. [**Form of.**].—The notice shall state in plain and ordinary language the nature and grounds of the motion, and the day on which it will be made.

The nature and grounds of the motion only are to be stated in the notice, and the motion is heard without written pleading. *Mansfield v. Wilkerson*, 26 Iowa, 482, 485. See, also, *Rees v. Leach*, 10 Id., 439; *The State ex rel. v. The Mayor etc.*, 18 Id., 388, and cases cited.

SEC. 2909. [**When abandoned.**].—Unless the motion is made and filed with the case on or before the day named in the notice, it shall be considered as abandoned.

SEC. 2910. [**No written pleadings.**].—The motion shall be heard and determined without written pleadings, and judgment given according to law and the rules of equity.

CHAPTER 14.

OF MOTIONS AND ORDERS.

SECTION 2911. [**Motion defined.**].—A motion is a written application for an order addressed to the court, or to a judge in vacation, by any party to a suit or proceeding, or by any one interested therein.

SEC. 2912. [**Several objects included.**].—Several objects may be included in the same motion, if they all grow out of, or are connected with, the action or proceeding in which it is made.

SEC. 2913. [**Proof to sustain or resist: how taken.**].—Testimony to sustain or resist a motion may be in the form of affidavits, or in such other form as the parties may agree on or the court or judge direct. If by affidavit, the person making the same may be required to appear by the court or judge, and submit to a cross-examination.

In the determination of questions in relation to costs, and as to who shall pay them, the court is authorized to receive affidavits and determine the matter thereon or it may order the deponents to be brought before it and be subjected to an examination. *Packer v. Packer*, 24 Iowa, 20.

SEC. 2914. [**Notice of motion: how and when taken.**].—A party who has appeared in an action, or who has been served with the original notice in such action in any manner provided by this code, shall take notice of all motions filed during term time upon the same being filed by the clerk and entered in the appearance docket. All motions filed in vacation shall be entered on such docket and served as herein required.

After judgment the defendant is not required to take notice of subsequent proceedings. *Adair v. Wridht*, 16 Iowa, 385, 386; *Wright v. LeClaire*, 3 Id., 221.

A motion for a change of venue, made in vacation, should not be heard without notice to the adverse party. *Preston v. Winter*, 20 Id., 265.

A party once in court must take notice of a motion filed during a term of court for final judgment. No other notice than the filing is necessary. *Wagner v. Tice*, 36 Id., 599.

An application made in vacation to change the venue in a cause should not be heard without notice to the adverse party. *Preston v. Winter*, 20 Id., 264; *Hornis v. McKensie*, 31 Id., 425.

All parties interested should be notified of the filing of a motion to set aside a judgment rendered at a prior term, and it is error to sustain such motion in the absence of such notice, unless the party entitled to notice appeared by himself or counsel. *Keeney v. Lyon*, 21 Id., 277.

SEC. 2915. [**Notice: what to state.**].—When notice of a motion is required to be served, it shall state the names of the parties to the action or proceeding in

which it is made, the name of the court or judge before whom it is to be made, and the place where, and the day on which it is to be heard, and, if affidavits are to be used on the hearing, the notice shall be accompanied with copies thereof and shall be served such length of time before the hearing as the court or judge deems reasonable.

SERVICE.

SEC. 2916. [**Service: how made.**]-Notices, and copies of motions mentioned in this chapter, may be served by any one who would be authorized to serve an original notice.

SEC. 2917. **The service** shall be on each of the parties adverse to the motion, if more than one, or on an attorney of record of such party.

SEC. 2918. **The service may be personal** on such party or attorney, or may be made in the same manner as is provided for the service of the original notice in civil actions; or it may be served on the attorney by being left at his office with any person having the charge thereof.

SEC. 2919. [**Return.**]-Any officer authorized to serve any notice, shall serve at once the same and make prompt return to the party who delivered the same to him, and a failure to do so shall be punished as a disobedience of the process of the court.

SEC. 2920. **The return of proof** of service must state the manner in which it was made.

SEC. 2921. [**When court may direct manner of service.**]-When the party has no known place of abode in this state, and no attorney in the county where the action is pending, or where the parties, plaintiffs or defendants, are numerous, the court or judge may direct the mode of serving notices, and on whom they shall be served.

ORDERS.

SEC. 2922. [**Order defined.**]-Every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.

A final decree in equity is not an "order" but a "judgment" within the meaning of this section of the code. *Wagner v. Tree*, 36 Iowa, 599, 602; see also, *Smith, Murphy & Co. v. Shawhan*, 37 Id., 533.

SEC. 2923. [**May issue in vacation.**]-For good cause shown, a judge's order may issue in vacation, directing any of the officers of the court in relation to the discharge of their duties.

The judge in vacation may direct the sheriff to publish notice of a sale in the manner prescribed by law, as determined by the judge. *Herrman v. Moore*, 49 Iowa, 171.

Mandamus will not lie to compel the clerk to issue execution on a judgment, because this section provides a plain, speedy and adequate remedy for his refusal to do so. *Pickell et al. v. Owen*, 66 Id., 485.

SEC. 2924. [**How long in force.**]-Such order shall be in force only during the vacation in which it is granted and for the first two days of the ensuing term.

This section applies only to the orders contemplated in section 2923 and not to an order for a temporary injunction made in vacation. *Shaw v. McHenry*, 52 Iowa, 182; *Curtis v. Crane*, 38 Id., 459.

SEC. 2925. [**Bond.**]-The judge granting it may require the filing of a bond as in case of an injunction, unless from the nature of the case such requirement would be clearly unnecessary and improper.

A judge's order may be obtained in vacation directing the clerk as to his duty. *Maynes v. Brockway*, 55 Iowa, 457, 460.

SEC. 2926. [**To be filed and entered of record.**]-Orders made out of court shall forthwith be filed with and entered by the clerk in the journal of the court in the same manner as orders made in the term.

CHAPTER 15.

OF SECURITY FOR COSTS.

SECTION 2927. [Must be given, when.]—If a defendant shall at any time before answering, make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, if he be a non-resident of this state or a private or foreign corporation, before any other proceeding in the cause shall file in the clerk's office a bond, with a sufficient security to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought or in any other to which it may be carried, either to the defendant or to the officers of the court. The application for such security shall be by motion filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter.

The provisions of this section are not confined to foreign corporations. A domestic corporation may be required to give security for costs. *The D. M. V. Live Stock Ins. Co. v. Henderson*, 38 Iowa, 446.

The affidavit annexed to a motion for security for costs need not set out the facts constituting the defense, but only that the party making the motion has a good defense. *Id.*

The time fixed by the court within which a bond for costs must be filed, will be deemed sufficient, on appeal, unless it is made to appear that the plaintiff was prejudiced by the order. *Id.*

This section of the code does not apply to the justice's courts. *Smith v. Humphrey*, 15 Id., 428.

In a case where a motion for security for costs is proper, such motion must be filed by the time the defendant is required to plead, or such further time as may be granted by the court, otherwise it may be properly overruled. *Sprague v. Haight*, 54 Id., 446.

If a motion for security for costs could be made at all upon an appeal from a justice of the peace, it would be too late after the jury were sworn. *Ade & Co. v. Zangs*, 41 Id., 536.

Where the plaintiff became a non-resident after the institution of a suit, and defendant on that account moved for security for costs, but not until after they had answered, held that the motion was made too late. *Gilbert v. Hoffman*, 66 Id., 206.

SEC. 2928. [Cause dismissed.]—An action in which a bond for costs is required by the last section, shall be dismissed if a bond is not given in such time as the court may allow.

A dismissal of the action is the penalty for a non-compliance with an order to secure costs; and where the court below dismisses the action without fixing a further time for filing a bond for costs, the supreme court will not interfere where the order works no substantial prejudice to the plaintiff. *The D. M. V. R. Co. v. Henderson*, 38 Iowa, 446.

SEC. 2929. [When plaintiff becomes non-resident.]—If the plaintiff in an action, after its institution becomes a non-resident of this state, he may be required to give security for costs in the manner and under the restrictions provided in the preceding sections of this chapter.

SEC. 2930. [Additional security.]—In an action in which a bond for costs has been given, the defendant may at any time before trial, make a motion for additional security on the part of plaintiff; and if on such motion the court is satisfied that the surety in the plaintiff's bond has removed from the state, or is not sufficient for the amount thereof, it may dismiss the action, unless, in a reasonable time to be fixed by the court, sufficient security is given by the plaintiff.

SEC. 2931. [Attorney or officer cannot be.]—No attorney or other officer of the court shall be received as security in any proceeding in court.

The prohibition of this section against attorneys becoming sureties in proceedings in court, is not limited to costs. It applies to injunctions, attachment and similar bonds, as fully as to those securing costs. *Massie v. Meann*, 17 Iowa, 131.

An attorney who tenders himself as surety on a bond in court and is accepted, cannot afterwards plead the fact that he is an attorney to relieve him of his obligation. *Wright v. Schmidt*, 47 Id., 233.

The fact that an attorney's name is signed to the bond, and that the approval of the clerk is indorsed thereon in due form is conclusive of his acceptance as surety. *Id.*

SEC. 2932. [Judgment on bond rendered on motion.]—After final judgment has been rendered in an action in which security for costs has been given as required by this chapter, the court on motion of the defendant or any other person having the right to such costs or any part thereof, may render judgment summarily according to the chapter on summary proceedings, in the name of the defendant or his legal representatives, against the sureties for costs, for the amount of costs adjudged against the plaintiff or so much thereof as may remain unpaid.

CHAPTER 16.

OF COSTS.

SECTION 2933. [Recoverable by successful party.]—Costs shall be recovered by the successful against the losing party. But where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court may, on rendering judgment, make an equitable apportionment of costs.

Where a number of witnesses subpoenaed by the plaintiff were in attendance at the trial to testify touching an issue joined, and the defendant withdrew his answer immediately before the jury was impaneled, and presented a new issue which rendered the testimony of said witnesses immaterial, it was held proper for the court to tax a portion of the costs to the defendant, notwithstanding he was the successful party. *Whitney v. Hackney*, 20 Iowa, 460.

While, as a rule, the successful party is entitled to recover costs, the court has the power, under peculiar circumstances to adjudge otherwise. *Scott's Adm'r v. Cole*, 27 Id., 109.

Where the plaintiff obtains relief in part, though he fails in the main part of his case, the court may, in its discretion, order the defendant to pay his own costs. *Burton v. Mayson*, 26 Id., 392.

A plaintiff who recovers in his action is not, as a matter of law, entitled, in all cases, to recover full costs. There may be circumstances justifying an equitable apportionment thereof by the court. *Hatch v. Gudd*, 29 Id., 95; *Brink v. Nuweg*, Id., 444; *Bare v. Wright*, 23 Id., 101.

Where no abuse of discretion is shown, an order of the court below apportioning costs will be sustained in the appellate court, if the plaintiff has recovered but a part of his demand. *Boone County v. Wilson*, 41 Id., 69.

The apportionment of costs is a matter resting in the discretionary powers of the court, and its action in this respect will not be disturbed, on appeal, unless an abuse of such discretion is affirmatively shown from all the facts. *Bush v. Yoeman*, 30 Id., 479.

It is competent for the trial court to adopt and enforce a rule limiting the right of witnesses, subpoenaed and attending court in several cases at the same time, to fees for mileage and attendance in one case only. Such a rule is consistent with law, within the meaning of section 2680 of the revision (code, section 130). *Muffert v. The D. B. S. M. R. Co.*, 34 Id., 430. MILLER, J., dissenting.

The costs in a proceeding to restore the record of a judgment which has been destroyed, if the motion is resisted and is sustained by the court, should be taxed against the losing party. *Rankin & McKinley v. Herrum*, 48 Id., 276.

Where in an action before a justice of the peace upon four separate items of demand, the judgment of the justice in favor of the plaintiff was appealed from, and the plaintiff recovered one dollar in the circuit court, it was held that the case was a proper one for an apportionment of the costs under section 2933 of the code. *Howder v. Overholser*, 48 Id., 365.

While, as a rule, the successful party is entitled to recover costs, the court has the power, under peculiar circumstances, to adjudge otherwise, and if a party would show error in this respect, the facts upon which the court below acted must in some manner be disclosed, so that the appellate court may see whether there has been any abuse of discretion. *Scott's Adm'r v. Cole et al.*, 27 Id., 109.

The general rule as to costs, both at law and in equity, is that they shall be adjudged to the successful against the unsuccessful party. *French v. Gifford*, 31 Id., 428.

This section, in providing that in certain cases the court may make an equitable apportionment of the costs between the parties, does not apply to those cases in which the cause of action is a single, indivisible claim. *Upson v. Fuller*, 43 Id., 409; *Hammond v. S. C. & P. R. Co.*, 49 Id., 450.

Where in an action in equity the relief asked is of such a character that a part thereof may be granted, while a part may be refused, the costs may be apportioned equitably between the parties. *Strayer v. Stone*, 47 Id., 335.

Where judgment is recovered against an administrator who refuses to defend, but defense is made by the heirs, of the intestate, the costs should be taxed against such heirs. *Drummond v. Irish*, 52 Id., 41.

Where in an action of replevin the property consists of distinct articles, and there is a recovery for a part only, it is competent for the court to make an equitable apportionment of the costs. *Whitaker v. Sigler*, 44 Id., 419.

But where the cause of action is a single claim, a reduction in the amount does not entitle the losing party to an apportionment of the costs. *Hammond v. The S. C. & P. R. Co.*, 49 Id., 450.

A minor is bound by a judgment for costs rendered against him in an action brought by him, by his next friend, and his property can be taken to satisfy such judgment. *Albee Jr., v. Winterink et al.*, 55 Id., 184.

In an action on a promissory note, the defendants pleaded a counter-claim, and afterwards offered to confess judgment for an amount less than was found against them on the trial, and the trial involved only the issues raised by the counter-claim, which were found in defendants' favor; held that defendants were entitled to judgment for all the costs made on the trial of these issues, and that their insufficient offer to confess judgment was in no way connected with and did not affect his right. *McClatchey v. Finley et al.*, 62 Id., 200.

Though this section provides that costs shall be recovered by the successful party against the losing; yet the executors named in a will, whose duty it is to offer it for probate, should not, the will being broken, be held personally liable for costs in the absence of bad faith on their part. *Meeker et al. v. Meeker et al.*, 37 N. W. R., 773.

In an action on a promissory note, the defendants pleaded a counter-claim, and afterwards offered to confess judgment for an amount less than was found against them on the trial, and the trial involved only the issues raised by the counter-claim, which were found in defendant's favor, held that defendants were entitled to judgment for all the costs made on the trial of these issues, and that their insufficient offer to confess judgment was in no way connected with, and did not affect, this right. *McClatchey v. Finley et al.*, 62 Id., 200.

SEC. 2934. [Where several parties and causes of action.]—In actions where there are several plaintiffs or several defendants, the costs shall be apportioned according to the several judgments rendered; and where there are several causes of action embraced in the same petition, or several issues; the plaintiff shall recover costs upon the issues determined in his favor, and the defendant shall recover costs upon the issues determined in his favor.

While this section has reference primarily to cases where the petition embraces several causes of action, or where there are several issues joined upon the matters therein alleged, it may still include a case where the plaintiff recovers upon his demand, and the defendant, in whole or in part upon his counter-claim. *Arthur v. Funk*, 22 Iowa, 238. See, also, *Brink v. Neueg*, 29 Id., 444.

Where there are two issues, one of which is determined in favor of the plaintiff and the other in favor of the defendant, it is proper that the plaintiff should pay the costs on the issue decided against him, and that the defendant should pay the costs on the issue decided against him. *Porter v. McBride*, 44 Id., 479.

SEC. 2935. [Uncollected costs: party making to pay.]—All costs accrued at the instance of the successful party which cannot be collected of the other party, may be recovered on motion by the person entitled to them against the successful party.

A party against whom a judgment is rendered is primarily liable for all the costs to the persons entitled thereto, who may have a fee-bill issued therefor; and failing to collect thereon they may by motion require the successful party to pay such of the costs as accrued at his instance. *McConkey v. Chapman*, 58 Id., 231.

SEC. 2936. [What included in.]—The necessary fees paid by the successful party in procuring copies of deeds, bonds, wills, or other records filed as a part of the testimony, shall be taxed in the bill of costs.

SEC. 2937. [Same.]—Postage paid by the officers of the court, or by the parties in sending process, depositions, and other papers being part of the record, by mail, shall be taxed in the bill of costs.

SEC. 2938. [Cost: allowed party who confess matter which arose after action.]—When a pleading contains a defense stating matter which arose after the commencement of the action, whether such matter of defense be alone or with other matter of defense which arose before the action, the party affected by such matter may confess the same, and thereupon shall be entitled to the costs of the cause as to the party pleading such matter up to the time of such pleading.

SEC. 2939. [On dismissal of action or death of party.]—When a plaintiff dismisses the action or any part thereof, or suffers it to abate by death of the defen-

dant or other cause, or where the suit abates by death of the plaintiff and his representatives fail to revive the same according to law, judgment for costs may be rendered against such plaintiff or representative, and, if against a representative, shall be paid as other claims against the estate.

SEC. 2940. [**Between co-parties.**—The co-parties against whom judgment has been recovered, are entitled as between themselves to a taxation of the costs of witnesses whose testimony was obtained at the instance of one of the co-parties, and inured exclusively to his benefit.

SEC. 2941. [**When dismissed for want of jurisdiction.**]—Where an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs shall be adjudged against the party attempting to institute or bring up the cause.

SEC. 2942. **The clerk shall tax** in favor of the party recovering costs, the allowance of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the cause or may deem just to be taxed.

It was held under this section in the revision, prior to the code, that the compensation of a person agreed upon by the parties and appointed by the court to take down the testimony in writing in a civil case, might be properly taxed as part of the costs against the unsuccessful party. *Kunkele v. The Ind. S. D. of Charles City*, 36 Iowa, 99.

Officers whose fees are fixed by law cannot charge fees for services for which no specific fee is allowed. The clerk cannot charge a separate fee for assessing the amount due on a promissory note. *Sprout v. Kelly*, 37 Id., 44.

SEC. 2943. [**When cause of action is assigned.**]—In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such party shall be liable for the costs in the same manner as if he were a party.

SEC. 2944. [**Re-taxation.**]—Any person aggrieved by the taxation of a bill of costs, may, upon application, have the same re-taxed by the court, or by a referee appointed by the court in which the application or proceeding was had, and in such re-taxation all errors shall be corrected; and if the party aggrieved shall have paid any unlawful charge by reason of the first taxation, the clerk shall pay the costs of re-taxation, and also to the party aggrieved the amount which he may have paid by reason of the allowing of such unlawful charges.

Where a receipt purporting to "release and discharge the defendant from all actions, causes of action, debts, claims and demands in law or equity up to date," includes the costs as well as the debt of a judgment before a justice of the peace, in favor of the person making the receipt and against the one to whom it was delivered, was held to be a question of law for the court and not for a jury. *Packer v. Packer*, 24 Iowa, 20.

SEC. 2945. [**On appeals to supreme court.**]—In cases of appeals from the district or circuit court, the clerk shall make a complete bill of costs, showing the items which shall accompany the record, and a copy of the same shall be placed upon the execution docket of the court below.

SEC. 2946. [**Clerk of supreme court: duty of.**]—When the costs accrued in the supreme court and the court below are paid to the clerk of the supreme court, he shall pay so much of them as accrued in the court below to the clerk of said court, and take his receipt for the same.

SEC. 2847. [**Duty of clerk below.**]—On receiving such costs, the clerk of the court below shall charge himself with the money upon his execution docket, and pay it to the persons entitled to the same.

SEC. 2948. [**Interest from verdict to be computed.**]—When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered shall be computed by the clerk and added to the costs of the party entitled thereto.

TITLE XVIII.

OF ATTACHMENTS, EXECUTIONS, AND SUPPLEMENTARY PROCEEDINGS.

CHAPTER 1.

OF ATTACHMENT AND GARNISHMENT.

SECTION 2949. [Property attached.]—The plaintiff in a civil action may cause any property of the defendant which is not exempt from execution to be attached at the commencement or during the progress of the proceeding, by pursuing the course hereinafter prescribed.

Where the petition and bond for an attachment are filed, and the writ issued on the same day, but the original notice dated and delivered to the sheriff the next day thereafter, a motion to quash the writ because issued before the commencement of the action was held properly overruled. *Hagan v. Burch*, 8 Iowa, 309.

Where the petition which asks an attachment is filed, the action is so far commenced that the writ of attachment may then issue, before the original notice is placed in the hands of the sheriff for service. *Id.*

Where the writ is not issued for several days after the filing of the petition asking an attachment, it will not be quashed. *Van Winkle v. A. G. Stevens & Co.*, 9 Id., 264; *Hagan v. Burch*, 8 Id., 309.

The unassigned dower interest of a widow in the real estate of her deceased husband is not subject to attachment in an ordinary action at law. *Rusch v. Moore*, 48 Id., 611.

A judgment may be levied on and sold under an execution, like any other personal property, but it can be attached by garnishment only. *Ochiltree v. M., I. & N. R. Co.*, 49 Id., 150.

It was held in *Baldwin v. J. C. & E. B. Buchanan*, 10 Iowa, 277, that a writ of attachment was properly issued in an action to foreclose a mortgage, the petition alleging that the mortgaged property was insufficient security for the amount of the claim, and prayed an attachment for sufficient cause.

In an action against the joint and several makers of a promissory note an attachment may, for sufficient cause alleged, be issued against the property of but one. *Chittendon & Co. v. Hobbs*, 9 Id., 417; *Smith, Twogood & Co. v. Coopers & Clarke*, Id., 376.

An attachment may be issued in any civil action, whether by ordinary or equitable proceedings. *Curry v. Allen*, 55 Id., 318.

SEC. 2950. [Separate petition.]—If it be subsequent to the commencement of the action, a separate petition must be filed, and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto.

If the writ is asked in the original petition, but one petition is required, but there must be a separate petition where the writ is sued out subsequent to the institution of the action. *Shapleigh v. Roop*, 6 Iowa, 524.

This section applies to cases when the attachment is sought after the commencement of the action. *Van Winkle v. A. J. Stevens & Co.*, 9 Id., 264.

While an attachment proceeding is auxiliary to the principal action, yet it is also of such an

independent character within the meaning of the statute, that an appeal will lie from an order dissolving or sustaining the same. *Johnson v. Butler*, 1 Id., 459.

A change of venue from the county is not allowed in cases appealed from justices courts under sub. 5 of section 2950 as amended by chapter 118, laws of 1878. *Artery v. The C., B. & Q. R'y Co.*, 65 Id., 723. See, also, *Schuchart v. Lamney*, 62 Id., 197.

SEC. 2951. [**Petition must state.**]—The petition which asks an attachment must in all cases be sworn to. It must state:

1. That the defendant is a foreign corporation, or acting as such; or,
2. That he is a non-resident of the state; or,
3. That he is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts; or,
4. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or,
5. That the defendant is about to dispose of his property with intent to defraud his creditors; or,
6. That he has absconded, so that the ordinary process cannot be served upon him; or,
7. That he is about to remove permanently out of the county and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff; or,
8. That he is about to remove permanently out of the state, and refuses to pay or secure the debt due the plaintiff; or,
9. That he is about to remove his property, or a part thereof, out of the county with intent to defraud his creditors; or,
10. That he is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; or,
11. That he has property or rights in action which he conceals; or,
12. That the debt is due for property obtained under false pretences.

An amendment of a petition which asks an attachment, by annexing copies of the causes of action sued on, will not warrant the dissolution of the attachment. *McCarn & Scott v. Rivers*, 7 Iowa, 104.

Where, in an action asking an attachment, the affidavit does not show *where* it was "subscribed and sworn to," it will be presumed to have been in the proper county, and that the failure to set out definitely the county and state where the affidavit was taken cannot materially prejudice the defendant. *Snell v. Eckerson*, 8 Id., 284.

It was held under the code of 1851 that where an attachment was sued out upon the ground that "the defendant is, in some manner, about to dispose of, or remove his property out of the state, without leaving sufficient remaining for the payment of his debts," the affidavit should allege further, that such disposition or removal was with intent to defraud his creditors. *Pitman & Bro. v. Searcey*, 8 Id., 352; *Bowen v. Gellkison*, 7 Id., 503; *Lockhard v. Eaton*, 3 G. Greene, 543.

But under the revision of 1860 it was held that the fraudulent intent need not be alleged, when seeking an attachment on the ground "that the defendant was about to dispose of or remove his property out of the state without leaving sufficient remaining for the payment of his debts." *The Br. St. Bk. v. White*, 12 Id., 141; *Sherill v. Fay*, 14 Id., 292.

Where affidavit appended to a petition for an attachment stated "that the facts set forth therein asking a writ of attachment, are true," it was held to be equivalent to an averment that the allegations of the petition were true, and that it was sufficient. *Sherril v. Fay*, 14 Id., 292.

An allegation in a petition asking an attachment, that "said defendant is in some manner about to dispose of his property without leaving sufficient remaining for the payment of his debts, *held*, insufficient in that it did not allege the removal or disposition BEYOND THE STATE as mentioned in the third clause of this section. *Mingus v. McLeod*, 25 Id., 452; *Bundy v. McKee*, 29 Id., 253.

Nor will an amendment, filed after the issuing of the writ stating that the defendant *is* in some manner about to dispose of his property *out of the state*, sustain the writ already issued. It should state that the alleged cause *existed at the time* the action was commenced or the writ issued. *Bundy v. McKee*, Id.

Where an action was commenced against a non-resident by attachment in B. county, no property of defendant was found or attached in that county, but on another writ issued to P. county real property belonging to the defendant was attached, after which, on motion of defendant the venue was changed to P. county; *held*, that the lien of the attachment upon the property was

valid from the date of levy, and took precedence of an attachment in another action brought in P. county, the attachment therein being issued and levied after the first and prior to the transfer of the cause from B. county. *Laird Bros. v. Dickerson*, 40 Id., 665.

The allegation that "the defendant is not an inhabitant of the state" is equivalent to the allegation that he is a non-resident, and is sufficient. *Wiltse v. Stearns*, 13 Id., 282.

An affidavit showing cause for an attachment, may be made by plaintiff's attorney. *Chittenden & Co. v. Hobbs*, 9 Id., 417; *Bates v. Robinson*, 7 Id., 318.

In an action against the joint and several makers of a promissory note, an attachment may, for sufficient legal cause alleged, be issued against the property of but one defendant. *Chittenden v. Hobbs*, 9 Id., 417.

When the petition states the amount claimed to be due, a similar averment in the affidavit for the attachment is not necessary. *Id.*

When the plaintiff states in his petition more than one cause for an attachment they must be stated in the conjunctive and not in the alternative. *Stacey & Co. v. Stiction & Co.* 9 Id., 399.

An affidavit to the effect that the defendant is in another state, and that he is about to sell or remove his property, is not sufficient to authorize an attachment. *The State v. Morris*, 50 Id., 203.

The provision of the statute authorizing an attachment on the ground that the defendant is about to remove his property out of the state, without leaving sufficient for the payment of his debts, contemplates a permanent removal, and not a temporary use of property by the owner out of the state. *Warder, Mitchell & Co. v. Thrikeld*, 52 Id., 134.

Proceedings in attachment cannot be annulled on the ground that the jurat to the affidavit is not signed by the officer administering the oath, if it be shown that the affidavit was, in fact, sworn to before him. *Cook v. Jenkins & Co.*, 30 Id., 452.

Plaintiffs obtained a change of venue from the district court in Boone county to the district court of Story county, both counties being in the same judicial district. Afterwards, and after there had been a change of the district judge in that district, defendant moved for another change on the ground of prejudice of the judges, but made no showing that the ground on which they asked the change did not exist when the first change was obtained as prescribed in this section of the code. *Held*, that such showing was not necessary, because, on account of the change of the judges, the alleged prejudice could not have existed when the first change was obtained, and the district court and the supreme court will take judicial notice as to who are the judges of the various state courts. *Upton & Co. v. Paxton et al.*, 72 Id., 295.

SEC. 2952. [Issued and served on Sunday: when.]—Where the petition states, in addition to the other facts required, that the plaintiff will lose his claim unless the attachment issues and is served on Sunday, it may be issued and served on that day.

SEC. 2953. [On contract petition must state.]—If the plaintiff's demand is founded on contract, the petition must state that something is due, and, as near as practicable, the amount, which must be more than five dollars in order to authorize an attachment.

An action on a judgment, although recovered for a tort, is founded on contract, and no allowance is necessary, as in case of tort. *Johnson et al. v. Butler*, 2 Iowa, 535.

A petition in an action on contract asking for an attachment, which fails to state that something is due, and as nearly as practicable the amount thereof, is defective. *Blakley v. Bird*, 12 Id., 601; *Kelley v. Donnelly*, 29 Id., 70.

A claim for damages resulting from the diseased condition of sheep sold under a representation of soundness, is a demand founded on contract. *Swan v. Smith et al.*, 26 Id., 87.

An action on a penal bond for a breach thereof is an action founded on contract. *Lord v. Gaddis*, 6 Id., 57. So also an action to recover a penalty prescribed by a city ordinance, and in such cases no allowance by a judge is necessary. *The Town of Decorah v. Dunstan Bros.*, 34 Id., 360.

In an action for unliquidated damages it is not necessary to state in the petition for an attachment the amount due from the defendant to the plaintiff. *Sherrill v. Fay*, 14 Id., 292.

The provisions of this section denying an attachment where the amount claimed does not exceed five dollars is limited to actions upon contracts, and has no application to actions founded on torts. *Weller v. Hawes*, 49 Id., 45.

SEC. 2954. [Amount of property attached.]—The amount thus sworn to is intended as a guide to the sheriff, who must, as nearly as the circumstances of the case will permit, levy upon property fifty per cent greater in value than that amount.

SEC. 2955. [**Not on contract: judge to allow.**—If the demand is not founded on contract the original petition must be presented to some judge of the supreme, district, or circuit court, who shall make an allowance thereon of the amount in value of the property that may be attached. The provisions of this section apply only to cases in the district and circuit court.

In an action for false representations, the damages being unliquidated, an attachment should not issue until the provisions of this section have been complied with. *Gates v. Reynolds*, 13 Iowa, 1.

The law regulating the issuing of attachments in cases of torts applies to the circuit courts and the judges thereof as well as to the district courts and judges. *Sturman v. Stone*, 31 Id., 115.

In an action to recover value of certain wheat, the petition, which asked an attachment, alleged that the plaintiff had deposited the wheat for storage with the defendant under a special contract by which the defendant agreed to deliver the wheat to plaintiff on demand; and further alleged that plaintiff demanded the wheat of defendants; that they had before such demand sold and shipped the same without authority; that they could not and did not deliver the same to plaintiff, and refused to pay therefor; it was held, that the action was founded on contract and not upon tort, and that no order of allowance by a judge of the amount to be attached was necessary. *McGinn v. Butler*, 31 Id., 160.

The order of allowance in attachments for torts must be made by a judge of one of the courts named in the statute in his individual capacity, and not by the court. *Sherrill v. Fay*, 14 Id., 292.

An action to recover the penalty prescribed for the violation of a city ordinance is not an action *ex delicto*, but rather *ex contractu*, and is not governed by this section, wherein an allowance of the amount to be attached must be made. *The Town of Decorah v. Dunstan Bros.*, 34 Id., 360.

An action for damages resulting from the diseased condition of sheep represented to be sound, is a demand founded upon contract, and does not require an order of allowance by a judge of the amount in value of property to be attached. *Swan v. Smith*, 26 Id., 87.

Where an attachment has been issued and levied, in an action for tort, without an order of allowance having first been made by a judge, the defect may be cured, under section 3021, by an allowance made by the court after the filing of a motion to quash. And it is not a valid objection that the allowance is made by the court instead of the judge. *Magoon v. Gillett*, 54 Id., 54.

FOR DEBTS NOT DUE.

SEC. 2956. (*As amended by ch. 29, 21st g. a.*) [**What petition must state.**—The property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the petition, in addition to that fact, states:

1. That the defendant is about to dispose of his property with intent to defraud his creditors; or,
2. That he is about to remove [or has removed] from the state and refuses to make any arrangements for securing the payment of the debt when it falls due, and which [removal or] contemplated removal was not known to the plaintiff at the time the debt was contracted; or,
3. That the defendant has disposed of his property in whole or in part with intent to defraud his creditors; or,
4. That the debt was incurred for property obtained under false pretences.

The allegation in the petition of refusal to secure the debt applies alone to the second subdivision of this section. *Danforth, Davis & Co. v. Carter & May*, 1 Iowa, 546.

Where the plaintiff, in commencing his action, brings himself within the provisions of the statute providing for commencing attachment suits previous to the maturity of the debt, in certain cases, the defendant cannot plead as a defense that the debt was not due when the action was commenced. *Churchill v. Fulliam*, 8 Id., 45.

An attachment may be issued in an action on a claim before it is due, only when one or more of the causes defined by the statute providing for attachments in such cases, are alleged in the petition. *Stacy & Thomas v. Stichton & Co.*, 9 Id., 399.

Where a petition asking an attachment stated, as a cause of action, the indebtedness of the defendant for the purchase money of certain lands, under a contract which was not then matured, and after it became mature, the plaintiff filed an amended petition claiming damages for a breach of contract on the part of defendant, it was held: 1. That by the filing of an amended petition which was inconsistent with the original petition upon which the writ of attachment issued, the

plaintiff would be deemed to have waived his original cause of action; 2. That by this abandonment of the cause of action first alleged, it is to be presumed that it did not exist when the attachment was sued out. *Young v. Broadbent*, 23 Id., 539.

The existence of an indebtedness is an essential pre-requisite to the issuance of the writ and if no indebtedness exists the writ cannot be rightfully sued out. *Id.*

A surety on a promissory note cannot maintain an action or attachment proceeding against his principal until the maturity of the note and payment thereof by him. Payment by him after the commencement of the action is not sufficient. *Dennison v. Soper*, 33 Id., 183.

An action may be properly commenced on notes given for rent, before they are due, when nothing but time is wanting to fix an absolute indebtedness, and it is alleged in the petition that the defendant is about to dispose of his property with intent to defraud his creditors. *Brace v. Brady*, 36 Id., 352.

An attachment may issue on an unmatured debt when nothing but time is wanting to fix an absolute indebtedness. *Bacon v. Marshall*, 37 Id., 581.

SEC. 2957. [**When to plead in such case.**—If the debt or demand on which the attachment suit is brought is not due at the time of the service of the attachment, the defendant is not required to file any pleadings until the maturity of such debt or demand; but he may, in his discretion, do so and go to trial as early as the cause is reached.

SEC. 2958. [**Judgment in.**—And no final judgment shall be rendered upon such attachment unless the party consents as in the last section, until the debt or demand upon which it is based becomes due. But property of perishable nature may be sold as in other attachment cases.

BOND.

SEC. 2959. [**Must be first given: amount.**—In all cases before it can be issued, the plaintiff must file with the clerk a bond for the use of the defendant, with sureties to be approved by such clerk, in a penalty at least double the value of the property sought to be attached, and in no case less than two hundred and fifty dollars in a court of record, nor less than fifty dollars if in a justice's court, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment.

An attachment bond with but one surety is not for that reason defective. The word "sureties" in this section may be construed as either singular or plural. *Elliott v. A. J. Stevens & Co.*, 10 Iowa, 418.

Where a bond for an attachment is signed by the principal and sureties in their partnership names, it is sufficient. *Danforth, Davis & Co. v. Carter & May*, 1 Id., 546; *Churchill v. Fulliam*, 8 Id., 45.

The penalty of the bond should be double the amount of the value of the property which the sheriff may attach, and not double the amount claimed in the petition to be due. *Id.* To the same effect are *Van Winkle v. Stevens & Co.*, 9 Id., 264; *Hamile et al. v. Phenice*, Id., 525; *Hamble v. Owens*, 20 Id., 70. It should not be less than three times the amount claimed in the petition to be due. *Hamble v. Owens*, 20 Id., 70.

When the penalty of the bond for an attachment is less than the amount required it may be enlarged by the parties to it, or a new and sufficient bond may be filed. *Van Winkle v. Stevens & Co.*, 9 Id., 264; *Churchill v. Fulliam*, 8 Id., 47.

Where a new bond is substituted for the one filed at the commencement of the action, it takes the place of the original one, and is to be treated as if filed at the commencement of the action, so far as the defendant's claim for damages under it is concerned. *Branch of St. Bank v. Morris*, 132 Id., 136.

A new bond may be filed after the cause has been reversed by the appellate court, because the bond was not in sufficient amount. *Hamble v. Owen*, 20 Id., 70.

A misnomer in the bond of the county in which the action is pending, may be cured by filing a new bond. *Holmes & Avery v. Budd*, 11 Id., 186.

The deputy clerk has authority to approve the bond and sureties for an attachment. *Finn & Co. v. Rose et ux.*, 12 Id., 565.

An attachment bond may be executed in the name of the plaintiff by his attorneys, as well as by himself, and the bond will be good, even if not signed by the plaintiff at all, if otherwise sufficient. *Pilkins v. Boyd*, 4 G. Greene, 255.

The bond required by this section must be given before the attachment can issue. *Mason v. Rice*, 66 Iowa, 176.

SEC. 2960. [**Additional security.**—The defendant may, at any time before judgment, move the court or judge for additional security on the part of the plaintiff, and if, on such motion, the court or judge is satisfied that the surety in the plaintiff's bond has removed from this state, or is not sufficient, the attachment may be vacated and restitution directed of any property taken under it, unless, in a reasonable time, to be fixed by the court or judge, security is given by the plaintiff.

The defendant is not limited to a motion for a new bond where that filed is not in sufficient amount, but he may move to dissolve the attachment. *Hamble v. Owen*, 20 Iowa, 70.

SEC. 2961. [**Action on or by way of counter-claim.**—In an action on such bond, the plaintiff therein may recover if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained and reasonable attorney's fees, to be fixed by the court; and if it be shown such attachment was sued out maliciously, he may recover exemplary damages, nor need he wait until the principal suit is determined before suing on the bond.

In an action on the attachment bond the plaintiff must allege in his petition, and prove on the trial, that the defendant in suing out the attachment, had no reasonable grounds for believing the facts stated and sworn to in his petition as grounds for the attachment. It is not sufficient to allege generally that the writ was wrongfully sued out. *Burton v. Knapp*, 14 Iowa, 196; following *Winchester v. Cox*, 4 G. Greene, 121; *Mahnke v. Damon & Co.*, 3 Iowa, 107; *Raver v. Webster*, Id., 503.

In an action on an attachment bond the plaintiff must allege and prove the breach of its conditions. He must allege the non-payment of the damages which he alleges he has sustained by the wrongful suing out of the writ. *Horren v. Harrison*, 37 Id., 378; *Ryder v. Thomas*, 32 Id., 56.

When an attachment is wrongfully sued out, the right of action on the bond accrues as soon as the attachment defendant is disturbed in the possession of his property by the levy of the writ. *Campbell v. Chamberlain*, 10 Id., 337.

In such action the measure of damages is all such losses and expenses incurred in defending the attachment proceedings, losses sustained by being deprived of the use of property attached, and for injuries thereto, by its depreciation in value or entire loss. *Id.*

But injuries to credit, character, or business, are too remote and speculative to be considered in assessing damages sustained by the wrongful suing out of an attachment. *Id.*

Where the suing out of the attachment was willfully wrong, exemplary damages may be recovered. *Id.*

Where, in an action on an attachment bond, the suing out of the writ was not willful and malicious, the damages recoverable are confined to actual compensation for the wrong done, and restricted to its immediate consequences. *Plumb v. Woodmansee*, 34 Id., 116.

In an action on the attachment bond the defendant may show in defense, either that he had good cause to believe the grounds stated for the writ to be true, or that they were true in fact. If true in fact, it would constitute a good defense, though at the time of suing out the writ he had no sufficient knowledge to constitute reasonable ground for believing them true. *Vorse v. Phillips*, 37 Id., 428.

The plaintiff cannot recover, as part of his damages, attorney's fees for prosecuting the action on the attachment bond. *Id.*

Nor can he recover attorney's fees incurred in defending the same against the attachment suit, in the absence of an allegation of a general claim for damages, or a special averment of the particular item. *Id.*

Where the jury found specially that the defendant was entitled to damages for the wrongful suing out of an attachment, and that the plaintiff's claim was not yet due, a judgment for the amount of damages found, not diminished by the amount of plaintiff's claim, was held, correct. *Wetherell v. Sprigley*, 43 Id., 41.

In the absence of malice, an action for the wrongful suing out of an attachment can be maintained only on the attachment bond. In order to maintain an action independently of the statute, and not on the bond, malice in suing out the writ must be averred. *Tallant v. The B. G. L. Co.*, 36 Id., 262.

Where in an action to recover damages on an attachment bond the jury found a general verdict in favor of the plaintiff, it was held that such verdict authorized a further sum as attorney's fees by the court, the finding of the same facts being necessary under section 2961 of the code to sustain the verdict and to authorize such allowance. *Nockels v. Eggspieler*, 53 Id., 730.

Where the plaintiff in the principal action recovers less than five dollars, the judgment determines that the writ was wrongfully sued out, and the defendant may recover in an action on the

bond all actual damages sustained by him; but such judgment without other evidence does not prove that the suing out of the writ was willfully wrong. *Gaddis v. Lord & Jewett*, 10 Id., 141.

Damages are recoverable in an attachment bond, only in the event of the writ being wrongfully sued out, and this is not to be inferred from a voluntary dismissal of the action. *Nockles v. Eggspieler*, 47 Id., 400.

Whether or not in such case the plaintiff is entitled to nominal damages is a question of fact for the jury. *Id.*

Attorney's fees, under this section, may be regarded as part of the costs, and the provision authorizing the court to fix the amount of attorney's fees for defending against an attachment wrongfully sued out is within the scope of legislative authority. *Weller v. Hawes*, 49 Id., 45.

Where in an action on the bond the issue is the wrongful suing out of the attachment, based upon the alleged sale of property to defraud creditors, the testimony of the attachment defendant respecting the intent with which he disposed of his property, is not admissible. The true question, in such case, is, had the defendant so conducted himself as to give the plaintiff reasonable grounds to believe his intent was fraudulent. *Letz & Co. v. Belden*, 48 Id., 451.

Damages are recoverable in an action on an attachment bond only in the event that the attachment was wrongfully sued out, and this is not to be inferred from the voluntary dismissal of the suit. *Nockles v. Eggspieler*. 47 Id., 400.

Whether or not plaintiff is entitled to recover in such a case, even nominal damages, is a question of fact for the jury. *Id.*

Under this section a defendant in attachment, where the writ is wrongfully sued out, is not entitled to recover attorney's fees for defending the whole case, but only the reasonable fee of his attorneys for other services in the auxiliary proceedings. *Porter et al., Admin'rs. v. Knight*, 63 Id., 366.

MODE OF ATTACHMENT.

SEC. 2962. [To whom directed.]—The clerk shall issue an attachment, directing the sheriff of the county therein named to attach the property of the defendant to the requisite amount therein stated.

Where a writ of attachment is issued under the seal of one court, while the action is pending in another, it is competent to amend the writ by attaching the proper seal, and a motion to quash the writ will not lie for this cause. *Murdough v. McPerrin*, 49 Id., 479.

It is not necessary in a writ of attachment to recite the cause for issuing the writ set out in the petition. *Wadsworth & Wells v. Cheeney & Stimson*, 13 Id., 576; *Hays et al. v. Gorby*, 3 Id., 203.

Nor need a writ of attachment recite that a bond has been filed. *Ellsworth v. Moore*, 5 Id., 486; *Hays et al. v. Gorby*, 3 Id., 203.

It is not necessary to the validity of a writ of attachment that it contain a direction to the sheriff to make return thereof by the first day of the next term of court, and such direction, though a common one, is to be regarded as mere surplusage. *Westphal, Hinds & Co. v. Sherwood & Chapman*, 69 Id., 364; see, also, *Wadsworth v. Cheeney*, 13 Id., 276; *Hays v. Gorby*, 3 Id., 203.

SEC. 2963. [More than one attachment may issue and to several counties at same time.]—Attachments may be issued from courts of record to different counties, and several may, at the option of the plaintiff, be issued at the same time, or in succession and subsequently, until sufficient property has been attached; but only those executed shall be taxed in the costs, unless otherwise ordered by the court, and if more property is attached in the aggregate than the plaintiff is entitled to have held, the surplus must be abandoned and the plaintiff pay all costs incurred in relation to such surplus.

SEC. 2964. [Property attached: officer's duty.]—The sheriff shall in all cases attach the amount of property directed if sufficient, not exempt from execution, found in his county, giving that in which the defendant has a legal and unquestionable title a preference over that in which his title is doubtful or only equitable.

SEC. 2965. Where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff.

SEC. 2966. [May follow to another county: when.]—If, after an attachment has been placed in the hands of the sheriff, any property of the defendant is moved from the county, the sheriff may pursue and attach the same in an adjoining county within twenty-four hours after removal.

In respect to the authority of the sheriff to follow property removed from his county and attach it in an adjoining county under this section, it is immaterial when the *defendant* removed from the county. The sheriff may levy on the *property* removed within twenty-four hours after its removal into an adjoining county. *Budd v. Duval et al.*, 36 Iowa, 315, 318.

SEC. 2967. [**What may be attached and how done.**—Stock or interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows:

1. By giving the defendant in the action, if found within the county, and also the person occupying or in possession of the property, if it be in the hands of a third person, notice of attachment;

2. If the property is capable of manual delivery, the sheriff must take it into his custody if it can be found;

3. Stock in a company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached;

4. Debts due the defendant, or property of his held by third persons and which cannot be found, or the title to which is doubtful, are attached by garnishment thereof.

In a proceeding of attachment by garnishment, notice of the process to the defendant in the principal action is not necessary as in attachment of property, under section 2967. *Phillips v. Germon*, 43 Iowa, 101.

In order to constitute a valid levy of an attachment, the officer must do such acts as that without the protection of his writ, he would be a trespasser. *Allen v. McCalla*, 25 Id., 464.

The officer should do that which will amount to a change of possession, or something that will be equivalent to a claim of dominion, coupled with a power to exercise it. *Crawford v. Newell*, 23 Id., 453.

In order to make a valid levy on personal property, the sheriff must take, or have it within his power or control, or at least within his view, and if, having, it so, he makes a levy upon it, it will be good if followed up afterward within a reasonable time, by his taking possession in such a manner as to apprise everybody of the fact of its having been levied upon. And he may do this by placing it in the possession or under the control of another person for him; but it is not a valid levy where the sheriff leaves the property in the possession and custody of the defendant. *Kingsbury v. Buchanan*, 11 Id., 387, 397.

A judgment can be attached only by garnishment. *Ochiltree v. The M., I. & N. R. Co.*, 49 Id., 150.

In order to perfect a levy of an attachment upon lands in possession of defendant, it is necessary to notify the defendant thereof, and make return of the writ; and a return is not made until signed by the officer. *First Nat'l B'k of Newton v. Jasper County*, 71 Id., 436.

SEC. 2968. [**Defendant examined on oath before judge.**—Whenever it appears by the affidavit of the plaintiff, or by the return of the attachment, that no property is known to the plaintiff or the officer on which the attachment can be executed, or not enough to satisfy the plaintiff's claim, and, it being shown to the judge of any court by affidavit, that the defendant has property within the state not exempt, the defendant may be required by such judge to attend before him, or before the court in which the action is pending, and give information on oath respecting his property.

SEC. 2969. [**Property bound.**—Property attached otherwise than by garnishment, is bound thereby from the time of the service of the attachment only.

The levy of an attachment upon property creates a real lien, which can be divested only by a dissolution of the attachment; and while the legislature may suspend the sale of property thus levied upon, it cannot discharge the lien absolutely. *Hannahs v. Felt*, 15 Iowa, 141; *Day v. Griffith*, Id., 104; *Norton v. Williams*, 9 Id., 528.

The rule recognized in some of the states, that the death of a defendant, whose personal property has been attached, dissolves the attachment and passes the property to the administrator for distribution among the creditors, does not prevail in this state. *Lord v. Allen*, 34 Id., 281.

An attachment lien is not superior to a prior unrecorded deed or mortgage of real property. *Norton v. Williams*, 9 Id., 528; *Savery v. Browning*, 18 Id., 246.

But an attachment of personal property takes precedence to a chattel mortgage on the same property executed and recorded by the mortgagor without the knowledge or consent of the mortgagee till after the levy. *Day v. Griffith*, 15 Id., 104.

A levy of an attachment upon property effected by fraud or violence of the officer or his employe, is unlawful and creates no lien upon the property seized. *Pomeroy & Co. v. Parmlee*, 9 Id., 140; *Patterson v. Pratt*, 19 Id., 353.

Where the sheriff seizes property beyond the limits of his own county, under a writ of attachment issued from the court in his county, and carries it back into his own county where he makes a formal levy thereon under the writ in his possession, such levy is illegal and creates no lien, and the property should be discharged. *Id.* See, also, *Parmlee v. Leonard*, Id., 131.

In an action against one who is the owner of stock in a corporation the secretary of such corporation was attached as garnishee, the notice being directed to him as an individual, requiring him not to pay any debt due by him to the defendant stockholder, it was held, that the process gave to the plaintiff no lien upon the defendant's stock, even though the secretary understood that the attachment was a valid one and acted in pursuance of that understanding. *Morar v. Walker et al.*, 46 Id., 164.

An attaching creditor cannot acquire through his attachment any higher or better right to the property or assets attached than the defendant had when the attachment was levied, unless he can show some fraud or collusion by which his rights have been impaired. *Thomas v. Hillhouse*, 17 Id., 67.

A defendant in attachment who is called before a judge to discover his property under section 2968, may, under section 349, be punished for contempt in refusing to answer proper questions. The power to punish such contempt is not confined to the courts. *Lutz v. Aylesworth*, 66 Id., 629.

SEC. 2970. [**Receiver appointed.**].—The court before whom the action is pending, or the judge thereof in vacation, may at any time, appoint a receiver to take possession of property attached under the provisions of this character, and to collect, manage and control the same, and pay over the proceeds according to the nature of the property and the exigency of the case.

This section conferring upon the court or judge, in a law action, the power to appoint a receiver of attached property, does not authorize the appointment of a receiver without a showing of acts rendering the exercise of the power necessary or proper. *Silverman v. Kuhn et al.*, 53 Iowa, 436.

SEC. 2971. [**Pay to clerk.**].—All money attached by the sheriff, or coming into his hands by virtue of the attachment, shall forthwith be paid over to the clerk to be by him retained till the further action of the court.

SEC. 2972. [**Other property.**].—The sheriff shall make such disposition of other attached property as may be directed by the court or judge, and where there is no direction upon the subject he shall safely keep the property subject to the order of the court.

(CHAPTER 45, LAWS OF 1884.)

SHERIFFS' INDEMNITY.

An Act to indemnify sheriffs in the service of writs of attachment. [Amendatory of code, chapter 1, title XVIII.]

SECTION 1. [**Levy of attachment.**].—*Be it enacted by the general assembly of the state of Iowa:* An officer is bound to levy an attachment on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which the plaintiff directs him to levy. But if after such levy he shall receive notice in writing under oath from some other person, his agent or attorney, that such property belongs to him, and stating the nature of his interest and the fact showing how he acquired such interest and for what consideration, such officer may release the property unless a bond is given as provided in the next section. But such officer shall be protected from all liability by reason of such levy until he receives such written notice.

SEC. 2. [**Notice: indemnifying bond.**].—When the officer receives such notice, he may forthwith give the plaintiff, his agent or attorney, notice that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sureties, to be approved by the officer to the effect that

the obligors will protect and indemnify him against the damages which he may sustain in consequence of the seizure and sale, and warrant to any purchaser of the property such estate or interest therein as is sold, and thereupon the officer shall proceed to subject the property to the attachment, and shall return the bond aforesaid to the district or circuit court of the county in which the levy is made.

SEC. 3. [Proceedings where bond is not given.]—If such bond is not given, the officer holding the attachment may, within a reasonable time after demand being made by said officer, restore the property to the person from whose possession it was taken, and the levy shall stand discharged.

SEC. 4. The provisions of the foregoing sections shall apply to attachments issued by justices of the peace, and such bonds shall be returned to the justice issuing said writ.

SEC. 5. All acts and parts of acts in conflict with this act are hereby repealed.

Approved March 22, 1884.

Since this chapter does not deprive a person whose property is seized under a writ of attachment against another of his right of action on account thereof, but only requires that such person shall give written notice to the officer of his ownership of the property, as a condition precedent to his right of action, the statute does not authorize the taking of property without due process of law, and is not unconstitutional on that ground. *Cheadle & Zangs v. Guittar*, 68 Iowa, 680.

Where a third party claiming attached property gives notice to the sheriff, stating that he claims it by virtue of a mortgage giving its date, and that the mortgage was given to secure certain promissory notes given by the mortgagor, this is sufficient, without stating the consideration of the notes. *Crawford, Trustee, v. Nolan*, 70 Id., 97.

PARTNERSHIP PROPERTY.

SEC. 2973. [Inventory and appraisement.]—In executing an attachment against a person who owns property jointly or in common with another, or who is a member of a partnership, the officer may take possession of such property so owned jointly, in common, or in partnership, sufficiently to enable him to inventory and appraise the same, and for that purpose shall call to his assistance three disinterested persons; which inventory and appraisement shall be returned by the officer with the attachment, and such return shall state who claims to own such property.

The creditor of one partner may levy upon the interest of his debtor in partnership property; but the creditors of the firm are entitled to be first satisfied from the partnership funds and property, and the separate creditors from the individual funds and property. *Hubbard v. Curtis*, 8 Iowa, 1. See also, *Richards, Crumbaugh & Shaw v. Haines*, 30 Id., 574; *Switzer v. Smith*, 35 Id., 269; *Cox v. Russell*, 44 Id., 556, 560.

The preference which the law gives the creditors of the partnership to be first satisfied out of the firm property, will be protected in proceedings by garnishment by firm and individual creditors. *Switzer v. Smith*, 35 Id., 269.

SEC. 2974. [Lien of plaintiff enforced by equitable proceedings.]—The plaintiff shall, from the time such property is taken possession of by the officer, have a lien on the interest of the defendant therein, and may, either before or after he obtains judgment in the action in which the attachment issued, commence an action by equitable proceedings to ascertain the nature and extent of such interest and to enforce the lien; and, if deemed necessary or proper, the court or judge may appoint a receiver under the circumstances and conditions provided in chapter twelve, of title seventeen.

By levying an attachment on partnership property in an action against a partner, the creditor simply acquires a lien upon the defendant's interest, the extent of which must be determined by equitable proceedings. *Cox v. Russell*, 44 Id., 556; *Richards, Crumbaugh & Shaw v. Haines*, 30 Id., 574.

GARNISHMENT.

SEC. 2975. (*As amended by ch. 58, 18th g. a.*) [How affected.]—The attachment by garnishment is effected by informing the supposed debtor or person holding the property, that he is attached as garnishee, and by leaving with him a written notice to the effect that he is required not to pay any debt due by him to the defendant or thereafter to become due, and that he must retain possession of all property of the said defendant then, or thereafter, being in his custody or under his control, in order that the same may be dealt with according to law, and the sheriff shall summon such persons as garnishees as the plaintiff may direct. [But no judgment shall be entered in any garnishment proceedings condemning the property or debt in the hands of the garnishee until the principal defendant shall have had ten days notice of such proceedings. If the case is pending in the district or circuit court the notice shall be served in the same manner as original notices are required to be served. If the case is pending before a justice of the peace, the defendant shall have at least five days personal notice of such proceeding, if he be a resident of the county; otherwise service of such notice may be made by posting the same in three public places in the township, in the manner provided by sections 3609 and 3610 of the code. The fact that the defendant is not a resident of the county may be shown by the affidavit of the plaintiff, or his attorney, filed with the justice before such notices are posted.]

A notice of garnishment directed to the mayor, recorder and treasurer of an incorporated city by their individual names and name of office respectively, informing them that they and each of them were "attached and held as garnishees, as a debtor and as a person holding property of" the defendant: *Held*, that the notice did not give the court jurisdiction of the city as garnishee. *Clafin v. Iowa City, Garnishee*, 12 Iowa, 234.

Where by the terms of a policy of fire insurance the same became forfeited and void by a change of occupancy and increase of hazard, the company was held not liable to be garnished as a debtor of the policy holder, there being no legal indebtedness on the part of the company. *Victor v. The Hartford Fire Ins. Co.*, 33 Id., 210.

A garnishee occupies the relation of defendant to the principal action, and, like the defendant therein, may take a change of venue. When either the plaintiff or the defendant has taken a change of venue, in which the garnishee has not joined, the case will proceed as to him in the court where it was commenced. *Westphal, Hinds & Co. v. Clark*, 42 Id., 371.

In proceedings by garnishment, notice to the defendant in the principal action of the proceeding is not necessary. *Phillips v. Germon*, 43 Id., 101.

And the garnishment process may be served before the original notice is served on the defendant. *Id.*

A debt which is not in existence at the time of garnishment is not a debt "to become due," in the contemplation of this section, hence wages earned after the service of garnishment process are not held thereby. *Thomas v. Gibbons*, 61 Id., 50.

The notice required by this section to be served on the principal defendant in garnishment cases must be served ten days before the trial of the issue in the case; or, if there be no issue, ten days before judgment is rendered against the garnishee. This notice is essential to the jurisdiction of the court to render such judgment, and where judgment was rendered without such notice it was proper for the court to make an order setting it aside as premature, and to continue the cause for such proceedings as either party might be advised to pursue. *Williams v. Williams*, 61 Id., 612.

A mortgagee of personal property which has never come into his possession is not bound, after being garnished by an attaching creditor of the mortgagor, to take possession of the property for the benefit of such creditor, and cannot, in the absence of fraud or collusion, be held liable for the same, though it exceeded in value the mortgage debt. *Curtis v. Raymond Bros. & Co.*, 29 Id., 52.

Without a writ of attachment, the sheriff has no authority to notify an individual that he is attached as garnishee, nor to take his answers to the interrogatories specified in section 2980 of the code. *Vanfossen v. Anderson*, 8 Id., 251.

It is not necessary that one should have the independent possession of the property of another coupled with the right to maintain the custody and control of it, to render it subject to garnishment in his hands. Although he may act under the order of another who has the disposition of the property, yet he may be still liable as a garnishee in an action against their common employer. *The First N'l B'k of Davenport v. The Davenport & St. P. R. Co.*, 45 Id., 120.

A prior settlement between the defendant in the main action and the garnishee, by which the indebtedness of the latter to the former is extinguished, avoids any liability of the garnishee upon a judgment against the defendant. His liability as garnishee is measured by his indebtedness to the defendant at the time of the garnishment. *Huntington v. Risdon*, 43 Id., 517.

Where one is sued in attachment and brought into court by proper notice, and the attachment is served upon the supposed debtor by process of garnishment, no valid judgment can be rendered against the garnishee unless notice of the garnishment has also been served on the principal defendant as required by this section as amended by chapter 58 laws of 1880. The original notice does not avail for the purpose of the garnishment. *Wise v. Rothchild Bros.*, 67 Id., 84.

A mortgagee of chattels, when garnished in an action against the mortgagor, cannot be charged in a money judgment for the excess in value of the chattels over the secured debt, when he does not have the chattels in possession. *Fountain Bros. v. Smith, garnishee*, 70 Id., 282.

In order that a garnishee may be holden for property of the debtor, he must have the property in his possession and not a mere right of possession, so that he can surrender it if the court so orders, in exoneration of his liability as garnishee. *Smally v. Miller*, 71 Id., 90.

SEC. 2976. [Sheriff garnished for money in his hands.]—A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment debtor of the defendant when the judgment has not been previously assigned on the record, or by writing filed in the office of the clerk and by him minuted as an assignment on the margin of the judgment docket, and also an executor for money due from the decedent to the defendant may be garnished, but a municipal or political corporation shall not be garnished.

The objection that the garnishee is exempt from the process of garnishment is a privilege which he alone can assert. *Wales & Son v. City of Muscatine*, 4 Iowa, 302.

And such garnishee may waive the privilege. *Clapp v. Walker*, 25 Id., 315.

Prior to the revision of 1860, a municipal corporation was liable to be garnished. *Id.* See, also, *Taylor v. The B. & M. R. R. Co.*, 5 Id. 114.

Under the statute, money belonging to a debtor, and in possession of a court or officer, may be attached by garnishment. *Patterson v. Pratt*, 19 Id., 358.

But property in the hands of a receiver cannot be seized on execution. *Martin v. Davis*, 21 Id., 535.

The rule that municipal corporations cannot be garnished is not limited to cases where it would interfere with the discharge of corporate duties, but is universal in its application, and the objection may be made at the time or before the answer is filed. *Jenks v. Osceola Tp.*, 45 Id., 554.

The judgment defendant in an action in the district court cannot be attached as garnishee, and subjected to a judgment in a garnishment proceeding in the circuit court. *McGuier v. Pitts*, 42 Id., 535.

The garnishment of a judgment debtor, under this section, does not affect the rights of claimants, but simply the liability of the garnishee. *Howe & Co. v. Jones*, 57 Id., 130.

A county is not liable to be attached as a garnishee, and it is doubtful whether it waives such exemption by bringing an action in relation to the garnished fund and making the garnishers parties thereto. *County of Des Moines v. Hinkley & Norris*, 62 Id., 637.

A railroad or other private corporation, may be garnished, but a municipal corporation is not thus liable. *Clapp v. Walker et al.*, 25 Id., 315. See, also, *Caldwell v. Stewart*, 30 Id., 379.

The guest of an inn-keeper may be garnished in an action by a creditor against the inn-keeper. It seems that municipal or political corporations are the only exemptions to the operation of the statutes as to who may be garnished. *Caldwell v. Stewart*, 30 Id., 379.

A trustee may be garnished for the surplus money arising from a sale under a trust deed, and such surplus applied to satisfy the debt of the person entitled to such surplus. *Cook & Sargent v. Dillon*, 9 Id., 407.

A mortgagee of chattels may be attached as a garnishee, and required to answer as to the amount of his claim yet unpaid, the amount and value of the property, and he may be held responsible for the sale and disposition of the property over and above the payment of his own claim. *Torbert v. Hayden*, 11 Id., 435; *Campbell v. Leonard*, Id., 489; *Jessup v. Bridge et al.*, Id., 572.

Where mortgaged chattels have been seized by the sheriff, to be sold under the mortgage, the balance of the proceeds, after satisfying the mortgage, is the property of the mortgagor, and in an action against him is subject to be garnished by the service of process upon the sheriff. *Hoffman v. Wetherell*, 42 Id., 89.

The holders of certain notes and accounts which has been assigned to them for collection, and the proceeds to be by them applied on certain specified debts of the assignor, were held not subject to garnishment by other creditors of the assignor. *Van Winkle v. The Iowa Iron & Steel Fence Co.*, 56 Id., 245.

SEC. 2977. [**Fund in court.**]—Where the property to be attached is a fund in court, the execution of a writ of attachment shall be by leaving with the clerk of the court a copy thereof, with notice, specifying the fund.

Under this and the preceding section, money, belonging to a debtor and in the possession of a court or officer, may be attached. *Patterson v. Pratt*, 19 Iowa, 358.

But property in the hands of a receiver appointed by the court is not legally liable to seizure by an officer under an execution. *Martin & Bro. v. Davis & Co.*, 21 Id., 535. In order to secure the recognition and enforcement of the right of a creditor in such property application must be made to the court by petition or motion.

SEC. 2978. [**Death of garnishee.**]—If the garnishee die after he has been summoned by garnishment and pending the litigation, the proceeding may be revived by or against his heirs or legal representatives.

SEC. 2979. [**When garnishee to appear at court.**]—Unless exempted as provided in the next section, the notice must also require the garnishee to appear on the first day of the next term of the court wherein the main cause is pending, or on the day fixed for trial if in a justice's court, and answer such interrogatories as may be then propounded to him, or that he will be liable to pay the entire judgment which the plaintiff eventually obtains against the defendant.

A garnishee is not compelled to appear and answer unless he is paid the fees and mileage to which a witness would be entitled, when demanded. *Westphal v. Clark*, 42 Iowa, 371.

But the Garnishee is not discharged from the obligation to retain in his possession all the property of the defendant under his control, and to withhold payment of any money due him, by reason of a failure to pay his fees. *Id.*

If the fees were not paid or tendered at the first summons, they may be subsequently paid or tendered and the attendance of the garnishee secured. *Id.*

The plaintiff has the option to direct the sheriff to take the answer of the garnishee, or to require his attendance in the court where the principal action is pending, without regard to the distance of the latter place from the place of notice. *Id.*

Where A. obtains a judgment against K. which on the same day he assigned to M., P. having a judgment against A. garnished K. who appeared and acknowledged his indebtedness on the judgment obtained by A. No notice of the assignment of the judgment had been given. *Held*, that K. could not be compelled to pay M., the assignee, while the judgment in the garnishment proceeding remained in force. *McGuire v. Pitts*, 42 Id., 535.

The rights of the plaintiff in the garnishment proceeding are not affected by the failure to give notice of the prior assignment, since in any event he could only attach the interest of A. which had already passed by the assignment. *Id.*

In *Branard v. Simmons*, 58 Id., 464, it was held that the answer of a garnishee to interrogatories propounded to him cannot be regarded as a pleading, and must be preserved in a bill of exceptions to become a matter of record. *ROTHROCK, J., dissenting.*

This section provides that the notice served on the garnishee requiring him to appear at court and answer interrogatories, shall require such appearance on the first day of the next term of the court, and that where the notice requires him to appear at any other time the court acquires no jurisdiction by means of such service. *Paddon v. Moore*, Id., 703.

The provisions of sections 2979 and 2980, requiring a garnishee to appear in court and answer interrogatories, cannot, in the nature of the case, apply to a corporation aggregate; and it is, therefore, competent for such corporation to answer in writing through some officer or agent authorized to do so, and cognizant of the facts. *Bailey v. The U. P. R'y Co. Garnishee*, 62 Id., 354. [Why could not such officer appear in court and answer interrogatories as well as to make and file a written statement; the former is no more of a *personal* act than the latter. *Ed.*]

SEC. 2980. [**Sheriff may take answers of garnishee.**]—When the plaintiff, in writing, directs the sheriff to take answer of the garnishee, the sheriff shall put to the garnishee the following questions:

1. Are you in any manner indebted to the defendant in this suit or do you owe him money or property which is not yet due? If so, state the particulars;

2. Have you in your possession or under your control, any property, rights or credits of the said defendant? If so, what is the value of the same, and state all particulars;

3. Do you know of any debts owing to the said defendant, whether due or not due, or any property, rights or credits belonging to him and now in the possession

or under the control of others? If so, state the particulars, and append the examination to his return.

Where the sheriff has attached property on a writ of attachment and has returned the same he has then no authority to summon a third party as a garnishee nor to take his answers as such. Nor has the court power to render judgment upon a notice of garnishment thus given and answers thus taken. *Vanfossen v. Anderson*, 8 Iowa, 251.

Where M. was employed in Iowa by the defendant, a corporation operating a railroad in both Iowa and Missouri, a judgment was rendered against him in the latter state by a court having jurisdiction, and wages due him from defendant were garnished, notwithstanding they were exempt under the laws of Iowa; held, that the garnishee was not bound to interpose such exemption as a defense, and that the judgment rendered against the garnishee could not be attacked in a collateral proceeding, for the purpose of again holding the defendant liable to M. *Moore v. The C. R. I. & P. R'y Co.*, 43 Id., 385.

A garnishee is not a party to an action in the sense that he is required to make defense for either of the parties, between whom he is presumed to be indifferent as to the merits of the case. *Id.*

If a partner is garnished in an action against his co-partner, he has a right to deduct from the amount he may owe the latter any liability which he would have a right to claim against the co-partner in a settlement with him. *Cox v. Russell*, 44 Id., 556.

The provision of sections 2979 and 2980, requiring a garnishee to appear in court and answer interrogatories, cannot, in the nature of the case, apply to a corporation aggregate; and it is, therefore, competent for such corporation to answer in writing or through some officer or agent authorized to do so, cognizant of the facts. *Bailey v. U. P. R'y Co., Garnishee*, 62 Id., 354.

MODE.

SEC. 2981. [When garnishee refuses to answer.]—If the garnishee refuses to answer fully and unequivocally all the foregoing interrogatories, he shall be notified to appear and answer on the first day of the next term of court, or on the day fixed for trial as above provided, and so he may be required in any event, if the plaintiff so notify him.

SEC. 2982. [Examination in court.]—The questions propounded to the garnishee in court, may be such as are above prescribed to be asked by the sheriff, and such others as the court may think proper and right.

Under the provisions of this section the plaintiff in garnishment has not the absolute right to examine the garnishee under oath before the court, or before a commissioner to be appointed by the court, without let or hindrance as to the pertinency of the examination; but it is within the power of the court to require that written interrogatories shall be filed, the competency of which shall be passed upon by the court before being answered by the garnishee. *Elwood & Co. v. Crowley, garnishee*, 64 Iowa, 68.

SEC. 2983. [When garnishee entitled to fees.]—Where the garnishee is required to appear at court, unless he has refused to answer as contemplated above, he is entitled to the pay and mileage of a witness, and may in like manner, require payment beforehand in order to be made liable for non-attendance.

SEC. 2984. [Presumption for failure to attend.]—If, when duly summoned, and his fees tendered when demanded, he fail to appear and answer the interrogatories propounded to him without sufficient excuse for his delinquency, he shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demand, and shall be dealt with accordingly.

See *Westphal et al. v. Clark et al.*, 42 Iowa, 371, cited in notes to § 2979, ante.

The garnishee is to be placed in no worse condition than if the attachment defendant, himself, were prosecuting an action against him on the claim. *Field v. Wood*, 9 Id., 249; *Smith, Two-good & Co. v. Clark & Henley*, Id., 241.

When a garnishee is called and fails to appear, a default may be entered against him, though no interrogatories have been prepared and propounded by the plaintiff. It is not necessary to submit interrogatories before the appearance of the garnishee. *Parmenter v. Childs*, and *Noble v. Same, etc.*, 12 Id., 22.

A garnishee is not compelled to appear and answer unless the fees to which a witness is entitled are paid or tendered, if demanded. *Westphal et al. v. Clark et al.*, 42 Iowa, 371.

Where a garnishee, after answering the statutory questions to the sheriff, was summoned before a referee for further examination, where she appeared but refused to answer, the plaintiff

might, under this section, have taken judgment against her, but having failed to move for judgment or having moved, he did not insist on a ruling on his motion, but procured an order for the further appearance and examination of the garnishee, *held* that, after such order, she had a right to assume that no judgment could be rendered against her until such further examination had been completed, and such facts elicited therefrom as would warrant the judgment. Also *held* that, on appeal to the supreme court from the ruling of the court below, excusing the garnishee from answering further, judgment could not be rendered against her in the supreme court, although the rulings of the court below were reversed. *Thompson v. Silvers et al.*, 59 Id., 670.

Witnesses, including garnishees, may demand their mileage and their fees for one day's attendance in advance, and, if not so paid, they need not attend; but if they do attend without demanding their mileage in advance, they cannot then, as a condition to testifying, for the first time demand their mileage. And where a garnishee appears and demands mileage and one day's attendance, as a condition to answering, and upon the refusal of the plaintiff to comply with such demand, he departs and refuses to answer, the court may rightly render judgment against him to the full extent of the plaintiff's demand. Whether he might not, after appearance, be entitled to his fees for one day's attendance before answering, *quære?* *Stockberger v. Lindsey*, 65 Id., 471.

SEC. 2985. [May exonerate himself.]—But, for a mere failure to appear, he is not liable to pay the amount of plaintiff's judgment, until he has had an opportunity to show cause against the issuing of an execution.

Where the record shows that the garnishee was called and failed to appear, the appellate court will not reverse an order of the court below refusing to set aside a default, upon the unsupported affidavit of the garnishee. *Parmenter v. Childs*, 12 Iowa, 22.

A showing to set aside a default against a garnishee, or against issuing an execution against him, must rebut the presumption of indebtedness, and show a sufficient excuse for the default. *Id.*

The notice to show cause, required by this section, before execution can issue against a garnishee, is a reasonable one only, and may be served during the term at which it requires the garnishee to appear. *Langford et al. v. The Ottumwa Water P. Co.*, 53 Id., 415. In this case more than ten days' notice was given, and it was not claimed to have been unreasonable. *Id.*

A judgment by default against a garnishee, who failed to appear when garnished, constitutes no bar to a subsequent action against him on the same debt for which he was garnished by one claiming to own the same by assignment from the defendant in the attachment proceeding, prior to the garnishment. *McPhail & Co. v. Hyatt*, 29 Id., 137.

Where a garnishee has been required to make his answer more specific, and upon failure to do so judgment has been rendered against him by default, a motion to set aside the default should be made at the same term the default was entered. *Scamahorn v. Scott et al.*, 42 Id., 529.

Where judgment by default is rendered against a garnishee he is entitled to notice to appear and show cause before an execution can be issued against him. *Evans v. Mohn*, 55 Id., 302, 304.

SEC. 2986. [By paying over money or property in his hands.]—A garnishee may, at any time after answer, exonerate himself from further responsibility, by paying over to the sheriff the amount owing by him to the defendant, and placing at the sheriff's disposal the property of the defendant, or so much of said debts and property as is equal to the value of the property to be attached, all of which may afterward be treated as though attached in the usual manner.

A garnishee is not chargeable with interest upon funds in his hands from the time of garnishment, unless the presumption, which obtains, that they were not used by him from that time, but kept as a separate fund to answer the judgment of the court, be in some manner overcome. And this rule is not changed by section 2986, which provides that the garnishee may exonerate himself from liability by paying the money to the sheriff. *Moore v. Lowrey*, 25 Id., 336.

The notice to show cause, required by this section, before execution can issue against a garnishee, is a reasonable one only, and may be served during the term at which it requires the garnishee to appear. *Langford et al. v. The Ottumwa Water P. Co.*, 53 Id., 415. In this case more than ten days' notice was given, and it was not claimed to have been unreasonable. *Id.*

Where judgment by default is rendered against a garnishee he is entitled to notice to appear and show cause before an execution can be issued against him. *Evans v. Mohn*, 55 Id., 302, 304.

A garnishee is not generally liable for costs but if he refuses to answer, or seeks to avoid a fair investigation of his liability to the party attached he will be charged with such costs as are caused by such conduct. *Fairfield v. Wood*, 9 Id., 249; *Fagg v. Parker*, 11 Id., 18.

A garnishee is not bound to pay money, or property attached in his hands, to the court. He may do so at any time before answer, to avoid further responsibility; but his failure to do so, or

to tender the amount confessed to be in his hands, does not make him liable for costs. *Randolph et al. v. Heastip*, 11 Id., 37.

SEC. 2987. [**Answer controverted.**].—When the garnishee has answered the interrogatories propounded to him, the plaintiff may controvert the same by pleading by him filed, and issue may be joined and the same tried in the usual manner. The answer of the garnishee shall be competent testimony on such trial.

While the answer of a garnishee is competent testimony in the trial of an issue taken thereon, its weight and credit are for the jury alone and the court has no authority to instruct in respect thereto. *Drake v. Buck*, 35 Iowa, 472; *Bean v. Barney et al.*, 10 Id., 498; *Randolph & Leslie v. Heastip*, 11 Id., 37.

The answer of the garnishee if uncontroverted must be taken as true. *Bean v. Barney et al.*, 10 Id., 498.

A garnishee should not be charged on his answer alone, unless it contains a clear admission of a debt due, or the possession of money or attachable property of the defendant. If it is doubtful he is entitled to judgment in his favor. *Morse v. Marshall*, 22 Id., 290; *Farwell & Co. v. Howard & Co.*, 26 Id., 381; *Smith, Twogood & Co. v. Clarke & Henley*, 9 Id., 241.

A garnishee having a lien upon the attached property in his hands, has a right to hold the same until his lien is discharged. *Smith, Twogood & Co. v. Clarke & Henley*, 9 Id., 246.

The trial of an issue made upon the answer of a garnishee denying indebtedness must take place in the court wherein the principal action is pending, and the garnishee is not entitled to a change of venue to the county of his residence. *Miller & Co. v. Mason & Co.*, 51 Id., 239.

Where a garnishee, in his answer, has denied indebtedness, and the plaintiff files a pleading controverting the answer of the garnishee and alleging an indebtedness in general terms, it was held, that the garnishee should have demurred or moved to make the pleading more specific, and that failing so to do he could not object to the introduction of evidence tending to establish an indebtedness. *Ruby v. Schee*, 51 Id., 422.

A garnishee upon making his answer, may move to be discharged, but if he fails to do this he must take notice of whatever is done in the case relating to his answer, the same as a party, and follow it until it is disposed of. *Chase v. Foster*, 9 Id., 421.

When a garnishee answers, confessing his indebtedness, the defendant may make any objection to judgment being rendered against the garnishee, which goes to show that the indebtedness is exempt from execution or attachment, or that the principal judgment was satisfied, or any other defense of a like nature; but he cannot object that the garnishee is not liable to the process of garnishment. *Wales & Son v. The City of Muscatine*, 4 Id., 302.

Upon the trial of an issue taken on the answer of a garnishee, the answer is admissible in evidence. *Fairfield v. McNany*, 37 Id., 75.

JUDGMENT.

SEC. 2988. [**May be entered.**].—If, in any of the above methods, it is made to appear that the garnishee was indebted to the defendant, or had any of the defendant's property in his hands either at the time of being served with the garnishee notice aforesaid, or at any time subsequent thereto, he is liable to the plaintiff in case judgment is finally recovered by him, to the full amount of that judgment, or to the amount of such indebtedness and of the property so held by him; and a conditional judgment shall be entered up against him accordingly, unless he prefers paying or delivering the same to the sheriff as above provided.

Unless there is a recovery of judgment against the defendant in the main action, there can be no judgment against a garnishee; hence, in an action on a promissory note, where the maker sets up as a defense, a prior garnishment, as the debtor of the payee of the note, he should show that final judgment was rendered against the payee of the note, in the suit in which he was garnished. *Barton v. Smith*, 7 Iowa, 85.

A judgment against a garnishee should not exceed that against the defendant in the principal action. *Timmons v. Johnson*, 15 Id., 23.

A garnishee cannot be made liable on a mortgage which is not negotiable, but is assignable, unless the mortgage is produced, or the garnishee is completely exonerated or indemnified from liability thereon after he may have satisfied the judgment. *Id.*

A garnishee should pay no money to his debtor until an order is made discharging him as garnishee. If he does so it will be at the peril of being compelled to pay it again. *Hughes v. Monty*, 24 Id., 499.

A garnishee cannot pay over money to the defendant after garnishment, though the defendant receive it as agent of, and in payment of a note given to the defendant's son, for property purchased of the father, but which it was afterwards claimed belonged to the son, if in fact the prop-

erty belonged to the father, and the use of the son's name was merely to defraud defendant's creditors, and the garnishee knew that the object of the garnishment was to reach this money. *Kesler v. St. John*, 22 Id., 565.

Where a party was garnisheed, who had been a partner of the defendant and held unpaid accounts belonging to the firm, it was held that judgment should not be rendered against him absolutely for the amount of the defendant's interest in the accounts, but only that he be directed to pay over the sum to which the partner was entitled as the same should be collected. *Cox v. Russell*, 44 Id., 556.

A garnishee is to be placed in no worse position than if the defendant was enforcing the claim against him. Nor is he entitled to occupy in any respect a better position. He is not to be placed in a situation, except from his own negligence or carelessness, where he will be compelled to pay the debt twice. *Smith, Twogood & Co. v. Clarke & Henley*, 9 Id., 241; *Fifield v. Wood*, Id., 249; *Burton v. District Township of Warren*, 11 Id., 166; *McCord v. Beatty*, 12 Id., 299; *Walters v. Washington Insurance Co.*, 1 Id., 404; *McPhail & Co. v. Hyatt*, 29 Id., 137; *Taylor v. The B. & M. R. R. Co.*, 5 Id., 114; *Morse v. Marshall*, 22 Id., 290; *Williams v. Housel*, 2 Id., 254.

Where, in a garnishment proceeding before a justice of the peace having jurisdiction of the person of the garnishee, as well as the subject matter, an erroneous judgment is rendered against the garnishee, from which he neglects to appeal, a court of equity will not grant relief. *B. & M. R. R. Co. v. Hall*, 37 Id., 620.

To render a garnishee liable on his answer alone, he must clearly admit his indebtedness to the defendant in the attachment or execution, and if there be a reasonable doubt of such indebtedness, judgment should not be rendered against him. *Church v. Simpson*, 25 Id., 408; *Morse v. Marshall*, 22 Id., 290.

The right of the plaintiff to a judgment against the garnishee is dependent upon the recovery of a judgment against the principal debtor; and a judgment rendered against the garnishee before judgment against the defendant is erroneous. *Bean v. Barney*, 10 Id., 498; *Barton v. Smith*, Id., 85; *Toll v. Knight*, 15 Id., 370.

The legal effect of a judgment against a garnishee upon his answer, condemning the property or debt in his hands, is to satisfy, to the extent thereof, the indebtedness between the garnishee and the principal debtor; and it is not necessary that the judgment entry shall in terms express such satisfaction. *Stradler Bros. & Co. v. Parmlee & Watts*, 14 Id., 175.

A garnishee will not be discharged by an order quashing the writ of attachment because of a defect in the petition, when such defect is cured by an amendment of the petition. *Id.*

A money judgment cannot be rendered against a garnishee upon his answer, showing that he has in his possession property of the defendant upon which he holds a lien, without giving him an opportunity to discharge the judgment by a surrender of the property, upon provision being made for the payment of his lien. *Hawthorn v. Unthank*, 52 Id., 507.

SEC. 2989. [When debt not due.]—If the debt of the garnishee to the defendant is not due, execution shall be suspended until its maturity.

SEC. 2990. [Negotiable paper.]—The garnishee shall not be made liable on a debt due by negotiable paper, unless such paper is delivered, or garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment.

A garnishee cannot be made liable on a mortgage or assignable paper, unless the same be produced or the garnishee completely exonerated, or indemnified from liability thereon after he shall have paid the judgment. *Simmons v. Johnson*, 15 Iowa, 23; *Yocum v. White*, 36 Id., 288.

While the rights of the holder of a promissory note may be affected by a garnishment of the maker, before the transfer under which he claims, the rights of a holder who receives a note before garnishment are not affected thereby. *Fowler v. Doyle*, 16 Id., 534.

The garnishment of the maker of a negotiable note past due will not render him liable thereto, unless the note is delivered up, or he be completely exonerated or indemnified from all liability thereon. *Hughes v. Monty*, 24 Id., 499.

If the maker of a negotiable or assignable paper, when garnished thereon fail to require the note to be delivered up or to be indemnified, as he has a right to demand, and does not interpose to prevent a judgment against him, then such judgment will constitute no bar or defense to an action on the note by a holder of the paper who received it before the garnishment. *Yocum v. White*, 36 Id., 288.

In case of the garnishment of a debt due by non-negotiable or over-due paper, where the same has been assigned, the assignee should give notice to the garnishee of the assignment in time to enable him to show the fact by his answer, or at least before judgment against him. If the garnishee has received such notice and neglects to show in his defense that the debt has been assigned he cannot resist a subsequent claim by the assignee; and if he shows the assignment in his answer he cannot be charged as garnishee. *Walters v. The Washington Ins. Co.*, 1 Id., 404; *McCord v. Beatty*, 12 Id., 299.

Where a garnishee is indebted to the defendant on negotiable notes, an order that plaintiff have judgment against the garnishee for the amount of the claim against the defendant, provided the garnishee be first fully indemnified as provided by law, or the notes surrendered to him, is not a final judgment, and an execution issued thereon will be enjoined on the application of the assignee. *Seals v. Wright*, 37 Id., 171.

The answer of a garnishee that he holds a note made by a third person to the debtor, which was placed in his hands by the latter for the purpose of paying a certain judgment against the debtor on which the garnishee is a surety for the stay of execution, will not justify a judgment against the garnishee. *Dryden v. Adams*, 29 Id., 195.

Where the answer of the garnishee shows merely that he holds a mortgage upon personal property of the debtor, which is in possession of the latter, and the value of which is not shown, the garnishee should be discharged. *Nat. Bank v. Berry*, 29 Id., 266.

Exemption from garnishment in another state where the debtor resides, cannot be pleaded by a garnishee in this state, unless the amount due the debtor from the garnishee be also exempt by the laws of this state. *Leiber v. The U. P. R. Co.*, 49 Id., 688.

A garnishee is not a party to the action in the sense that he is required to make defense for either of the parties or set up the exemption laws. He is presumed to be indifferent respecting the merits of the case. *Moore v. The C., R. I. & P. R. Co.*, 43 Id., 385.

That the notice to a garnishee required him to appear in the district court, will not affect the power of the circuit court to render judgment against him upon his answers taken by the sheriff, showing his indebtedness. Nor will the judgment be disturbed where it is not alleged to be unjust and the garnishee does not himself complain. *Fanning v. The Minn. R. Co.*, 37 Id., 379.

Where A was indebted to B on a promissory note which was overdue, in an action against B by C, he may garnish A as the debtor of B, and hold him liable, when the note had been assigned after the garnishment and before the garnishee answered, when the garnishee had knowledge of the fact at the time he answered. *Stevens v. Pugh*, 12 Id., 430; *McCord v. Beatty*, Id., 299.

SEC. 2991. [Judgment conclusive.]—The judgment in the garnishment suit condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demand, is conclusive between the garnishee and defendant.

SEC. 2992. [Docket of original case shall contain.]—The docketing of the original case shall contain a statement of all the garnishments therein, and when judgment is rendered against a garnishee, the same shall distinctly refer to the original judgment.

In a judgment against a garnishee, it is a sufficient compliance with this section if the record entry contains the title of the cause in which the original judgment was rendered, distinctly and fully stated. *Boyd v. Rutlege*, 25 Iowa, 271.

Where a single pleading was filed controverting the answer of two garnishees, and on motion one of the garnishees was dismissed therefrom as improperly joined with his co-garnishee, it was held that the plaintiff was entitled to file a further pleading taking issue upon the answer of such garnishee. *Coffman v. Ford*, 56 Id., 185.

SEC. 2993. [Appeal.]—An appeal lies in all garnishment cases at the instance of the plaintiff, the defendant, the garnishee, or an intervenor claiming the property or money.

Where an erroneous judgment is rendered against a garnishee by a justice of the peace, having jurisdiction of the person of the garnishee, as well as the subject matter, from which judgment he neglects to appeal, a court of equity will not grant relief. *The B. & M. R. Co. v. Hale*, 37 Iowa, 620.

Where an erroneous judgment is rendered against a garnishee, from which he appeals to the supreme court, the judgment will not be reviewed unless it appears that exception was taken thereto at the time of its rendition. *Eason v. Lester*, 31 Id., 475; *Pigman v. Denny*, 12 Id., 396; *McKinley v. Bechtel*, Id., 561; *Downing v. Harman*, 13 Id., 535; *Robison v. Saunders, Kibbon & Co.*, 14 Id., 539; *Perkins v. Whittam*, Id., 596.

RELEASE OF PROPERTY.

SEC. 2994. [By defendant executing bond.]—If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient securities to be approved by the officer having the attachment, or after the return thereof by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be deemed an appearance of such defendant to the action.

The bond provided for by this section, may be taken and approved by the sheriff in vacation, if offered before he returns the writ, or by the clerk after the return has been made. *Budd v. Durlall*, 36 Iowa, 315.

Where the parties and the sheriff intended to execute a delivery bond under section 2996, by mistake executed a bond under section 2994, to perform the judgment, which before signing was carefully read over by the obligors, fully understanding its language, it was held to be a mistake of law against which they could not be relieved. *Moorman v. Collier*, 32 Id., 138. To the same effect is *Glenn & Pryce v. Staller*, 42 Id., 107.

Where the sheriff releases attached property under a bond providing that the obligors shall be liable for any judgment that may be rendered, the property is nevertheless constructively in his possession so long as it is in the possession of the bondsmen, and parol evidence is not admissible to show that the property was in fact released to the owner thereof. *Selz & Co. v. Belden et al.*, 48 Id., 451.

Where attachment defendants executed to the sheriff, after the levy of the writ upon property of sufficient value to satisfy the plaintiff's demand, a bond conditioned that the defendants "shall produce said goods in satisfaction of the judgment in said action, or pay such judgment as shall be rendered against them," it was held that the bond was valid and that an action for a breach thereof was maintainable by the attachment plaintiffs. *Sheppard & Morgan v. Collins*, 12 Id., 570.

The execution of an appeal bond on the removal of a case to the supreme court in which a delivery bond had been executed to discharge the attached property, does not discharge the sureties on such bond. *Williams v. Robinson*, 21 Id., 498.

The defendant in attachment gave bond as provided in this section, and the attached property was restored to him. On the trial the judgment was for the defendant for costs, the attachment was dissolved, and the sureties on defendant's bond were discharged. Plaintiff excepted to all parts of the judgment except the order discharging the sureties, and he appealed from the judgment generally. The order discharging the sureties was in no way raised or considered on appeal, but the judgment otherwise was reversed. Upon a new trial plaintiff recovered judgment and thereupon moved for judgment against the sureties on the bond of defendant, and it was so entered. Held that such judgment was erroneous, because the order discharging them was not excepted to, and was a final adjudication of their liability. *Barton v. Thompson et al.*, 66 Id., 526.

SEC. 2995. [Judgment on bond.]—Such bond shall be part of the record, and, if judgment go against the defendant, the same shall be entered against him and sureties.

Where a delivery bond is given under section 2994, and judgment is rendered against the attachment defendant, such judgment may, under section 2995, be entered also against the sureties in the bond; but this remedy against the sureties is not exclusive, and a separate action on the bond may be maintained against the sureties to recover the amount of the unpaid judgment. *The State for the use of Meeker v. McGlothlin*, 61 Iowa, 312.

SEC. 2996. [By defendant or person in possession giving bond.]—The defendant, or any person in whose possession any attached property is found, or any person making affidavit that he has an interest in it, may, at any time before judgment, discharge the property attached, or any part thereof, by giving bond with security, to be approved by the sheriff, in a penalty at least double the value of the property sought to be released, but if that sum would exceed three times the claim, then in such sum as equals three times the claim, conditioned that such property, or its estimated value, shall be delivered to the sheriff to satisfy any judgment which may be obtained against the defendant in that suit within twenty days after the rendition thereof. This bond shall be filed with the clerk of the court.

A bond executed by an intervenor after judgment, and not containing the conditions prescribed for a delivery bond, nor executed in the manner provided by the statute, cannot be regarded as a delivery bond, though executed as such, and will not entitle the intervenor to the possession of the attached property. *Jenkins v. Warnock*, 37 Iowa, 278.

Property attached by garnishment may be released by the execution of a delivery bond, in the same manner that property taken into the actual custody of the officers is discharged. *Woodward v. Adams*, 9 Id., 474.

In an action on a delivery bond, it is not necessary for the plaintiff to aver or prove that the property released was appraised, or its value fixed by agreement before the execution of the bond. *Id.*

A third person claiming ownership of personal property, attached in an action to which he is not a party, who has obtained actual possession of the property by the execution of a delivery bond to the officer levying the writ under this and the following sections, may intervene in the

attachment suit by virtue of section 3016 of the code, and have his rights in the property adjudicated. *Tuttle v. Wheaton et al.*, 57 Id., 304.

Where a delivery bond is executed, and the property is not delivered according to the requirements of the bond, an action may be maintained thereon, without any order having been entered in the principal action making the judgment thereon a lien on the attached property. *Wyant v. Dodson et al.*, 12 Id., 22; *Garretson v. Reeder*, 23 Id., 21.

Although a delivery bond may be defective as a statutory bond, because not in the form prescribed in the statute, yet it may be valid as a common law obligation. *Id.*

A bond given by an attachment defendant, in whose custody the property is left, conditioned that he will return the same on demand to the sheriff, does not constitute a statutory delivery bond which will discharge the attachment. *Allerton v. Eldridge*, 56 Id., 709.

SEC. 2997. [Appraisal of property.]—To determine the value of property in cases where a bond is to be given, unless the parties agree otherwise, the sheriff shall summon two disinterested persons having the qualification of jurors, who, after having been sworn by him to make the appraisal faithfully and impartially, shall proceed to the discharge of their duty. If such persons disagree as to the value of the property, the sheriff shall decide between them.

The obligors in a delivery bond given to discharge property from attachment, cannot object to the validity of the bond on the ground that the property released was not appraised before the execution of the bond. *Woodward v. Adams*, 9 Iowa, 474.

SEC. 2998. [Defense to action on bond.]—In an action brought upon the bond above contemplated, it shall be a sufficient defense that the property for the delivery of which the bond was given, did not, at the time of the levy, belong to the defendant against whom the attachment was issued, or was exempt from seizure under such attachment.

In an action on a delivery bond, an answer averring that the property attached, at the time of the levy, did not belong to the defendant in the attachment proceeding, is insufficient, unless it also alleges to whom the property did belong. *Blatchley & Simpson v. Adair*, 5 Iowa, 545.

SALE OF PERISHABLE PROPERTY.

SEC. 2999. [How and when done.]—When the sheriff thinks the property attached in danger of serious and immediate waste and decay, or when the keeping of the same will necessarily be attended with such expense as greatly to depreciate the amount of proceeds to be realized therefrom, or when the plaintiff makes affidavit to that effect, the sheriff may summon three persons having the qualification of jurors to examine the same. The sheriff shall give the defendant, if within the county, three days' notice of such hearing, and he may appear before such jury and have a personal hearing. If they are of the opinion that the property requires soon to be disposed of, they shall specify in writing a day beyond which they do not deem it prudent that it should be kept in the hands of the sheriff. If such day occurs before the trial day, he shall thereupon give the same notice as for sale of goods in execution, and for the same length of time, unless the condition of the property renders a more immediate sale necessary. The sale shall be made accordingly. If the defendant gives his written consent, such sale may be made without such finding.

SPECIAL ATTACHMENTS.

SEC. 3000. [In actions to enforce liens, recovery, sale or partition of real property.]—In an action to enforce a mortgage of, or lien upon, personal property, or for the recovery, sale or partition of such property, or by a plaintiff having a future estate or interest therein, for the security of his rights, where it satisfactorily appears by the petition, verified on oath or by affidavits, or the proofs, in the cause that the plaintiff has a just claim, and that the property has been or is about to be sold, concealed or removed from the state, or where plaintiff states on oath that he has reasonable cause to believe, and does believe, unless prevented

by the court, the property will be sold, concealed, or removed from the state, an attachment may be granted against the property.

Where an officer in the levy of a special attachment not having indorsed thereon the direction of the court or judge, did not take the attached property into his custody, nor give notice of the levy, nor make such return as required by the statute, the levy was held invalid. *Crawford v. Newell*, 23 Iowa, 453.

SEC. 3001. [By vendor of property fraudulently purchased.]—In an action by a vendor of property fraudulently purchased, to vacate the contract and have a restoration of the property, or compensation therefor, where the petition shows such fraudulent purchase of property and the amount of the plaintiff's claim, and is verified by his oath, an attachment against the property may be granted.

SEC. 3002. [Granted by court or judge: terms of.]—The attachment in the cases mentioned in the last two sections may be granted by the court in which the action is brought, or by the judge of any court, upon such terms and conditions as to security on the part of the plaintiff for the damages which may be occasioned by them, and with such directions as to the disposition to be made of the property attached, as may be just and proper under the circumstances of each case.

SEC. 3003. [Describe property: to be indorsed by court or judge.]—The attachment shall describe the specific property against which it is issued; and shall have indorsed upon it the direction of the court or judge as to the disposition to be made of the attached property. It shall be directed, executed, and returned as other attachments.

See *Crawford v. Newell*, 23 Iowa, 453, cited in note to section 3000.

SEC. 3004. [Court to fix terms of bonds given to discharge property.]—The court may, in any of the cases mentioned under this head of specific attachments, direct the terms and conditions of the bond to be executed by the defendant, with security, in order to obtain a discharge of the attachment or to retain the attached property.

INDEBTEDNESS DUE THE STATE.

SEC. 3005. [Duty of district attorney and attorney general.]—In all cases in which any person is indebted to the state of Iowa, or to any officer or agent of the state for the use or benefit of the state, the proper district attorney, or the attorney general, shall demand payment or security therefor, whenever, in the opinion of said district attorney or attorney general, the debt is not sufficiently secured.

SEC. 3006. [Attachment may issue: conditions of.]—In all suits for money due to the state of Iowa, or due to any state agent or officer for the use of the state, it shall be lawful for an attachment to issue against the property or debts of the defendant not exempt from execution, upon the filing of an affidavit by the district attorney of the proper district, or of the attorney general, that he verily believes that a specific amount therein stated is justly due, and the defendant therein has refused to pay or secure the same, and that unless an attachment is issued against the property of the defendant there is danger that the amount due will be lost to the state.

A demand must first have been made of the party against whom an attachment is sought to entitle the state thereto under sections 3005 and 3006 of the code. *The State v. Morris*, 50 Iowa, 203.

An affidavit to the effect that the defendant is in another state, and that he is about to sell or remove his property, is not sufficient to authorize an attachment. *Id.*

SEC. 3007. [No bonds can be required.]—The attachment so issued shall be levied as in other cases of attachment, and no bond shall be required of the plaintiff in such cases, and the sheriff shall not be authorized to require any indemnifying bond before levying the same.

SEC. 3008. [**Property released: how.**]—Any property taken on attachment under the provisions of the two preceding sections, shall be subject to be released upon the execution of a delivery bond, with sufficient security as provided by law in other cases.

SEC. 3009. [**Damages paid by sheriff becomes a debt against the state.**]—In case any sheriff shall be held liable to pay any damages by reason of the wrongful execution of any writ of attachment issued under the three preceding sections, and if a judgment be rendered therefor by any court of competent jurisdiction, the amount of judgment when paid by such sheriff shall become a claim against the state of Iowa in favor of such sheriff, and a warrant therefor shall be drawn by the auditor upon proper proof.

SEC. 3010. [**Sheriff's return: contents of specified.**]—The sheriff shall return upon every attachment what he has done under it. The return must show the property attached, the time it was attached, and the disposition made of it, by a full and particular inventory; also the appraisement above contemplated, when such has been made. When garnishees are summoned, their names, and the time each was summoned, must be stated. And where real property is attached, the sheriff shall describe it with certainty to identify it, and, where he can do so, by a reference to the book and page where the deed under which the defendant holds is recorded. He shall return with the writ all bonds taken under it. Such return must be made immediately after he shall have attached sufficient property, or all that he can find; or, at latest, on the first day of the first term on which the defendant is notified to appear.

Where real property has been attached, and the court, in rendering judgment, orders the sale thereof to satisfy the judgment, this will not authorize the sale thereof on execution issued thereon after the death of the judgment debtor; such sale is void. *Welch v. Battern et al.*, 47 Iowa, 147.

The officer's return on a writ of attachment is the statutory evidence of what he has done under it; as, for example, that he has attached a person, named, as garnishee. And where the writ had no such return indorsed thereon, the garnishee was properly discharged upon the ground that there was no legal evidence before the court that he had been garnished. A notice of garnishment with a return of service indorsed thereon, did not furnish the proper evidence. *Boch & Son v. Signmaster, Garnishee*, 62 Id., 511.

The last clause of this section does not require that a writ of attachment be returned by the first day of the term at which the defendant is required to appear, unless it has been executed by that time, but the writ remains in force, and a levy may be made at any time before the judgment and before the return of the writ. *Westphal, Hinds & Co. v. Sherwood & Chapman*, 69 Id., 364.

A sheriff's return on a writ of attachment is evidence only of such of his acts as he may lawfully do under and by virtue of the writ, and so, where the sheriff returned, not only that he had seized certain chattels under the writ, but that he had also, at plaintiff's direction, seized, closed up and held possession of the houses in which the chattels were stored, which was not necessary for the preservation of the chattels, *held*, in an action on the attachment bond, that the return was not evidence of such seizure of the buildings, nor of the attachment plaintiff's direction so to seize them. *The Charles City Plow & Mfg. Co. v. Jones & Co. et al.*, 71 Id., 234.

SEC. 3011. [**Judgment: how satisfied.**]—If judgment is rendered for the plaintiff in any case in which an attachment has been issued, the court shall apply in satisfaction thereof, the money arising from the sales of perishable property, and if the same is not sufficient to satisfy the plaintiff's claim, the court shall order a sale by the sheriff of any other attached property which may be under his control.

SEC. 3012. [**Court may control property.**]—The court may, from time to time, make and enforce proper orders respecting the property, sales, and the application of the moneys collected.

SEC. 3013. [**Expenses for keeping.**]—The sheriff shall be allowed by the court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the costs.

Where a sheriff employs persons to aid him in guarding attached property, he is personally liable to them for the reasonable value of their services; and he must look for reimbursement to the

court, which should allow "the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the costs. *Rowley v. Painter*, 69 Iowa, 432.

SEC. 3014. [**Surplus.**—Any surplus of the attached property and its proceeds shall be returned to the defendant.

SEC. 3015. [**Discharge of property.**—If judgment is rendered in the action for the defendant, the attachment shall be discharged, and the property attached, or its proceeds shall be returned to him.

Where, in an attachment proceeding, the special verdict of the jury shows that, at the time of the commencement of the action and issuing of the attachment, no cause of action had accrued to the plaintiff, the defendant is entitled, on motion, to have the attached property discharged. *Craver v. White*, 29 Iowa, 336.

The clerk does not render himself liable to the plaintiff by making payment to the defendant of the proceeds of the sale of attached property, after the dissolution of the attachment, if such payment is made in good faith, and without notice of plaintiff's intention to appeal, and continue his attachment by a *supersedeas* bond, but it would be better to have an order of the court directing such payment. *Danforth, Davis & Co. v. Rupert et al.*, 11 Id., 547.

SEC. 3016. [**Intervention: how made and tried.**—Any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof or any attached debt, present his petition, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in, or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded; and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may impanel a jury to inquire into the facts. If it is found that the petitioner has title to, a lien on, or any interest in such property, the court shall make such order as may be necessary to protect his rights. The cost of such proceedings shall be paid by either party at the discretion of the court.

The filing of a petition of intervention under this section, upon which an injunction is granted as merely auxiliary to the proceeding at law in which every issue presented can be tried, does not change the proceeding or the method of trial from law to equity. *Pool v. Paul*, 23 Iowa, 421.

In an action before a justice of the peace C. was garnished, and answered that he was indebted to the defendant R., who replied that the debt was due to his wife. On appeal in the circuit court, W. and A. were permitted to intervene as assignees of the debt. *Held*, that the intervention was properly allowed, and that the failure of the garnishee to appeal would not have the effect to affirm the judgment of the justice. *Daniels & Co. v. Clark*, 33 Id., 556.

The plaintiff in garnishment proceedings stands as against the garnishee in the same relation as the defendant in the main action, and is liable to be met by the same defenses which the garnishee might make against an action by the defendant. *Id.*

The remedy of a third person claiming a lien upon or interest in attached property is under this section, and not by motion to discharge the property from the levy under section 3018. *Tidrick v. Sulgrove*, 38 Id., 339.

A party who intervenes in an attachment proceeding, and claims to be the owner of property, and his right thereto is established, may subsequently maintain an action against the plaintiff for the use of the property and reasonable costs of intervention. *Jennings v. Hoppe*, 44 Id., 205.

An assignee, for the benefit of creditors, may intervene in an attachment suit brought against his assignor prior to the assignment, and set up a claim against the plaintiff therein for damages sustained by his assignor by reason of the wrongful suing out of the attachment, and this though the assignor has himself pleaded the same as a counter claim. *Dunham v. Greenbaum*, 56 Id., 303.

When real estate has been sold under an attachment, a third party cannot intervene claiming a superior lien by virtue of a prior mortgage, but may proceed in equity to restrain the sale. *The First National Bank, etc., v. Jasper County*, 71 Id., 486.

After final judgment has been rendered in attachment proceedings, settling all the rights of the parties thereto, including an intervenor, and after the attached property has been sold, it is too late to file an amendment to the intervening petition setting up new issues and new causes of action. This section of the code does not authorize such amendment. *Bicklin v. Kendal*, 72 Id., 490.

So long as money paid into court by a garnishee on execution has not been paid over to the execution plaintiff, a third party claiming the money may intervene in the action for the purpose of asserting his claim to the money. *Edwards v. Cosgro*, 71 Id., 296.

SEC. 3017. [Defendant's remedy only on bond.]—The fact stated as a cause of attachment, shall not be contested in the action by a mere defense. The defendant's remedy shall be on the bond, but he may, in his discretion, sue thereon by way of counter-claim, and in such case shall recover damages as in an original action on such bond.

The allegations in a petition setting forth the causes for an attachment do not constitute any part of the cause of action, and cannot be reached by demurrer, nor can issue be joined thereon by answer. *Holliday v. Herryford*, 9 Iowa, 353; *Berry v. Gravel*, 11 Id., 135; *McLaren v. Hall*, 26 Id., 297; *Burrows v. Lehdorff*, 8 Id., 96; *Branch of State Bank v. Morris*, 13 Id., 136.

In the main action the defendant in his answer may set up a counter-claim in the nature of an action on the attachment bond, in which he may controvert the causes alleged for the attachment. *Toyn v. Bringolf*, 47 Id., 133.

See *Tuttle v. Wheaton*, 57 Id., 304, cited in notes to section 2956, *ante*; see, also, *Howe & Co. v. Jones*, 57 Id., 135.

A motion to dissolve an attachment cannot be aided by affidavits showing that the statements of cause for the attachment were not true. No issue can be joined in the principal action on the averment of facts on which the attachment is prayed. *Sturmin v. Stone*, 31 Id., 115.

Where, in an action of attachment, the defendant in his answer set up a counter claim for damages for wrongfully suing out the attachment, and recovered judgment by default, such judgment was held not conclusive upon the surety on the attachment bond, he not having been a party to the action, and that an action on such judgment against him was not maintainable. *Bunt v. Rheum*, 52 Id., 619.

SEC. 3018. [Discharge of attachment on motion: causes for.]—A motion may be made to discharge the attachment, or any part thereof, at any time before trial for insufficiency of statement of cause thereof, or for other cause making it apparent of record that the attachment should not have issued, or should not have been levied on all or on some part of the property held.

In order to justify the discharge of attached property under this section, on the ground that it is exempt from levy, the case should be made clear and satisfactory. *McLaren v. Hall*, 26 Iowa, 297.

Attached property will be discharged on motion under this section, only when it is *apparent of record* that the property should not have been levied on. *Tidrick v. Sulgrove*, 38 Id., 339.

An officer who holds personal goods in his possession under a writ of attachment, may at his discretion, release the same on the claim of a third party that he is their owner, but the officer does so at his peril, and he has the burden of establishing that the attached property did not belong to the defendant. *Wadsworth v. Walliker*, 45 Id., 395.

It is competent to move to discharge an attachment on real property where the question of ownership is in issue, when the facts upon which the motion is based are conceded. *Rusch v. Moore*, 48 Id., 611.

Where an attached property was released by a justice of the peace on motion, as exempt, it was held that the decision of the justice was conclusive as to the defendant's right to the property until reversed, and that he might maintain replevin therefor if again seized by the plaintiff, although the latter had sued out a writ of error from the decision of the justice but had filed no supersedeas bond. *Pellersells v. Allen et al.*, 56 Id., 717.

A motion to discharge an attachment based on the allegation that the defendant was about to remove his property out of the state, without leaving sufficient for the payment of his debts, which motion is supported by affidavits showing that the property attached was exempt, should have been sustained under this section. *Hastings v. Phœnix*, 59 Id., 394; *Joyes v. Miller Bros.*, Id., 761.

SEC. 3019. [Plaintiff to have two days to appeal.]—When an attachment has been discharged, if the plaintiff then announce his purpose to appeal from such order of discharge, he shall have two days in which to perfect his appeal, and during that time such discharge shall not operate a return of the property nor divest any lien, if such appeal be so perfected at the end thereof.

SEC. 3020. [Same.]—But, if judgment in the action be also given against the plaintiff, he must also, within the same time, take his appeal thereon, or such discharge shall be final.

Where an attachment has been dissolved in legal effect by the rendition of a judgment, and the party holding the property under the attachment fails to appeal within two days after the judgment is rendered, the attachment is not revived by appeal, nor is the trial court deprived of jurisdiction to order a discharge. *Hager v. Spofford*, 44 Id., 369.

SEC. 3021. **This chapter shall be liberally construed,** and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ, or other proceeding; and no attachment shall be quashed, dismissed, or the property attached released, if the defect in any of the proceedings has, or can be amended so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings; the causes for attachment shall not be stated in the alternative.

A petition or affidavit for an attachment may be amended, and after amendment the plaintiff will not be prejudiced by the defect corrected, neither is it necessary to issue and levy a new writ upon the attached property. *Wadsworth & Wells v. Cheeney & Stinson*, 13 Id., 576.

It is not necessary to recite in a writ of attachment the causes alleged in the petition as grounds for attachment. *Id.* See also, *Hays et al. v. Gorb*, 3 Id., 203. Nor is it necessary to recite in the writ that a bond has been filed. *Ellsworth v. Moore*, 5 Id., 468; *Hays v. Gorb* *supra*.

Amendments to the petition, which do not state any new cause for the attachment, but merely make that in the original more specific, held permissible under section 3242 of the revision, and that where the penalty of the bond is for too small an amount, the same may be amended by filing a new bond in the proper amount. So, too, a clerical error in the amount stated in the writ, causing a slight discrepancy between it and that claimed in the petition and notice, may be amended, and it was held error to dissolve an attachment for these defects, after the amendments had been made. *Gourley v. Carmody*, 23 Id., 212. This section of the code is more liberal yet than section 3242 of the revision.

An amendment, curing a defect as to the form of the affidavit for the attachment, may properly be allowed. *Shaffer v. Sundwall*, 34 Id., 579.

Where a writ of attachment from the circuit court had the seal of the district court affixed thereto instead of that of the circuit court, the writ was held under the revision, to be fatally defective, and could not be amended. *Id.*

A person not a party to the action, though claiming to own the attached property cannot move to dissolve the attachment. *Williams v. Walker*, 11 Id., 77.

Proceedings in attachment cannot be successfully attacked on the ground that the jurat to the affidavit is not signed by the officer administering the oath, if it be shown that the affidavit was, in fact, sworn to before him. *Cook v. Jenkins & Co.*, 30 Id., 452; *Stout v. Folger*, 34 Id., 71.

And where it appears that, through inadvertence or omission, the affidavit to a petition for an attachment was not signed by the party, though actually sworn to by him, nor the affidavit certified by the officer, the defect may be cured by amendment. *Stout v. Folger*, 34 Id., 71.

When a motion is made to dissolve an attachment, or quash the writ, because the bond is insufficient, the motion should be overruled, if a new and sufficient bond is filed after the motion. *Van Winkle v. Stevens & Co.*, 6 Id., 264.

So, also, where the motion is made because of defects in the petition or affidavit, if the defects be corrected by amendment. *Bunn v. Pritchard*, 6 Id., 56; *Langworthy v. Waters*, 11 Id., 432.

Where a writ of attachment is issued under the seal of the district court, while the action was pending in the circuit court, it was held competent to amend the writ by affixing the proper seal thereto, and a motion to quash for such cause will not lie. *Murdough v. McPherrin*, 49 Id., 479.

An attachment bond which recited that the proceedings were being had in the district court of a county other than the one in which the suit was actually commenced, it was held that the defect might be cured by filing an amended bond. *Holmes & Avery v. Budd*, 11 Id., 186.

A defective verification of a petition which asks an attachment may be amended under this section. *Lowenstein v. Monroe*, 52 Id., 231.

So under this section the writ of attachment may be amended after levy. *Atkins v. Womeldorf*, 53 Id., 150; *Murdough v. McPherrin*, 49 Id., 479.

And where a writ of attachment has been issued and levied, in an action not founded on contract, without an allowance of the amount in value of property that might be attached, having been first made, the defect may be cured by an allowance made by the court after the filing of the motion to quash. It is not a valid objection that the allowance was made by the court instead of by the judge. *Magoon v. Gillett*, 54 Id., 54.

SEC. 3022. [**Encumbrance book: notice of attachment to be entered in.**—No levy of attachment on real estate shall be notice to a subsequent vendee or encumbrancer in good faith, unless the sheriff making such levy shall have entered in a book which shall be kept in the clerk's office of each county by the clerk thereof, and called "encumbrance book," a statement that the land, describing it, has been attached, and stating the cause in which it was so attached, and when it was done and signed by such sheriff; and such book shall be open as other books kept by such clerk to public inspection.

Where an equitable interest in land, which does not appear of record, is attached, and a statement thereof is entered in the encumbrance book, this entry will not constitute constructive notice to a vendee or mortgagee of the person holding the legal title. *The Farmers Nat. Bank of Salem v. Fletcher*, 44 Iowa, 252.

A grantee is not affected by a *lis pendens*, where the conveyance to him was made prior to the commencement of the action in which it is sought to establish a charge on the land as the property of the grantor. *Id.* See, also *Bailey v. McGregor*, 46 Id., 667.

The fact that one who buys real estate of a married woman has knowledge of the pendency of an action against her husband will not charge him with notice of an attachment therein levied on the land, nor deprive him of the character of a *bona fide* purchaser. *Bailey v. McGregor*, 46 Id., 667; *Eldred v. Drake*, 43 Id., 569; *Farmers' Nat. Bank of Salem v. Fletcher*, 44 Id., 252.

The entry in the incumbrance book of the levy of attachment upon lands in an action against one not the holder of the legal title, does not constitute constructive notice to the purchaser of such title. *Bailey v. McGregor*, 46 Id., 667. Under this section an entry made by the sheriff in the "incumbrance book," showing that certain lands therein described have been attached, is notice to subsequent purchasers, though the entry is not indexed, notwithstanding subdivision 8 of section 197 of the code, which requires the clerk to keep an index of all liens in the district or circuit courts. *Blodgett v. Huiscamp Bros.*, 64 Id., 548.

Where the sheriff intended to attach land in township 67, but his return on the writ showed an attachment of land in township 68 only, but this entry in the incumbrance book recited an attachment of lands in township 67, held that such entry did not constitute notice to subsequent purchasers, and incumbancers of an attachment of land in township 67. *Collier v. French*, 64 Id., 577.

SEC. 3023. [**Sheriff: constables.**]

—The word "sheriff," as used in this chapter, is meant to apply to constables when the proceedings are in a justice's court, or the like officer of any other court.

SEC. 3024. [**Justice: clerk.**]

—When the proceedings are in a justice's court, the justice is to be regarded as the clerk of the court for all purposes herein contemplated.

(CHAPTER 117, LAWS OF 1886.)

RELATING TO LEVIES ON MORTGAGED PERSONAL PROPERTY.

An Act to provide for the levy of attachment or execution on personal property covered by mortgage.

SECTION 1. [**Personal property not exempt from execution may be taken on attachment or execution.**]

—*Be it enacted by the general assembly of the state of Iowa:* That personal property not exempt from execution hereafter mortgaged, or heretofore mortgaged, when the debt secured thereby is due, may be taken on attachment or execution issued at the suit of a creditor of a mortgagor, but before the property is so taken the officer or plaintiff must pay or tender to the holder of the mortgage the amount of the mortgage debt and interest accrued, or must deposit to the amount thereof with the clerk of the district court of the county wherein the mortgaged property is found payable to the order of the holder of the mortgage. When the debt secured by a mortgage hereafter made is not due, as shown by such chattel mortgage, he must also deposit with the clerk, interest on the principal sum at the agreed rate specified in the mortgage, for the term of sixty days from the date of deposit; *provided, however*, if the debt secured fall due in less than sixty days from the date of deposit, then interest shall be deposited only for such shorter period; and when such sums are tendered to the holder of the mortgage, or deposited with the clerk, the attaching creditor shall be subrogated to all the rights of the holder of the mortgage; and the proceeds from the sale of the mortgaged property shall go, first to the discharge of such indebtedness and costs of execution; *provided, however*, that if the judgment debtor shall pay the debt for which the attachment or execution was issued, the property shall be released, and the creditor shall be entitled to receive money deposited to pay the

mortgage debt, and shall have no right or interest in the mortgage, or in the mortgaged property.

SEC. 2. [**Holder of mortgage shall only receive amount due.**]—The holder of the mortgage shall state over his signature and under oath on the back of said mortgage, the amount due, or to become thereon, and deliver the same to the person paying him said amount, and if the said sum has been deposited with the clerk of the district court, the holder of the mortgage shall only receive the amount so stated to be due, and shall surrender to the clerk the mortgage and other evidence of indebtedness, and the surplus, if any, shall be returned to the person who made the deposit; *provided, however*, that the execution or attaching creditor shall have the right to controvert, in the court from which the process issued, such statement of indebtedness in the manner provided in other garnishment proceedings, if he give notice in writing to the clerk at the time of the deposit; and the clerk shall hold the deposit until such matter is determined. If the attaching or judgment creditor fail to sustain his claim against the mortgage, he shall pay to the holder of the mortgage interest upon the debt at the rate of ten per cent per annum, together with the costs of the proceeding, and an attorney's fee of ten per cent on the amount of the debt.

SEC. 3. [**Bid must cover amount of debt and costs.**]—At the sale of said property no bid shall be received for a less sum than the amount then due on said mortgage, together with the costs made by virtue of such levy of attachments or executions, and the costs of said sale. And unless there shall be a bid of more than such amount, the execution or attachment creditor shall pay the costs made by such levy and sale. If said property shall sell for more than the amount due on said mortgage and the costs aforesaid, the officer shall immediately pay the sum due on said mortgage to the person who paid the same, and shall apply this surplus on the execution or attachment held by him.

SEC. 4. [**Validity of mortgage may be contested.**]—But nothing contained in this act shall in any way affect the right of any creditor to contest for any reason the validity of such mortgage.

SEC. 5. [**Mortgagee compelled to state amount of debt upon request.**]—Upon written demand of a creditor, his agent, or attorney, or of any mortgagor of personal property other than exempt property, the person entitled to receive said debt shall deliver to said creditor a statement in writing under oath, which statement shall show the nature and amount of the original debt secured by the mortgage, the date and amount of each payment, if any, which has been made thereon, and an itemized statement of the amount then due and unpaid.

SEC. 6. [**Failure to comply.**]—The refusal of the person entitled to receive said mortgage debt, or his failure within a reasonable time after demand to deliver to the attachment or execution creditor, or to his attorney or agent, or either of them, the statements required by the second and fifth sections of this act, is hereby declared to be a misdemeanor, and willfully swearing to a greater amount of mortgage debt than is actually due, shall be deemed perjury. The person who fails or refuses to furnish the verified statements, or either of them, required by the second and fifth sections of this act, shall also be liable to the attachment or execution creditor for all damages which shall result from such refusal or failure, and for reasonable attorney's fees and costs in any action brought to recover such damages, or to ascertain the amount of the mortgage debt.

Approved April 9, 1886.

CHAPTER 2.

OF EXECUTIONS.

SEC. 3025. [**Limitation on issuance of.**]-Executions may issue at any time before the judgment is barred by the statute of limitations, and but one execution shall be in existence at the same time.

Execution may properly issue on a judgment after the lien thereof on land has expired, and at any time within twenty years, the statutory period of limitations; and a sale of real estate thereunder is effectual to pass all the interest the defendant therein had at the time of the levy. *State v. Roost et ux.*, 34 Iowa, 475.

This section in providing that only one execution shall be in existence at the same time is mandatory; and the fact that the first execution was *ordered* returned, but was not, did not authorize the issue of a second execution or make a sale thereunder valid. *Merritt v. Grover*, 61 Id., 99.

An execution, ordinarily, must be regarded as existing until it has been returned; and in cases where that cannot be done, it devolves upon the party in interest to allege and prove facts, showing that a second execution might lawfully issue. *Merritt et al., v. Grover*, 57 Id., 493.

Where the judgment creditor becomes the purchaser of property at a sale under a second execution issued at his instance, before the first execution has been returned, he is bound to know whether such second execution was lawfully issued. *Id.*

SEC. 3026. [**Judgments: orders enforced by.**]-Judgments or orders requiring the payment of money, or the delivery of the possession of property, are to be enforced by execution. Obedience to those requiring the performance of any other act, is to be coerced by attachment for contempt.

A court of law by its judgments declares the conclusion of the law upon the facts proved, and leaves the party to the proper process to enforce it. It affords specific relief only in actions *in rem.* *Kramer v. Rebman*, 9 Iowa, 114.

An attachment for contempt is the proper mode of enforcing obedience to a continuing order in the form of a mandatory injunction. *The State v. Baldwin*, 57 Id., 266.

SEC. 3027. [**From courts of record.**]-Executions from any court of record may issue into any county which the party ordering them may direct.

Where judgment is rendered in one county and a transcript thereof filed in another, execution must issue from the former county for the sale of lands in the latter; and a sale made under an execution issued in the latter is invalid. *Furman v. Dewell*, 35 Iowa, 170; *Seaton v. Hamilton*, Id., 394.

Execution may issue *from* the county where judgment is rendered *into* any county in the state. *Anderson v. Hall*, 48 Id., 346, 347.

SEC. 3028. [**When issued and served on Sunday.**]-An execution may be issued and executed on Sunday, whenever an affidavit shall be filed by the plaintiff or some person in his behalf, stating that he believes he will lose his judgment unless process issue on that day.

SEC. 3029. [**Issued on demand of party: duty of clerk.**]-Upon the rendition of judgment, execution may be at once issued, and shall be by the clerk on the demand of the party entitled thereto; and upon its issuance, the clerk shall enter on the judgment docket the date of its issuance, and to what county and what officer issued, and shall also enter on said docket the return of the officer with the date of the return, the dates and amount of all moneys received into or paid out of the office thereon; and these entries shall be made at the time of the thing done.

SEC. 3030. [**Penalty for clerk's failure of duty.**]-The clerk willfully neglecting or refusing to perform any one of the duties in this chapter imposed, shall be liable to a penalty of five hundred dollars, and to damages to the party aggrieved, and shall be guilty of a misdemeanor in office, and on conviction thereof, shall be removed from office.

SEC. 3031. [**When issued to another county what done.**]-In case execution is issued to a county other than that in which the judgment is rendered, a

transcript of such judgment must be filed in the office of the clerk of the district court of such county, who shall make an entry thereof in the judgment docket of such court; and the officer having such execution shall return a copy thereof, with his return and doings indorsed thereon, to such clerk, who shall make entries thereof in the same manner and extent as if such judgment had been entered in and execution issued from such court.

It seems that where for any reason the amount of a judgment cannot safely be paid to the attorney, the judgment debtor may pay it to the clerk, the judgment debtor thus making the clerk his agent for the proper appropriation of the money. *Fisher v. Oskaloosa*, 28 Id., 381.

Money paid to the clerk of the district and circuit courts upon a judgment recorded in his office, is received by him in virtue of his office; and upon his failure to pay over the money to the judgment creditor, a recovery may be had therefor against him and his sureties on his official bond. Thus held where the clerk deposited the money with a private banker who failed. *Morgan v. Long and Hibben & Co. v. Same*, 29 Id., 434.

Where land is sold in one county under an execution issued on a judgment rendered in another county, the recording of the sheriff's deed in the former county will operate as constructive notice, although no transcript of the judgment has been filed in the county in which the land was situated at the time of the sale. *Foreman v. Higham*, 35 Id., 382.

Under this section executions may be issued into any county which the party ordering them may direct, and a valid sale of real property may, as between the parties and as to subsequent purchasers having actual notice thereof, be made in one county under execution issued on a judgment in another county, notwithstanding no transcript of the judgment is filed in the county where the land is situated and sold. *Hubbard v. Barnes*, 29 Id., 239.

The object and purpose of this section is to provide a method for effecting a lien of the judgment on the real estate where the transcript is filed, and giving of constructive notice thereof and of the proceedings thereunder, by keeping a record showing the same. *Id.*

Prior to the enactment of this section where land in one county was sold on execution issued upon a judgment rendered in another county, no transcript of the judgment having been filed in the county where the sale took place, a *bona fide* purchaser from the judgment debtor without notice, whose purchase was after the execution sale but before the execution and recording of the sheriff's deed, would hold the land as against the purchaser at the sheriff's sale. *McGinnis v. Edgell*, 39 Id., 419.

When judgment is rendered in one county and a transcript thereof filed in another, execution must issue from the former; and a sale made under an execution issued from the latter county is void. *Furman v. Dewell*, 35 Id., 170; *Seaton v. Hamilton*, 10 Id., 394.

SEC. 3032. [**Return, how made: money, how sent.**—When sent into any county other than that in which the judgment was rendered, return may be made by mail. But money cannot thus be sent except by the direction of the party entitled thereto, or his attorney.

SEC. 3033. [**General form of execution.**—The execution must intelligibly refer to the judgment, stating the time and place at which it was rendered, the names of the parties to the action as well as to the judgment, its amount, and the amount still to be collected thereon, if for money; and, if not for money, it must state what specific act is required to be performed. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of property of the debtor subject to execution,

A slight variance in the amount stated in an execution from that stated in the judgment will not vitiate the writ. *Williams v. Brown*, 23 Iowa, 247.

For form of execution issued by a justice of the peace held good under this section, see *Burdick v. Shigley*, 30 Id., 63.

SEC. 3034. [**When against representatives.**—If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees, it shall require the sheriff to satisfy the judgment and interest out of such property.

SEC. 3035. [**When for delivery of possession of real property.**] If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages or rents and profits, with interest, recovered by the same judgment out of the property of the party against whom it was rendered subject to execution,

and the value of the property for which judgment was recovered to be specified therein if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property.

SEC. 3036. [**When for performance of any other act.**] When it requires the performance of any other act, a certified copy of the judgment may be served on the person against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced.

An attachment for contempt is the proper mode of enforcing obedience to a continuing order in the form of a mandatory injunction. *The State v. Baldwin*, 57 Iowa, 266.

SEC. 3037. [**Officer to receipt for.**] Every officer to whose hands an execution may legally come shall give a receipt therefor, if required, stating the hour when the same was received, and shall make sufficient return thereof, together with the money collected, on or before the seventieth day from such delivery.

Although this section directs that an execution shall be returned on or before the seventieth day after its delivery to the officer, yet, where a levy has been made before the expiration of that time, a sale after the expiration of the seventy days is valid. *Cox v. Currier, Sheriff*, 62 Id., 551. Citing and following *Butterfield v. Walsh*, 21 Id., 97; *Stein v. Chambless*, 18 Id., 474.

SEC. 3038. [**Officer to indorse when received and what he does under it.**]—The officer to whom an execution is legally issued, shall indorse thereon the day and hour when he received it, and the levy, sale, or other act done by virtue thereof, with the date, and the dates and amounts of any receipts or payments in satisfaction thereof; the indorsements must be made at the time of the receipt or act done.

The sale of property under an execution after the expiration of seventy days from the date thereof, was held not invalid when the levy was made before the expiration of that time. *Butterfield v. Walsh*, 21 Iowa, 97.

The proper and best evidence of what an officer has done under an execution is the written return made by him as required by this and the preceding section; and in the absence of a showing that the return on the original execution has been lost, or cannot be produced, a levy thereunder cannot be proved by copy or by parol. *West v. St. John*, 63 Id., 287.

It is the duty of an officer having an execution to levy upon the debtor's property, as provided in this section; and he is not required, upon a mere disclaimer by the debtor of any interest in the property, to postpone the levy and institute an inquiry as to the truth of the statement. So held in an action by a third party to recover the property from an officer. *Id.*

The sheriff's return on an execution that "the within execution was satisfied by defendant giving security for said money" is not evidence of satisfaction, nor will such return, with the entry by the clerk upon the judgment record, "execution returned satisfied as per sheriff's return thereon," justify a subsequent mortgagee in relying upon them as showing the judgment satisfied. *Aultman, Miller & Co. v. McGrady*, 58 Id., 118.

PRINCIPAL AND SURETY.

SEC. 3039. [**Property of principal first liable.**]—When a judgment is against a principal and his surety, the officer having the collection thereof shall exhaust the property of the principal before proceeding to sell that of the surety.

A judgment defendant who is a surety for his co-defendant has such an interest against such co-defendant that he may show that property of his principal is subject to execution for his debts. *Delevan v. Pratt*, 19 Iowa, 429.

An abandonment of the levy of an execution upon, and a release therefrom of personal property of the principal judgment debtor, operates as a discharge of one who is only surety therein, when such abandonment is without his consent, and the fact of his suretyship was known to the execution plaintiff; especially is this so where the property thus released from levy was held by the surety as his indemnity, and beyond whose legal control it was placed by the levy. *Sherraden v. Parker*, 24 Id., 28.

The judgment plaintiff in an action against joint defendants may enforce his judgment to its fullest extent, against either of them, at his option. *Palmer v. Stacey*, 44 Id., 340.

SEC. 3040. [**Meaning of the term surety.**]—The term "surety" in the foregoing section, shall embrace accommodation indorsers, stayers and all other per-

sons whose liability on the claim is posterior to that of another; but the surety shall, if requested by the officer, show property of the principal to entitle himself to the benefit of this provision.

SEC. 3041. [**Property of surety liable: when.**]—After exhausting the property of the principal, the officer shall subject the property of the other parties in the order of their liability in the execution. But the party subsequently liable, shall, if requested by the officer, show property of the party liable before him so as to entitle himself to the benefit of this provision.

SEC. 3042. [**Judgment recite order of liability.**]—But all the parties will be considered as equally liable in all cases, unless the order of liability is shown to the court and recited in the judgment, and the clerk issuing execution on the judgment containing such recital shall state the order of liability in the execution.

Any act of the creditor which entitles the principal to claim, for any time, an exemption from performance, will work a discharge of the surety. But the surety will not be discharged on the ground that time was given to the principal, if given with the consent of the surety, or if he subsequently ratify the same. *Hershele v. Reynolds*, 22 Iowa, 153.

And these rules apply, not only to obligations resting in ordinary contracts, but are to be enforced after the contract has passed into a judgment. *Id.* See, also, *Chambers v. Cochran & Brock*, *Id.*, 159.

Where an action at law has been begun against the principal and surety on a note, and the surety sets up the fact of his suretyship and asks judgment accordingly, the plaintiff is not by reason of such plea bound to pursue the alleged principal, but may dismiss as to him, and pursue the surety alone, because as to plaintiff, both are principals, and he may pursue either or both. *Dorothy v. Hicks*, 53 *Id.*, 240.

LEVY.

SEC. 3043. [**Mode of: duty of officer.**]—When an execution is delivered to an officer, he must proceed to execute the same with diligence; if executed, an exact description of the property at length, with the date of the levy, shall be indorsed upon or appended to the execution, and if the writ was not executed, or only executed in part, the reason in such case must be stated in the return.

The return of an officer upon an execution is the only legal evidence to show upon what property the writ was levied. Where an execution with the return is lost, parol evidence is admissible to show the contents of the lost return, but it is limited to this. *Le Barrow v. Taylor*, 53 Iowa, 637.

It was held under the code of 1851 that the statute did not require that notice should be given to the execution defendant of an execution or levy. The law presumes that he has notice that judgment has been rendered against him, and of all the steps taken for the enforcement thereof. *Ayres v. Campbell*, 9 *Id.*, 213.

The returns on an execution should describe the property levied on with such reasonable certainty as to enable the purchaser to find and identify the same. *Payne v. Billingham*, 10 *Id.*, 360.

SEC. 3044. [**Same.**]—The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same, selling the other property and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution.

By the term "property" in this section is meant real, as well as personal, property or estate. *Harrison v. Kramer*, 3 Iowa, 543, 561.

A judgment creditor may elect, but he is not compelled, to take in payment of his debt script, or the ordinary evidences of indebtedness issued by such corporation. *Oswald v. Thedinga*, 17 *Id.*, 13.

The levy should describe the property taken, with a certainty that would enable either the successor of the sheriff, if one should be appointed in the meantime, or the purchaser at the sale, to find and identify it. *Payne v. Billingham*, 10 *Id.*, 360.

Among the steps required by the statute is a levy on, or seizure of, the property, whether it be real or personal. *Downard v. Crenshaw*, 49 *Id.*, 296, 299.

SEC. 3045. [What property he shall take.]—The officer shall in all cases select such property, and in such quantities as will be likely to bring the exact amount required to be raised, as nearly as practicable, and having made one levy, may, at any time thereafter, make other levies if he deem it necessary. But no writ of execution shall be a lien on personal property before the actual levy thereof.

Where land appraised at \$800 was levied on and sold to satisfy a judgment of \$21, and accrued costs of less than that sum, it was held that the levy was excessive, and that the sale should be set aside without any further showing. *Cook v. Jenkins & Co.*, 30 Iowa, 452.

The simple noting of personal property on a writ, or taking an inventory, where there is no removal of the property and no person is placed in charge thereof by the officer, does not constitute a valid levy as against one who claims never to have parted with the title to the judgment debtor. *Teachmeyer v. Waltz*, 49 Id., 645.

The right of a pledgee will prevail over the lien of an execution levied upon the property pledged by an officer with notice of the contract pledging the same. *Reeves & Co. v. Sebern*, 16 Id., 234.

SEC. 3046. Judgments, bank bills, and other things in action, may be levied upon and sold, or appropriated as hereinafter provided, and assignment thereof by the officer shall have the same effect as if made by the defendant.

Where a railroad company received a number of its own mortgage bonds from a debtor in payment of his debt, not for the purpose of canceling the same, but with the intention of putting them in circulation as securities, it was held that such bonds were property of the corporation, subject to be levied on under an execution against its property. *Hetherington v. Hayden*, 11 Iowa, 335.

As a general rule, the right to levy on and sell personal property under execution, is measured by the power to take and deliver possession thereof. *Campbell v. Leonard*, 11 Id., 489.

The mortgagor of personal property has no interest therein which can be levied upon and sold under execution. *Campbell v. Leonard*, 11 Id., 489; *Torbirt v. Hayden*, Id., 435.

A judgment may be levied on and sold under execution as any other personal property under the provisions of this section, but it can be attached only by garnishment under section 2967. *Ochiltree v. The M., I. & N. R. Co.*, 49 Id., 150. See *Osborn v. Cloud*, 23 Id., 104.

A promissory note may be levied on and sold on execution. *Savery v. Hays*, 20 Id., 25, 29.

It was held under section 3272 of the revision, which did not expressly include judgments, that a judgment could not be levied on and sold on execution as any other personal property, but that the proper course was to garnish the judgment debtor. *Osborn v. Cloud*, 23 Id., 104.

Under this section and section 3091, an assignment of a promissory note by an officer levying on and selling the same has the same effect as if made by the defendant in execution, and confers the same rights upon the assignee of the officer as would be conferred upon an indorsee of the defendant. *Earhart v. Gant*, 32 Id., 481.

These sections (3045, 3091) are in their nature remedial, and by fair construction, in view of their purpose, the word "defendant" therein should be held to include not only the execution defendant, but a defendant in a garnishment proceeding auxiliary to the execution. *Id.*

SEC. 3047. [Persons indebted to defendant may pay.]—After the rendition of judgment, any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor.

The assignee of railroad bonds under an assignment made after a levy of an execution thereon, takes the same subject to the levy. *Hetherington v. Hayden*, 11 Iowa, 335.

SEC. 3048. [Public property not liable.]—Public buildings owned by the state, or any county, city, school district, or other municipal corporation, or any other public property which is necessary and proper for carrying out the general purpose for which such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied on to pay the debt of any such.

A judgment against a city corporation is not a lien upon premises owned by it and used for hospital purposes. *City of Davenport v. The P. M. & F. Ins. Co.*, 17 Iowa, 276.

The property of a municipal corporation which is necessary to be used in carrying out the general purpose of its organization, is exempt from execution. *The City of Fort Dodge v. Moore*, 37 Id., 338.

A mechanic's lien cannot be established against a building owned by a county and used for county purposes. *Lewis v. Chickasaw County*, 50 Id., 234.

The mechanic's lien law is framed with reference only to property which can be sold under execution, and bridges constructed by a county are not, therefore, subject to such a lien. Nor can the court, in an action to enforce a mechanic's lien on such property, render a personal judgment for the plaintiff. *Loring & Co. v. Small*, 50 Id., 271.

For the same reason as above, a mechanic's lien cannot be established against a public school-house. *Charnock v. Dist. Tp. of Colfax*, 51 Id., 70.

A mechanic's lien cannot be established against a court-house, or other public property which is exempt from sale under execution under this section. *Whiting & Keemer v. Story County, and other cases*, 54 Id., 81, and cases cited.

SEC. 3049. [Tax levied to pay corporate debts.]—If no property of a municipal corporation against which execution has issued can be found, or if the judgment creditor elect not to issue execution against such corporation, a tax must be levied as early as practicable to pay off the judgment. When a tax has been so levied and any part thereof shall be collected, the treasurer of such corporation shall pay the same to the judgment creditor, or to the clerk of the court in which the judgment was rendered, in satisfaction thereof.

A municipal corporation can exercise the power of taxation only when expressly conferred by the legislature. *Clark v. City of Davenport*, 14 Iowa, 494; *Jeffries v. Lawrence*, 42 Id., 498; *The Iowa R. L. Co. v. The County of Sac*, 39 Id., 124.

When a judgment against a municipal corporation can be paid in no other manner, it is the duty of the corporate authorities to levy a special tax sufficient to discharge the same, if within the limit of their power to levy taxes. *Oswald v. Thedinga*, 17 Id., 13; *Coy v. The City Council of Lyons*, Id., 1; *Coffin v. City Council of Davenport*, 26 Id., 515.

When an execution, upon a judgment duly rendered against a municipal corporation, has been issued and returned *nulla bona*, it is not a matter in the discretion of the city council, but a matter of duty on their part to levy the necessary tax to pay the judgment. *Coy v. The City Council of Lyons*, 13 Id., 1.

The discharge of this duty will be enforced by *mandamus*. *Id.* Also, *Boynton v. Dist. Tp. of Newton*, 34 Id., 570.

When the limitation of the power of a city council renders it impossible to raise sufficient by a single levy to pay off a judgment which is made the basis of a proceeding for *mandamus*, it is competent for the court to order the making of levies from year to year, within such limitation, until the entire debt is raised and discharged. *Id.*

A judgment creditor may, but is not compelled to take the scrip of a municipal corporation in payment of his judgment. *Porter v. Thomson*, 22 Id., 391; *Oswald v. Thedinga*, 17 Id., 13.

After demand upon, and refusal by, the officers of a municipal corporation to levy a tax to pay a judgment, if within the limit of their power to do so, they were individually liable under the revision of 1860. But if the taxing power was exhausted for the year for which the demand was made, they would not be liable for such failure; but the failure to make the levy from year to year, when no legal impediment existed, would render them liable without any new demand. *Id.*

If the current expenses of a corporation are so large as to absorb the entire amount of taxes which the officers of the corporation are authorized to levy, they will not be liable for a refusal to make a further levy; nor for a failure to set apart a portion of that levied, in payment of the judgment. *Porter v. Thompson* 22 Id., 391. See, also, *Coffin v. The City Council of Davenport*, 26 Id., 515.

The provisions of this section apply to school districts as well as other municipal corporations, and the levy of a tax to pay a judgment against the district may be enforced against the directors by *mandamus*. And that they have issued an order on the treasurer of the district for the amount of the judgment does not change the rule above stated. *Boynton v. The Dist. Tp. of Newton*, 34 Id., 510.

If it be shown that the valuation and assessment of property within the corporation is purposely made too low in order to avoid a judgment against the corporation, it will be compelled by *mandamus* to make a fair assessment of the property, and apply in payment of the judgment, of the proceeds arising from the maximum tax levied thereon, such surplus as remains after deducting the amount required for the current expenses of the municipal government. *Coffin v. City Council of Davenport*, 26 Id., 515.

This section confers no independent power of taxation, and does not require municipal corporations to levy a judgment tax in excess of the maximum rate of taxation established by the statute. *The Iowa Railroad Land Co. v. The County of Sac*, 39 Id., 124; *Coy v. The City Council of Lyons*, 17 Id., 1; *Oswald v. Thedinga*, Id., 13; *Porter v. Thompson*, 22 Id., 391; *Coffin v. City Council of Davenport*, 26 Id., 515.

The denomination of a tax in the levy as "for judgment fund," and "for city judgment tax," is not so ambiguous as will permit the introduction of evidence to show that the proceeds were intended by the city council to be applied to another purpose than the payment of outstanding judgments against the city. *Rice v. Walker*, 44 Id., 458.

The levy of a tax of eight mills by a city for the payment of judgments against it, after a tax of ten mills had been levied for general purposes, was *held*, not illegal. *Id.*

Where orders are drawn on the treasurer of a school district by order of the board of directors to a creditor for the amount of his claim, and there are no funds in the treasurer's hands to meet the same, it becomes the duty of the board to levy a tax to provide the necessary funds, and on its refusal, it may be compelled thereto by mandamus. *Stevenson & Rice v. The Dist. Tp. of Summit*, 35 Id., 462. See, also, *Brown v. Crego*, 32 Id., 498; and *The State, ex rel Clark, Dodge & Co. v. The City of Davenport*, 12 Id., 335.

SEC. 3050. [**Stocks or interests levied upon.**].—Stock or interests owned by the defendant in any corporation, and also debts due him, and property of his in the hands of the third persons, may be levied upon in the same manner provided for attaching the same.

Debts due a defendant may be levied upon under execution, in the manner provided for attaching the same, and the proceeding by garnishment must be the same as near as practicable. *Clafin v. Iowa City*, 12 Iowa, 286; *Lambert v. Powers*, 36 Id., 18, 20.

PROCEEDINGS BY GARNISHMENT.

SEC. 3051. [**How done: proceedings.**].—In proceedings by garnishment on execution, the garnishee shall be served as in case of attachment. The plaintiff may, also, if the garnishee is called into court, have a case docketed against him without docket fee, and upon his answer to the officer, issue may be made and notice thereof given him or issue may be made on his answer in court without any notice thereon if made at the same term; and in all these and every other particular, the proceedings shall be the same as under garnishment on attachment, as near as the nature of the case will allow.

Where issue is not taken on the answer of the garnishee at the same time it is filed, the garnishee is entitled to notice. But if he makes a voluntary appearance in person, or by attorney, notice is unnecessary. *Kinne v. Anderson*, 13 Iowa, 565, 566.

When the property to be levied upon is a fund in court, it may be levied upon in the manner prescribed by statute. *Patterson v. Pratt*, 19 Id., 358.

SEC. 3052. [**Not affected by expiration of execution.**].—Proceedings by garnishment on execution shall not be in any manner affected by the expiration of the execution or its return; and where parties thereunder have been garnished, the officer shall return to the next term thereafter a copy of the execution with all his doings thereon, so far as garnishments thereon are concerned.

PARTNERSHIP PROPERTY.

SEC. 3053. [**Officer may take possession, inventory and appraise.**].—When an officer has an execution against a person who owns property jointly, in common, or in partnership with another, such officer may levy on and take possession of the property owned jointly, in common, or in partnership, sufficiently to enable him to appraise and inventory the same, and for that purpose shall call to his assistance three disinterested persons, which inventory and appraisement shall be returned by the officer with the execution, and shall state in his return who claims to own the property.

See *ante*, section 2973, and notes to that section, as to the effect of a levy upon partnership property.

The interest of a defendant in the assets of a partnership of which he is a member, is liable to be taken in execution or reached by proceedings thereunder, and must be first exhausted before resort can be had to the homestead of the defendant. *Lambert v. Powers*, 36 Iowa, 18.

SEC. 3054. [**Lien enforced by equitable proceeding.**].—The plaintiff shall, from the time such property is so levied on, have a lien on the interest of the defendant therein, and may commence an action by equitable proceedings to ascertain the nature and intent of such interest and to enforce the lien; and, if deemed necessary or proper, the court or judge may appoint a receiver under the circumstances provided in chapter twelve of title seventeen of this code.

The creditor of an insolvent person can subject to the payment of his debt, real property the title to which is in his wife's name, but toward the payment of which the debtor has contributed, to the extent of such contributions, and this rule is not varied by the fact that the real property in controversy embraces the homestead, which would to the same extent, be liable for an antecedent indebtedness. *Croup & Shaffer v. Morton et ux.*, 49 Id., 16.

Where it is sought to reach the interest of a party in partnership property, the burden of proof is on the plaintiff to show that the party is a member of the partnership; and where such fact is not established by the evidence, the appointment of a receiver to determine the value of his interest in the partnership is erroneous. *Dupuy & Howell v. Sheak & Sharra*, 57 Id., 361.

Where a separate creditor of an individual partner levied upon and sold partnership property, without bringing an action to determine the partner's interest therein as provided by this section it was held that such sale was invalid as against a creditor of the partnership who afterward levied upon the same property. *Aultman & Co. v. Fuller, Williams & Co.*, 53 Id., 60.

INDEMNIFYING BOND.

SEC. 3055. [May be required when.]—An officer is bound to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, unless he has received notice in writing from some other person, his agent, or his attorney, that such property belongs to him; or, if after levy he receives such notice, such officer may release the property unless a bond is given as provided in the next section; but the officer shall be protected from all liability by reason of such levy until he receives such written notice.

An officer is bound to levy an execution upon any personal property in the possession of the defendants, unless he receives written notice that such property belongs to a third person, and he is protected from all liability by reason of the levy until he receives such notice. *Kaster & Farwell v. Pease*, 42 Iowa, 488; *Finch v. Hollinger*, 43 Id., 598.

An action to recover possession of personal property cannot be maintained against a sheriff who holds it by virtue of an execution, unless the plaintiff, prior to the commencement of the action gives the sheriff notice in writing of his ownership thereof. *Finch v. Hollinger*, 43 Id., 598; *Kaster & Farwell v. Pease*, 42 Id., 488; *Peterson v. Espeset*, 43 Id., 262.

In an action of replevin for property in the hands of an officer, wherein the plaintiffs fail in their petition to allege notice of their claim of ownership to the officer, the defendant cannot be permitted, after the testimony in the case has been submitted, to avail himself of the want of such notice. *Warder, Mitchell & Co. v. Hoover & Co. et al.*, 51 Id., 491.

The reading to an officer about to levy upon personal property, by virtue of an execution, of a bill of sale of the property does not constitute the giving to the officer a written notice which, under this section of the code, would relieve him from the necessity of making the levy. *Gray v. Parker et al.*, 49 Id., 624.

An officer cannot recover for his time and expenses in successfully defending in an action of replevin for personal property on which he had levied, and with respect to which the plaintiff in the replevin action had served no notice of claim of ownership. *Rickabaugh v. Bada*, 50 Id., 57.

Where an execution was levied on mortgaged chattels, and the mortgagee gave written notice to the officer that he was the owner of the chattels by virtue of a chattel mortgage, and that he demanded immediate return of the chattels to the place from which they had been taken by the officer, it was held, that the notice was sufficient, under this section, to render the further possession of the goods by the officer wrongful, and entitle him to demand a bond of indemnity, and to render him liable to a personal action. *Wells v. Chapman*, 59 Id., 658.

An officer is not bound to attach property the title of which is in doubt, but having made a levy, and on demand a proper indemnifying bond having been given, he cannot release the property without making himself liable if, in fact, the property was subject to attachment. *Wadsworth & Co. v. Walliker*, 51 Id., 605.

Where an officer levies on goods, and subsequently, on his own motion, releases the levy, the burden is on him to show a sufficient cause for such release. *Id.*

An officer cannot demand an indemnifying bond in excess of the sum necessary to secure him, and an agreement to give such bond cannot be enforced. *Id.*

A bill of sale to the claimant of property, delivered by him to an officer who is proceeding to levy an execution thereon, does not constitute the notice of his claim provided for in this section. *Gray v. Parker et al.*, 53 Id., 505.

This section does not require a debtor to give notice to the sheriff of his right or claim of exemption to property levied on. *McCoy v. Cornell et al.*, 40 Id., 457.

The provisions of sections 3055 to 3060 relate exclusively to the levy of an execution, and have no reference to an attachment. *Wadsworth & Co. v. Wallaker*, 45 Id., 395, 397.

An officer who holds goods under a writ of attachment may, at his discretion, release the

same upon the claim of a third party that he is the owner; but the officer does so at his peril, and he will have the burden of establishing that the attached property did not belong to the attachment defendant. *Id.*

The fact that property upon which an execution was levied was, at the time, in the custody of the officer under a writ of attachment, will not relieve a third person, who claims to own the property, of the necessity of serving upon the officer the notice required by section 3055 of the code. *Allen v. Wheeler et al.*, 54 Id., 628.

Where an officer held several executions in favor of several plaintiffs, all against the same defendant, which he levied upon property as that of the defendant, which was claimed by a third person as owner, and gave the notice prescribed in this section to the officer, giving only one notice, made applicable to all the executions, and the execution creditors thereupon joined in one indemnifying bond, held, that one notice and bond were sufficient compliance with the statute, and in an action upon the bond against all of the obligors there was no misjoinder of causes of action. *Baxter v. Ray et al.*, 62 Id., 336.

SEC. 3056. [Terms and conditions of.]—When the officer receives such notice he may forthwith give the plaintiff, his agent, or attorney, notice that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sufficient sureties, to be approved by the officer, to the effect that the obligors will indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property, and will pay to any claimant thereof the damages he may sustain in consequence of the seizure or sale, and will warrant to any purchaser of the property such estate or interest therein as is sold; and thereupon the officer shall proceed to subject the property to the execution, and shall return the indemnifying bond to the district court of the county in which the levy is made.

SEC. 3057. [If not given levy discharged.]—If such bond is not given, the officer may refuse to levy, or if he has done so, and the bond is not given in a reasonable time after it is required by the officer, he may restore the property to the person from whose possession it was taken, and the levy shall stand discharged.

SEC. 3058. [Officer protected if bond good when taken.]—The claimant or purchaser of any property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer shall be barred of any action against the officer levying on the property if the surety on the bond was good when it was taken. Any such claimant or purchaser may maintain an action upon the bond, and recover such damages as he may be entitled to.

This section of the code, in so far as it deprives the claimant of property levied upon by an officer, under the contingency therein provided, from bringing an action against such officer to recover the specific property levied on, is unconstitutional and void. *Towle et al v. Man*, 2 N. W. Rep. (Iowa), 340, (814).

This section is in conflict with the state constitution in so far as it seeks to bar an action against an officer, who levies an execution on and seizes property of a person not the execution defendant, by the taking and returning, by the officer, of a bond of indemnity, as provided in sections 3055, 3056. *Craig v. Fowler*, 59 Iowa, 200; Following the reasoning and holding in *Foule & Roper v. Mann*, 53 Id., 42.

The levy of an attachment is not within the provisions of the sections of the code providing for an indemnifying bond, and the officer, in such case, is not protected thereby; those sections refer solely to the protection of the officer in the service and levy of an execution. *Hall v. Ballou*, 58 Id., 535.

SEC. 3059. [Application of proceeds of such property.]—Where property, for the sale of which the officer is indemnified, sells for more than enough to satisfy the execution under which it was taken, the surplus shall be paid into the court to which the indemnifying bond is directed to be returned. The court may order such disposition or payment of the money to be made, temporarily or absolutely, as may be proper in respect to the rights of the parties interested.

SEC. 3060. [Executions issued by justices.]—The provisions of the preceding sections as to bonds, shall apply to the proceedings upon executions issued by justices of the peace. Indemnifying bonds shall be returned in such cases with the execution under which they are taken.

Where land was sold on execution issued upon a judgment which was not a lien on the land,

and the sale was afterwards set aside for that reason, *held* that the satisfaction of the judgment by the sale should also have been set aside; and the overruling of a motion to that end was erroneous. *Farmer & Sons v. Sasseen*, 63 Iowa, 110.

STAY OF EXECUTION.

SEC. 3061. [How effected: for what time.]—On all judgments for the recovery of money except those rendered in any court on an appeal or writ of error thereto, or against any officer, person or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be a stay of execution if the defendant therein shall, within ten days from the entry of judgment, procure one or more sufficient freehold sureties to enter into a bond acknowledging themselves security for the defendant for the payment of the judgment, interest and costs from the time of rendering judgment until paid, as follows:

1. If the sum for which judgment was rendered, inclusive of costs, does not exceed one hundred dollars, three months;

2. If such sum and costs exceed one hundred dollars, six months; *provided*, that the provisions of this chapter in relation to stay of execution shall not apply to existing contracts, but such contracts shall be governed by the laws in force at the time they were made, which are as follows:

When judgment has been rendered against any one for recovery of money, he may, by procuring one or more sufficient freehold securities to enter into a recognizance acknowledging themselves security for the defendant for the payment of the judgment, together with the interest and costs accrued and to accrue, have a stay of the execution from the time of rendering judgment, as follows:

If the sum for which judgment was rendered, inclusive of costs, does not exceed five dollars, one month;

If such sum and costs exceed five, but not twenty dollars, two months;

If such sum and costs exceed twenty, but not forty dollars, three months;

If such sum and costs exceed forty, but not sixty dollars, four months;

If such sum and costs exceed sixty, but not one hundred dollars, six months;

If such sum and costs exceed one hundred, but not one hundred and fifty dollars, nine months;

If such sum and costs exceed one hundred and fifty dollars, twelve months;

And provided, further, that all judgments shall bear interest at the rate of ten per cent per annum on which stay is taken.

A subsequent purchaser of mortgaged property, who has assumed, as between himself and the mortgagor, the payment of the mortgage debt, and who is also a co-defendant with the mortgagor in the action to foreclose the mortgage, may under this section, without the consent of the mortgagor, stay the execution of the judgment of foreclosure. *Moses v. The Clerk, etc.*, 12 Iowa, 139.

The provisions of the revision relating to stay of execution govern in judgments rendered before the code came into effect. *Du Boise v. Bloom*, 38 Id., 512.

A stay of execution, otherwise properly taken, is not rendered invalid by the failure of the clerk to require the sureties to justify as required by the statute. *Id.*

The provisions of this section are general, and apply to judgments in a justice's court as well as to judgments in the district and circuit courts. The enforcement of a judgment can be stayed as long in a justice's court as in the courts of record. *Brown v. Markley*, 58 Id., 689.

SEC. 3062. **Officers approving stay bonds** shall require the affidavit of the signers of such bond that they own real estate, not exempt from execution and aside from incumbrance, to the value of twice the amount of the judgment.

The act of the clerk of the court in passing upon the sufficiency of a stay bond is not a judicial one, and he is liable for any damage sustained by the judgment creditor by reason of his negligence in accepting an insufficient bond. *Hubbard v. Switzer*, 47 Iowa, 681.

The taking of the affidavit of the surety as required in this section does not exonerate the clerk from liability if he has been negligent. *Id.*

SEC. 3063. [No appeal where stay is taken.]—No appeal shall be allowed after such stay has been obtained, nor shall a stay be taken on a judgment entered as herein contemplated against one who is surety in the stay of execution, nor shall such stay be allowed to any judgment obtained by a laboring man or mechanic for his wages.

A stay of execution under section 3061, operates as a waiver of the right to appeal. *Seacrist v. Newman*, 19 Iowa, 323.

SEC. 3064. [Clerk to take and record bond.]—The surety for stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket, as in case of other judgments.

Where a bond for a stay of execution taken and filed with the clerk was lost and no entry thereof made upon the records of the court, it was held, that it did not become a lien under this section upon the property of the surety as against subsequent incumbrancers without actual notice. *Waldron Bros. v. Dickerson*, 52 Iowa, 171.

Parol evidence is not admissible to prove that a stay bond was not filed at the time stated in the records. *Maynes v. Brockway*, 55 Id., 457.

Where a bond for a stay of execution is accepted, approved and recorded by the clerk, it has, under this section, the force and effect of a judgment confessed against the property of the surety and by virtue thereof the judgment in the case, in which the bond is given, becomes a lien on the land owned by the surety and the fact that the debtor was not entitled by law to a stay of execution, will not change the effect of the bond—it having been offered and accepted as a stay bond, and the clerk's action in accepting and approving such bonds not being subject to review in a collateral proceeding. *Wishard v. Biddle*, 64 Id., 526. See, also, *Haynes v. Brockway*, 55 Id., 457.

SEC. 3965. [Execution recalled.]—When the surety is entered after execution issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution with his doings thereon.

SEC. 3066. [Property levied on released.]—All property levied on before stay of execution, and all written undertakings for the delivery of personal property to the sheriff, shall be relinquished by the officer upon stay of execution being entered.

SEC. 3067. [Execution against: form of.]—At the expiration of the stay, the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein.

The failure of the clerk to issue execution immediately after the expiration of the stay does not deprive the party in whose favor the bond was given of its benefits, the provisions of this section being directory merely. *Parish v. Elwell*, 46 Iowa, 162.

SEC. 3068. [Surety may prevent stay.]—When any court shall render judgment against two or more persons, any of whom is surety for any other in the contract on which judgment is founded, there shall be no stay of execution allowed if the surety object thereto at the time of rendering the judgment, whereupon it shall be ordered by the court that there be no stay, unless the surety for the stay of execution will undertake specifically to pay the judgment in case the amount thereof cannot be levied of the principal defendant.

When a judgment is rendered against a principal and surety upon any contract, the surety may object to any stay of execution. If he does so, no stay can be taken unless the surety for the stay will undertake specifically to pay the judgment in case the amount cannot be collected from the principal debtor. But where the original surety does not object to a stay, the surety on the stay bond will not, as between him and the original surety, be charged with primary liability to pay the judgment. *Chase v. Watty*, 57 Iowa, 230.

Where the original surety makes no objection to a stay of execution on the judgment, he is presumably a party thereto, and has thereby waived his right to redeem his lands subsequently sold on execution to satisfy the judgment. *Id.*

SEC. 3069. [Surety may determine stay.]—Any surety for the stay of execution may file with the clerk an affidavit, stating that he verily believes he will be liable for the judgment, interest, and costs thereon unless execution issues

immediately; and the clerk shall thereupon issue execution forthwith, unless other sufficient surety be entered before the clerk as in other cases.

SEC. 3070. [**Other surety given.**—If other sufficient surety be entered, it shall have the force of the original surety entered before the filing of the affidavit, and shall discharge the original surety.

SEC. 3071. [**Judgment lien not released.**—Where a stay of execution has been taken, such confessed judgment shall not release any judgment lien by virtue of the original judgment for the amount then due. The officer holding the said execution shall return thereon what amount was made from the principal debtor, and how much from the surety.

EXEMPTIONS.

SEC. 3072. (*As amended by ch. 42, 15 g. a., ch. 62, 19 g. a., and ch. 49, 19 g. a.*) [**Property enumerated.**—If the debtor is a resident of this state and is the head of a family, he may hold exempt from execution the following property: All wearing apparel of himself and family kept for actual use and suitable to their condition, and the trunks or other receptacles necessary to contain the same; one musket or rifle and shot gun; all private libraries, family bibles, portraits, pictures, musical instruments, and paintings, not kept for the purpose of sale; a seat or pew occupied by the debtor or his family in any house of public worship; an interest in a public or private burying ground, not exceeding one acre for any defendant; two cows and calf; one horse, unless a horse is exempt as hereinafter provided; fifty sheep and the wool therefrom, [and the materials manufactured from such wool] six stands of bees; five hogs, and all pigs under six months; the necessary food for all animals exempt from execution, for six months; all flax raised by the defendant on not exceeding one acre of ground and the manufactures therefrom; one bedstead and the necessary bedding for every two in the family; all cloth manufactured by the defendant, not exceeding one hundred yards in quantity; household and kitchen furniture, not exceeding two hundred dollars in value; all spinning wheels and looms, one sewing machine and other instruments of domestic labor kept for actual use; the necessary provisions and fuel for the use of the family for six months; the proper tools, instruments, or books of the debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor; the horse or the team, consisting of not more than two horses or mules, or two yoke of cattle, and the wagon or other vehicle, with a proper harness or tackle, by the use of which the debtor, if a physician, public officer, farmer, teamster, or other laborer habitually earns his living. [If the debtor is a seamstress one sewing machine shall be exempt from execution and attachment.] And to the debtor, if a printer, there shall also be exempt a printing press and the types, furniture, and material necessary for the use of such printing press and a newspaper office connected therewith, not to exceed in all the value of twelve hundred dollars. [Any person entitled to any of the exemptions mentioned in this section does not waive his rights thereto by failing to designate or select such exempt property, or by failing to object to a levy thereon, unless failing or refusing so to do when required to make such designation or selection by the officers about to levy.]

The exemption contemplated in section 3225 of the code, extends only to the articles enumerated in section 3072, and was intended for the particular parties mentioned. *Funk et al. v. Israel*, 5 Iowa, 438.

A waiver of exemption laws, contained in a promissory note, will not, when judgment is obtained thereon, entitle the plaintiff to have his execution levied upon property exempt from execution by the general law of the state. *Curtis v. O'Brien & Sears*, 20 Id., 376.

A widower with whom lived his son and his son's wife, and who employed a household servant, was held to be the head of a family within the meaning of this section. *Lyon v. Reynolds*, 52 Id., 431.

The stock of goods of plaintiff who was a retail grocer, was taken possession of under a chattel mortgage. Although no contract had been made for plaintiff's services between him and the mortgagee, he continued to assist in the business by delivering in person the goods sold to customers, using therefor a wagon owned and used by him for the purpose while he conducted the business. Two or three days after he surrendered the goods, the wagon was levied on by the defendant under an execution against the plaintiff; held that the wagon was exempt as property by the use of which the plaintiff earned his living. *Baker v. Hazlett*, 53 Id., 18.

Where the owner of exempt personal property is present when a levy is made thereon, and permits the property to be taken without objection, he will be deemed to have waived his right of exemption, and will be stopped from afterward asserting the same. *Angell v. Johnson et al.*, 51 Id., 625.

A threshing machine used by a farmer to thresh the grain of others for hire, as well as his own, is not exempt from execution, and will be assets in the hands of his administrator. *Meyer v. Meyer*, 23 Id., 359.

While a physician would be entitled to claim as exempt two horses, if by their use he habitually earned his living, and this whether he used them together or singly, yet, in order to avail himself of this exemption, he must show this use of both horses, for the purpose and in the manner contemplated by the statute. *Crop v. Griswold*, 27 Id., 379.

Property which under the statute is exempt to a widow, as the head of a family, is not to be deemed assets in the hands of the administrator, nor to be administered upon as such. *Ellsworth v. Ellsworth*, 33 Id., 164.

Consent on the part of the widow to such administration, under a misapprehension of her rights, will not estop her from afterwards claiming the property or the proceeds. *Id.*

The exemption law is to be liberally construed. If a person abandons one employment and procures a team, or a part of a team, intending to complete it for the purpose of using the same in good faith to earn for himself a livelihood, it will be deemed such an habitual use of the team in contemplation of the statute, as to exempt the same from execution, whether the person claiming the benefit of the exemption law has had an opportunity of using the team much or little. *Bevan v. Hayden*, 13 Id., 122, 125.

A person owning property exempt from execution, may dispose of the same by sale, and an attachment levied while a sale is being made and before it is perfected, does not affect the right of the owner under the exemption laws. *Id.*

The building in which a photographer carries on his business, even though it be personal property, is not exempt from execution under section 3072 of the code. *Holden v. Stranahan*, 48 Id., 70.

A person who is engaged in the livery business may be a laborer, and if he, in that business, uses a team of horses and wagon, or other vehicle, and thereby habitually earns his living, the same is exempt from execution under this section. *Root v. Gray*, 64 Id., 399.

The proceeds of personal property exempt from execution, voluntarily sold by the owner, are not exempt from execution. *Harrier v. Fassett et al.*, 56 Id., 264.

Where husband and wife having no children lived separate and apart for the period of seven years prior to the husband's death, he boarding with others, and neither contributing nor being asked to contribute to the support of his wife, it was held that he was not at the time of his death the head of a family within the meaning of the statute exempting personal property from execution. *Linton v. Crosby*, Id., 386.

A yearling heifer is not exempt from execution under this section, which exempts "two cows and a calf." *Mitchell v. Joyce*, 69 Id., 121.

Under this section, as amended by chapter 49, laws of 1882, an execution defendant does not waive his right to hold property exempt from execution by failing to assert his claim when he learns of its seizure, unless the officer requires him to designate the property which he claims as exempt, nor does such silence work an estoppel where it is not shown what, if any, expense was incurred by the officer in keeping and sale of the property. *Ellsworth v. Savre*, 67 Id., 449.

The provision of this section exempting from execution "the proper tools, instruments, or books of the debtor, if a * * * lawyer," exempts a lawyer's office furniture, including his table, necessary to enable him to carry on his business, and cannot be seized on a landlord's attachment. *Abraham v. Davenport*, 34 N. W. R., 767.

A person whose vocation is that of a farmer is entitled to have exempted to him the property with which he, as a farmer, earns a living for himself and family, even though he does not own a farm, and has not leased one, and is not actually engaged in farming at the time such property is levied to satisfy his debts. *Hickman v. Cruise, Sheriff*, 72 Iowa, 528.

Where the plaintiff entered into an agreement with her brother, who was insolvent, whereby she rented a farm of a third person and employed her brother to cultivate it in the use of his farm implements which were exempt from execution, the object being to enable the brother to employ himself and his implements at a certain rate per month, which would be exempt from execution, rather than to rent the farm himself and raise crop which would be subject to execution.

Held, that the transaction was not fraudulent in law, and that the crops could not be taken for his debts. *Patterson v. Johnson*, 59 Id., 397.

A widower with whom lived his son and his son's wife, and who employed a household servant, was held to be the head of a family within the meaning of this section. *Lyon v. Reynolds*, 52 Id., 431.

The husband is the head of the family within the meaning of this statute exempting property from sale on execution with which he habitually earns his living. Such property belonging to the wife before marriage and used for the family support, is not exempt from execution levied under a judgment against his wife. *Van Doran v. Marden*, 43 Id., 186.

But it has been held that a waiver of the exemption laws contained in a note will not, when a judgment is obtained thereon, entitle the plaintiff to have the execution levied upon property exempt from execution by the general law of the state. *Curtis v. O'Brien & Sears*, 20 Id., 376. See same case for cases holding the contrary, 378.

The proceeds of personal property exempt from execution, voluntarily sold by the owner, are not exempt from execution. *Harrier v. Fassett*, 56 Id., 284.

SEC. 3073. The word "family," as used in the last section, does not include strangers or boarders lodging with the family.

SEC. 3074. The earnings of such debtor for his personal services, or those of his family, at any time within ninety days next preceding the levy, are also exempt from execution and attachment.

The earnings of a debtor which are exempt from execution, include as well the earnings of professional men as of mechanics and laborers. *McCoy v. Cornell et al.*, 40 Iowa, 457.

It is not necessary that the person claiming exemption of his personal earnings shall give notice of such claim to the sheriff. *Id.*

This section does not authorize the creditor to seize by garnishment the earnings of a debtor accruing after the garnishment, except those earnings in excess of ninety days. The earnings for ninety days are exempt whether they accrue before or after garnishment. *Davis, Watson & Co. v. Humphrey*, 22 Id., 137.

Where the plaintiff, as a subcontractor, agreed to furnish the materials and perform the labor for a certain improvement, for a stipulated sum, the materials, however, to be paid for by the principal contractor, and the amount thereof credited upon the contract, it was held that the remainder, after such materials were paid for, was exempt from execution or counter-claim as the personal earnings of the plaintiff, he being the head of a family, and the work having been performed by him personally within ninety days next preceding the commencement of the action. *Banks v. Rodenbach et al.*, 54 Id., 695.

Money due from boarders to a boarding-house keeper, for boarding and lodging furnished by the boarding-house keeper, for which she charges and receives a stated sum per month, in a lump, for the entire boarding and lodging thus furnished, is not exempt from execution as earnings for personal services under this section. *Shelly v. Smith et al.*, 58 Id., 453.

Where the owner of exempt personal property is present when a levy is made thereon, and permits the property to be taken without objection, he will be deemed to have waived his right of exemption, and will be estopped from afterward asserting the same. *Angell v. Johnson et al.*, 51 Id., 625.

But it has been held that a waiver of the exemption laws contained in a note, will not, when a judgment is obtained thereon, entitle the plaintiff to have the execution levied upon property exempt from execution by the general law of the state. *Curtis v. O'Brien & Sears*, 20 Id., 376. See same case for cases holding the contrary, 378.

The proceeds of personal property exempt from execution, voluntarily sold by the owner, are not exempt from execution. *Harrier v. Fassett et al.*, 56 Id., 264.

SEC. 3075. [Unmarried persons.]—There shall be exempt to an unmarried person, not the head of a family, and to non-residents, their own ordinary wearing apparel and trunks necessary to contain the same.

SEC. 3076. [Persons who have started to leave the state.]—Where the debtor, if the head of a family, has started to leave the state, he shall have exempt only the ordinary wearing apparel of himself and family, and such other property, in addition, as he may select, in all not exceeding seventy-five dollars in value; which property shall be selected by the debtor and appraised according to the provisions of section two thousand nine hundred and ninety-seven of chapter one of this title, but any person coming into this state with the intention of remaining, shall be considered a resident within the meaning of this chapter.

Where a debtor, who was the head of a family, had declared his purpose to move out of the state, and had prepared his wagon to receive his household effects, a part of which he had boxed

and removed from the house, it was held that such acts constituted a starting to leave the state, such as would render his team, and other property otherwise exempt, subject to attachment under section 3076 of the code. *Graw v. Manning et al.*, 54 Iowa, 719. ADAMS, CH. J., and ROTHROCK, J., dissenting.

SEC. 3077. [**Purchase money.**—None of the exemptions prescribed in this chapter shall be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied.

Improvements in husbandry are not exempt from execution for the purchase money thereof. *Mitchell v. Joyce*, 69 Iowa, 121.

SEC. 3078. [**Absconding debtor.**—When a debtor absconds and leaves his family, such property shall be exempt in the hands of the wife and children, or either of them.

It is not necessary that a debtor should have deserted his family, or left without their knowledge or consent, to entitle his wife or children to hold property exempt from execution under this section of the code; it is sufficient if he has absconded to escape from the jurisdiction to avoid the service of the process of the courts. *Malvin v. Christoph*, 54 Iowa, 562. In such case where the debtor has left more property than is exempt under the statute, the wife may select that which she will retain. *Id.*

(CHAPTER 23, LAWS OF 1884.)

EXEMPTING PENSION MONEY.

An Act to exempt from judicial sale, the pension money paid to any person by the United States government, and certain of the proceeds and accumulations thereof.

SECTION 1. [**Moneys and credits.**—*Be it enacted by the general assembly of the state of Iowa:* All money received by any person, resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution or attachment, or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not.

SEC. 2. [**Homestead.**—The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations of such pension money, shall also be exempt as is now provided by the law of this state in relation to homesteads; and such exemption shall also apply to debts of such pensioner contracted prior to the purchase of such homestead.

SEC. 3. [**Absconding debtor.**—When a debtor absconds and leaves his family, the property exempted by this act, shall also be exempt to his wife and children, or either of them.

Approved March 20, 1884.

(Took effect by publication in newspapers.)

Where a woman received pension money and loaned it, and took a note for security, and a few days before her death, which occurred a few days prior to the taking effect of chapter 23, laws of 1884 exempting pensions from execution, she assigned the note as a gift to her daughter, held that, in the absence of other assets, the note was liable in the daughter's hands to the payment of claims against her mother's estate. *Baugh v. Barrett, Adm'r.*, 69 Id., 495.

From the time chapter 23, laws of 1884 took effect, a pensioner might make a gift of his pension money, and the donee might hold the same, or property purchased therewith, against the donor's creditors. But in a case where the gift was made to the wife of the pensioner, and the property was purchased and an action commenced to subject the property to the payment of the pensioner's debt, all before the said chapter took effect, it was held that plaintiff had acquired an equitable lien upon the property which it was not within the power of the legislature to divest, and that the actions are not intended to have such effect. *Globe & Co. v. Stephenson et al.*, 68 Id., 270.

Where a husband abandons his wife, leaving in her hands exempt property, such property is

exempt in her hands from his debts, under this section, and she may dispose of it in such way as in her judgment may seem best, and the husband's creditors cannot complain. *Waugh v. Bridgeford*, 69 Id., 334.

SALE.

SEC. 3079. [**Notice of.**]-The sheriff must give four weeks' notice of the time and place of selling real property, and three weeks' notice of personal property.

SEC. 3080. [**How given.**]-Notice shall be given by being posted up in at least three public places of the county, one of which shall be at the place where the last district court was held. In addition to which, in case of the sale of real estate, or where personal property to the amount of two hundred dollars or upwards is to be sold, there shall be two publications of such notice in some newspaper printed in the county, if there be one. In constables' sales there shall be no newspaper publication, and the notice shall be posted in three public places of the township of the justice, and one of them at his office door. The time of such notice shall be two weeks.

SEC. 3081. [**Penalty for selling without notice.**]-An officer selling without the notice above prescribed shall forfeit one hundred dollars to the defendant in execution, in addition the actual damages sustained by either party; but the validity of the sale is not thereby affected.

The purchaser at judicial sale is authorized to assume the regularity of the judgment and levy, and irregularities in other respects will not, in the absence of fraud, affect the title acquired by an innocent purchaser. *Cooley v. Wilson*, 42 Iowa, 425. See also, *Cavender v. Heirs of Smith*, 1 Id., 306; *Shaffer v. Bolander*, 4 G. Greene, 201; *Burton v. Emerson*, Id., 393; *Hopping v. Burnham*, 2 G. Greene, 39.

A failure to advertise will not invalidate the sale. *Cooley v. Wilson*, 42 Iowa, 425, 428.

The statute requiring notice of the sale of property on execution is directory, and, in the absence of fraud, a failure to comply with the statute in this respect will not render the sale and deed void. *Id.*

The penalty provided in this section for selling property on execution without giving the notice prescribed in the preceding section, cannot be recovered where no actual damage has accrued. And where action was begun for damages and penalty, but the claim for damages was withdrawn, a judgment for the penalty was unauthorized. *Enfield v. Blyler*, 67 Id., 294. See also, *Coffey v. Wilson*, 65 Id., 270.

SEC. 3082. [**Time of sale.**]-The sale must be at public auction, between nine o'clock in the forenoon and four o'clock in the afternoon, and the hour of the commencement of the sale must be fixed in the notice.

Sheriff's sales *must* be at public auction. *Swortzell v. Martin*, 16 Iowa, 519, 527.

For many purposes a sheriff in conducting a judicial sale is to be considered as the agent of both parties; while he is to be diligent in securing the money due to the creditor he is invested with a sound discretion as to the time, place and manner of sale; and this discretion must be exercised with a fair and impartial attention to the interests of *all* concerned. *Id.*

Improper conduct on the part of the sheriff is not alone sufficient to set aside a judicial sale when it is not shown that the purchaser was connected with such conduct. *Id.*

SEC. 3083. [**Officer may postpone when.**]-When there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the day fixed, the sheriff may postpone the sale for not more than three days, without being required to give any further notice thereof; but he shall not make more than two such postponements, and such postponement shall be publicly announced when the sale should have taken place.

It would seem that where the inadequacy of price is great, the bidders few, and the sheriff has failed judiciously to exercise the power to adjourn the sale, an application to set it aside should be sustained if made within a reasonable time. *Id.*

When real property is bid in on execution sale by the judgment plaintiff for the amount of his claim, and there is no proof of oppression on his part in not making the levy on other property, or proof that the sale was not properly and fairly conducted, and it appears that the debtor knew the property was advertised for sale, and the year of redemption was allowed to pass without an effort to redeem, the sale will not be set aside even though the price paid was grossly inadequate. *Peterson v. Little et al.*, 37 N. W. R., 169.

SEC. 3084. [Disposition of excess.]—When the property sells for more than the amount required to be collected, the overplus must be paid to the defendant, unless the officer have another execution in his hands on which said overplus may be rightfully applied.

While the surplus of moneys arising from the sale of lands under mortgage foreclosure, when remaining in the hands of the sheriff, or under the control of the court, belongs to subsequent lien-holders in the order of their priority, and should be so awarded by the court; yet when the execution on which the sale is made does not direct the disposition of such surplus, and the sheriff acting in good faith and without such subsequent liens, applies the money on other executions in his hands against the mortgagor, he is not liable therefor to such lien-holders. *Polk Co. for use, etc., v. Sypher*, 17 Iowa, 358.

Contests in respect to surplus arising on sales on execution may be determined upon motion instead of by petition in equity or other action, especially when the facts are undisputed, or are susceptible of being clearly and easily ascertained. *Id.*

But when the money has been actually paid over by the sheriff to subsequent execution creditors of the same debtor, such creditors should be brought into court as parties to the proceedings. *Id.*

Where the sheriff after sale on a foreclosure of a mortgage has a balance in his hands belonging to the mortgagor, such balance or surplus may be legally applied on executions against the mortgagor, then in the hands of the sheriff. *Payne v. Billingham*, 10 Id., 360.

Where an execution has been levied upon real property, such levy must be disposed of by a sale or abandonment thereof, or set aside by a court, before a second execution can issue, except as provided in section 3086 of the code. *Downard v. Crenshaw*, 49 Id., 296.

Where the property has been sold at judicial sale to the execution creditor, he cannot afterwards withdraw his bid, and treat the sale as a nullity, except with the consent of the execution debtor. *Id.*

SEC. 3085. [Another execution.]—If the property levied on sell for less than sufficient for that purpose, the plaintiff may order out another execution, which shall be credited with the amount of the previous sale. The proceedings under this second sale shall conform to those hereinbefore prescribed.

SEC. 3086. [Levy holds good unless plaintiff abandons.]—When property is unsold for want of bidders, the levy still holds good; and, if there be sufficient time, it may again be advertised or the execution returned and one issued commanding the officer to sell the property, describing it, previously levied on, to which a clause may be added, that if such property does not produce a sum sufficient to satisfy such execution, the officer shall proceed to make an additional levy, on which he shall proceed as on other executions, or the plaintiff may, in writing filed with the clerk or justice, abandon such levy upon paying the costs thereof. In which case the execution may issue with the same effect as if none had ever been issued.

SEC. 3087. [Notice to defendant: sale void without.]—If the defendant is in actual occupation and possession of the land levied on, the officer having the execution, shall, at least twenty days previous to such sale, serve the defendant with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale; and sales made without the notice required in this section, may be set aside on motion made at the same or at the next term thereafter.

A sale of land on execution without written notice to the owner, if he be in the actual occupation or possession thereof, as contemplated in this section, is irregular and should be set aside on the motion of such owner. *Jensen v. Woodbury et al.*, 16 Iowa, 515; *Fleming v. Maddox et al.*, 30 Id., 239.

To constitute actual occupation within the meaning of this section, it is not necessary that the defendant should reside on the land. The meaning of the terms "actual possession" and "occupation" defined by MILLER, J. *Id.*

The provisions of this section are applicable to sales under special executions, as well as those under a general one. *Id.*

The notice of the levy of an execution upon real property, required by this section to be served upon the defendant where he is in the actual occupation and possession of the land, need not be given him when the land is in the possession and under the control of an agent. *Bennett et al. v. Burton et al.*, 44 Id., 550.

So, also, no notice is required to be served on the defendant when the property is occupied by tenants of the owner. *Babcock v. Gurney*, 42 Id., 154.

SEC. 3088. [**Defendant may divide land and give officer plan.**—At any time before nine o'clock A. M. of the day of the sale, the defendant may deliver to the officer a plan of division of the land levied on, subscribed by him, and in that case the officer shall sell according to said plan so much of the land as may be necessary to satisfy the debt and costs and no more. If no such plan is furnished, the officer may sell without any division.

A sheriff's sale to the plaintiff in execution, for an inadequate price, of a large number of city lots, *en masse*, lying for the most part separate and remote from each other, is, at least, as to those lots remaining unsold by, and in the hands of, the purchaser, voidable, and may be set aside in a proceeding for that purpose brought by the execution defendant. *Williams et al v. Allison et al.*, 33 Iowa, 278.

But as to those lots that have been resold by the execution plaintiff to third parties, who purchased in good faith and without notice of any fraud or irregularity, and have made improvements thereon, the sale will be held valid after the lapse of several years. *Id.*

That real property embracing several tracts was sold in a body will not vitiate the sale when it is shown that it was first offered in parcels and no bids were received for it as thus offered. *Hill v. Baker*, 32 Id., 302. Nor will mere inadequacy of price, nor even gross inadequacy, where the original purchaser was not a party to the proceeding, and the premises have, in good faith, been sold to another. *Id.*

A sheriff's sale, under special execution, of two hundred and forty acres of land in a body, will not be held void when it appears that the land was first offered in forty-acre parcels, by the sheriff, and that no bids were received for any portion thus offered. Nor will the case be changed by the fact that one of the tracts thus sold was the homestead of the defendant. The offering of the land in separate tracts by the sheriff before selling the whole was held to be an exhausting of the other property before selling the homestead, as required by section 1992 of the code. *Burmeister v. Dewey et al.*, 27 Id., 463.

When it is shown by the return of the sheriff that lots were sold *en masse*, this fact alone will not be sufficient to invalidate the sale, where it is not shown that the debtor was injured by the mode of sale adopted, and he has delayed, without excuse, to question the same for nearly six years. *Cunningham v. Felker*, 26 Id., 117.

A sheriff's sale of real property *en masse*, for less than one-sixth its value, pending litigation, was set aside. *King v. Tharp*, Id., 283.

When an officer's return of an execution sale of two lots states that they were sold for a certain sum, but does not state whether separately or together, the presumption is that the officer did his duty and sold them separately. *Love v. Cherry*, 24 Id., 204.

Whether the sale of two lots together for a gross sum, could, after the term of redemption had expired, and sheriff's deed executed and delivered, be made available to defeat the title of a third party, *quere?* *Id.*

A sheriff's sale ought not to be set aside on motion, when the purchaser, who was not a party to the execution, has not had notice as a party to the motion. *Osborn v. Cloud*, 21 Id., 238; *Wright v. Le Claire*, 3 Id., 221; *Ritter v. Hinshaw*, 7 Id., 97; *Lyster v. Brewer*, 13 Id., 461; *Polk County v. Sypher et al.*, 17 Id., 358.

This section, providing for the sale of land on execution according to a plan furnished by the defendant, applies to sales made under special as well as under general executions. *Taylor et al. v. Trulock et al.*, 59 Id., 558.

SEC. 3089. [**When purchaser fails to pay.**—When the purchaser fails to pay the money when demanded, the plaintiff or his attorney may elect to proceed against him for the amount; otherwise the sheriff shall treat the sale as a nullity, and may sell the property on the same day, or after a postponement as above authorized.

Where the plaintiff in execution is the purchaser at judicial sale, and fails to pay the costs of the case, the sheriff may treat the sale as a nullity, and adjourn it to another day. *Reese v. Dobbins*, 51 Iowa, 282.

SEC. 3090. [**Sales vacated when execution is not a lien.**—When any person shall purchase at a sheriff's sale any real estate on which the judgment upon which the execution issued was not a lien at the time of the levy, and which fact was unknown to the purchaser, the court shall set aside such sale on motion, notice having been given to the debtor as in case of action, and a new execution may be issued to enforce the judgment, and upon the order being made to set aside the sale, the sheriff or judgment-creditor shall pay over to the purchaser the pur-

chase-money; said motion may also be made by any person interested in the real estate.

In the absence of fraud the law will not ordinarily relieve a purchaser at an execution sale who acquires a *defective* title. When seasonably applied for the sale will be set aside where the purchaser receives no title whatever. *Hamsmith v. Epsey*, 19 Iowa, 444; *Chambers v. Cochran & Brock*, 18 Id., 159.

The purchaser at sheriff's sale on execution takes only the title and interest of the judgment debtor. *Hamsmith v. Epsey*, 19 Id., 444.

A sale on execution at which the purchaser received an equity of redemption, will not be disturbed, when the evidence does not show that the amount of the prior lien exceeds the value of the property. *Id.*

Where personal property was levied on under execution and the sale postponed for fifteen months, at the request of the defendant and for his benefit, it was held that the validity of the sale as *between the parties* was not affected thereby. Not so as to creditors of defendant. *Payne v. Billingham*, 10 Id., 360.

The lien of a chattel mortgage, duly recorded, is prior to the lien of a landlord for rent of premises, notwithstanding the mortgaged chattels were afterwards used by the mortgagor as tenant of such premises although the mortgagee may have actual notice that such chattels were being so used upon the leased premises. *Jarchow & Sons v. Pickens*, 51 Id., 381.

When the judgment debtor has the legal title to property at the time the judgment is rendered and the sale made, the purchaser buys at his peril, and he is not entitled to relief, if, being the judgment creditor, he buys the property and thus satisfies the judgment, even though the property be encumbered by prior liens. *Holtzenger v. Edwards*, 51 Id., 383.

SEC. 3091. [**Disposition of money levied on.**]
—Money levied upon may be appropriated without being advertised or sold. The same may be done with bank bills, drafts, promissory notes or other papers of the like character, if the plaintiff will receive them at their par value as cash, or if the officer can exchange them for cash at that value.

SEC. 3092. [**Judgment against executor or decedent: how satisfied from real property.**]
—When a judgment has been obtained against the executor of one deceased, or against the decedent in his lifetime, which the personal estate of the deceased is insufficient to satisfy, the plaintiff may file his petition in the office of the clerk of the court where the judgment is a lien against the executor, the heirs and devisees of real estate, if such there be, setting forth the facts, and that there is real estate of the deceased, describing its location and extent, and praying the court to award execution against the same.

Where a judgment has been rendered against a decedent in his lifetime, which the personal estate is insufficient to pay, an action is authorized in this section to enforce the payment of the judgment by the sale of real estate. But collection must first be sought out of the personal estate, and for the purpose of such collection the judgment must be clearly stated, sworn to and filed as a claim against the estate, the same as any other claim. *Bayless v. Powers et al., Admin'rs*, 62 Iowa, 601.

Where the judgment debtor dies, this section does not require the judgment creditor to file his judgment as a claim against the estate in order to preserve his lien upon the real estate. *Boyd v. Collins*, 70 Id., 296. (See *Davis v. Shawhan*, 34 Id., 71, for a case where such filing becomes necessary.)

SEC. 3093. [**Notice.**]
—The person against whom the petition is filed shall be notified by the plaintiff to appear on the first day of the term, and show cause, if any he have, why execution should not be awarded.

SEC. 3094. [**How served and returned.**]
—The notice shall be served and returned in the ordinary manner, and the same length of time shall be allowed for appearance as in civil actions, and service of such notice on non-resident defendants may be had in in such cases by publication.

SEC. 3095. [**Execution awarded.**]
—At the proper time, the court shall award the execution unless sufficient cause be shown to the contrary.

SEC. 3096. [**Non-age.**]
—The non-age of the heirs or devisees shall not be deemed such sufficient cause.

SEC. 3097. [**Mutual judgments set off.**]
—Mutual judgments, the executions on which are in the hands of the same officer, may be set off the one against the other; except that the costs shall not be set off, unless the balance of cash actually

collected on the large judgment is sufficient to pay the costs of both judgments, and such costs shall be paid therefrom accordingly.

Where a judgment has been fraudulently assigned by the party in whose favor it was rendered, for the purpose of presenting a set-off of mutual judgment under this section, a court of equity will interpose and effect such set-off. *Hurst v. Sheets et al.*, 14 Iowa, 322.

Under this section and sections 2550 and 2655 of the code, an execution issued upon a judgment in favor of a sole plaintiff may be set-off against an execution issued upon a judgment in which such sole plaintiff is a joint defendant. *Ballinger v. Tarbell*, 16 Id., 491.

The sheriff has the power to set-off executions in his hands only when the parties to the judgments upon which they are issued are in both cases the same, and when the judgments are actually the property of the parties thereto. *Bell v. Perry & Townsend*, 43 Id., 368.

SEC. 3098. [**When sale absolute.**]—When real property has been levied upon if the estate is less than a leasehold having two years of unexpired term, the sale is absolute.

SEC. 3099. [**When redeemable.**]—When the estate is of a larger amount, the property is redeemable as hereinafter prescribed.

APPRAISEMENT OF PERSONAL PROPERTY.

SEC. 3100. [**How done and amount it must sell for.**]—Personal property levied upon and advertised for sale on execution must be appraised before sale by two disinterested householders of the neighborhood, one of whom shall be chosen by the execution debtor and the other by the plaintiff, or in case of the absence of either party, or if either or both parties neglect or refuse to make choice, the officer making the levy shall choose one or both, as the case may be, who shall forthwith proceed to return to said officer a just and true appraisal, under oath, of said property if they can agree; and in case they cannot agree, they shall choose another disinterested householder, and with his assistance they shall complete such appraisal, and the property shall not be sold for less than two-thirds of said valuation; provided, that the same shall be offered for three successive days at the same place and hour of day as advertised, and if no offer equal to two-thirds the value thereof be made, then it shall be lawful to sell said property for one-half of said valuation.

Contracts made prior to the taking effect of the appraisal law of 1860 (see revision §§ 3360-3374) were not affected thereby, even though enforced after the law took effect. Such a law imposes a new condition, rendering the debt more difficult of collection, and to apply it to existing contracts would impair the obligation thereof. *Olmstead v. Kellog*, 47 Iowa, 460; *Rosier v. Hale*, 10 Id., 470.

REDEMPTION.

SEC. 3101. [**Officer to execute deed or certificate.**]—If the property sold is not subject to redemption, the sheriff must execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to such purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, and stating that unless redemption is made within one year thereafter according to law, he or his heirs or assigns will be entitled to a deed for the same.

A sheriff's certificate of sale is admissible in evidence, after the proper foundation has been laid for the introduction of secondary evidence, as tending to show the existence and contents of the execution under which the sale was made. *Conger v. Converse*, 9 Iowa, 554.

SEC. 3102. [**By defendant, when.**]—The defendant may redeem real property at any time within one year from the day of the sale as herein provided, and will, in the meantime, be entitled to the possession of the property. But in no action where the defendant has taken an appeal from the circuit or district court, or stayed execution on the judgment, shall he be entitled to redeem.

Under the code of 1851, the sale of mortgaged property upon foreclosure barred and cut off all

equity of redemption. The mortgagor or any lien-holder might redeem before sale but not afterwards. *Kramer v. Rebman*, 9 Iowa, 114.

A judgment creditor has a right to redeem real estate, purchased by him or by his attorney for his benefit, under execution, from the holder of a senior judgment lien, by complying with the provisions of the statute. *Seerers v. Wood, Bacon & Co.*, 12 Id., 295.

Where, after a judgment had attached as a lien upon real property, it was sold by the judgment debtor and by him conveyed by deed with covenants against incumbrances and of warranty, after which it was sold on execution issued upon the judgment, it was held, 1. That the judgment debtor had a right of redemption for one year from the date of the sale; 2. That the grantee also had a right of redemption as a subsequent purchaser. *Harvey v. Spaulding et ux.*, 16 Id., 397.

To redeem from execution sale, the defendant must, within one year, pay the required amount of money into the clerk's office for the use of the person entitled thereto. *Webb v. Watson*, 18 Id., 537.

If in good faith the defendant pays and the clerk receives, before the expiration of the time of redemption, an ordinary bank check, and especially of a bank situated in the town or place where the business is transacted, upon which he realizes the money, though after the expiration of the time, the money being ready to be paid to the holder or the certificate of sale promptly and without trouble to him, the payment is sufficient. *Id.*

A purchaser of real property at sheriff's sale does not become vested at once with the legal title. During the period of redemption his title is equitable only, which may or may not ripen into a legal title. *Shimer v. Hammond*, 51 Id., 401, 404.

The holder of a lien upon the lands of a surety for the stay of execution is entitled to redeem from an execution sale of the lands at the expiration of the stay. *Sieben v. Becker et al.*, 53 Id., 24.

The right of redemption from an execution sale is lost to a defendant who has taken an appeal from the judgment under which the sale was made, although no *supersedeas* bond has been filed. *Dobbins v. Lusch, Carton & Co et al.*, 53 Id., 304.

In computing the time of redemption of real estate from execution, the first, or day of sale is to be excluded and the right of redemption exists during and until the last moment of the same day of the succeeding year. *Tencher & English v. Hiatt et al.*, 23 Id., 527.

A redemption of real property from sale on execution, effected by a sub-agent appointed by the agent, instead of by the agent himself, is valid if the act be afterward ratified by the principal. *Id.*

A purchaser of mortgaged lands, whose deed is recorded at the time of the institution of the action to foreclose will not be bound by the foreclosure proceedings unless he be made a party to the suit. But his right will be simply to redeem by payment of the mortgage debt. He will not be entitled to a judgment for possession. *Porter v. Kilgore*, 32 Id., 379.

A sale of real property, after the taking effect of the code of 1873, under a judgment rendered prior to that time, should conform to the law in force at the time the judgment was rendered, which gave the judgment debtor the right to elect whether the property should be appraised before the sale, or sold subject to redemption. *Holland v. Dickerson*, 41 Id., 367; *Babcock v. Gurney*, 42 Id., 154; *Fonda v. Clark*, 43 Id., 300.

Where judgment was rendered after the code took effect, upon a debt contracted before that time, the sale should be conducted under the provisions of the code. *Babcock v. Gurney*, 42 Id., 154; *Fonda v. Clark*, 43 Id., 200.

The fact that upon a sale of real estate on execution the sheriff has made a deed to the purchaser is a mere irregularity, which will not deprive the judgment debtor of his right to redeem. *Olmstead v. Kellogg*, 47 Id., 460.

When the debtor or his assignee redeems the land, it again becomes subject to sale for the satisfaction of any unpaid portion of the judgment under which the prior sale was made. *Hayes v. Thode*, 18 Id., 51.

But it does not become thus liable when the redemption is made by a lien holder. *Id.*

In an action by a mortgagor who was not made a party, to redeem from a sale under a decree of foreclosure, the amount necessary to redeem should be determined with reference both to the right to rents and the liability to pay for improvements. *Barrett v. Blackmar*, 47 Id., 565.

The right of a judgment debtor to redeem from a sheriff's sale of real property expires at the end of one year whether a valid deed be then executed or not. *Conner v. Long et al.*, 63 Id., 295, 300.

The vendee of an execution defendant, whose lands are sold at an execution sale, may, under this section, redeem the lands to which he holds title from such sale, although the judgment debtor may have taken an appeal from the judgment. *Thayer v. Coldren et al.*, 57 Id., 110.

The term "defendant," in the first sentence of this section, means the person holding the right of possession as the owner of the land, and this applies to the vendee of the execution defendant who has become such prior to the sale on execution. The term "defendant" in the last sentence of the section is the party to the action, and not his vendee, for he cannot appeal. *Id.*

Where a party stays a judgment in the court of a justice of the peace, and, thereafter, a tran-

script is filed in the circuit court, and execution is issued thereon and sale had, such sale is absolute, without the right of redemption. *Brown v. Markley et al.*, 58 Id., 689.

Where real property was ordered to be sold on special execution, and after the issuance thereof and before sale defendants appealed, the purchaser was entitled to a deed at the time of the sale but did not demand it, and took a certificate of purchase subject to redemption, and allowed defendants to remain in possession, it was held that having taken an appeal the defendants were not entitled to redeem, but having remained in possession with the assent of the owner were tenants at will, and entitled to thirty days' notice to quit before action for possession. *Munson v. Plummer et al.*, 59 Id., 120.

The "defendant" contemplated in this section is the mortgagor. *Miller v. Ayres*, Id., 424, 426.

Under this section of the code, an execution sale made after an appeal taken is without the right of redemption; but an appeal is not taken by service of a notice on the attorney of the execution plaintiff. It must also be served upon the clerk of the court. *Fitzgerald v. Kelso et al.*, 71 Id., 731.

Defendant's property was sold under an execution, and about eleven months thereafter it was sold under another execution issued upon a different judgment. Held, that he was entitled to redeem from both sales by paying to the clerk, within a year from the date of the first sale, the two amounts for which the property had been sold, with interest on each from date of sale. *Harrison v. Wilmering*, 72 Id., 727.

SEC. 3103. [When by creditors.]—For the first six months after such sale, his right to redeem is exclusive; but if no redemption is made by him at the end of that time, any creditor of the defendant whose demand is a lien upon such real estate, may redeem the same at any time within nine months from the day of sale. But a mechanic's lien, before judgment thereon, is not of such character as to entitle the holder to redeem.

A junior mortgagee, having assigned the mortgage as collateral security for a debt of his own, may redeem the mortgaged premises from a sale made in the foreclosure of a senior mortgage; and such redemption will inure to the benefit of the assignee of the junior mortgage. *Manning v. Market*, 19 Iowa, 103.

The refusal of the assignee to ratify the act of his assignor does not affect his rights in respect to such redemption. *Id.*

It seems that under this section, the objection that a redemption is made by a creditor before the expiration of six months from the date of sale, can be made only by the defendant or purchaser and not by a junior lien holder. *Wilson v. Conklin*, 22 Id., 452.

Where the purchaser of a junior judgment, but before the formal assignment thereof to him, and before the expiration of six months from the day of sale under execution on a prior judgment, intending to redeem, paid to the purchaser the amount of his claim, and took an assignment of the certificate of sale, it was held, that though his redemption might be informal, he was still entitled to be regarded in the light of a purchaser and holder of the certificate; and that to entitle a judgment creditor, whose lien was junior to his, to redeem, he would be required to pay such holder the amount of his certificate, as well as the amount of his judgment. *Id.*

Where P. recovered a judgment against Q. for the purchase money of the latter's homestead, and purchased the property at an execution sale thereon for less than the amount of the debt, and F. also recovered a judgment against Q. after the date of P.'s judgment, upon a claim alleged to ante-date the acquisition of the homestead, it was held: 1. That F. could show *aliunde* that the debt was contracted before the acquisition of the homestead; 2. That he was entitled to redeem from P.'s purchase upon payment of the amount of his bid. *Phelps v. Finn*, 45 Id., 447.

Where in proceedings to establish a mechanic's lien upon real property which had been sold under a decree of foreclosure, since the claim accrued, the mortgagor and wife, who had parted with the equity of redemption, were the only parties defendant, it was held that the holder of the mechanic's lien claim was not entitled to redeem from the foreclosure sale. *Spink v. McCall*, 42 Id., 432.

A junior mechanic's lien holder who has not been made a party to an action foreclosing a mortgage, may maintain a suit in equity to redeem from the foreclosure sale. *Jones v. Hartsock et al.* 42 Id., 147.

The holder of a junior mortgage who is made a defendant in an action to foreclose the senior mortgage, can redeem after sale by paying the amount bid, with interest, within the time allowed by the statute, notwithstanding the amount bid by the senior mortgagee at the sale is less than the amount of his mortgage debt. *Tuttle et al., v. Dewey et al.*, 41 Id., 306.

The right of judgment creditors to redeem from an execution sale of lands of their debtor becomes barred in nine months from the date of the sale, unless exercised by some creditor within that time. *George v. Hart*, 56 Id., 706.

A junior lien holder has no right under the statute to redeem real property sold at judicial sale after nine months subsequent to the date of the sale; but where the sale was under the foreclosure of a mortgage to which the junior lien holder was not made a party, he has the right in equity to redeem from the sale, and the mortgagee who was the purchaser at the foreclosure sale has the right also to redeem from the junior lien holder, by paying him the amount upon which his claim is based. *Newell v. Pennick et al.*, 62 Id., 123.

SEC. 3104. [**Who creditor.**—Any creditor whose claim becomes a lien prior to the expiration of the time allowed by law for the redemption by creditors may redeem. A mortgagee may thus redeem before or after the debt secured by the mortgage falls due.

Under this section, a mortgagee of lands has a right to redeem the same from a sale made on execution, although the liability secured by his mortgage be only a contingent one which may never ripen into a certainty. *Crossen v. White*, 19 Iowa, 109.

Where a junior judgment creditor purchases, at execution sale, in satisfaction of a senior judgment, property on which his judgment is a lien, he may, like any other judgment creditor, redeem the property from such sale, though he thereby redeems from himself. *Citizens Savings Bank of St. Louis v. Percival*, 61 Iowa, 183.

Sections 3103 and 3194 apply to redemption from sales under execution simply, and have no application to one holding a mechanic's lien on real property which has been sold on a mortgage foreclosure, to which he was not made a party. —*Jones v. Hartsock*, 42 Id., 147, 151.

SEC. 3105. [**May redeem from each other.**—Creditors having the right of redemption may redeem from each other within the time above limited, and in the manner herein provided.

See *SeEVERS v. Wood, Bacon & Co.*, 12 Iowa, 295, cited in notes to section 3102.

SEC. 3106. **The terms of redemption** in all cases will be the reimbursement of the amount paid by the then holder, added to the amount of his own lien, with interest on the whole at the rate of ten per cent per annum, together with costs, subject to the exception contained in the next section. But where a mortgagee whose claim is not yet due is the person from whom the redemption is thus to be made, a rebate of interest at the rate of ten per cent per annum must be made by such mortgagee on his claim.

The judgment in a foreclosure action directed the sale of the mortgaged premises on special execution, and provided that the proceeds of the sale should be applied in satisfaction of the judgment and costs, and that any balance thereof should be applied in satisfaction of notes secured by the mortgage not yet due. The land (eighty acres) was offered *en masse*, and bid in by the foreclosure plaintiff for much more than the judgment, but he had not paid the amount into court. *Held*, that the foreclosure defendant was not entitled to redeem by paying the amount of the judgment only, but must pay the full amount of the purchaser's bid. *Williams v. Dickerson*, 66 Iowa, 105.

SEC. 3107. [**Senior creditor.**—When a senior creditor thus redeems from his junior, he is required to pay off only the amount of those liens which are paramount to his own, with the interest and costs appertaining to those liens.

SEC. 3108. [**Junior.**—The junior creditor may in all such cases prevent a redemption by the holder of the paramount lien by paying off the lien, or by leaving with the clerk beforehand the amount necessary therefor.

SEC. 3109. A junior judgment creditor may redeem from a senior judgment creditor, by praying to the party, the clerk, or the sheriff, if execution has issued, the full sum due, with interest and costs, and shall become thereby vested with the title to the judgment so redeemed.

A junior judgment creditor who purchases and takes an assignment of the certificate of sale from his senior creditor, to whom the land has been sold, will be regarded as a redemption creditor within the meaning of the statute; and to entitle a creditor or lien holder junior to him to redeem the property from such sale, he must pay not only the amount for which it was sold, but also the amount of the other superior judgment liens held by the person thus holding the certificate of the sale by assignment. *Goode v. Cummings*, 35 Iowa, 67.

The holder of a junior mortgage who is made defendant in an action to foreclose a senior mortgage, has the right to redeem after sale by paying the amount bid with interest within the time allowed by the statute, notwithstanding the amount bid by the senior mortgagee at the sale is less than the amount of the mortgage debt. *Tuttle et al. v. Dewey*, 44 Id., 306.

Real estate which has been sold in part satisfaction of a judgment and redeemed by the judg-

ment debtor does not become again subject in his hands to the lien of the judgment. (Overruling *Crosby v. Elkadar Lodge*, 16 Id., 399); *Clayton et al. v. Ellis et al.*, 50 Id., 590.

The holder of an unsatisfied balance of a judgment cannot redeem from an execution sale made under the same judgment. *Id.*

SEC. 3110. [**When money paid to sheriff.**]-If paid to the sheriff, he shall give to the party redeeming a certificate that he has paid such sum for the redemption of the judgment, describing it, which being presented to the clerk, he shall enter such redemption on the judgment docket, as he shall also do if the money is paid to himself.

SEC. 3111. [**Junior from senior creditor.**]-Whenever a senior creditor redeems from a junior creditor, the latter may in return redeem from the former, and so on as often as the land is taken from him by virtue of a paramount lien.

SEC. 3112. [**When right of creditors expire.**]-After the expiration of nine months from the day of sale, the creditors can no longer redeem from each other except as hereinafter provided. But the defendant may still redeem at any time before the end of the year as aforesaid.

SEC. 3113. [**Who gets property.**]-Unless the defendant thus redeems, the purchaser, or the creditor who has last redeemed prior to the expiration of the nine months aforesaid, will hold the property absolutely.

SEC. 3114. [**Claim extinct.**]-In case it is thus held by a redeeming creditor, his lien, and the claim out of which it arose, will be held to be extinguished, unless he pursues the course pointed out in the next section.

SEC. 3115. [**Exception.**]-If he is unwilling to hold the property and credit the defendant therefor with the full amount of his lien, he must, within ten days after the nine months aforesaid, enter on the sale book the utmost amount that he is thus willing to credit on his claim.

Where a junior judgment creditor redeemed from a sale under a senior judgment, and filed with the clerk, within the time prescribed by the statute, a statement of the amount he was willing to credit on his judgment, which statement the clerk failed to enter upon the sale book until after ten days from the expiration of nine months after the day of sale, it was held, that the neglect of the clerk did not have the effect to invalidate the lien of the junior judgment. *Craig et al. v. Alcorn*, 46 Id., 560.

When a debtor has actual notice of the filing of the statement he can suffer no prejudice for want of constructive notice. *Id.*

No particular form of statement under this section is required to be filed by the junior lien holder, and it is sufficient if it indicate with clearness the amount he is willing to credit on his judgment. *Id.*

The provisions of this section 3115, apply only to redemptions by creditors after the expiration of nine months from the day of sale. A redemption within that time may be sufficiently made by merely paying the necessary amount directly to the creditor or to the clerk. *Goode v. Cummings*, 35 Id., 67.

Where a national bank, holding a second mortgage, procured an assignment of the certificate of purchase issued upon a judicial sale of the property under the first mortgage, and at the expiration of the period of redemption took a sheriff's deed, no entry being made in the sale-books as required by this section, it was held that the transaction was a purchase and not a redemption, and was valid. *Streeter v. First N'l B'k of Tama City*, 53 Iowa, 177.

The provisions of this section are applicable to redemptions made before the expiration of the nine months, and that the lien of a junior mortgagee who redeemed after six and before nine months from the foreclosure of a prior mortgage without making the statement of a record of the amount he was willing to credit was discharged. *West v. Fitzgerald, sheriff*, 72 Id., 306.

Where a junior mortgagee, more than six months and less than nine months after a foreclosure sale under a senior mortgage paid to the purchaser at such sale the full amount of his bid, with interest, and took an assignment of the certificate of sale, and filed an affidavit with the clerk setting out the amount of his mortgage lien, and stating that he had redeemed as junior lien holder, held, that this amounted to a redemption under the statute, though the clerk took no part in the transaction. *Lamb et al. v. Feeley et al.*, 71 Id., 742.

SEC. 3116. [**Further redemptions.**]-Any unsatisfied lien creditor, within ten days after the expiration of the time thus allowed to make the entry required in the last section, may redeem the property by paying the amount of the legal

disbursements of the last holder as hereinbefore regulated, added to the amount thus entered on the sale book, together with interests and costs.

SEC. 3117. [**Same.**—Such redemptioner shall also credit the defendant with the full amount of his lien, unless within ten days after redeeming as aforesaid, he likewise makes a like entry on the sale book, in which case any unsatisfied lien creditor may in like manner redeem within ten days as aforesaid, and so on until there are no more unsatisfied liens, or until the expiration of the year for redemption, the defendant having the final privilege of redeeming from the last redemptioner at the end of the year.

See *Goode v. Cummings*, 35 Iowa, 67, cited in notes to section 3115.

SEC. 3118. [**Mode of redemption.**—The mode of making the redemption is by paying the money into the clerk's office for the use of the persons thereto entitled. The person so redeeming, if not defendant in execution, must also file his affidavit, or that of his agent or attorney, stating as nearly as practicable the amount still unpaid and due on his own claim.

The payment to the clerk by bank check will be good payment in redemption. See *Webb v. Watson*, 18 Iowa, 537, cited in notes to section 3102, *ante*.

Whether the affidavit provided for in this section stating the amount due and unpaid on the claim of the party redeeming, is necessary to be filed by him *before* the expiration of nine months from the day of sale, *dubitat*. *Wilson v. Conklin*, 22 Id., 452.

The usual mode of making redemption is by paying the money into the clerk's office. *Morgan v. Long*, 29 Id., 434, 436.

The debtor or lien holder may redeem by paying the amount of the bid with interest and costs. *Hayes v. Thode*, 18 Id., 51.

A junior lien holder cannot redeem from a prior judgment under which there has been no sale without paying the full amount due on the judgment. *Id.*

SEC. 3119. [**Same.**—The clerk shall thereupon give him a receipt for the money stating the purpose for which it was paid. He must also, at the same time, enter in the sale book a minute of such redemption, of the amount paid, and the amount of the lien of the last redemptioner as sworn to by him.

SEC. 3120. [**Entitled to assignment.**—A creditor redeeming as above contemplated, is entitled to receive an assignment of the certificate issued by the sheriff to the original purchaser as hereinbefore directed.

SEC. 3121. [**Sale in parcels.**—When the property has been sold in parcels, any distinct portion may be redeemed by itself.

SEC. 3122. [**Tenants in common.**—When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately.

SEC. 3123. [**Defendant may transfer right.**—The rights of the defendant in relation to redemption are transferable, and the assignee has the like power to redeem.

The right of redemption may be exercised by an assignee of the judgment debtor to the same extent as it could be by the assignor. *Stoddard v. Forbes*, 13 Iowa, 296.

SEC. 3124. [**Deed made to whom.**—If the defendant or his assignee fail to redeem, the sheriff must, at the end of the year, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to his assignee. If the person entitled be dead, the deed shall be made to his heirs, but the property will be subject to the payment of the debts of the deceased in the same manner as if acquired during his lifetime.

The sheriff in office when a certificate of sale, made by his predecessors, is presented, is the proper officer to make the deed. A sheriff cannot execute a valid deed after his term of office has expired. *Conger v. Converse*, 9 Iowa, 554.

SEC. 3125. (*As amended by ch. 146, 21st g. a.*) [**When evidence of title to be recorded.**—The purchaser of real estate at a sale on execution, need not place any evidence of his purchase upon record until [sixty] days after the expiration of the full time of redemption. Up to that time, the publication of the proceedings is constructive notice of the rights of the purchaser, but no longer.

While under this section a *bona fide* purchaser without notice, who takes title from the debtor to lands sold on execution after the twenty days mentioned therein, will be protected against the purchaser at such sale. One who thus purchases with *actual* notice, or one who purchases with a fraudulent intent to defeat the title of a purchaser at the execution sale, will not be protected. *Harrison v. Kramer*, 3 Iowa, 243.

Deelay in taking a sheriff's deed will not estop the purchaser from asserting his title under the sale, when no right adverse to his title was acquired after the expiration of twenty days from the time he was entitled to deed and the execution of the sheriff's deed. *Wood, Bacon & Co. v. Young*, 38 Id., 102.

Under this section the publicity of the proceedings of a sheriff's sale of land is constructive notice to those only who derive their title from or through the judgment debtor. *Hultz v. Zollars*, 39 Id., 589.

Where the sheriff gives to the purchaser a certificate of sale and the right of redemption exists for one year, the proceedings are notice for one year and twenty days from the sale. *Churchill v. Morse*, 23 Id., 229, 234.

Deelay in taking a sheriff's deed until more than twenty days after the time for redemption has expired will not avail one who has *actual* notice of the fact of sale. *Walker v. Schreiber*, 47 Id., 529.

SEC. 3126. [Deeds imply regularity.]—Deeds executed by a sheriff in pursuance of the sales contemplated in this chapter, are presumptive evidence of the regularity of all previous proceedings in the case, and may be given in evidence without preliminary proof.

A sheriff's deed is presumptive evidence of the regularity of all prior proceedings, and may be offered in evidence without preliminary proofs. *Conger v. Converse*, 9 Iowa, 554; *Deere & Co. v. McConnells*, 15 Id., 269, 272; *Childs v. McChesney*, 20 Id., 431, 437.

It is presumed that a sheriff's sale was regularly conducted, and this presumption is not rebutted by the silence of the sheriff's deed as to whether the sale was made under an *alias fi. fa.* or a *venditioni exponas*. *Childs v. McChesney*, 20 Id., 431.

SEC. 3127. [Damages.]—When real estate has been sold on execution, the purchaser thereof, or any person who has succeeded to his interest, may, after his estate becomes absolute, recover damages for any injury to the property committed after the sale and before possession is delivered under the conveyance.

SEC. 3128. ["Defendant": "plaintiff."]—The term "defendant," as herein used, is intended to designate the party against whom, and the term "plaintiff" the party in favor of whom, any execution is issued.

SEC. 3129. [Application to justices' proceedings.]—The provisions of this chapter are intended to embrace proceedings in justices' courts, so far as they are applicable; and the terms "sheriff" and "clerk" are accordingly to be understood, as qualified in this chapter, in the same manner in this respect as in that relative to attachment.

REVIVOR OF JUDGMENTS.

SEC. 3130. [Death of plaintiff: how execution may issue.]—The death of one or all the plaintiffs shall not prevent an execution being issued, but on such execution the clerk shall indorse the death of such of them as are dead, and if all be dead, the names of the personal representatives, or the last survivor, if the judgment passed to the personal representatives, or the names of the survivors' heirs, if the judgment was for real property.

A levy of an execution after the death of the judgment plaintiff is invalid without the indorsement on the execution provided for by this section of the statute, and the sale thereunder will be enjoined on the application of the defendant. *Meek v. Bunker*, 33 Iowa, 169.

Where a plaintiff dies after judgment an execution cannot properly issue without an indorsement thereon of the names of the personal representatives or heirs. *White v. Secor*, 58 Id., 533.

Where a mortgage was foreclosed, in the name of the mortgagee, by one claiming to be the owner by devise from the mortgagee, the decree was held to be of no validity, and that the same could not, by suit in equity, be corrected and the sheriff's deed reformed by the substitution of the name of the devisee; but that he was entitled to a re-foreclosure of the mortgage in his own name. *Id.*

SEC. 3131. [**Officer's duty.**]—The sheriff, in acting upon execution indorsed as provided in the last section, shall proceed as if the surviving plaintiff or plaintiffs, or the personal representatives or heirs, were the only plaintiffs in execution, and take bonds accordingly.

SEC. 3132. [**Affidavit required.**]—Before making the indorsements named above, an affidavit shall be filed with the clerk by one of the plaintiffs or personal representatives, or heirs or their attorney, of the death of the defendant, and that the persons named as such are the personal representatives or heirs; and in the case of personal representatives, they shall file with the clerk a certificate of their qualification, according to law in this state.

SEC. 3133. [**Death of part of Defendants.**]—The death of only part of the defendants, shall not prevent execution being issued, which, however, shall operate alone on the survivors and their property.

This section does not change the common law rule that execution cannot be issued after the decease of the judgment debtor, even though the judgment be rendered in an attachment proceeding and that a sale of land under an execution so issued is void. *Welch v. Battern*, 47 Iowa, 147.

SEC. 3134. [**When execution may be quashed.**]—The defendant may move the court to quash an execution, on the ground that the personal representatives or heirs of a deceased plaintiff are not properly stated in the indorsement on the execution, and, during the vacation of the court, may obtain an injunction, upon its being made to appear that the persons named are not entitled to the judgment on which the execution was issued.

See *Meek v. Bunker*, 33 Iowa, 169, cited in note to section 3130, *ante*.

CHAPTER 3.

PROCEEDINGS AUXILIARY TO EXECUTION.

SECTION 3135. [**Defendant examined.**]—When execution against the property of a judgment debtor, or one of several debtors in the same judgment, has been issued from the district, circuit, or supreme court to the sheriff of the county where such debtor resides, or if he do not reside in the state, to the sheriff of the county where the judgment was rendered or transcript of a justice's judgment has been filed, and execution issued thereon is returned unsatisfied in whole or in part, the owner of the judgment is entitled to an order for the appearance and examination of such debtor.

SEC. 3136. [**Same.**]—The like order may be obtained at any time after the issuing of an execution, upon proof, by the affidavit of the party or otherwise, to the satisfaction of the court or officer who is to grant the same, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment.

This section providing for an order for the appearance and examination of a debtor upon an affidavit that the debtor has property which he refuses to apply in satisfaction of the judgment, such affidavit is not necessary upon a second examination which is but the continuation of the former one. *McDowell v. Henderson*, 33 N. W. Rep., 512.

SEC. 3137. [**By whom order granted.**]—Such order may be made by the district or circuit court of the county in which the judgment was rendered, or to which execution has been issued, or in vacation by a judge thereof. And the debtor may be required to appear and answer before either of such courts or judges, or before a referee appointed for that purpose by the court or judge who issued the order to report either the evidence or the facts.

SEC. 3138. [**Debtor interrogated.**]—The debtor, on his appearance, may be

interrogated in relation to any facts calculated to show the amount of his property, or the disposition which has been made of it, or any other matter pertaining to the purposes for which the examination is permitted to be made. And the interrogatories and answers shall be reduced to writing and preserved by the court or officer before whom they are taken. All examinations and answers under this chapter shall be on oath, and no person shall, on such examination, be excused from answering any questions on the ground that his examination will tend to convict him of a fraud, but his answers shall not be used as evidence against him in a prosecution for such fraud.

SEC. 3139. [Witness examined.]—Witnesses may be required by the order of the court or judge, or by subpoenas from the referee, to appear and testify upon any proceedings under this chapter in the same manner as upon the trial of an issue.

SEC. 3140. [Property found: disposition of.]—If any property, rights, or credits, subject to execution are thus ascertained, an execution may be issued and they may be levied upon accordingly. The court or judge may order any property of the judgment debtor not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor to be delivered up, or in any other mode applied towards the satisfaction of the judgment.

The purpose of those auxiliary proceedings is to obtain an order for the payment of the debt, and not alone to settle the right of the creditor to the application of the proceeds of a certain fund. *Ex parte Grace*, 12 Iowa, 208.

The provisions of this chapter, so far as it purports to confer upon the examining officer the power to order any property in the hands of himself or others to be delivered up and applied in satisfaction of the judgment under which the proceedings were had, and the further power to punish as for a contempt any disobedience of any order made by the acting officer in the premises are repugnant to sections 9 and 10 of article 1, of the constitution, and therefore void. *Id.*

An order that an execution shall issue against a corporation, with a clause inserted therein directing the officer to levy upon the property of certain stockholders, does not render such stockholders judgment debtors within the meaning of this chapter, and they cannot be compelled, after the return of the execution, to disclose property in the summary manner provided in this chapter. *Bailey v. The D. W. R. Co.*, 13 Id., 97.

SEC. 3141. [Receiver.]—The court or judge may also, by order, appoint the sheriff of the proper county or other suitable person a receiver of the property of the judgment debtor, and may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, or may forbid any interference therewith.

SEC. 3142. [Equitable interest.]—If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor, mortgagee, or otherwise, and the interest of said debtor can be ascertained as between himself and the person holding the legal estate, or having any lien on, or interest in the same, without controversy as to the interest of such person, the receiver may be ordered to sell and convey such real estate or the debtor's equitable interest therein, in the same manner as is provided by this code for the sale of real estate upon execution.

SEC. 3143. [Sheriff liable.]—If the sheriff shall be appointed receiver, he and his sureties shall be liable on his official bond for the faithful discharge of his duties as such.

SEC. 3144. [Continuance.]—The judge or referee acting under the provisions of this chapter, shall have power to continue his proceedings from time to time until they shall be completed.

SEC. 3145. [Defendant failing to appear.]—Should the judgment debtor fail to appear after being personally served with notice to that effect, or should he fail to make full answer to all proper interrogatories thus propounded to him, he will be guilty of contempt and may be arrested and imprisoned until he complies with the requirements of the law in this respect. And if any person, party or

witness, disobey an order of the court or judge, or referee, duly served, such person, party or witness may be punished as for contempt.

SEC. 3146. [Service of order.]—The order mentioned herein shall be in writing and signed by the court or judge or referee making the same, and shall be served in the same manner as an original notice in other cases.

SEC. 3147. [Compensation of officers and witnesses.]—Sheriffs, referees, receivers and witnesses, shall receive such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and the collection thereof from such party or parties as ought to pay the same shall be enforced by an order.

In a proceeding against a defendant for refusing to obey the order contemplated in sections 3145 and 3146, having been present in court through all the proceedings, and having been given a full and fair trial, he is not entitled to have the proceedings set aside on the ground that he was not served with a written order signed by the judge. *McDonnall v. Henderson*, 38 N. W. R. 572.

SEC. 3148. [When warrant of arrest to issue.]—Upon proof to the satisfaction of the court, or officer authorized to grant the order aforesaid, that there is danger that the defendant will leave the state, or that he will conceal himself, the said court or officer, instead of the order aforesaid, may issue a warrant for the arrest of the debtor, and for bringing him forthwith before the court or officer authorized to take his examination as hereinbefore provided. After being thus brought before the said court or officer, he may be examined in the same manner with the like effect as is above provided.

SEC. 3149. [Defendant to give bond.]—Upon being brought before the court or officer he may enter into an undertaking in such sum as the court or officer shall prescribe, with one or more sureties, that he will attend from time to time for examination before the court or officer as shall be directed, and will not, in the meantime, dispose of his property, or any part thereof; in default whereof he shall continue under arrest, and may be committed to jail on the warrant of such court or officer from time to time for safe keeping until the examination shall be concluded.

The right of trial by jury is secured in actions at law, and the general assembly cannot, by an evasion of the constitution, render that which is in its essence a suit at law, a proceeding for contempt. *Ex parte Grace*, 12 Iowa, 208.

See *Eikenberry & Co. v. Edwards*, 67 Id., 619, where it is held that sec. 3145 of this chapter is not repugnant to sections 9 and 10 of article 1, of the state constitution.

EQUITABLE PROCEEDINGS.

SEC. 3150. [How and when brought.]—At any time after the rendition of a judgment, an action by equitable proceedings may be brought to subject any property, money, rights, credits or interest therein belonging to the defendant, to the satisfaction of such judgment. In such action, persons indebted to the judgment debtor, or holding any property or money in which such debtor has any interest, or the evidences of sureties for the same, may be made defendants.

SEC. 3151. [Answers verified: petition taken as true.]—The answers of all defendants shall be verified by their own oath, and not by that of an agent or attorney, and the court shall enforce full and explicit discoveries in such answers by process of contempt; or upon failure to answer the petition, or any part thereof, as fully and explicitly as the court may require, the same, or such part not thus answered, shall be deemed true, and such orders made or judgment rendered as the nature of the case may require.

SEC. 3152. [Lien created from time of service of notice.]—In the case contemplated in the two preceding sections, a lien shall be created on the property of the judgment debtor, or his interest therein, in the hands of any defendant or under his control, which is sufficiently described in the petition, from the time of the controlling such property or any interest therein.

SEC. 3153. [**Surrender of property enforced.**]—The court shall enforce the surrender of the money or securities therefor, or of any other property of the defendant in the execution which may be discovered in the action, and for this purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender until it shall be done, or the court is satisfied that it is out of his power to do so.

The provisions of sections 3150 to 3153, inclusive, apply as well to equities of the debtor in real property; as to moneys, choses in action and other personal property; but as to real property the remedy here provided is merely cumulative. *Bridgman & Co. v. McKissick*, 15 Iowa, 260.

The lien of a judgment attaches to an equitable interest in real property, and it may be subjected to the satisfaction of a judgment by apt proceedings in equity for that purpose, but cannot be thus subjected by proceedings at law. A junior judgment creditor, by first instituting proceedings in equity to subject the property to the payment of his debt, acquires a priority over the senior judgment creditor who is less diligent. *Id.*

TITLE XIX.

OF PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS, OR THE PROCEEDINGS OF BOARDS OR INDIVIDUALS ACTING JUDICIALLY.

CHAPTER 1.

OF PROCEEDINGS TO REVERSE, VACATE, OR MODIFY JUDGMENTS IN THE COURTS IN WHICH RENDERED.

SECTION 3154. [By court where rendered.]—The district or circuit court in which a judgment has been rendered, or by which, or by the judge of which, a final order has been made, shall have power after the term at which such judgment or order was made to vacate or modify such judgment or order:

1. By granting a new trial for the cause within the time and in the manner prescribed by the sections on new trials;

2. By a new trial granted on proceedings against defendants served by publication only, as prescribed in title seventeen, chapter nine, section two thousand eight hundred and seventy-seven;

3. For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order;

4. For fraud practiced by the successful party in obtaining the judgment or order;

5. For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the errors in the proceedings;

6. For the death of one of the parties before the judgment in the action;

7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending;

8. For error in a judgment shown by a minor within twelve months after arriving at full age.

It is only an error of fact, committed by the trial court, in its own judgment that can be reviewed on a writ of error *coram nobis*. *McKiney v. The Western Stage Co.*, 4 Iowa, 420.

An application to vacate a judgment in a case where the court had jurisdiction of the person and of the subject-matter must be made within one year from the rendition of the judgment; and the same limit would apply if the proceedings were in the nature of a new application under the chapter relating to new trials. *Hunt & Kendall v. Stevens et al.*, 26 Id., 399.

That a party intending to appear and defend in an action is, while on a journey attacked with a severe illness, and thereby rendered incapable of attending to and interposing his defense, which is shown to be a valid one, is good ground under subdivision seven of this section for the vacation of the judgment rendered by default against him. *Luscomb v. Maloy*, 26 Id., 444.

But the mere loss of a note, constituting a defense, is not sufficient to entitle a party to relief under subdivision seven, since he might avail himself of it as a defense by proving the loss

and the contents of the note. *Miller v. Albaugh*, 24 Id., 128. See, also, *Brewer v. Holborn*, 34 Id., 478.

When a petition was held to be sufficient under this section, see *Brown v. Mallory*, 26 Id., 469.

Where in an action on a promissory note the clerk by mistake assessed a much smaller amount than was actually due and judgment was rendered accordingly, which mistake was not discovered until after the time allowed by the statute to correct such errors on motion had expired, and until after the case had been appealed to the supreme court, and there affirmed on motion of the plaintiff, the appeal not having been perfected, and judgment rendered for the same amount as in the court below; it was held, notwithstanding the affirmance of the judgment that the plaintiff being without default or negligence, and without any remedy at law, was entitled to maintain an equitable proceeding in the court below to correct the error in the judgment, this being matter not passed upon in the appellate court. *Partridge & Co. v. Harrow*, 27 Id., 96.

Where a default and judgment thereon are irregular they may be properly set aside on motion. *Morgan v. Small*, 33 Id., 118, 119.

It is no bar to an application to vacate a judgment under the fourth subdivision of this section, that an application for a new trial had been previously made on other grounds. And in the application to vacate, other facts than those connected with the cause may be united, when they constitute a defense to the claim on which the judgment is based. *Reno v. Teagarden*, 24 Id., 144.

A judgment may be vacated for fraud practiced by the successful party in obtaining it, by an action commenced within one year after the judgment was rendered. *The Ind. S. Dist., etc., v. Schmeer*, 46 Id., 172.

Where a judgment has been obtained by fraud against a school district, the fact that the directors had levied a tax to pay it, will not estop the district to bring an action to set it aside within one year after it was obtained. *Id.*

Where a petition is filed to vacate a judgment, the court may first determine whether the grounds upon which the petition is based are sufficient before inquiring into the validity of the defense, although the judgment cannot be vacated until a valid defense to the action is shown. *The Niagara Ins. Co. v. Roderick & Pearson*, 47 Id., 162.

The fact that service of process was had on the agent of the insurance company in another county than the one where the loss occurred does not constitute "fraud practiced by the successful party," authorizing a vacation of the judgment. *Id.*

It was held not sufficient ground for vacating a judgment that the agent served with notice of the action placed the notice in an envelope addressed to the general agent of the company, and placed the letter where he supposed it would be mailed, but which never reached the general agent, and who was, accordingly, ignorant of the pendency of the suit, and judgment was rendered by default. *Id.*

To entitle a party to have a judgment vacated, either on the fourth or seventh grounds named in section 3154, he must prove due diligence on his part, as well as the existence of good cause. *Miller v. Albaugh*, 24 Id., 128.

The loss of all the written evidence on which a case has been tried, occurring after judgment and appeal to the supreme court, without fault on the part of the appellant, affords no ground for granting a new trial by the court below. *Loomis v. McKinzie*, 48 Id., 416.

Courts have power, independently of statute to supply any part of their record which may have been lost. In the exercise of their general equity powers they cannot grant relief by giving a new trial on account of lost evidence, when the law affords a plain and direct remedy by permitting the substitution of lost evidence. *Id.*

New Trial in Equity. A court of equity will direct a new trial in an action at law, in a case where such trial would have been ordered by the court wherein the judgment was rendered, if timely application had been made therein, upon it being shown that proper reasons existed for not making such application, or the grounds of equitable interference arose after the time had expired for the court wherein the action was tried to grant relief.

On Ground of Fraud. A petition for a new trial, under section 3154 of the code, on the ground of fraud, need not allege the fraud in terms, but is sufficient if it sets up facts which amount in law to fraud. *Lefever v. Stone*, 55 Id., 49.

New Trial for Minor. A new trial cannot be obtained by a minor, under paragraphs five and eight of section 3154, on the ground that he did not appear on the trial by guardian, where it is shown that after his appearance by attorney, such attorney was appointed his guardian *ad litem*, and continued to act for him through the trial, and no prejudice to the minor is shown. *Webster v. Page*, 54 Id., 461.

A motion to vacate a judgment rendered against a garnishee for failure to answer, when he had notice of the time and place when and where his answer was to be taken, may be made after the term at which the judgment was rendered. *Thomas v. Hoffman, Garnishee*, 62 Id., 125; *Town of Storm Lake v. I. F. & S. C. R'y Co.*, Id., 219.

A new trial will not usually be granted upon the ground of newly discovered evidence when

such evidence is merely cumulative in character. Facts of case held insufficient to entitle party to a new trial. *Bailey, Wood & Co. v. Landingham*, 52 Id., 415.

Where a judgment is rendered in favor of a plaintiff in an action, after his death, the judgment is voidable only, and must be considered valid unless set aside in proceedings under chapter 1, title XIX, of the code, upon an adjudication that there is a valid defense to the action. The court is not authorized to treat such judgment as a nullity, allow a substitution of plaintiffs, and enter a second judgment, upon the application of plaintiff's attorney. *Gilman v. Donovan*, 53 Id., 362.

A decree of divorce may be set aside on the ground that it was obtained by fraud, notwithstanding the rights of third parties may have intervened. *Rush v. Rush*, 40 Id., 648; *Same v. Same*, 38 Id., 701; *Whitcomb v. Whitcomb*, 46 Id., 437.

A new trial should not be granted on the ground of newly discovered evidence, when such evidence, if produced, would not authorize a different judgment from that before rendered. *Carpenter v. Brown*, 50 Id., 451.

A probate order for a guardian's sale is not a judgment; and these sections providing for reversing, vacating, and modifying judgments have no proper application to such an order. *Bunce v. Bunce*, 59 Id., 533. See, also, *Gilman v. Donovan*, Id., 76.

Where an insufficient petition for a new trial was filed within the year, as provided by section 3157, and after the expiration of a year an amended petition was filed, setting up facts which might be sufficient, held that the amended petition could not be regarded as a more specific statement of the original, and did not entitle the party to a new trial. *Harnett v. Harnett*, Id., 401.

When an original notice is duly served upon a married woman, she must be presumed, in the absence of evidence of mental incapacity, to understand the object and purport of the notice, and how her rights are affected thereby; and where, as in this case, she gave the copy of the notice to her husband, claiming that she did it upon the supposition that it did not relate to her individual rights, and the husband neglected to defend, and judgment by default was rendered against her, held that she could not have the judgment set aside on the grounds of unavoidable casualty or misfortune, under the statute. *Teabout v. Roper & Co.*, 62 Id., 603.

Certain parties were brought into the case upon a notice which stated that no personal judgment was asked against them unless they defended. They appeared, denied knowledge or information, and disclaimed any interest in the subject of the action, but the court rendered judgment against them for costs of the case, and the record was signed and approved. At the next term these parties filed a motion to re-tax costs, the object of which was really to have the judgment wholly set aside as being unwarranted. Held, that the court had no power to vacate the judgment on motion filed after the term at which it was rendered, the ground of the motion not being one of those named in section 3154 of the code. *Fairbairn v. Dana*, 63 Id., 231.

A motion to vacate a judgment rendered against a garnishee for failure to answer, when he had no notice of the time and place when and where his answer was to be taken, may be made after the term at which the judgment was rendered. *Thomas v. Hoffman, Garnishee*, 62 Id., 125; *Town of Storm Lake v. I. F. & S. C. Ry Co.*, Id., 219.

Where one who is entitled to have a judgment against him set aside on account of fraud under subdivision 4 of section 3154, is prevented by fraud or procurement of his adversary from bringing his action therefor within the time prescribed by section 3157, a court of equity will, upon a proper showing, grant him relief after that time, *Lumpkin v. Shook*, 63 Id., 515, (citing *Young v. Tucker*, 39 Id., 596; *Dist. Tp. of Newton v. White*, 42 Id., 608); but as a basis for such relief he must bring himself within the terms of the statute.

A judgment of foreclosure was procured under which plaintiff's property was sold and purchased by the defendant. Plaintiff was a minor at the time, and her guardian was alone named as defendant in the papers in the case but the original notice was duly served upon her, by which she was informed as to the nature of the proceeding; but she did not appear, though the guardian did, and he filed an answer denying the allegations of the petition. The judgment, by its terms, foreclosed the equity of redemption of both plaintiff and the guardian. Held that if the mortgage was invalid, as the plaintiff claims, she might have appeared within a year after attaining her majority and asked to have the judgment set aside under paragraph 8 of section 3154 of the code, but that she could not, after that time maintain a collateral proceeding against the defendant to set aside the judgment and sheriff's deed, and to have the title quieted in herself. *Dahms v. Aston*, 72 Id., 411.

SEC. 3155. [Petition for new trial: when proper mode.]—When the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases, not later than the second term after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action. The facts stated in the petition shall be considered as denied without answer. The case shall be tried as other cases by ordinary proceedings, but no petition shall be filed more than one year after the final judgment was rendered.

To entitle a party to a new trial on the ground of surprise, he must show that he was prejudiced by the judgment rendered on the former trial, that he was prevented by reason of such accident or surprise from properly defending the action, and that he has material evidence which he could not, by the exercise of reasonable diligence have discovered and produced on that trial. *Richards v. Nuckolls*, 19 Iowa, 555.

In a proceeding for a new trial on the ground of newly discovered evidence, both the statute and the common law require proof of diligence to discover the evidence before the trial. *Stuckslager v. McKee*, 40 Id., 212.

Under this section the applicant for a new trial on the ground of newly discovered evidence should be made by petition, as in an ordinary action. *First Nat. Bk. etc. v. Murdough*, 40 Id., 26.

When it would be proper for a court of law to grant a new trial on the ground of newly discovered evidence, if the application is made while the court has power to do so, it is equally proper for a court of equity to decree a new trial when the application is based upon the ground of evidence discovered after the court of law ceased to have power to grant it. *Haskins v. Huttenback et al.*, 14 Id., 314.

When a party goes into a court of equity for relief after a trial at law, he must be able to impeach the justice and equity of the verdict, and it must be upon grounds that either could not be made available to him at law, or which he was prevented from setting up, by fraud, accident or the wrongful act of the other party, *without any negligence or other fault on his part*. When he brings himself within these requirements a court of equity will grant him a new trial in that court. *Johnson v. Lyon*, 14 Id., 434; *Richards v. Nuckolls*, 19 Id., 555; *Humphrey v. Darlington*, 15 Id., 207; *Dixon v. Graham*, 16 Id., 310; *McGregor v. Gardner*, Id., 538.

A petition for a new trial under this section must be filed and notice thereof served upon the opposite party or his attorney within one year from the date of the judgment or decree of the court in which the same was rendered. *Gray v. Coan*, 48 Id., 424; *Bond v. Epley*, Id., 600.

The time within which the petition must be filed commences to run from the date of the decree in the trial court, and not from the date of the affirmance of the decree in the supreme court on appeal. *Id.*

Pending an application for a new trial made subsequent to the trial term, under this section, for newly discovered evidence, a change of venue may be granted upon a cause shown. *Gibles v. Buckingham*, 48 Id., 96.

A petition for a new trial on the ground of newly discovered evidence, under section 3155 of the code which states that the grounds for new trial could not, with reasonable diligence, have been discovered before, is not vulnerable to a demurrer. *Woodman v. Dutton*, 49 Id., 398.

Where a petition for a new trial is filed in accordance with the provisions of section 3155, it is for the court without a jury to first try and decide upon the grounds to vacate or modify the judgment. *Carpenter v. Brown*, 50 Id., 451.

Where a petition for a new trial is filed in accordance with the provisions of this section, it is for the court, without a jury, to "first try and decide upon the grounds to vacate or modify the judgment." *Id.*

Under this section an application for a new trial on the ground of newly discovered evidence should be made by petition, as in ordinary proceedings. *The First National Bank of Tama City v. Murdough*, 40 Id., 26.

Upon hearing of a petition for a new trial under the first subdivision of section 3154, and section 3155, the court should first make the order granting (in a proper case) a new trial before proceeding to determine the merits of the original case upon the issues made therein. *Brown v. Byam*, 59 Id., 52.

The right to apply for a new trial, under section 3155, and the power of the court to entertain such application during the time limited in the statute are absolute and unconditional; and a subsequent appeal from the judgment on the first trial will not oust the court of such jurisdiction. *Cook v. Smith*, 58 Id., 607.

Where there was an error in the verdict of a jury, which did not inhere in the verdict, but was the result of the jury's adding extraneous evidence to the case, thus making a case different from that which had been submitted to them in court, which error was not discovered by the plaintiffs until after the term, when they filed a petition for a new trial under this section, held that a new trial should have been granted. *Kruidner Bros. v. Shields*, 70 Id., 428.

Upon a petition to vacate a judgment and for a new trial under this section of the code, no answer is allowable, because the allegations of the petition are considered as denied without answer, and the cause made by the petition is alone to be tried, and where the petition in such case sets up the facts relied on as a defense, such facts are considered only in determining whether or not the petitioner is entitled to a new trial and it is not competent there, in an answer to the petition, to reply to such defense; but such reply should be deferred until a new trial is granted, and should be set up as against the facts then pleaded as a defense to the original action. *Bennet v. Carey*, 72 Id., 476.

SEC. 3156. [Mistakes of clerk and irregularity.]—The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion served on the adverse party, or on his attorney in the action and within one year; and when made to vacate a judgment because of irregularity in obtaining it, must be made on the second day of the succeeding term.

A mistake of the clerk in entering up a judgment, may be corrected on motion of the plaintiff, within the time and in the manner prescribed by this section, even after the payment and satisfaction of the erroneous judgment by the defendant. *Goldsmith v. Clausen*, 14 Iowa, 278.

When a court of equity will grant relief in the correction of mistakes of the clerk, after the expiration of one year, see *Partridge & Co. v. Harrow et al.*, 27 Id., 96, cited in the notes to section 3154, *ante*.

Courts possess the inherent power to enter judgments *nunc pro tunc* and the lapse of time will not bar its exercise. *Fuller & Co. v. Stebbins et al.*, 49 Id., 376.

This section (3156) does not apply to an application for a *nunc pro tunc* order for the entry of judgment when the duty has been omitted by the clerk. *Id.*

Equity will interfere to set aside a judgment at law and grant a new trial, after more than one year from the date of the judgment, if it be shown to have been obtained by fraud and valid reasons are assigned for the delay in making the application for relief. *The Dist. Tp. of Newton v. White et al.*, 42 Id., 608. See, also, *Bowen v. The Troy Portable Mill Co.*, 31 Id., 460.

A notice of appeal to the supreme court should be filed with the clerk of the court below, and it is one of the original papers, and becomes a part of the record of the court, and it is subject to correction, on motion, in that court within the time prescribed by the statute. *Beier v. The C. B. & P. Ry Co.*, 66 Id., 602.

A motion to modify a final decree on the ground that it is irregularly obtained should be overruled, when it is filed later than the second day of the succeeding term, and no notice thereof has been given to the adverse party. *Westmore v. Harper et al.*, 70 Id., 346.

SEC. 3157. [When petition must be filed.]—The proceedings, to obtain the benefit of subdivisions four, five, six, seven and eight of section three thousand one hundred and fifty-four of this chapter, shall be by petition, verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and the facts constituting a defense to the action if the party applying was a defendant, and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability.

The objection that the application to vacate a judgment does not state the facts constituting a defense, and is otherwise informal in not conforming to section 3157 of the code, should be taken advantage of by a motion for more specific statement or possibly by a demurrer, and cannot be made available on the trial of the merits or after appeal. *Turner v. First Natl Bk, etc.*, 30 Iowa, 191.

After a cause has been appealed and is pending in the supreme court, the court below has no authority to make a *nunc pro tunc* order without notice to the other party. *Id.*

In a proceeding under this section to vacate a judgment, it is necessary not only that the matters relied upon to excuse the failure to defend are sufficient, but that the facts set out as a defense shall be adjudged sufficient for that purpose. *Brewer v. Holborn*, 34 Id., 473.

A decree of divorce may be vacated and set aside on the ground that it was obtained by fraud, notwithstanding the rights of innocent third persons may have intervened. *Rush v. Rush*, 46 Id., 648. The case of *Gilruth v. Gilruth*, 20 Id., 225, explained. *Id.*

The provisions of section 3157 are directory merely, and a petition not verified confers jurisdiction on the court, which may give the plaintiff leave to amend so that the pleading shall comply with the statute. *Id.*

The proceedings by which to obtain relief under the fourth subdivision of section 3154 is by petition verified by affidavit setting forth the judgment, etc. *Reno v. Teagarden*, 24 Id., 144, 149.

SEC. 3158. [Party brought into court in the ordinary way.]—In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, and the pleadings shall be governed by the principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that defendant shall introduce no new cause, and the cause of the petition shall alone be tried.

SEC. 3159. [**Not vacated until it is adjudged there is a defense.**—The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

SEC. 3160. [**First try grounds to vacate.**—The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action.

Upon an application to vacate a judgment rendered by default, the court may first try the question of the validity of the defense, and if that shall appear insufficient the application should be overruled. *Miracle v. Lancaster*, 46 Iowa, 179.

When a petition is filed to vacate a judgment and for a new trial, the court may first determine whether the grounds upon which the petition is based are sufficient before inquiry into the validity of the defense, although the judgment cannot be vacated until it be shown there is a valid defense to the action. *The Niagara Ins. Co. v. Rodecker & Pearson*, 47 Id., 162.

SEC. 3161. [**Injunction.**—The party seeking to vacate or modify a judgment or order, may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court or the judge upon its being rendered probable, by affidavit or petition sworn to, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified.

SEC. 3162. [**When judgment is affirmed.**—In all cases of affirmance of the judgment or order, when the proceedings have been suspended, judgment shall be rendered against the plaintiff in error for the amount of the former judgment, interests and costs, together with damages at the discretion of the court, not exceeding ten per cent on the amount of the judgment.

CHAPTER 2.

OF APPELLATE PROCEEDINGS IN THE SUPREME COURT.

SECTION 3163. [**From what appeals may be taken.**—The supreme court has appellate jurisdiction over all judgments and decisions of all other courts of record, as well in case of civil action as in proceedings of a special or independent character.

An appeal cannot be taken from the verdict of a jury. Judgment must be first rendered thereon before an appeal will lie. *Heath v. Groce*, 10 Iowa, 591; *Jordan v. Henderson*, 19 Id., 565; *Wallis v. Sparks*, Morris 21.

The abstract must show that final judgment has been rendered. *Shannon v. Scott*, 40 Iowa, 629.

An appeal lies from a judgment in a garnishment proceeding, whether it is for or against the garnishee. *Bebb v. Preston*, 1 Id., 459.

The principal defendant may appeal from the judgment against a garnishee. *Sinard v. Gleason*, 19 Id., 165.

No appeal lies from a judgment rendered in a proceeding for contempt. *The First Congregational Church, etc., v. Muscatine*, 2 Id., 69.

An appeal may be taken to the supreme court, from a judgment rendered by default, or a decree *pro confesso*. *Woodward v. Whitescarver et ux.*, 6 Id., 1; *Harris v. Kramer*, 3 Id., 543; *Carr v. Kopp*, Id., 80; *Byington v. Crosthwait*, 1 Id., 143.

So also an appeal will lie from a judgment by confession. *Troxell v. Clark*, 9 Id., 201; *Edgar v. Greer*, 7 Id., 136.

A person has no right of appeal until some question to which he was a party has been adjudicated by the court below. *Phillips v. Shelton*, 6 Id., 545; *Borgalhouse v. The F. & M. Ins. Co.*, 36 Id., 250; *The State, et rel. Alderson, v. Jones*, 11 Id., 11.

An appeal lies from a judgment rendered by an attorney, not the judge, setting and acting temporarily as such. *Petty v. Ourell*, 4 G. Greene, 120.

An appeal may be taken from any decree rendered in a cause which finally determines any mate-

rial issue between the parties, although another branch of the suit is still pending and undetermined. *Lucas v. Pickel et ux.*, 20 Iowa, 490.

Where a party takes a stay of execution under the statute, he waives his right to appeal. *Seacrest v. Newman*, 19 Id., 323.

No appeal can properly be taken from a ruling which the court in effect subsequently changed, or set aside in the case. *Thompson v. Burnham*, 35 Id., 41.

By the express provisions of the constitution, the jurisdiction in chancery causes is appellate only, and in reviewing such causes that court will consider only the issues and evidence presented in the court below, and no evidence will be originally received and considered in the trial *de novo* in such causes on appeal. *McGregor v. Gardner*, 16 Id., 538.

An appeal lies from an order refusing to grant a new trial, for the purpose of reviewing any error involved in such ruling which is assigned with the necessary exactness; and the appeal may be taken six months from the date of the order. *Kitterman v. The C. M. & St. Paul R'y Co.*, 69 Id., 440.

In order to deprive the supreme court of jurisdiction of an appeal, on the ground that the amount involved does not exceed \$100, that fact must appear affirmatively from the pleadings. *Babeock v. The Tp. Board of Eq., &c.*, 65 Id., 110.

Where the petition claimed less than \$100, and the answer alleged the payment of more than \$100, but did not set up a counter-claim, nor ask judgment against the plaintiff for any balance, the amount in controversy was less than \$100, and the appellate court had no jurisdiction to entertain an appeal in the case, without the certificate of the trial judge required by this section, even though the cause was tried below, and presented in the appellate court, on the theory that the answer did plead a counter-claim. *Kirtz & Bittinger v. Hoffman*, Id., 260.

SEC. 3164. An appeal may also be taken to the supreme court from the following orders:

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

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

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

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

5. An order or judgment on habeas corpus.

An appeal lies from an order of the court dissolving an injunction, where the dissolution affects the merits of the cause, or where the order involves an adjudication upon any of the material questions in controversy. So held under section 1556 of the code of 1851. *The Trustees of I. C. v. City of Davenport*, 7 Iowa, 213.

The party against whom the court has made a ruling on the admissibility of evidence, may except the same, and where it virtually disposes of the whole case, appeal from it to the supreme court without interposing a motion for a new trial. *McCoy v. Julien*, 15 Id., 371.

An order of the district court refusing the district attorney the right to appear and defend in an action against the county, is erroneous, and he may prosecute an appeal in the name of the county from such order to the supreme court. *Clark et al. v. Lyon County*, 37 Id., 469.

An appeal may be taken from an order of the court, appointing, or refusing to appoint, a receiver. *Callanan et al. v. Shaw*, 19 Id., 183.

Prior to the code of 1873, an appeal did not lie from an order of a circuit judge in vacation, dissolving an injunction. *Aliter*, if the order was made by the court in session. *Jewett v. Squires*, 30 Id., 92.

An appeal to the supreme court does not lie from a ruling of the court below upon the admission or exclusion of evidence. The ruling or order appealed from must extend to and affect the merits of the case; if it be merely incidental to the progress or trial of the cause, no appeal will lie. *Richards v. Burden*, 31 Id., 305.

An appeal from the final judgment in an action, brings up for review the intermediate rulings of the court which have been duly excepted to, and not otherwise waived. *Jones v. The C. & N. W. R'y Co.*, 36 Id., 68.

An order of the district court refusing the district attorney the right to appear and defend an action pending against his county is erroneous, and may be corrected on appeal presented by the district attorney in the name of the county. *Clark & Grant v. Lyon County*, 37 Id., 469.

An appeal will lie from an order of a court committing a cause to arbitrators after the filing of their report. *Brown v. Harper*, 54 Id., 546.

It was held under the revision of 1860 that an appeal would not lie to the supreme court from an order of a county judge dissolving an injunction (*The Monticello Bank v. Smith*, 25 Id., 246), but under the code an appeal lies to the supreme court from an order made by any judge allowing or refusing an injunction. *Bennett et al. v. Hetherington*, 41 Id., 142.

The statute does not give a right of appeal from an order granting a change of venue, but an appeal properly taken from an interlocutory order affecting substantial rights brings up for review all rulings theretofore made in the action and duly excepted to. *Allerton v. Eldridge*, 56 Id., 709.

An appeal lies, as a matter of right, from an order sustaining a demurrer to the petition, although the record does not show an election to stand on the petition. *Hampton v. Jones*, 58 Id., 317.

While, under the statute, appeals are allowed from certain intermediate orders made in the progress of the cause, a failure to appeal therefrom does not operate as a waiver in respect thereto, but they are saved and may be reviewed on appeal from the final judgment, if duly excepted to. *Id.*

An appeal from an order requiring a bond for costs, is premature if taken before the expiration of the time for filing the bond. *The D. M. V. Live Stock Ins. Co. v. Henderson*, 38 Id., 446.

An appeal lies from an order quashing the original notice. *Elliott v. Corbin*, 4 Id., 564; *Worster, Templin & Co. v. Oliver*, Id., 345.

So, also, an appeal lies from an order discharging a garnishee. *Bebb v. Preston*, 1 Id., 460.

An appeal may be taken from an order granting a new trial. *Newell v. Sanford*, 10 Id., 396; *Caffrey v. Groom*, Id., 548.

An appeal lies to the supreme court from an order overruling a motion to set aside the verdict and quash the writ in a proceeding *ad quod damnum*. *Burnham v. Thompson*, 35 Id., 421.

An appeal will not lie from a ruling on a motion to suppress depositions. *Baldwin v. Mayne*, 40 Id., 687.

An appeal lies from an order of the court overruling a demurrer when the ruling involves the merits of the case, and the party at the time elects to stand on his demurrer, though no final judgment has been rendered. *Cowen v. Boone et al.*, 48 Id., 350; *Richards v. Burden*, 31 Id., 305.

Prior to the code of 1873, an appeal did not lie from an order of a judge of the supreme court dissolving an injunction; nor under the code (§ 3165) would an appeal lie from such order, made prior to the taking effect of the code. *The City of Davenport v. The D. & St. P. R. Co.*, 37 Id., 624. *In re Curley*, 34 Id., 184.

An appeal will lie from an order of the court refusing to strike a petition from the files. *The First Nat. Bank, etc., v. Gill & Co. et al.*, 50 Id., 425.

Where a cause is dismissed because of the non-appearance of the plaintiff, and judgment is rendered against him for costs, an appeal will not lie from such judgment. *Striker v. Holtz*, 50 Id., 291.

An appeal will lie from a final order, made in a special proceeding, and affecting a substantial right therein. *Dryden v. Wyllis et al.*, 51 Id., 534.

An agreed statement of facts for the purpose of procuring a review in the supreme court of the action of the court below, in overruling a motion for a new trial, based upon the ground that the verdict is against the evidence, which does not purport to contain even the substance of the evidence on which the case was tried, or the facts established by the evidence, but which is simply a general statement of facts upon which it is agreed the court may give judgment, is insufficient. The supreme court sits, in cases at law, for the correction of errors, and not to decide cases upon the agreement of parties or otherwise as upon an original hearing. *Harvey v. Miller*, 25 Id., 219.

An appeal to the supreme court will lie from a judgment overruling a demurrer to an answer and dismissing the action at plaintiff's cost. *Arnold Bros. v. Kreutzer et al.*, 67 Id., 214.

Where a cause has been reversed by the supreme court and remanded to the court below for a decree in accordance with the opinion of the supreme court, and defendant was then permitted in the lower court, against plaintiff's objection, to introduce additional evidence, it was held that such ruling was not such a final order as would sustain an appeal, since it could not be said in advance that such evidence would determine the case against the plaintiff. *Garmore v. Sturgeon*, 67 Id., 700.

No appeal lies from a ruling on a motion for a change of venue. *Horak v. Horak*, 68 Id., 49. Following *Allerton v. Eldridge*, 56 Id., 709, and *Groves v. Richmond*, 58 Id., 54.

The overruling of a motion to appoint counsel to prosecute charges against an attorney, looking to his disbarment, is not such a final order as that an appeal will lie therefrom to the supreme court, under section 3164 of the code. *Byington v. Moore*, 70 Id., 206.

Under this section of the code, an appeal may be taken when the court refuses a new trial, whether judgment has been rendered on the verdict or not. *Baldwin v. Foss*, 71 Id., 388.

Under section 4164, paragraph 4, an appeal will lie from an order overruling a motion to strike

from the files an amended petition of intervention, when such motion assails the right of the intervenor to recover on such amended petition. *Bicklin, Winzer & Co. v. Kendall* 72 Id., 490.

In a bastardy proceeding, the defendant attached to his answer certain interrogatories to be answered by the mother of the child. The court sustained exceptions to the interrogatories on the ground that the mother was not a party to the action in such a sense as to require her to answer them. Held that an appeal would not lie from such ruling of the court, it not being such an order as is contemplated by this section of the code. *The State v. Arns*, Id., 555, following the principle in *Richards v. Burden*, 31 Id., 305.

This section authorizes an appeal from an order allowing temporary alimony to be paid on certain dates, and giving execution therefor. *Blair v. Blair*, 37 N. W. R., 385.

SEC. 3165. [Orders made by judge.]—If any of the above orders are made by a judge, the same is reviewable in the same way as if made by a court.

Under section 2633 of the revision, it was held, that where any of the appealable orders enumerated in section 3632 (code section 3164), were made by a supreme judge or by a circuit judge in vacation, no appeal was allowed therefrom. *In re Curley*, 34 Iowa, 184; *Jewett v. Squires*, 30 Id., 92; *The Monticello Bank v. Smith*, 25 Id., 246.

SEC. 3166. [Court may prescribe rules.]—The court may also, in its discretion, prescribe rules for allowing appeals on such other intermediate orders or decisions as is deemed expedient, and for permitting the same to be taken and tried during the progress of the trial in the court below; but such intermediate appeals must not retard, proceedings in the court from which the appeal is taken.

SEC. 3167. [Mistakes of clerk below.]—A mistake of the clerk shall not be ground for an appeal until the same has been presented and acted upon by the court below.

The supreme court will dismiss an appeal from a judgment by confession, when the record fails to show that a motion to set the same aside has been presented to and passed upon by the court below. *Daniels & Co. v. Clafin*, 15 Id., 152.

SEC. 3168. A judgment or order shall not be reversed for an error which can be corrected on motion in an inferior court, until such motion has been made there and overruled.

The supreme court will not reverse a cause because of a defect in the original notice or for any cause that may be corrected in the court below, until a motion has there been made and overruled. *Van Vark v. Van Dam*, 14 Iowa, 232; *Bethel v. Leay*, Id., 592; *Daniels & Co. v. Clafin*, 15 Id., 152; *Berryhill v. Jacobs*, 19 Id., 346; *Same v. Same*, 20 Id., 247; *Finch v. Billings*, 22 Id., 228; *Tribeir v. Shaffer*, 18 Id., 29; *Decatur Co. v. Clements*, Id., 538; *Hunt v. Stevens et al.*, 25 Id., 261; *Boyd v. Rutledge*, Id., 271; *Dickey v. Harmon*, 26 Id., 501; *Webster v. The Cedar Rapids & St. P. R. Co.*, 27 Id., 315; *Pratt v. Western Stage Co.*, Id., 363; *Smith v. Parker*, 28 Id., 359; *Leonard v. Hallum*, 17 Id., 564; *Wile v. Wright*, 32 Id., 451; *Borghathous v. The Farmer's & M. Ins. Co.*, 36 Id., 250; *Grimes v. Hamilton County*, 37 Id., 290; *Holmes v. Hull*, 48 Id., 177, 180; *Smith v. Warren Co.*, 49 Id., 336; *Bayliss v. Hennessey*, 54 Id., 11, 14; *Brownlee v. Marion County*, 53 Id., 487, 490; *Fulmer v. Fulmer*, 22 Id., 230; *The Savings B'k v. Horn et al.*, 41 Id., 55; *Garvin v. Cannon*, 53 Id., 716, 718; *Black v. Boyd et al.*, 52 Id., 719; *Carmichael v. Vandebur et al.*, 50 Id., 651, 653; *Pigman v. Denney*, 12 Id., 396; *McKinley v. Bechtel*, Id., 561; *Downing v. Harmon*, 13 Id., 536; *Carleton v. Byington*, 17 Id., 579.

The objections that a judgment is excessive, or that the petition does not state a cause of action will not be considered on appeal until a motion has been made to correct the same in the court below and there overruled. *Webster v. The Cedar R. & St. P. R. Co.*, 26 Id., 315.

The supreme court will not grant a new trial on the ground that the verdict is excessive where no motion for that purpose was made in the court below. *Small v. C. R. I. & P. R. Co.*, 55 Id., 582.

SEC. 3169. [Motion for new trial.]—The supreme court may review and reverse on appeal any judgment or order of the district or circuit court, although no motion for a new trial was made in such courts.

Under this section it is not necessary to entitle a party to have reviewed in the supreme court the rulings of the court below, properly excepted to, that a motion for a new trial shall have been made and acted upon by the latter court. *Presnall v. Herbert*, 34 Iowa, 539; *Drefahl v. Tuttle*, 42 Id., 177.

Where the case is tried by the court without a jury, it is not necessary to entitle a party to a review on appeal that there should be a finding of fact or conclusion of law upon the record. *Drefahl v. Tuttle*, 42 Id., 177.

While this section obviates the necessity of a motion for a new trial, it does not dispense with the necessity of excepting to the decision sought to be reviewed; and a judgment will not

be reviewed by the appellate court unless it appears in the record that exception was taken thereto at the time of its rendition. *Eason v. Gester*, 31 Id., 475; *Root v. The Ill. C. R. Co.*, 29 Id., 102.

Where instructions are excepted to at the time they are given, it is not necessary to make further exceptions to them in a motion for a new trial; in such case no motion for a new trial is required. *Butterfield & Co. v. Stephens*, 59 Id., 596.

SEC. 3170. [**Finding of facts: evidence certified.**].—Where a cause is tried by the court, it shall not be necessary in order to secure a review of the same in the supreme court that there should have been any finding of facts or conclusions of law stated in the record, but the supreme court shall hear and determine the same whenever it shall appear from a certificate of the judge, agreement of parties or their attorneys, or, in case the evidence consists wholly of written testimony, from the certificate of the clerk, that the transcript contains all the evidence introduced by the parties on the trial in the court below.

This and the preceding section are not in conflict with section 4 of article 5 of the state constitution, which provides that the supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law under such restrictions as the general assembly may prescribe. *Coffin v. The City of Davenport*, 26 Iowa, 515; *Johnson v. Semple*, 31 Id., 49.

Where the record does not show that all the evidence is before the appellate court and there is no finding of fact in the court below, the supreme court will not disturb the judgment on matters of fact. *Van Biper v. Baker*, 44 Id., 450, 452.

This section does not obviate the necessity of excepting to the decision nor of an assignment of errors in the appellate court. *Eason v. Gester*, 31 Id., 475; *Root v. The Ill. C. R. Co.*, 29 Id., 102; *Sisters of Visitation v. Glass*, 45 Id., 154, 156.

This section applies to actions at law only, and has no application to proceedings in equity. *Vinsant v. Vinsant*, 47 Id., 594, 596.

There are but three modes known to our law by which the supreme court can know that all the evidence introduced on the trial of a cause in the court below is before the appellate court, namely: *first*, by a bill of exceptions stating such fact; *second*, by certificate of the judge under section 2742; and *third*, certificate of judge, agreement of the parties or their attorneys, or certificate of the clerk under section 3170 of the code. *Flesher v. Groves*, 48 Id., 700, 701.

In all appeals to the supreme court the record must show that *all* of the evidence introduced and received in the court below is before the supreme court in the case. *Davenport v. Ells*, 22 Id., 296; *Winslow v. Turner*, 20 Id., 294; *Lindsay v. Byington*, 22 Id., 441; *Wetherell v. Goodrich*, Id., 583; *Chambers v. Ingham*, 25 Id., 222; *Garner v. Pomeroy*, 11 Id., 149; *Cook v. Woodbury Co.*, 13 Id., 21; *Van Orman v. Clarke*, 16 Id., 186; *Kellogg v. Kelsey*, Id., 388; *Ford v. Vance*, 17 Id., 94; *Robb v. Dougherty*, 14 Id., 379; *Anderson v. Easton & Son*, 16 Id., 56; *Krappel v. Pffner*, 24 Id., 176; *Grant v. Grant*, 46 Id., 478; *Starr v. The City of Burlington*, 45 Id., 87; *Wormly v. The District Tp. of Carroll*, 45 Id., 666; *Lillie v. Skinner*, 46 Id., 329; *Grant v. Crow*, 47 Id., 632; *Vinsant v. Vinsant*, Id., 594; *Flesher v. Groves*, 48 Id., 700; *Niece v. Weed*, Id., 698; *Lentzinger v. Hershey*, 47 Id., 696; *Kenny v. Pool*, 47 Id., 700; *Fuller v. Schwartz*, Id., 711; *Fitzgerald v. Daniels*, 3 N. W. Reporter N. S., 198, 630; *Walker v. Plummer*, 41 Id., 697.

Where the evidence certified as contained in the abstract in an equity case is stricken out on motion of the appellant, the cause cannot be tried *de novo*. *Hoy v. Cowgill*, 52 Iowa, 711.

The parties to an equity cause have the right to have it reviewed in the supreme court upon errors duly assigned, and having so agreed, they may, to effectuate such purpose, agree upon the evidence introduced and considered by the court below, as provided in this section. *Hutchinson v. Wells*, 67 Id., 430.

SEC. 3171. [**How docketed.**].—The cause shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee.

SEC. 3172. [**Process.**].—The court may issue all writs and process necessary for the exercise and enforcement of its appellate jurisdiction.

SEC. 3173. [**Appeals, when taken: limitation on right.**].—Appeals from the district and circuit courts may be taken to the supreme court at any time within six months from the rendition of the judgment or order appealed from, and not afterward. But no appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall certify that such cause involves the

determination of a question of law upon which it is desirable to have the opinion of the supreme court, but this limitation shall not affect the right of appeal in any cause in which is involved any interest in real property.

Under section 3507 of the revision, which limited appeals to the supreme court to one year from the rendition of the judgment or order appealed from, it was held that an appeal had been taken in time, although the record showed the judgment to have been rendered more than one year before the notice of appeal was given, it also appearing that at the term the judgment appeared to have been rendered, a motion for a new trial was interposed by the defendant, which was not decided until sometime after the close of that term, and within one year before the appeal was taken, and that the judgment was not in fact rendered until the motion was decided. *Kendall v. Lucas County*, 26 Iowa, 395.

The right of appeal is governed by the provisions of the law in force at the time of the rendition of the judgment appealed from. And under section 3173 of the code, no appeal lies to the supreme court where the amount in controversy is less than \$100, unless the appellant shall procure a certificate from the trial judge to the effect that the case "involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court." *Rivers v. Cole*, 38 Id., 677; *Uplinger v. Kittering*, 43 Id., 483; *Smyser v. Trask*, 40 Id., 689; *Dean v. Taggart*, Id., 688; *Jeffries v. The Singer Mf. Co.*, Id., 702; *Harrington v. Pierce*, 38 Id., 260.

The supreme court does not acquire jurisdiction of a cause on appeal where the amount in controversy is less than \$100, by the certificate of the trial judge made after the adjournment of the term and more than two months after the rendition of the judgment. *Nicely v. Rogers*, 39 Id., 441.

The certificate must be made at the time of the trial of the cause and made a part of the record. If the defeated party wishes the right of appeal in a cause involving less than \$100 he should make his application for the proper certificate at the time of the decision of the case so that his right of appeal is apparent of record from the rendition of the judgment. *Lomax v. Fletcher*, 40 Id., 705; *Hirshfield et al. v. The First Nat. Bank*, 39 Id., 699; *Nicely v. Rogers*, Id., 441.

The certificate required by this section of the code must state that the cause involves a question of law, etc., in order to confer jurisdiction upon the supreme court. *Kierulff v. Adams*, 40 Id., 31.

But the particular question of law need not be stated in the certificate. *Fell v. The B. C. R. & N. R. Co.*, 43 Id., 177.

But now under the rules of the supreme court the certificate is insufficient unless it shows what the question is. *Stormer v. Henzie* 3 N. W. Rep., N. S., 202, 634; *Wilson v. Iowa County*, 13 W. Jur., 366; *Wetz v. Austin*, Id., 369; Sec. 12 Rules of Supreme Court, 43 Iowa, 691.

Where the abstract recited as follows: "The court gave the certificate of the question involved, upon which it was desirable to have the opinion of the supreme court, and stated the particular question of law to be: Where suit is brought upon a note barred on its face by the statute of limitations (limitation being pleaded by the defendant), is the burden of proof on the plaintiff to show the exception taking the note out of the statute?" Held not a sufficient certificate under this section to give the court jurisdiction of a cause involving less than \$100. *Millikin v. Dougherty*, 59 Id., 294. Distinguishing *Yant v. Harvey*, 55 Id., 421.

The certificate of the trial judge, in order to confer jurisdiction of the appeal, where the amount in controversy is less than \$100, must be made at the term in which the cause was tried, otherwise the appeal will be dismissed. *Rose v. Wheeler*, 12 W. Jr., 557; *City of Independence v. Purdy*, 48 Iowa, 675.

While the parties may stipulate that judgment may be entered in vacation as of the last preceding term, yet they cannot stipulate that a case involving less than one hundred dollars shall go to the supreme court on the certificate of the trial judge. The judge alone has power to determine that question under section 2173 of the code. *Fallow v. The District Tp. of Johnson, etc.*, 13 W. Jur., 365.

The right of appeal expires in six months from the rendition of the judgment, and this right is not revived by filing a petition for a new trial. *Carpenter v. Brown*, 50 Iowa, 451.

Where the abstract recited that "the proper certificate of the judge for an appeal was signed at the time the judgment was rendered, and is on file with the papers of this case," it was held that the certificate was insufficient in not stating what question of law was involved. *Barnes v. Independent District No. 2*, 51 Id., 700.

In computing the time in which an appeal may be taken, the day on which the judgment or decree was rendered is excluded, and the corresponding day of the last month in the time is included. *Carleton v. Byington*, 16 Id., 588.

An appeal to the supreme court, from a judgment of the district or circuit court on a verdict, must be taken within six months from the rendition of the same. *Cohol v. Allen*, 37 Id., 449.

The time limited by statute within which appeals may be taken, in cases where intermediate rulings have been properly excepted to, is from the date of the final judgment instead of from the ruling of which complaint is made. *Jones v. The C. & N. W. Ry Co.*, 36 Id., 68.

It is not competent for the parties to stipulate that the judge render his decision in vacation and

grant a certificate indicating a question of law upon which it is desirable to have the opinion of the supreme court. *Fallen v. The District Tp. of Johnson*, 51 Id., 206.

A certificate of the trial judge reciting that although the case involved less than one hundred dollars it "involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court" does not comply with the requirements of the rule of court relating thereto. It should state the question. *Wetz v. Austin*, 51 Id., 342.

The supreme court has jurisdiction in a suit brought to vacate a judgment which with interest exceeds one hundred dollars. *Dryden v. Wyllis*, 51 Id., 534.

Although the question as to the sufficiency of the evidence to support a verdict may, in a certain sense, be said to become a question of law, yet it is not such a question as the legislature intended should be certified to the supreme court in cases involving less than \$100. *Hudson v. The C. & N. W. Ry Co.*, Id., 581; *Landers & Son v. Boyd*, Id., 758.

A notice of appeal filed six months and ten days after the date of the judgment appealed from is too late under this section. *Patterson v. Jack*, Id., 632.

When the amount actually in controversy, including attorney's fees, is less than one hundred dollars no appeal can be entertained under the certificate required by this section. *Fisher v. Lane*, 57 Id., 334.

A decree in equity rendered August 18, 1883, and on the same day filed a motion for a new trial, based upon alleged errors committed by the court. The motion was overruled January 21, 1884 and an appeal taken June 30, 1884, but the errors assigned in the motion for a new trial were not assigned in the appellate court. Held, that the appeal being taken more than ten months after the date of the decree, though within six months of the overruling of the motion, it was not taken in time to secure a trial *de novo* on appeal. *Bosch v. Bosch*, 66 Id., 701.

It is the amount in controversy, as shown by the pleadings, that determines the jurisdiction of the appellate court to entertain an appeal under this section of the code. So where the demand was for a hundred dollars only, and there was no counter-claim, the fact that there was judgment for \$100 and costs does not give the supreme court jurisdiction, without the requisite certificate of the judge. *Brandenberger v. Bigler*, 68 Id., 300.

The certificate of a trial judge, attached to questions certified to the supreme court for its decision, must, under this section, state that the questions are involved in the cause concerning which they arose, or they will not be considered. *Van Sickle v. Downs*, 34 N. W. R., 449.

In cases involving less than \$100 the supreme court has no jurisdiction to consider questions of fact certified by the trial court, but only questions of law. *Hanna & Henderson v. Collins*, 69 Iowa, 51.

Where a petition in replevin alleged the value of the property to be \$95, and plaintiff's interest therein at \$86.50, and claimed \$25 as damages for its wrongful detention, held that the cause was appealable without a certificate from the trial judge, more than \$100 being in controversy as shown by the pleadings. *Ormsby Bros. & Co. v. Nolan, Sheriff*, Id., 130.

Where less than \$100 is involved in an appeal to the supreme court, only such questions can be determined as are certified though the action be in equity. *Teager v. Ludwley*, Id., 725.

Rule 12 of the supreme court, providing that appeals in cases involving less than one hundred dollars will only be considered when the certificate of the trial judge states the question of law upon which an opinion is desirable, is not objectionable upon the ground that it limits the jurisdiction of the courts. *Wilson v. Iowa County*, 52 Id., 339.

It is not necessary that the judge's certificate should be made on the day of the trial of the cause; if made on the day when a motion for a new trial is overruled it is made in time, for where a motion for a new trial is filed the certificate cannot be properly made until the cause is finally disposed of by a ruling on the motion. *Haddock v. Buel*, 51 Id., 655, 658.

But where the certificate was not made until more than three months after the rendition and entry of the judgment, it was held it was insufficient to confer jurisdiction upon the supreme court. *Hershfield & Mitchell v. The First Nat. Bank, etc.*, 39 Id., 699.

A certificate by the trial judge stating that "there is a question of law involved in the 8th and 9th instructions given by the court to the jury and in the 1st, 2nd and 3d instructions asked by the plaintiff," is sufficient to give the supreme court jurisdiction. *Greyy v. White*, 55 Id., 744.

Where the questions stated in the judge's certificate called for the opinion of the supreme court upon the evidence or its sufficiency in a case under this provision of the statute, it was held that the appeal should be dismissed. *Brown v. Petrie*, 56 Id., 209.

Where a tender made by the defendant reduces the amount in actual controversy in the action to less than one hundred dollars, no appeal will lie to the supreme court except upon a question of law duly certified by the trial judge. *Marlow v. Marlow*, 56 Id., 299.

This section applies to cases in equity as well as to law actions, and an action to enjoin the enforcement of an execution against the plaintiff's land, on a judgment for \$25, and \$18.85 costs, does not involve an interest in real estate within the meaning of this section. *Jones v. Patten et al.*, 61 Id., 393. But this section does not extend to other than civil actions. *State v. Knapf*, Id., 522.

Only questions of law can under this section properly be certified for the opinion of the supreme

court, and the certificate must point out the specific questions of law to be determined without mingling them with questions of fact. *Gillooby v. C. M. & St. P. R'y. Co.*, Id., 53.

Rule 12 of the supreme court, providing that appeals in cases involving less than one hundred dollars will only be considered when the certificate of the trial judge states the question of law upon which an opinion is desirable, is not objectionable upon the ground that it limits the jurisdiction of the courts. *Wilson v. Iowa County*, 52 Id., 339.

It is not necessary that the judge's certificate should be made on the day of the trial of the cause; if made on the day when a motion for a new trial is overruled it is made in time, for where a motion for a new trial is filed the certificate cannot be properly made until the cause is finally disposed of by a ruling on the motion. *Hickock v. Buel*, 51 Id., 655, 658.

But where the certificate was not made until more than three months after the rendition and entry of the judgments, it was held that it was insufficient to confer jurisdiction upon the supreme court. *Hershfield & Mitchell v. The First N'l B'k, etc.*, 39 Id., 699.

More than one question may be submitted in a case by a certificate of the trial judge, but each question must be specifically stated, so that each may be determined. Questions of law and fact cannot be mingled and called questions of law. *The City of Centerville v. Drake*, 53 Id., 564.

Where the petition claimed \$70, and the answer set up a counter-claim of \$57, held that the supreme court had no jurisdiction of an appeal of the cause without the certificate required in cases involving less than \$100. The amount in controversy is not ascertained by adding the amount of the counter-claim to that claimed in the petition. *Fox v. Duncan*, 60 Id., 321; following, *Madison v. Spitznogle*, 58 Id., 369.

Where an appeal is sought in a cause involving less than \$100, the certificate required in such case must be made and filed at the time of the rendition of the judgment. It is not sufficient that it be done at the same term. *Forze v. Walker*, 62 Id., 251.

An action brought to enforce a mechanic's lien is not "a cause in which is involved any interest in real property" as contemplated by this section. *Andrews & Smith v. Burdick & Goble et al.*, Id., 714.

Where an appeal is sought in a cause involving less than \$100, the certificate required in such cases must be made and filed at the time of the rendition of the judgment. It is not sufficient that it be done at the same term. *Foye v. Walker*, 62 Iowa, 251.

An action brought to enforce a mechanic's lien is not "a cause in which is involved any interest in real property," as contemplated by this section. *Andrews & Smith v. Burdick & Gobel et al.*, Id., 714.

Where a cause involves less than \$100, and the certificate of the trial judge fails to state explicitly the facts involved and the questions to be decided, so as to avoid the necessity of finding the facts from the records, the supreme court has no jurisdiction to entertain the appeal, and will dismiss it though the question of jurisdiction be not raised by counsel. *White v. Beatty*, 64 Iowa, 331; following *Votaw v. Corwin*, 62 Id., 39; and *Hawkeye Ins. Co. v. Lewis*, 63 Id., 512.

An action to establish a lien upon real property, and to subject it to the satisfaction of a judgment, is not an action involving an interest in real estate, as contemplated by this section of the code, and where the amount involved is less than \$100, the cause cannot be reviewed in the supreme court without the proper certificate of the trial judge. *Colyar v. Pettit* 63 Id., 97.

In appeals involving less than \$100 the supreme court has no jurisdiction to determine any question not properly certified by the judge of the lower court. *Vreeland v. Ellsworth*, 71 Id., 347. And in such case the appellate court cannot declare the law upon the facts of the case, where the necessary facts are not all found and certified by the trial court. *Id.*

Nor can the appellate court decide questions of fact on appeal where the amount in controversy is less than \$100, even when certified by the trial judge; and the appeal in such case must be dismissed. *Riddell v. Fletcher*, 72 Id., 454. See also *Clinton v. The C. R. I. & P. R'y Co.*, Id., 689.

Under this section if on an appeal where the amount involved is less than \$100, and there is no certificate of the trial judge stating the questions of law to be decided, no jurisdiction is acquired by the supreme court, although the questions involved in the cause could be determined from the pleadings or the evidence. The certificate is what confers jurisdiction. *Beach v. Donovan*, 38 N. W. Rep., 404.

SEC. 3174. [Part of co-parties may appeal.]—A part of several co-parties may appeal; but in such case they must serve notice of the appeal upon all the other co-parties and file the proof thereof with the clerk of the supreme court.

In an action brought by A. for the use of B. and others not named, the persons for whose use the action is brought are not parties thereto, in such a sense as will entitle them to appeal. *Fleming, for the use of, etc., v. Merston et al.*, 36 Iowa, 413.

Where one of several parties appeals to the supreme court, and serves notice of the appeal on his co-parties, they may join therein and avail themselves of all the benefits arising out of the appeal. *Barlow et al. v. Scott's Adm'r*, 12 Id., 63.

In an action for partition, where there were several defendants, and only one of them appealed from the judgment, it was necessary, in order to perfect the appeal, for the defendant to serve

notice of the appeal on all the other parties to the action, and file proof thereof with the clerk of the supreme court. When this is not done the appeal will be dismissed. *Hunt v. Hawley et al.*, 70 Id., 183.

Where an appeal was duly taken by two of several co-parties, but without service of notice on the other co-parties, *held*, that notwithstanding appellants' omission to serve notice on the co-parties, the court had jurisdiction to determine such questions as only affected the interests of appellants and the adverse party. *Moore v. Held et al.*, 35 N. W. R., 623.

SEC. 3175. [When they refuse to join.]—If the other co-parties refuse to join they cannot, nor can any of them, take an appeal afterwards; nor shall they derive any benefit from the appeal, unless from the necessity of the case.

SEC. 3176. [When deemed to have joined.]—Unless they appear and decline to join, they shall be deemed to have joined, and shall be liable for their due proportion of costs.

Where notice of appeal by one defendant is served upon a co-defendant he will be held to have joined in the appeal, unless he appears in the appellate court and refuses to do so. *Engleken v. Webber et al.*, 47 Iowa, 553.

Where one of several parties appeals to the supreme court from a judgment of the lower court, and serves notice of such appeal upon his co-parties, they may join therein and avail themselves of all the benefits arising therefrom. *Barlow et al. v. Scott's Admr's et al.*, 12 Id., 63.

SEC. 3277. [Appeal from part of judgment or order.]—An appeal from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, shall not disturb or delay the rights of any party to any judgment, or part of a judgment, or order not appealed from, but the same shall proceed as if no such appeal had been made.

NOTICE AND FILING TRANSCRIPTS.

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

An appeal from the decision of the court below to the supreme court is fully effected by the service of a notice of appeal on the clerk and adverse party within the time limited in the statute, and it is not necessary that such notice be filed with, or marked "filed" by, the clerk within that time. *Baldwin v. Tuttle*, 23 Iowa, 66. See, also, *Carpenter v. Parker*, 25 Id., 450; *Pratt v. W. Stage Co.*, 26 Id., 241.

Where a verbal notice of appeal from the judgment of a court of contest, in a contested election case, was given at the time the judgment was rendered, and thereupon the parties entered into a new agreement respecting the custody of the ballot-box, it was *held*, that the appeal should not be dismissed for insufficiency of notice. Whether *verbal* notice of appeal, unaccompanied by other action would be good, *quere?* *McIntosh v. Livingston*, 41 Id., 219.

An appeal from a final decree in a chancery cause deprives the court below of all power over the parties thereto or the subject-matter thereof, until the cause or some part thereof is remanded by the supreme court for the further action of the court below. *Levi v. Karrick et al.*, 15 Id., 444. Nor can the court below, after an appeal is taken, make an order correcting the record in the cause. *McGlaughlin v. O'Rourke*, 12 Id., 459; *Carmichael v. Vandebur et al.*, 51 Id., 225; *Turner v. The First Nat. Bank, etc.*, 30 Id., 191.

Service of notice of appeal upon the wife of the adverse party does not comply with the requirements of the statute, and is insufficient. *Draper v. Taylor*, 47 Id., 407.

The notice of the appeal cannot be served by a party to the action. *Id.* See, also, *Marion County v. Stanfield*, 8 Id., 406. See, also, rule 32 of the supreme court.

Irregularity in taking an appeal, or in giving notice thereof, is waived by a voluntary appearance on the part of the appellee. *Wilgus v. Gettings*, 19 Id., 82.

Where a party appeals generally from a decree containing two provisions, one adverse and the other favorable to him, it will not be presumed that he appeals from the part which is in his favor. *Hintrager v. Hennesey*, 46 Id., 600.

An appeal must be taken within six months after the rendition of the judgment or order appealed from, but it is not required that the appeal shall be perfected by the filing of a transcript in the supreme court within that time. *Faerbert v. Goldsmith et al.*, 56 Id., 347.

An appeal to the supreme court cannot be perfected without the service of a notice of appeal on

the adverse party, his agent or attorney; and service upon the wife of the attorney is not service upon him. *Webster v. Carson*, 69 Id., 243.

SEC. 3179. (*As amended by ch. 35, 22d g. a.*) [**When perfected.**]
—An appeal shall not be perfected until the notice thereof has been served upon both the party and the clerk, and the clerk paid or secured his fees for a transcript; whereupon the clerk shall forthwith transmit by mail, express or messenger, not a party nor the attorney of a party, a transcript of the record in the cause, or so much thereof as the appellant in writing in the notice has directed, to which shall be appended copies of the notices of appeal, and of the supersedeas bond if any. [But no transcript of the record need be forwarded to the supreme court until a denial of the appellant's abstract of the record has been served and if no denial shall be made no transcript of the record shall be required. If such denial shall be entered without good and sufficient cause therefor the costs for such transcript of the record shall be taxed to the party making the denial.]

It is the duty of the appellant to see that the transcript in a cause appealed embraces all the papers therein, which are necessary to a clear understanding of the ruling to which exception is taken. When the facts are found by the court, with the conclusions of the law based thereon, and no exception is taken to the finding of facts, it is not necessary to incorporate the pleadings in the transcript. *Hall v. Smith*, 15 Iowa, 584.

An appeal will not be dismissed or a judgment affirmed, on motion, on the alleged ground that the case is not triable *de novo* in the supreme court. *White & Smith v. Savery*, 49 Id., 197.

Where, on appeal, the clerk's fees for transcript were not paid or secured, it was held that the appeal was not perfected, and that the court below still retained jurisdiction of the cause with power to grant a new trial. *Loomis v. McKinzie*, 57 Id., 77.

The supersedeas bond secured the clerk's fees for the transcript only, in case the judgment should be affirmed. *Id.*

SEC. 3180. [**When tried.**]
—The notice of appeal must be served at least thirty days, and the cause filed and docketed at least fifteen days before the first day of the next term of the supreme court, or the same shall not then be tried unless by consent of parties. If the appeal is taken less than thirty days before the term, it must be so filed and docketed before the next succeeding term.

SEC. 3181. [**For failure to file transcript and docket appeal: dismissed or judgment affirmed.**]
—If the appellant fails to file a transcript and have the cause docketed as provided in the preceding section, or fails to file at the time the transcript should be filed, the certificate of the clerk of the inferior court, stating when he was served with notice, and that he has not had sufficient time to prepare the transcript, the appellee may file a certified copy of the judgment or order appealed from, and of the notice served on such clerk, and, on motion, have the appeal dismissed or the judgment or order appealed from affirmed.

Under this section the appellee cannot have the judgment affirmed where the notice of appeal was not served on the clerk and appellee within fifteen days of the term, though the supersedeas bond was filed that length of time before. *Pratt v. Western Stage Co.*, 26 Iowa, 241.

It seems that under sections 3181 and 3182 of the code, an appellee may in proper cases have an affirmance by showing that the clerk has been served in time with notice of appeal, without showing the service of such notice on the appellee. *Id.*

The mere filing of a supersedeas bond does not amount to the taking of an appeal; nor should the clerk recall an execution until notice of appeal is served. *Id.*

The failure to file a transcript does not constitute ground for dismissing the appeal, unless the appellee shall have indicated to the appellant a wish that it be filed, and he then fails or neglects, without sufficient excuse, to file it. *White & Smith v. Savery*, 49 Id., 197.

When the judgment below is affirmed on motion in the supreme court for failure to file a transcript and printed abstract within the time prescribed, the order of affirmance may be set aside upon a showing of facts authorizing such action. *Scarf v. Patterson*, 37 Id., 503.

SEC. 3182. [**If the transcript has been sent up,** but the appellant does not file the same when the same should be filed as herein provided, the appellee may file the same, and may, on motion, have the appeal dismissed or the judgment affirmed, as the court, from the circumstances of the case, shall determine.

Under this section, an appellee cannot have the judgment affirmed where notices of appeal have not been served on the clerk and appellee until within fifteen days of the time, though the

supersedeas bond was filed more than that length of time before. *Pratt v. Western Stage Co.*, 26 Iowa, 241.

(CHAPTER 56, LAWS OF 1874.)

IN RELATION TO APPEALS TO THE SUPREME COURT.

An Act to amend sections 3181 and 3182 of the code of 1873 [title XIX, chapter 2: "Of appellate proceedings in the supreme court."]

SECTION 1. [Appeal not to be dismissed or judgment affirmed, when.]
—*Be it enacted by the general assembly of the state of Iowa:* That no appeal to the supreme court of the state shall be dismissed or judgment of court below affirmed because the said cause was not docketed or transcript filed in supreme court, if it be made to appear that an appeal was taken in good faith and not for delay, or if, from the conduct of appellee or his counsel, appellant was induced to believe no motion to dismiss or affirm would be made.

A failure to file a transcript will not necessarily cause a dismissal of the appeal. *White & Smith v. Savery*, 49 Iowa, 197, 199.

Where an order of affirmance had been entered for failure of appellants to file transcript and docket cause, the affirmance was set aside upon it being shown that the appeal was taken in good faith, and not for the purpose of delay. *Engleken v. Schultz*, 40 Id., 903.

SEC. 3183. [Same as to assignment of errors.]—If, the transcript being filed, errors are not assigned and filed with the clerk of the supreme court, and a copy of the same served on the appellee or his attorney ten days before the first day of the trial term, the appellee may have the appeal dismissed or the judgment or order affirmed, unless good cause for the failure be shown by affidavit.

An appeal will be dismissed on motion, if the assignment of errors is not served on the appellee ten days before the first day of the trial term. Whether it must be filed with the clerk previous to the day for the hearing of which the cause is assigned, *quere*. *Ind. Dist. of Crocker v. Ind. Dist. of Ankeny*, 48 Id., 206. See, also, *Berryhill v. Keilmeyer*, 33 Id., 20; Rule 24 of supreme court.

An amended assignment of errors, filed during a term of the court when a cause is otherwise ready for submission, is not too late under this section, where the appellee asks and obtains a continuance because of such amendment. *Brown v. Rose*, 55 Id., 634.

An amended assignment of errors, filed without leave after the filing of the appellate's argument, will not be considered. *Betts v. The City of Glenwood*, 52 Id., 124.

Where an assignment of errors was as follows: "The court erred in refusing to give the instructions asked by defendant. The court erred in giving the instructions to the jury that were given. The court erred in overruling defendant's motion for a new trial. The court erred in rendering any judgment upon the verdict and special findings." *Held*, that such assignment of errors was too general and inexplicit, and could not be considered. *Id.*

Where the appellant fails to assign errors, the appellee, if he desires to take advantage of this failure, must do so at the proper time, and when he does not make the objection until after argument of the cause upon its merits, he will be deemed to have waived his right to object. *Andrews v. Burdick*, 62 Id., 714.

An assignment of errors filed within the time prescribed in this section is filed in time, though not until after the filing of the appellee's argument. *Conner v. Long*, 63 Id., 295; *Betts v. Glenwood*, 52 Id., 124, distinguished.

The supreme court cannot entertain an appeal where no errors are assigned. *Tizzard v. Gray & Conkey*, Id., 213.

An assignment of errors filed within the time prescribed in this section, is filed in time, though not until after the filing of the appellee's argument. *Conner v. Long*, 63 Id., 295; *Betts v. Glenwood*, 52 Id., 124, distinguished.

An assignment of errors not filed ten days before the first day of the term, and not until after appellee's argument is filed, cannot be considered. *Russell & Co. v. Johnson*, 67 Id., 279.

SEC. 3184. [What shall be sent up.]—In an action by ordinary proceedings, and in an action by equitable proceedings, tried in the whole or in part on oral testimony, all proper entries made by the clerk, and all papers pertaining to the cause and filed therein, except subpoenas, depositions, and other papers which are used as mere evidence, are to be deemed part of the record. But in an action by equit-

able proceedings tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the supreme court, and shall be so certified, not by transcript but in the original form. But a transcript of a motion, affidavit or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant. If so certified when not material to the determination of the appeal the court may direct the person blameable therefor to pay the costs thereof.

The supreme court will not review on appeal the action of the court below on the facts in an equity action, where it does not appear that all of the evidence on which the case was heard is contained in the record. *Davenport v. Ellis*, 22 Iowa, 296; *The State, for the use, etc. v. Orwig et al.*, 27 Id., 528; *Krouse v. Hampton*, 11 Id., 457; *State v. Donnell*, Id. 452; *Schroder v. Carey*, Id., 555; *State v. Leis*, Id., 416; *Sweet v. Porter*, 12 Id., 387; *Hayden v. Wiltse*, 13 Id., 604; *Gray et al. v. Montgomery*, 17 Id., 63; *Woods v. Irish*, 14 Id., 427; *Wilkins v. Treyvor*, Id., 391; *Stone v. Brown*, Id., 595; *Nicking v. Nesmith*, 15 Id., 595; *Bennett v. Hyland*, Id., 597; *State v. Mooney*, 10 Id., 506; *Laumant et al. v. Nickols*, Id., 161; *Thompson v. Lord*, 14 Id., 591; *Fletcher v. Burrows*, Id., 557; *Emerick v. Sloan*, 18 Id., 139; *Bradley v. Kavanaugh*, 12 Id., 273; *State v. Postlewait*, 14 Id., 446; *Van Orman v. Spofford et al.*, 16 Id., 186; *Ticonic Bank*, Id., 141; *Kellogg v. Kelsey*, Id., 388.

The certificate of the clerk that the transcript contains "all the evidence appearing on file," does not sufficiently show that the evidence certified was all that was used in the court below. *Davenport v. Ellis*, 22 Id., 296.

An appeal to the supreme court from a final decree in an equitable action brings up the case for trial *de novo*, without regard to interlocutory rulings or decisions of the court below. *The State v. Orwig*, 27 Id., 528; *Blake v. Blake*, 13 Id., 40; *Van Orman v. Spafford et al.*, 16 Id., 168; *Kellogg v. Kelsey*, Id., 388; *Ticonic Bank v. Harvey*, Id., 141; *Malloy v. Malloy*, 31 Id., 60; *Dove v. The Ind. S. D.*, 41 Id., 680.

In order that the cause may be tried *de novo*, not only the pleadings and other papers in the case should be certified, but also the evidence, in its original form, upon which the case was tried below. *The State v. Orwig*, 27 Id., 528; *Winslow et al. v. Farmer*, 20 Id., 294; *Moon v. Moon*, 19 Id., 130.

In the trial of chancery cases the supreme court will consider only the issues and evidence presented in the court below; and evidence will not be originally received and considered in the supreme court. *McGregor v. Gardner*, 16 Id., 538.

Under the rules of the supreme court equity causes are tried in that court upon the printed abstract, and the evidence in its original form is not consulted, except in cases of a difference of abstracts, when an amended one is filed. *Austin v. Bremer County*, 44 Id., 155.

Equity cases only are triable *de novo* on appeal in the supreme court; in all other cases the trial is confined to legal errors properly presented. *Dove v. The I. S. D. of Keokuk*, 41 Id., 689.

The transcript or record of the court below cannot be amended or added to in the supreme court, either upon the certificate of the judge before whom the case was tried, or upon affidavits. The review must be had on the record as made in the court below. *Bartle v. The City of Des Moines*, 37 Id., 635.

A motion will not lie to strike out the bill of exceptions on the ground that it does not state the evidence correctly. *Hughes v. Stanley*, 45 Id., 784.

Where, after an appeal in an equity cause had been perfected, all the written evidence on which the case had been tried was lost, without fault of the appellant, who thereupon served notice upon the other party and the clerk that he had withdrawn his appeal, and filed a motion for a new trial, which was granted, it was held that the new trial was improperly granted, that the courts have power to supply the part of a record that may be lost, and therefore cannot grant a new trial on account of such loss. *Loomis v. McKenzie*, 48 Id., 416.

The supreme court in a hearing *de novo* will pay no regard to the finding of facts in the lower court, or by referee. And no exceptions to the findings or rulings are necessary, nor need a motion for a new trial be made. *Robb v. Daugherty*, 14 Id., 379; *Cooper v. Skeel et al.*, 14 Id., 578; *Vannice v. Berym*, 16 Id., 555, 559; *O'Conner v. O'Conner*, 15 Id., 303; *Rundskoff v. Lyman*, 16 Id., 260; *Clarke v. Larkin*, 9 Id., 391; *Blake v. Blake*, 13 Id., 40; *Hackworth v. Zollers*, 30 Id., 432; *Chambers v. Ingham*, 25 Id., 222; *Mally v. Mally*, 31 Id., 60.

The supreme court will not review the finding of the lower court upon the sufficiency of the service of notice by publication in an equitable action when the record does not show that it embraces all the evidence touching the publication which was submitted to the court below. *Moon v. Moon*, 19 Id., 130.

Where an answer in an action at law sets up both legal and equitable defenses upon which issues are formed, the case will, on appeal to the supreme court, be considered as in equity, and be determined according to the rules applicable to equity cases. *Van Orman v. Merrill*, 27 Id., 476.

Where an equitable action is not tried below in such manner as to entitle either party to a trial *de novo*, the appellant has the right to be heard on appeal on exceptions and errors duly assigned. *Cross v. The B. & S. W. R. Co. et al.*, 51 Id., 683.

An abstract purporting to contain "all of the evidence bearing upon and introduced to sustain the issues and findings as to which the plaintiff appealed," is not sufficient to entitle appellant to a trial *de novo*. *Roe v. Wilnot*, 51 Id., 689.

In law actions where appellant assigns as error the ruling of the court upon the sufficiency of the evidence to support the verdict, all of the evidence must be contained in the record, or the questions made thereon will not be passed upon by the appellate court. *Krouse v. Hampton*, 11 Id., 457; *State v. Donnell*, Id., 452; *Schroder v. Carey*, Id., 555; *State v. Leis*, Id., 416; *Sweet v. Porter*, 12 Id., 387; *Hayden et al. v. Wiltse*, 13 Id., 604; *Gray, Phelps & Co. v. Montgomery et ux.*, 17 Id., 65; *Woods v. Irish*, 14 Id., 427; *Wilkins v. Treynor*, Id., 391; *Stone v. Brown et ux.*, Id., 595; *Nicking v. Nesmith*, 15 Id., 595; *Bennett v. Hyland*, 15 Id., 597; *State v. Mooney*, 10 Id., 506; *Lawman et al. v. Nichols*, 15 Id., 161; *Thompson v. Lord*, 14 Id., 591; *Emerick v. Sloan*, 18 Id., 139; *Fletcher v. Burrows*, 10 Id., 557; *Bradley v. Kavanagh*, 12 Id., 273; *State v. Postlewait*, 14 Id., 446.

Prior to the supreme court rules respecting printed abstracts it was held that an equity cause could not be tried *de novo* on appeal if objected to, except upon the deposition and papers used as evidence in their original form, nor could an ordinary law action be tried except upon a transcript of the original papers. *Baldwin v. Tuttle*, 23 Id., 66.

Where the cause is in the nature of an equitable action and the abstract recites that the evidence was by order of the court reduced to writing and made a part of the record of the case and purports to contain all the evidence given on the trial, the case is triable *de novo* in the supreme court. *Stoddard & Birmirch v. Hardwick et al.*, 46 Id., 160.

In an equity cause, triable *de novo* in the supreme court, the certificate of the trial judge must state that the abstract contains all of the evidence introduced on the trial below. *Andrews v. Kerr et al.*, 49 Id., 689. It is not sufficient to recite that it contains the material portions of the evidence. *Id.*

The judge's certificate must show that all the evidence offered on the trial in the court below is certified and must be contained in the abstract. *Taylor & Co. v. Kier et al.*, 54 Id., 645.

This section is not repealed by chapter 145 of acts 1878, and the certificate of the clerk, under the seal of the court, that the depositions and papers used in evidence on the trial in equity in the original form are contained in the record transmitted to the supreme court, is sufficient. *Cross v. The B. & S. W. R. Co.*, 58 Id., 62.

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

See *Hall v. Smith*, 15 Iowa, 584, cited in notes to section 3179.

STAY OF PROCEEDINGS.

SEC. 3186. [How obtained: bond, conditions and approval.]—An appeal shall not stay proceedings on the judgment or order, or any part thereof unless the appellant shall cause to be executed before the clerk of the court which rendered the judgment or order, by one or more sufficient sureties to be approved by such clerk, a bond to the effect that the appellant shall pay to the appellee all costs and damages that shall be adjudged against the appellant on the appeal; also that he will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the

original judgment or order, and all rents or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. When such bond has been approved by the clerk, and filed, he shall issue a written order commanding the appellee and all others to stay proceedings on such judgment or order, or on such part as is superseded as the case may be. No appeal or stay shall vacate or affect the judgment appealed from.

The filing of an appeal bond, without the service of a notice of appeal, at least upon the clerk, will not stay proceedings on the judgment. *Pratt v. The Western Stage Co.*, 26 Iowa, 241.

And where an appeal is taken by the service of notice of appeal, but no bond filed, proceedings on the judgment will not be stayed by the appeal. *Phillips v. Germon*, 43 Id., 101, 102.

In a habeas corpus proceeding, an order of discharge made by the judge before whom the proceeding is had, cannot be superseded pending an appeal. *The State v. Kirkpatrick*, 54 Iowa, 373. In *Thompson v. Oglesby*, 42 Id., 598, a supersedeas bond was filed, but no question was made as to its effect.

Where a supersedeas bond, in an appeal from a decree for the possession of real property, failed to obligate the appellants to pay "all rents and damages to the property pending the appeal, out of which appellee was kept by reason of the appeal," held, that the bond did not in fact supersede the judgment, and that after an affirmance of the decree in the supreme court, the plaintiff could not recover upon the bond for rents and damages, during the pendency of the appeal. *Gill v. Sullivan, Muldowney v. Same, Walsh v. Same*, 62 Id., 529.

Where in *quo warranto* proceedings judgment is rendered for plaintiff which is appealed from by the defendant, held that a supersedeas bond, in such case, does not have the effect to keep the plaintiff out of possession of the office, but only stays the enforcement of the judgment for costs. *Jayne v. Drorbaugh*, 63 Id., 711.

SEC. 3187. [When supreme court or judge may fix condition of bond and approve same.]—In cases wherein the appellant has perfected his appeal to the supreme court, and the clerk of the district or circuit court has unjustly refused to approve the appeal bond offered, or makes the penalty therein too large, or the conditions thereof unjust, the appellant may move the supreme court, if in session, or in its vacation, on such written notice to the appellee as the judge may prescribe, may move any judge thereof to determine the conditions, fix the penalty, and approve the appeal bond. The motion, verified by the affidavit of the appellant or his attorney, shall contain a brief statement of the nature of the action in which the appeal was taken, of the judgment or order appealed from, of the steps taken by the appellant with reference to his appeal, and of his giving, or offering to give, an appeal bond, of the action of the court below with reference to such bond, and wherein he has acted wrongfully; and if the supreme court, or any judge thereof, considers that the clerk has made unjust conditions in the bond, or the penalty thereof too high, or has wrongfully refused to approve the same, such court or judge shall issue an order prescribing the conditions of the appeal bond, fixing the penalty thereof, and either approve it or direct the clerk of the supreme court so to do, which bond shall be filed with the officer last named. The supreme court, or judge thereof, may order that all or any part of the papers and records in the cause appealed, or certified copies thereof, be produced on the hearing of such motion and pending the disposition thereof, may make an order staying the enforcement of the judgment or order, appealed from and on such terms as are just. The order, if made by the judge, shall be in writing and signed by him, and upon the service thereof, or of a certified copy, when made in court, upon the clerk of the court below, all proceedings in the court appealed from shall be stayed, and all orders, processes, executions, or other papers issued therefrom shall be recalled, and the appellant be placed in the same condition that he was when the judgment or order appealed from was made or rendered.

SEC. 3188. [How and when additional surety obtained.]—If the appellee believe the bond defective, or the sureties insufficient, he may move the supreme court if in session, or in its vacation, on ten days written notice to the appellant,

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

SEC. 3189. [**Proceedings stayed.**]—But another order staying proceedings may be issued by the clerk, upon the execution before him of a new and lawful bond with sufficient sureties as hereinbefore provided.

SEC. 3190. [**Penalty of bond.**]—If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal. But it shall in no case be less than one hundred dollars.

Where, in an action to enforce a mechanic's lien, judgment is rendered for a money judgment and a lien established upon the property, which secures it, and which is ordered sold on special execution to satisfy the judgment, its character as a judgment for money, as contemplated by this section, is not changed, and a bond to supersede the judgment on appeal must be for double the amount thereof. *Flynn v. The D. M. & St. L. R'y Co.*, 62 Iowa, 521.

SEC. 3191. [**When appeal is from a part only.**]—The taking of the appeal from the part of a judgment or order, and the filing of a bond as above directed, does not cause a stay of execution as to any part of the judgment or order not appealed from.

SEC. 3192. [**Execution recalled.**]—If execution has issued prior to the filing of the bond above contemplated, the clerk shall countermand the same.

SEC. 3193. [**Property surrendered.**]—Property levied upon and not sold at the time such countermand is received by the sheriff, shall forthwith be delivered up to the judgment debtor.

TRIAL—JUDGMENT.

SEC. 3194. [**Power of court.**]—The supreme court may reverse or affirm the judgment or order below, or the part of either appealed from, or may render such judgment or order as the inferior court or judge should have done, according as it may think it proper.

It is competent for the supreme court, in reversing a judgment, to order that the new trial shall extend only to defendant's cross-action, in connection with which the error occurred, and that the judgment establishing the plaintiff's claim remain undisturbed. *McAfferty v. Hale*, 24 Iowa, 355.

Where a judgment of the court below, rendered upon a special finding of facts by that court, is appealed to and reversed by the supreme court, upon the sole ground that the law upon the facts thus found is with the appellant, and the cause is remanded, with directions to the court below that further proceedings be had therein not inconsistent with the opinion of the supreme court, the appellant is entitled to judgment upon the finding of facts in the court below, and no new trial can be had. *Roberts v. Corbin & Co.*, 28 Id., 355.

The supreme court, in reversing a judgment appealed from, may render such judgment or order upon the facts, as the court below should have rendered. *Gilmore & Smith v. Ferguson & Cassell*, 28 Id., 422.

Where, in a *habeas corpus* proceeding for the custody of a child, it was possible that the judgment of the court below might constitute a bar to the plaintiff's right to the custody of the child at a future time, the supreme court, under the power given in this section, modified the judgment so that the plaintiff would not be thus barred. *Drumb v. Keen*, 47 Id., 435, 438.

The supreme court will not render judgment in reversing a cause where the error in the court

below consisted in refusing to grant a new trial. *Payne v. The C., R. I. & P. R. Co.*, 37 Id., 605.

In equity causes the supreme court has complete and final jurisdiction to render such a decree as it may deem proper in the case. *McGregor v. Gardiner*, 16 Id., 538.

When, in a petition for rehearing, the appellee offered to confess error and remit a sum erroneously included in the judgment below, for which error the judgment was reversed, it was held competent for the supreme court, under this section, to consider the offer, and enter final judgment in that court. *Hyde v. The Minneapolis Lumber Co.*, 53 Id., 243.

Where judgment of affirmance was, by consent of parties, but without the knowledge of the sureties on the appeal bond, entered in the supreme court, it was held that upon a motion made at the following term at the instance of the sureties the court had jurisdiction to set aside the judgment. *Drake v. Smythe*, 44 Id., 410.

A final judgment will not be entered in the supreme court in favor of an appellant which will prevent the appellee from raising questions upon exceptions reversed in the court below. *Baird v. C. R. I. & P. R. Co.*, 55 Id., 121.

On reversing a judgment appealed from the court may, in a law action, render such judgment or order upon the facts as the court below should have rendered. *Gilmore & Smith v. Ferguson & Cassell*, 28 Id., 422.

The supreme court has no general original jurisdiction, and cannot order that an appellee shall proceed no further with a cause. An appellant who deems that the appellee has, pending the appeal, deprived himself of his rights thereunder, has the alternative of dismissing his appeal, or to finally submit it on its merits. *Simonson v. The C., R. I. & P. R. Co.*, 48 Id., 19.

Where the court, in his instructions to the jury, follows the rule announced in the plaintiff's petition, and the latter fails to ask an instruction announcing a different and the true rule, he cannot avail himself of the error on appeal. *Briscoe v. Reynolds*, 51 Id., 673.

Where the evidence is conflicting, and the court below which heard the evidence, had full opportunity for observing the manner and appearance of the witnesses, has overruled appellant's motion for a new trial, based on the insufficiency of the evidence, the supreme court will not interfere, the presumption being that the jury and the court below correctly decided upon the credibility of the witnesses, and found according to the weight of the evidence. *Snyder v. Eldridge*, 31 Id., 129; *Brockman v. Berryhill*, 16 Id., 133; *Havelick v. Havelick*, 18 Id., 414; *Donaldson v. The M. & M. R. Co.*, 18 Id., 239; *Pilmer v. The Branch of the State Bank*, 19 Id., 112; *Gordon v. Pitt*, 3 Id., 335; *State v. Elliott*, 15 Id., 72; *Snyder v. Nelson*, 31 Id., 238; *Melhop v. Doane & Co.*, 35 Id., 630; *Fransden v. The C., R. I. & P. R. Co.*, Id., 372; *Dunlacey v. Watson*, 38 Id., 398.

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

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

The supreme court is authorized, under sections 3195 and 3196 of the code, to render judgment against the appellant and his sureties in the appeal bond, and to award damages to the appellee, where it appears that the appeal was taken for delay, in those cases only where the judgment or order appealed from was for the payment of money, "the collection of which, in whole or in part, has been superseded by the bond." *Berryhill v. Heilmeyer et al.*, 33 Iowa, 20.

The supreme court can award damages against a party taking an appeal for delay, only where a judgment or order for money is appealed from, or where the damages can be accurately known to the court, without an issue and trial. *Branscomb v. Gillian*, 55 Id., 235, 237.

SEC. 3197. [Cause remanded.]—If the supreme court affirm the judgment or order, it may send the cause to the court below to have the same carried into effect, or it may itself issue the necessary process for this purpose and direct such process to the sheriff of the proper county, as the party may require.

It is not necessary that a *procedendo* should issue to give the court below jurisdiction, but if the

case is re-docketed upon service of proper notice, the case will stand for re-trial. *Becker v. Becker et al.*, 50 Iowa, 129.

When a cause has been reversed and remanded, the supreme court will not revoke such order and enter judgment in that court on motion of the party claiming to be entitled thereto, made several months after the order, and after the time for filing a petition thereto had expired. *Roberts v. Ausin, Corbin & Co.*, 26 Id., 315.

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

A purchase of land at sheriff's sale by the plaintiff in execution or his attorney, with actual knowledge of a pending appeal, is at the peril of the purchaser; and the party or his attorney thus buying is not a *bona fide* purchaser within the meaning of section 3199. *Twoood v. Franklyn*, 27 Iowa, 239.

Where property, taken under a judgment from which an appeal has been taken without the filing of a *supersedeas* bond, and which is afterwards reversed, has by voluntary sale, or by seizure and sale under process, passed to an innocent purchaser pending the appeal, or where money collected under such judgment is received by one occupying a fiduciary capacity, as by an administrator, and he has, pursuant to an order of court, paid it over to another, the summary remedy provided by section 3198 of the code cannot properly be administered, and the party is left to his ordinary remedy. *Hanschid v. Stratford*, 27 Id., 301. See, also, *Lombard v. Atwater*, 46 Id., 501.

Where property has been taken and sold on execution issued upon a judgment which is afterwards reversed by the supreme court, it is the duty of the party taking such property to make restitution therefor upon the reversal of the judgment, and if he does not do so, the execution defendant may at once maintain an action, without demand, to recover the damages sustained by reason of such taking. *Zimmerman v. The Nat. Bank of Winterset*, 56 Id., 133.

Where, pending an appeal, real property was sold on execution and purchased by the execution plaintiff, and subsequently the supreme court reduced the judgment, it was held: 1. That the plaintiff was not a *bona fide* purchaser, entitled to protection under section 3199; 2. That defendants were entitled to restitution, and that an order of the court setting aside the sale, and restoring all of the property to the defendants, was proper and right; 3. That the plaintiff could not be compelled to keep the property for the amount bid and pay the defendant the difference between that sum and that of the reduced judgment. *Munson v. Plummer*, 58 Id., 736.

SEC. 3199. [Title not affected.]—Property acquired by a purchaser in good faith under a judgment subsequently reversed, shall not be affected by such reversal.

Whether the purchaser at an execution sale takes the estate charged with the equities and secret trusts which may exist against the judgment debtor, *query*. *Parker v. Pierce*, 16 Iowa, 227.

A purchaser at sheriff's sale takes the land purchased, discharged of any claim of title, whether arising under an unregistered deed or a mere equity, of which he had no notice at the time of the purchase, and which would be invalid against an ordinary purchaser, and this principle applies both at law and in equity. Per DILLON, J. in *Vannice v. Bergen*, Id., 555.

Under this section a purchaser at judicial sale, who does not pay the full amount of his bid, but only the costs in the case, is not a purchaser in good faith, nor is the grantee of such purchaser, who pays to his grantor only the money paid by such grantor, in any better position than his grantor nor can one who acted as the attorney of the judgment plaintiff, both in the court below and in the supreme court, and who is chargeable with actual knowledge of the appeal, acquire from such grantee of the original purchaser, any better title than such grantee himself had. *O'Brien v. Harrison*, 59 Id., 686.

SEC. 3200. [Power to imprison.]—The supreme court shall have power to enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until obeyed.

SEC. 3201. (As amended by ch. 144, 19th g. a.) [Petition for rehearing suspends judgment till when.]—[If a petition for rehearing be filed the same shall suspend the decision, if the court on its presentation, or one of the judges if in vacation, shall so order, in either of which case such decision shall be suspended until after the final arguments provided for in the next section.]

The supreme court will not, upon a rehearing, consider matters not presented in the former

arguments nor considered in the opinion; nor can the record of notice of appeal and its service be supplied in a petition for rehearing when omitted in the abstract. *Hintrager v. Hennessy*, 46 Iowa, 600. Nor will the supreme court, upon a rehearing, consider changes and amendments in the abstract, when such amendments show grounds for a different decision. *Nixon v. Downey*, 49 Id., 166.

SEC. 3202. (*As amended by ch. 144, 19th g. a.*) [**Oral argument.**—[The party filing a petition for rehearing may make the same an argument or a brief of authorities upon which he relies for a rehearing, and if he desires to make an oral argument in support of his petition, and as upon rehearing, he shall make an indorsement upon his argument, or brief, either in writing or print, stating in substance that the petition[er] for a rehearing will ask to be heard orally in support thereof, which notice shall be served with the petition for rehearing upon the adverse party, and deposited with the clerk of the supreme court; and in such case such petitioner and the counsel for the adverse party shall have the right to be heard orally thereon at the next term of said court, or any subsequent term to which the same is continued. In such case it shall be the duty of the clerk to place the cause wherein the petition is filed upon the docket for the next term of the court, beginning not less than twenty days after the depositing of the petition, indorsed as aforesaid, in his office.]

Where, after a *procedendo* has been issued from the supreme court, and a petition for a rehearing was filed within sixty days, it was held that the cause could not be transferred to the federal court upon the filing of a petition therefor and bond in the court below, in accordance with the requirements of the act of congress, pending the action of the supreme court on the petition for rehearing. *McKinley v. The C. & N. W. R. Co.*, 44 Iowa, 314.

All petitions for rehearing must be printed as required by sections 97, 98 and 99 of the rules of the supreme court, and a copy must be delivered to the attorney of the adverse party, and if there be more than one, to the attorney of each, and ten copies to the clerk of the supreme court. No. 3, Rules of the Supreme Court.

The petition for a rehearing is the argument therefor. If the court so indicates the opposite party may file a reply, but this is the end of the argument, and a rejoinder to such reply will, on motion be stricken from the files. *Webster County v. Hutchinson*, 60 Iowa, 721.

While this and the preceding section of the code are general in their character, a proper construction of them in the interest of justice requires that they be considered as authorizing rehearings in the supreme court in criminal cases; and such rehearing may be had upon the petition of the state as well as of the accused. Such has been the practice. *The State v. Jones*, 64 Id., 349; citing *The State v. White*, 41 Id., 316; and 45 Id., 325; and *State v. Brandt*, 41 Id., 493.

GENERAL PROVISIONS.

SEC. 3203. [**Clerk to docket and arrange causes: notice of.**—The clerk shall docket the causes as the same are filed in his office, and shall arrange and set a proper number for trial for each day of the term, placing together those from the same judicial district, and shall cause notice of the manner he has set such causes to be published and distributed in such manner as the court may direct.

SEC. 3204. [**Hear causes: argument.**—The court shall hear all the causes docketed, when not continued by consent, or for cause shown by the party, and the party may be heard orally or otherwise, in his discretion.

SEC. 3205. [**Opinion filed.**—No cause is decided until the opinion in writing is filed with the clerk.

SEC. 3206. [**What done in court below on reversal.**—If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records of the court, shall have the same force and effect as if made and entered during the session of the court in that district.

SEC. 3207. [**Assignment of errors: form of.**—An assignment of error need follow no stated form, but must, in a way as specific as the cause will allow, point out the very error objected to. Among several points in a demurrer, or in a motion, or instructions, or rulings in an exception, it must designate which is relied

on as an error, and the court will only regard errors which are assigned with the required exactness: but the court must decide on each error assigned.

The assignments of error were as follows: "1. The court erred in admitting improper and incompetent testimony. 2. There was error in the instruction of the jury." *Held*, that under the revision, Sec. 3546, the assignments were too general and should be disregarded. *Hawes v. Twogood*, 12 Iowa, 582.

The supreme court will not regard an assignment of error which does not point out the particular point, or points claimed to be erroneous specifically and with the exactness required by the statute. *Peck v. Hendershott*, 14 Id., 40; *Brewington v. Swan*, 1 Id., 121.

Where the bill of exceptions contained a large amount of evidence and cross examination, and the assignment was "that there was error in allowing the cross examination, and the introduction of evidence, and the overruling of plaintiff's objections, as set forth in bill of exceptions, No. 1," it was *held*, that the assignment was not sufficiently specific. *Wilson v. Hillhouse*, 14 Id., 199.

The supreme court will not review the rulings of the court below, which have not been made the basis of an assignment of errors. *Clark v. Polk Co.*, 19 Id., 248; *Maclay v. Bunkers*, 46 Id., 700; *Parsons v. Chapman*, 11 Id., 294; *Platt v. Hedge & Co.*, 10 Id., 591; *Henry Wisner & Co. v. Brady*, 11 Id., 248; *D. S. F. & L. A. v. The N. Am. L. Ins. Co.*, 16 Id., 74; *Roberts v. Cass*, 27 Id., 225.

Where an assignment of error is general and fails to comply with the requirements of the statute it will not be noticed by the supreme court. *Arnold v. Arnold*, 20 Id., 273, 276.

Where the overruling of a motion for a new trial, based upon several distinct grounds, is assigned as error, the assignment should specify the very error relied upon by the appellant. *Reilly v. Ringland*, 14 Id., 422; *Morris v. C. B. & Q. R. Co.*, 45 Id., 29; *Benton v. Nichols*, 47 Id., 698.

A party cannot be heard on appeal to assign error in the admission of evidence based upon a ground other than that assigned when the evidence was admitted. *The Iowa Homestead Company v. Duncombe*, 51 Id., 525.

Error cannot be predicated upon the admission of evidence, when the fact which it was introduced to establish is provided by other evidence introduced afterward without objection. *Id.*

A single assignment of errors may embrace more than one instruction, if the instructions are each designated therein by number, and the assignment will have the same effect as if each instruction objected to were named in a distinct assignment. *Sherwood v. Snow, Foote & Co.*, 46 Id., 481.

An assignment of error as follows: "The court erred in overruling defendant's motion for a new trial, and to modify and amend the decree," is not sufficiently specific. *Patterson v. Jack*, 59 Id., 634.

So an assignment of error in these words: "The court erred in overruling the defendant's exceptions to the report of the referee and entering judgment against defendant," was *held* not sufficiently specific. *Hoefer v. City of Burlington*, Id., 281.

Where an assignment of errors is so general that any one of a number of rulings might be considered under it, the assignment is insufficient under this section and will be disregarded by the court. *Terry v. Thomas*, 64 Id., 35.

While an assignment of error need follow no specified form, it must nevertheless, point out in a manner as specific as possible the very error objected to. An assignment in the words: "The court erred in rendering judgment for the appellee," was *held* insufficient. *Tomblin v. Rall*, 46 Id., 190.

An assignment of error must specify which of several points in a motion for a new trial is relied upon as constituting the error which vitiates the judgment. *Oschner v. Schunk*, 46 Id., 293.

An assignment of error in the form that the court erred in overruling appellant's motion for a new trial is not specific enough to comply with the requirements of section 3207 of the code, and will be disregarded by the supreme court. *Richardson v. McCormack*, 47 Id., 80; *McCormack v. The C. R. I. & P. R'y Co.*, Id., 345.

An assignment of error reciting that, "The court erred in refusing to set aside the verdict, and in not rendering judgment for plaintiffs," is not sufficiently specific. *Bardwell v. Clare*, 47 Id., 297.

An assignment of error that, "The court erred in giving each of the instructions on its own motion," is too general to be regarded in the supreme court. *Moffat v. Fisher*, Id., 474.

An assignment of errors should show affirmatively that the party appealing was in some manner prejudiced by the rulings or decision appealed from. *Brewington v. Patton*, 1 Id., 721.

Errors assigned but which are not presented in argument, will not be considered by the supreme court. *Snyder v. Eldridge*, 31 Id., 129; *Shaw v. Brown*, 13 Id., 508; *Wilson v. Hillhouse*, 14 Id., 199.

An assignment of error as follows: "1. The court erred in admitting improper and incompe-

tent testimony. 2. There was error in the instructions to the jury," was held too general and disregarded. *Hawes v. Twogood*, 12 Id., 582.

So where the assignment was that "a new trial should have been given for the reasons set forth in the motion," it was held not sufficiently specific. *Morris v. The C. B. & Q. R. Co.*, 45 Id., 29.

So where the assignment stated that "the court erred in giving each of the instructions given on its own motion," held too general. *Moffat v. Fisher*, 47 Id., 473, 474. And an assignment in these words: "Appellant says the court erred in refusing to sustain the motion to set aside the verdict," was held too general. *Benton v. Nichols*, 47 Id., 698. To the same effect are *Betts v. The City of Glenwood*, 52 Id., 124; *Tomlin v. Ball*, 46 Id., 190.

The statute requiring the assignment of errors in law actions is peremptory, and unless they are assigned the supreme court cannot entertain the appeal. *Barnhart v. Farr*, 55 Id., 366.

The assignment should specify which of several points, where there is more than one, in a motion for a new trial is relied upon as constituting error. *Oschner v. Schunk*, 46 Id., 293.

An assignment of error which does not plainly state the error complained of, but refers opposing counsel and the court to the record wherein the error is said to appear, is not sufficiently specific to justify consideration by the supreme court. *Wood v. Whitten*, 66 Id., 295.

Where a motion for a new trial is based upon several grounds, an assignment of error in overruling the same must state particularly each of the grounds upon which the appellant intends to rely, or it will not be considered. *Id.*

Where a motion for a new trial was based on several grounds, an assignment of error, that "the court erred in overruling the motion," without more, is not sufficiently specific, under this section of the code, and will not be considered by the supreme court. *Leekins v. The Nordyke & Marmon Co.*, Id., 471.

An assignment of errors as follows: "The court erred in admitting improper and rejecting proper testimony, as shown by the record," and "The court erred in admitting certain evidence of the defendant against plaintiff's objection;" held, too indefinite to be noticed. *The M. U. Barb W. Co. v. Rice*, 70 Id., 14.

Where a motion was based on a single ground, and the assignment of error was that the court erred in sustaining the motion, the assignment was sufficiently specific. *Nichols v. Wood*, 66 Id., 225; *Lundak v. C. & N. W. Ry Co.*, 65 Id., 473, and *Perry v. Conger*, Id., 588, followed.

Where each of two defendants separately demurred to the petition, and the demurrers were sustained, and the appellant assigned as error "the rulings of the court in sustaining the several demurrers of the defendants," naming them, held, that the assignment was not sufficiently specific. *Bradley v. Johnson*, 67 Id., 614.

Errors not assigned with the exactness required by this section of the code will not be considered on appeal. *Armstrong v. Killen*, 70 Id., 51.

SEC. 3208. [Motion book.]—All motions must be entered in the motion book, and shall stand over till the next morning after the morning on which entered, and till after having been publicly called by the court, unless the parties otherwise agree, and the adverse party shall be deemed to have notice of such motion.

SEC. 3209. [When original paper sent up.]—Where a view of an original paper in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in some safe mode, to the clerk of the supreme court, who shall hold the same subject to the control of the court.

SEC. 3210. [Security for costs.]—The appellant may be required to give security for costs under the same circumstances as those in which plaintiffs in civil actions in the inferior court may be so required.

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

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

A party cannot accept the benefits of an adjudication and afterwards appeal therefrom. *M. & M. R. Co. v. Byington*, 14 Iowa, 572; *The Ind. Dist. of Altoona v. The Dist. Tp. of Delaware*, 44 Id., 201.

As to the right of the appellee to pursue a different remedy from that provided in this section, see *Cotter v. O'Connell*, 48 Id., 552.

A party does not waive his right to appeal from a judgment by causing a transcript thereof to be filed in other counties for the purpose of preserving a lien on real estate, no action being taken by him toward enforcing the judgment. *Tama County v. Melindy*, 55 Id., 355.

SEC. 3213. [**Proceedings in such case.**]—The appellee may, by answer filed and verified by himself, agent, or attorney, plead any facts which render the taking of the appeal improper or destroy the appellant's right of further prosecuting the same, to which answer the appellant may file a reply, likewise verified by himself, his agent, or attorney, and the questions of law or fact therein shall be determined by the court.

SEC. 3214. [**Notices: how served.**]—The service of all notices of appeal, or in any way growing out of such rights or connected therewith, and all notices in the supreme court, shall be in the way provided for the service of like notices in the circuit or district court, and they may be served by the same person and returned in the same manner, and the original notice of the appeal must be returned immediately after service to the office of the clerk of the district or circuit court where the suit is pending.

Service of notice of appeal on the wife of the adverse party does not comply with the requirements of this section, and is insufficient. *Draper v. Taylor*, 47 Iowa, 407.

SEC. 3215. [**Executions: form of.**]—Executions from the supreme court shall be the same as those from the district or circuit court and attended with the same consequences, and shall be returnable in the same time.

CHAPTER 3.

OF CERTIORARI.

SECTION 3216. [**When the writ may issue.**]—The writ of certiorari may be granted whenever specially authorized by law, and especially in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when in the judgment of the superior court there is no other plain, speedy, and adequate remedy.

A judgment in the county court for damages sustained by the complainant, by the removal of a road away from his property, should, under the revision, be taken to the district court by appeal, and not by *certiorari*. *Spray & Barnes v. Thompson*, 9 Iowa, 40.

The writ of *certiorari* commands the tribunal to which it is directed to certify fully a transcript of its records and proceedings as well as the facts in the case. *Blake v. Baily*, 20 Id., 125.

The proper remedy against an order of the court refusing to correct a mistake in a settlement with an administrator is by appeal, and not by *certiorari*. *O'Hara v. Hemstead*, 21 Id., 35.

Certiorari is the proper remedy to test the legality of the action of township trustees, in calling an election for the purpose of voting upon the question of a tax to aid in the construction of a railroad. *Jordan v. Hayne*, 36 Id., 9.

It is also the proper remedy to test the jurisdiction of the board of supervisors, in the submission of a proposition to remove the county seat. *Bennett v. Hetherington*, 41 Id., 142.

Proceedings in the establishment of a road will not be annulled on *certiorari*, unless it is shown that the inferior tribunal has exceeded its proper jurisdiction or is otherwise acting illegally. *McCollister v. Shuey*, 24 Id., 362.

The writ of *certiorari* is the proper remedy to test the expediency or propriety of establishing a public highway, and the legality and regularity of the proceedings of the board of supervisors in the premises, but is not the proper remedy to review the question of damages for the land taken for a road. *McCrary v. Griswold*, 7 Id., 248.

Where the district court did not exceed its jurisdiction in entertaining an action upon a school order, against the several independent districts into which the district, issuing the order, had subsequently divided, the writ of *certiorari* was denied. *The Ind. Dist. of Asbury v. The Dist. Court of Dubuque Co.*, 43 Id., 182.

In a proceeding for the punishment of a contempt, growing out of publications alleged to be

false, scandalous and defamatory, evidence is admissible to show the meaning and intent of the publications. *Henry v. Ellis*, 49 Id., 205.

The determination by the board of supervisors of the sufficiency of the remonstrance and number of names signed thereto under section 282 and 283 of the code, is a judicial act and may be reviewed by *certiorari*. *Herrick v. Carpenter*, 54 Id., 340, 342.

Equity has no jurisdiction to enjoin the passage of an ordinance by city council establishing or vacating streets, *certiorari* being the proper method of reviewing such action, *Stubenrauch v. Neyenesch*, 54 Id., 567.

When a city ordinance is of such a character that in its passage the council act in a legislative rather than a judicial capacity, their action is not subject to review on *certiorari*. *Isk v. The City of Newton*, Id., 586.

The validity of a city ordinance cannot be determined in a *certiorari* proceeding, brought by a citizen who is not shown to be specially affected thereby, or to have some interest therein other than in common with the general public. *Id.*

Where the board of supervisors has exercised powers not within its jurisdiction, *certiorari* is the proper remedy for the party specially aggrieved thereby. *Royce v. Genney*, 50 Id., 676.

It is not the office of a writ of *certiorari* to correct error in the judgments of judicial tribunals, in cases where the party asking the writ has lost a plain, speedy and adequate remedy by his own fault or negligence. *Fagg v. Barker*, 11 Id., 18.

Where the county judge refused to correct a mistake in a settlement with an administrator, it was held that the proper remedy was by appeal and not by *certiorari*. *O'Hare v. Hempstead*, 21 Id., 33.

Certiorari lies when some act has been done by an inferior tribunal, board or officer in excess of their jurisdiction, or is otherwise illegal. *Smith v. Powell*, 55 Id., 215. It may properly issue where the board of directors of a district township direct their secretary not to certify for collection a tax voted by the electors of the district. *Id.*

Under this section allowing the writ of *certiorari*, it is not intended that questions of fact may be reviewed. *Tiedt v. Carstenson*, 61 Id., 334.

Certiorari will not lie when there is a remedy by appeal, or when the party fails to appeal within the time prescribed by law. *Lumberg v. The District Court of Linn County*, Id., 597.

Where the only complaint made by an owner of land against proceedings condemning a portion of it for right of way purposes for a railroad is that the damages awarded are inadequate, and that the award was made on a day subsequent to that fixed in the notice, he has a plain, speedy and adequate remedy by appeal, and *certiorari* will not lie. *The C. R. I. F. & N. W. R'y Co. v. Whelen*, 64 Id., 694.

Where there is a plain, speedy and adequate remedy by appeal for alleged errors in proceedings before a justice of the peace, *certiorari* will not lie. *Ransom v. Cummins*, 66 Id., 137.

Where a demurrer was sustained to the petition and the plaintiffs in the cause electing to stand on their petition, judgment was entered against them for costs. After the record of such proceedings was made, and approved and signed by the judge, and after counsel for the defendant had left the court, but during the term at which the order and judgment were entered the court permitted the plaintiffs in the action to withdraw their election to stand on their petition, and, without any application therefor having been filed, or notice thereof to the defendant, entered, an order setting aside the judgment, and granting plaintiffs time to file an amendment to their petition. Held that the court had no jurisdiction, thus to change the record in the absence of, and without notice to, the defendant; and that, since the defendant had no opportunity to except, and thereby lay the foundation for an appeal, *certiorari* would lie to correct the error. *The Hawkeye Ins. Co. v. Duffee, Judge, etc.*, 67 Id., 175.

SEC. 3217. [By whom granted.]—The writ may be granted by the district or circuit court, or, in vacation, by a judge or clerk thereof, but if to be directed to either of such courts or judges, then by the supreme court, or, in vacation, by a judge thereof, and shall command the defendant therein to certify fully to the court from which the same issues, at a specified time and place, a transcript of the records and proceedings, as well as the facts in the case, describing or referring to them, or any of them, with convenient certainty, and also to have then and there the writ.

Under the revision the circuit court did not have jurisdiction in *certiorari* cases. *Thompson v. Reed*, 29 Iowa, 117.

SEC. 3218. [When stay of proceedings is asked.]—If a stay of proceedings is sought, the writ can only be issued by a court or judge, who may require a bond and fix the penalty and conditions thereof; the sureties thereon may be approved by the judge granting, or clerk who issues the writ.

Under this section the remedy by *certiorari*, where it applies, is full and complete; when the

writ is applied for, the proceedings before the inferior tribunal may be stayed. *Stubehrauch v. Neyenesch*, 54 Iowa, 571.

SEC. 3219. [**Petition.**—The petition for the writ must state facts constituting a case wherein the writ may issue, and must be verified by affidavit, and the supreme court or judge issuing the writ, may require notice of the application to be given the adverse party, or may grant the writ without notice. If a stay of proceedings is sought, the writ can only be granted on reasonable notice of the time, place and court or judge before whom the application will be made.

Where a stay of execution is sought in connection with the issuance of the writ, reasonable notice must be given to the defendant. *Iske v. The City of Newton*, 54 Iowa, 586.

SEC. 3220. [**Service and return.**—The writ must be served and the proof of such service made in the same manner as is prescribed for the original notice in a civil action, except that the original shall be left with the defendant, and the return or proof of service made upon a copy thereof.

SEC. 3221. [**Same.**—If the return of the writ be defective, the court may order a further return to be made, and may compel obedience to the writ and to such further order, by attachment if necessary.

SEC. 3222. [**Trial: Judgment.**—When full return has been made, the court must proceed to hear the parties, or such of them as may attend for that purpose, on the record proceedings and facts as certified, and such other testimony, oral or written, as either party may introduce pertinent to the issue, and may give judgment affirming or annulling the proceedings in whole or in part, or, in its discretion, correcting the same and prescribing the manner in which the party or either of them shall further proceed.

SEC. 3223. [**How prosecuted: Appeal.**—The action shall be prosecuted by ordinary proceedings so far as applicable, and from the decision of the district or circuit court an appeal lies as in other ordinary actions, and the record shall be prepared in the same manner.

SEC. 3224. [**Limitation on right.**—No writ shall be granted after twelve months have elapsed from the time the inferior court, tribunal, board, or officer has, as alleged, exceeded his proper jurisdiction, or has otherwise acted illegally.

A writ of *certiorari* to the board of supervisors, directing them to certify up a transcript of their proceedings upon the question of the removal of the county seat, is not barred until twelve months after the adoption of the order submitting the question to vote. The statute does not commence to run upon the determination that the petition is signed by the requisite number of voters. *Jamison v. The Board of Supervisors of Louisa County*, 47 Iowa, 388.

In a *certiorari*, proceeding the court will not consider errors or irregularities relating to or dependent upon facts not stated in the petition. Nor will allegations without a return to sustain them afford grounds of interference. *Everett v. The Cedar Rapids & M. R. R'y Co.*, 28 Id., 417; *Jordan v. Hayne*, 36 Id., 9, 15.

While the action of a board or tribunal cannot be annulled by proceedings in *certiorari* unless the same shall be instituted within one year from the time of the action complained of, yet, where it was sought to amend the levy and assessment of a ditch tax, on the ground that the establishment of the ditch was illegal, and that, therefore, the assessment and levy of a tax to pay for it was also illegal, *held*, that the action would lie, though brought more than one year after the proceedings establishing the ditch, but within one year from the assessment and levy of the tax. *Sheppard et al. v. Board of Supervisors of Johnson County*, 72 Id., 258.

TITLE XX.

OF PROCEDURE IN PARTICULAR CASES.

CHAPTER 1.

(REPLEVIN AND DETINUE.)

OF ACTIONS FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY.

SECTION 3225. [Where brought: statements and verification of petition.]—An action for the recovery of specific personal property may be brought in any county in which the property or some part thereof is situated; the petition must be verified and must contain:

1. A particular description of the property claimed;
2. Its actual value and, where there are several articles, the actual value of each;
3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership;
4. That it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him, or against the property. But if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process;
5. The facts constituting the alleged cause of detention thereof, according to his best belief;
6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof.

Where, in an action of replevin, the plaintiff asked the court to instruct the jury as follows: "1. That it is not necessary in replevin that the plaintiff shall prove that he is the rightful owner of the property replevied. If he had the peaceable possession, his right of possession was good against every person but the real owner, or some one having a better right of possession. 2. That if the plaintiff had possession of the property, his right of possession is good against all persons, until a better right is proved by some other person," which instructions the court refused to give; *held*, that the court erred in refusing to give the instructions. *McCoy v. Cadle*, 4 Iowa, 557.

If the property of A is taken upon attachment, or under execution, against the property of B, it is exempt from such seizure and A may bring replevin. *Smith v. Montgomery*, 5 Id., 370.

When proceedings are commenced under the prohibitory liquor law, by the seizure of intoxicating liquors, alleged to be owned and kept for sale in violation of law, it is not competent for the party to take the cause away from the tribunal whose jurisdiction has attached by instituting an action of replevin and regaining possession of the liquors. *Funk & Hardman v. Israel*, 5 Id., 438; *Cooley v. Davis*, 34 Id., 128; *The State v. Harris*, 38 Id., 242.

A promissory note is personal property, under the code, and its possession may be recovered in an action of replevin. *Graff v. Shannon*, 7 Id., 508; *Sacery v. Haynes*, 20 Id., 25.

In an action of replevin, where the residence of the plaintiff becomes material, it may be proved without a specific allegation to that effect in the petition. *Newell v. Hayden*, 8 Id., 140.

Where personal property is replevied from an officer, on the ground that it was exempt from execution, and it is sought to show that the plaintiff is a non-resident of the state and not entitled to exemption, such defense should be specially pleaded by the defendant and need not be rebutted in the first instance, by the plaintiff. *Id.*

The exemption of property from execution relates to the remedy, and is governed by the law of the place where the contract is sought to be enforced, instead of the *lex loci contractus*. *Id.*

Where the petition in an action of replevin alleges the right of possession as in the plaintiff, an answer which does not specifically deny this in words, but states facts which, under the law, would defeat the plaintiff's action, is sufficient. *Skinner v. The C., R. I. & P. R. Co.*, 12 Id., 191.

Under the statute, evidence showing that the title of the plaintiff in an action of replevin, to the property in controversy, was acquired through a fraudulent sale, is inadmissible when fraud has not been set up in the pleadings. To admit such evidence the fraud must be specially pleaded. *Gray v. Earle*, 13 Id., 188.

The petition in an action of replevin commenced before a justice of the peace, must be sworn to as provided by statute; and if not thus sworn to does not authorize the issuing of the writ. *Cure v. Wilson*, 25 Id., 205.

An action to recover possession of specific personal property cannot be maintained against a sheriff, who holds it by virtue of an execution, unless the plaintiff, prior to the commencement of the action, gives the sheriff written notice of his ownership thereof. *Finch v. Hollinger*, 43 Id., 488; *Kaster & Farwell v. Pease*, 42 Id., 488; *Gray v. Parker*, 13 Wes. Jur., 40; *Richabaugh v. Bade*, Id., 87.

But if the want of such notice is not pleaded in the answer of the defendant and he proceeds to trial upon the question of the ownership of the property the plaintiff may recover the property upon proper proof, but may be adjudged to pay the costs. *Warder, Mitchell & Co. v. Hoover & Co & Leonard*, 1 N. W. R., 795, 309; 13 Wes. Jur., 380.

The common law rule that a person cannot maintain replevin for the possession of goods taken from him by virtue of legal process, has been modified by our statute so far as respects property exempt from seizure. *Cooley v. Davis*, 34 Id., 128.

An action in a justice's court may be commenced simply by the service of a notice upon the defendant, save when a writ of replevin is asked for, in which case the petition, duly verified, must be filed. In all other cases, the filing of a petition forms no part of the commencement of an action and need be done, only upon the day of the trial. *Duffy v. Dale*, 42 Id., 215.

An action of replevin will lie, at the instance of the owner, for the recovery of the possession of a building erected under an agreement with the owner of the land upon which it was placed that the lessee should have the free use of the land as long as the house should remain thereon. *The Dist. Twp. of Corwin v. Moorehead*, 43 Id., 466.

Where personal property has been seized by virtue of an execution duly issued, replevin will not lie to take the property from the possession of the officer upon the mere allegation that the judgment has been satisfied. *Armel v. Lendrum*, 47 Id., 535.

If process issue from a court having no jurisdiction of the subject matter, or if an execution issue without a judgment having been rendered, or if the law under which the process is issued be unconstitutional, the process is void, and replevin may be maintained for the property seized by the officer under such process. *Cooley v. Davis*, 34 Id., 128; *Campbell v. Williams*, 39 Id., 464.

When in an action of replevin it has been adjudged that the property replevied was subject to a judgment which the plaintiff was thereupon compelled to pay, his remedy is not by an action for wrongful conversion against the sheriff who levied upon the property under the judgment. *Finch v. Hollinger*, 46 Id., 216.

An action of replevin may be brought under this section, in any county in which the property or any part thereof is situated, and where such action was dismissed as to the defendant residing in the county in which the action was brought and the property situated, the other defendants, residing in another county were not entitled to have it dismissed as to them. This section does not apply to such cases, but only to actions purely personal. *Porter v. Dalhoff & Co.*, 59 Id., 459.

The action of replevin cannot be maintained against one who does not detain from the plaintiff the possession of the property. And in such case the defendant is entitled to costs. *Hone v. McHenry & Allison*, 69 Id., 227.

An action of replevin may be brought either in the county where the defendant resides or where the property is situated, at the election of the plaintiff, but the venue cannot properly be laid in a county other than one of these on the allegation that the property was wrongfully removed therefrom by the defendant. *Hibbs v. Dunham et al.*, 54 Id., 559.

An action of replevin will lie at the instance of a party whose property has been wrongfully seized by an officer. *Smith v. Montgomery*, 5 Id., 370; *Wilson v. Stripe*, 4 G. Greene, 651; *Miller v. Bryan*, 3 Id., 58; *Gimble v. Ackley et al.*, 12 Id., 27; *Shea v. Watkins*, Id., 605; *Cooley v. Davis*, 34 Id., 128; *Ramsden v. Wilson*, 49 Id., 211. The fact that the officer holds it under process issued by the circuit court would not deprive the district court of jurisdiction in an action of replevin. *Ramsden v. Wilson*, 49 Id., 211.

Replevin will not lie against an officer acting under a tax warrant for the collection of taxes erroneously assessed by a board having competent authority. *Belbo v. Henderson*, 21 Id., 56.

When there is a want of authority to levy the tax, the owner may replevy the property seized by the officer in payment of the same, but not when the authority exists but is irregularly exercised. *Buell v. Ball*, 20 Id., 282.

A description of property in a petition of replevin, which would be sufficient to pass the title by a chattel mortgage is sufficiently particular. *The City of Fort Dodge v. Moore*, 37 Id., 388. See *Smith v. McLean*, 24 Id., 322.

Demand of possession before commencing an action of replevin need be made only in those cases where it is necessary to terminate the right of possession in defendant, and confer it upon the plaintiff. Where both parties claim title, and the right of possession incident thereto, no demand is necessary. *Smith & Co. v. McLean*, 24 Id., 322.

See note to section 2589 *ante*, from *Goldsmith, Assignee, v. Willson et al.*, 67 Id., 662.

In an action for the conversion of personal property plaintiff alleged that he was the absolute and unqualified owner of the property and, that they acquired such ownership by purchase. In evidence of ownership the plaintiff offered in evidence a chattel mortgage in their favor as mortgagees. Held, that under this section of the code sub. 3, "the facts constituting the plaintiff's right to the present possession, and the extent of his interest in the property, whether it be full or qualified ownership," must be set out, and that the evidence offered was not admissible to prove the facts alleged. *Kern et al. v. Wilson*, 35 N. W. Rep., 594.

SEC. 3226. [**No counter-claim.**].—The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counter-claim.

One partner cannot maintain an action of replevin against the other, although by their contract of co-partnership one partner was to be the sole owner of the partnership property, the profits of the business being equally divided between them. Equity has exclusive jurisdiction of partnership settlements. *Kuhn v. Newman*, 49 Iowa, 424.

SEC. 3227. [**When process may issue on Sunday.**].—If the plaintiff allege in his petition that he will lose his property unless process issue on Sunday, the order may be issued and served on that day.

SEC. 3228. [**New parties.**].—If a third person claim the property or any part thereof, the plaintiff may amend and bring him in as a co-defendant, or the defendant may obtain his substitution by the proper mode, or the claimant may himself intervene by the process of intervenor.

Where a person intervenes in an action of replevin against an officer, and becomes the substantial defendant, the judgment therein designating the rights of the parties is conclusive upon all of the parties, as well between the plaintiff and the intervenor as between the plaintiff and the original defendant. *Witter v. Fisher*, 27 Iowa, 9.

The owner of personal property which has been taken by an officer under a writ of replevin in an action, to which such owner was not a party, may bring his action, and replevy the property from an officer. The remedy by intervention in the first suit is not exclusive. *Davis v. Gambert*, 57 Id., 239.

An assignee in bankruptcy may maintain an action of replevin in the state courts to recover property belonging to the estate, when the right thereto does not depend upon the bankrupt law; and the assignee acquires such an interest in the property of the bankrupt as authorizes him to intervene under this section of the code, or maintain an independent action for the recovery of such property fraudulently conveyed by the bankrupt. *Wetmore v. McMillen et al.*, Id., 344.

BOND—ORDER.

SEC. 3229. [**When bond required.**].—When the plaintiff desires the immediate delivery of the property, he shall execute a bond to the defendant, with sureties to be approved by the clerk, in a penalty at least equal to twice the value of the property sought, conditioned that he will appear at the next term of the court and prosecute his suit to judgment and return the property if a return be awarded, and also pay all costs and damages that may be adjudged against him. The bond shall be filed with the clerk of the court, and is for the use of any person injured by the proceeding, and a judgment for money rendered against the plaintiff shall go against the sureties on the bond.

Under (§§ 3554 and 3563 of the revision), 3229 and 3230 of the code, the defendant may, after the action is dismissed by the plaintiff, have an alternative judgment for a return of the property, or the amount of his damages, against both the principal and sureties on his bond. *Wilkins v. Treynor*, 14 Iowa, 391.

Under this section (3229) the sureties in a replevin bond, by signing the same, consent and agree that any judgment for money that may be adjudged against their principal, may be rendered against them also. *Hershler v. Reynolds*, 22 Id., 152.

Where grain taken on a writ of replevin was threshed and sold by the plaintiff, and upon the trial the ownership was found to be in the defendant, the measure of his recovery on the plaintiff's bond was held to be the market value of the grain at the time of the trial, less the cost of threshing and marketing, it not appearing that the plaintiff had acted in bad faith in obtaining the writ. *Clemet v. Duffy*, 54 Id., 632.

Where property levied upon under execution was replevied in an action by the execution defendant (who was the general owner) and sold to a *bona fide* purchaser, it was held that as to such purchaser the filing of the replevin bond operated to release the property from the lien of the execution. *Gimble v. Ackley et al.*, 12 Id., 27.

During the pendency of the replevin suit, the sureties in the replevin bond are treated as in court, and in the absence of exceptional circumstances, are not entitled to any other day. Being thus treated as in court, and not objecting, they are concluded by the judgment or order to which the principal consents, settling and fixing the rights of the parties. *Id.*

A surety in a replevin bond cannot in an action of replevin instituted by his principal before a justice of the peace, prosecute an appeal in his own name, and have the issues between his principal and the defendant re-tried in the appellate court. *Crits v. Littleton*, 23 Id., 205.

SEC. 3230. [Clerk to issue order.]—The clerk shall thereupon issue an order, under his hand and seal of the court, directed to the sheriff, requiring him to take the property therein described and deliver the same to the plaintiff. And where the petition shows that the property has been wrongfully removed into another county from the one in which the action is commenced, the order may issue from the county whence the property was so wrongfully taken, and may be served in any county where the property may be found, in the same manner and with like effect as in the county where suit is brought.

SEC. 3231. [Order follow property.]—When any of the property is removed to another county after the commencement of the action, counterparts of the proper order may issue on the demand of the plaintiff to such other county, and may be executed upon such goods found in such county, and further orders and the necessary counterparts thereof may issue as often as may be necessary.

ORDER—EXECUTION OF.

SEC. 3232. [Execution of: duty of officer.]—The sheriff must forthwith execute the order by taking possession of the property therein mentioned, if it is found in the possession of the defendant, or of his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the order was placed in the sheriff's hands, for which purpose he may break open any dwelling house or other enclosure, having first demanded entrance and exhibited his authority, if required.

SEC. 3233. [Defendant examined on oath to discover property.]—When it appears by affidavit that the property claimed has been disposed of, or concealed so that the order cannot be executed, the court or judge may compel the attendance of the defendant, and examine him on oath as to the situation of the property, and punish a willful obstruction or hinderance, or disobedience of the order of the court in this respect as in case of contempt.

Under this section the judge in vacation is authorized to punish a willful disobedience or hinderance of the execution of the replevin, as well as for any disobedience of any order made necessary by the proceedings to examine the defendant under oath. *The State v. Meyers*, 44 Iowa, 580, 583.

SEC. 3234. [Property delivered to plaintiff.]—The sheriff having taken the property, or any part thereof, shall forthwith deliver the same to the plaintiff.

SEC. 3235. [Defendant may prevent delivery of property to plaintiff.]
—At any time before the actual delivery to the plaintiff, the defendant may stay all proceedings under the aforesaid order and retain the property in his own possession, by executing a bond to the plaintiff, with sureties to be approved by the clerk or sheriff, conditioned that he will appear in and defend the action, and deliver the property to the plaintiff if he recover judgment therefor in as good a con-

dition as it was when the action was commenced, and that he will also pay all costs and damages that may be adjudged against him for the taking or detention of the property.

SEC. 3236. [Must let plaintiff inspect property: appraisement of.]—

But when the property is so retained by the defendant, he shall permit the sheriff and plaintiff to inspect the same; and if the plaintiff so request, the sheriff shall cause the property to be examined and appraised by two sworn appraisers, chosen by the parties to the action, or, in their default, by the sheriff himself, in the manner provided for other cases of appraisement; and he shall return their appraisement with the execution.

SEC. 3237. [Return of order.]—The sheriff must return the order on or before the first day of the trial term, and shall state fully what he has done thereunder. If he has taken any property he shall describe particularly the same. And if he has taken a bond from the defendant, as provided in the preceding section, he shall file the same with his return.

The taking the receipt of the defendant for the property in an action of replevin is unauthorized by the statute, and does not constitute a levy by the sheriff. He should take actual possession. *Davis v. Baylies*, 13 West. Jur., 373. See *Wittier v. Fisher*, 27 Iowa, 9, cited in note to section 3278, *ante*.

In replevin, when the defendant has given a delivery bond for the property which perishes in his hands, the plaintiff's measure of damages for unlawful detention is the same as if the property had been preserved to abide the result of the action. *Hinkson v. Morrison*, 47 Id., 167; *Lille v. McMillin*, 52 Id., 463.

JUDGMENT AND EXECUTION.

SEC. 3238. [Jury to assess value and damages.]—The jury must assess the value of the property, as also the damages for taking or detention, whenever by their verdict there will be a judgment for the recovery or the return of the property, and when required so to do by either party, must find the value of each article thereof.

SEC. 3239. [Form of judgment.]—The judgment shall determine which party is entitled to the possession of the property; and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party having no right in such property and shall also award such damages to either party as he may be entitled to for illegal detention of such property.

When in an action of replevin the ownership and right to the possession of personal property was in issue on the allegation of the plaintiff's petition, the defendant setting up no special property, and the jury returned the following verdict: "We find the ownership in the plaintiff, and assesses the value of the mare at \$75 and the damages for wrongful detention at \$25.00, it was held, that the form of the verdict was sufficient, and the court did not err in entering judgment thereon. *Cassel v. The Western Stage Co.*, 12 Iowa, 47.

The question to be determined in an action of replevin is, in whom was the right of possession at the time the action was commenced. *Id.*

As a general rule, ownership of personal property carries with it the right of possession, and in replevin a general allegation of a right to the possession of the property in controversy is sufficiently maintained by evidence of ownership only, when no special right to the possession is shown by the opposite party. *Id.*

Where property taken in execution was taken from the sheriff by replevin, and the plaintiff, in said action, failed to prosecute his action successfully, the measure of the defendant's damages is the balance due him as execution plaintiff, with interest and costs. *Hayden v. Anderson*, 17 Id., 158.

Under this section an action for the recovery of personal property wrongfully levied upon and sold by a sheriff to pay another's debts, may be brought and maintained against the sheriff, notwithstanding, he may have sold the property and parted with the possession thereof, provided due notice of plaintiff's ownership was served upon him while he was in possession. *Hardy v. Moore*, 62, Id., 65.

In rendering judgment on a verdict in favor of the defendant in replevin, it is not error to allow

interest on the value of the property from the time it was wrongfully taken from the defendant. *Heard v. Gallagher*, 14 Id., 394.

As a general rule, the judgment in replevin, where the plaintiff fails to maintain his action, should be for the return of the property. *Chadwick v. Miller*, 6 Id., 38; *Jansen v. Effey*, 10 Id., 227; *Mason v. Richards*, 12 Id., 73.

A person who purchases and takes possession of personal property subject to mortgages thereon, which he assumes to pay, cannot in an action of replevin brought in his own name, recover upon the ground that he is the agent of the mortgagees. *McMorton v. Akers*, 24 Id., 369.

Where, in an action of replevin, the petition alleged the value of the property and that the plaintiff was the absolute owner, and the possession was taken under the writ from the defendant and delivered to the plaintiff, a verdict as follows: "We, the jury, find for the plaintiff," was held sufficiently specific. *Newton v. Reed*, 30 Id., 496.

Where in an action of replevin the plaintiff dismisses his petition before an answer is filed, the defendant is, nevertheless to have judgment for his interest in the property replevined. But if he files an answer, notwithstanding the dismissal, claiming other and further relief, the plaintiff should be allowed to plead thereto, and introduce evidence upon the issues thus raised. *Crist v. Francis*, 50 Id., 257.

A person not a party to an action aided by attachment in the circuit court, may maintain an action of replevin in the district court. *Seaton v. Higgins*, 50 Id., 305.

Under this section an action for the recovery of personal property wrongfully levied upon and sold by a sheriff to pay another's debt, may be brought and maintained against the sheriff notwithstanding he may have sold the property and parted with the possession thereof, provided due notice of plaintiff's ownership was served upon him while he was in possession. *Harvey v. Moore*, 62 Id., 65.

SEC. 3240. [Execution: form of.]—The execution shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered subject to execution, and the value of property for which judgment was recovered to be specified therein, if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property.

SEC. 3241. [Plaintiff's option as to what he will take.]—If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter, or otherwise, he may, at his option, have execution for the specific delivery of the property, or for the value thereof as determined by the jury. And if any article of the property cannot be obtained on execution, he may take the remainder with the value of the missing articles.

Where the plaintiff, in an action of replevin, has established a *prima facie title*, through a purchase of a judgment debtor, before levy of execution, the burden of showing that the sale was fraudulent is upon the defendant. Where the fraud is once established, the sheriff's right to the possession may be shown by the execution under which it was seized, and the levy of the same upon the property. *Parsons v. Hedges*, 15 Iowa, 119.

Under this section of the code the defendant in replevin may, after the action has been dismissed by the plaintiff, have an alternative judgment for the return of the property or the amount of his damages, against both the principal and sureties on his bond. *Wilkins v. Traynor*, 14 Id., 391; *Clark v. Warner*, 32 Id., 219; *Byington v. Oaks*, Id., 488.

Under sections 3241 and 3242 of the code the plaintiff is entitled to a money judgment at his option when he is found entitled to the property and is not already in possession thereof. *Armel v. Lendrum*, 47 Id., 535, 538.

The successful party in replevin may, at his election, have judgment for a return of the property, or a money judgment for the value of his right therein. *McNorton v. Akers*, 24 Id., 369; *Clark v. Warner*, 32 Id., 219; *Davis v. Bayliss*, 51 Id., 435, 438.

Where an action of replevin is dismissed by the plaintiff, the defendant is entitled to a judgment for the return of the property or for a money judgment against the plaintiff for the extent of the defendant's interest therein, not exceeding the value of the property replevined. *Marshall v. Bunker*, 40 Id., 121.

This section, which provides that in actions of replevin the person found entitled to the possession of the property may, at his option, have execution for the specific property, or for the value thereof as determined by the jury, applies only to those cases which are decided on their merits, and not to cases decided on demurrer for want of jurisdiction. *Williams v. Chapman*, 60 Id., 57.

Where the plaintiff in replevin prevails, but elects, under this section, to take a money judgment for the value of the property instead of judgment for the property itself, he does not thereby

waive his right to damages for the wrongful detention of the property by defendant. *Cook v. Hamilton*, 67 Id., 394.

SEC. 3242. [**Judgment on bond.**]—When property for which a bond has been given, as hereinbefore provided, is not forthcoming to answer the judgment, and the party entitled thereto elects to take judgment for the value thereof, such judgment may be entered against the principal and sureties in the bond.

SEC. 3243. [**When property has been concealed.**]—When it appears by the return of the officer, or by the affidavit of the plaintiff, that any specific property which has been adjudged to belong to one party, has been concealed or removed by the other, the court or a judge may require him to attend and be examined on oath respecting such matter, and may enforce its order in this respect as in the case of contempt.

SEC. 3244. [**Exemption.**]—A money judgment taken under the provisions of this chapter in lieu of property exempt from execution, shall also be, to the same extent, exempt from execution, and from all set-off or diminution either by the adverse party or by any other person, and such exemption may, at the option of the party, be stated in the judgment.

Upon consideration of sections 3225, 3229, 3230, 3238 to 3244 of the code it was held that, where an action of replevin was begun in the county where the property was situated but against a defendant residing in another county, a failure to secure the property under the writ did not defeat the jurisdiction of the court to entertain the case to the end; and, in such case, the defendant is not entitled to have the cause removed to the county of his residence. *Laughlin v. Main*, 63 Iowa, 580. Compare *Porter v. Dalhoff*, 59 Id., 459.

CHAPTER 2.

OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

SECTION 3245. [**By ordinary proceedings.**]—Actions for the recovery of real property shall be by ordinary proceedings, and there shall be no joinder and no counter-claim therein, except of like proceedings and as provided in this chapter.

An equitable defense may be interposed in an action at law to recover real property. *Rosierz v. Van Dam*, 16 Iowa, 175. See, also, *Thompson v. Hurley*, 19 Id., 331; *Van Orman v. Spafford*, 16 Id., 186; *Kramer v. Conger*, Id., 434; *Warren v. Crew*, 22 Id., 315; *Shawhan v. Long*, 26 Id., 488; *Von Orman v. Merrill*, 27 Id., 476.

The joinder of actions referred to in this section relates to the cause of action and not to the relief sought. The language will not be construed to forbid an action in equity for full relief, if a decree quieting title will not give such relief. *The County of Buena Vista v. I. F. & S. C. R. Co.*, 49 Id., 657, 662.

A defendant in an action to recover real property who is the holder of a lien on the property, cannot foreclose such lien by way of counter-claim in that action. *Kemerer v. Bournes*, 53 Id., 172, 176.

SEC. 3246. [**Who may maintain: against whom.**]—Any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by action against any person acting as owner, landlord, or tenant of the property claimed.

A parol license to enter upon mineral lands and work the same, for a specific share of the mineral raised, for an indefinite time, an entry under such license, and an expenditure of labor and money in sinking shafts, running drifts, procuring machinery and other preparations for mining under such license gives to the licensee a valid subsisting interest in the real estate which the licensor can terminate only by giving him compensation for such expenditure, or the notice necessary to terminate a tenancy at will; and the licensee may assert his right to the possession against the licensor, or his subsequent licensee with notice, by action of ejectment. *Beatty v. Gregory*, 17 Iowa, 109.

SEC. 3247. [**Title.**]—The plaintiff must recover on the strength of his own title.

SEC. 3248. [**Joint or tenant in common.**]—In an action by a tenant in common, or joint tenant of real property against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial.

The objection that the plaintiff cannot recover without proof that the defendant denied his right before suit brought as provided in this section, cannot be made for the first time in the supreme court. *Starry v. Starry*, 21 Iowa, 254, 256.

SEC. 3249. [**Service on agent, when.**]—When the defendant is a non-resident, having an agent of record for the property in the state, service may be made upon such agent in the same manner and with the like effect as though made on the principal.

PETITION—ANSWER—TRIAL.

SEC. 3250. [**Form of petition.**]—The petition may state generally that the plaintiff is entitled to the possession of the premises, particularly describing them, also the quantity of his estate and the extent of his interest therein, and that the defendant unlawfully keeps him out of possession, and the damages, if any, which he claims for withholding the property; but if he claims other damages than the rents and profits, he shall state the facts constituting the cause thereof.

It is not necessary under this section that a party in an action for the recovery of real property shall annex, as an exhibit to his petition, the evidence of his title. *Boardman v. Beckwith*, 18 Iowa, 292.

It is only necessary for the plaintiff in an action to recover real property, to state generally the extent of his interest therein. The evidence upon which he relies to prove his title need not be stated. *Larnin v. Wilmer*, 35 Id., 244, 247.

In a petition for a recovery of real property, the plaintiff must allege that the defendant unlawfully keeps him out of possession. *Barrett v. Love*, 48 Id., 103, 123.

In our system of pleading the facts constituting an estoppel *in pais*, in an action to recover real property, need not be specially pleaded, the averments of the facts constituting defendant's interest being sufficient. *Phillips v. Blair*, 38 Id., 649.

SEC. 3251. [**Abstract of title to be attached.**]—The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page and book where the same appears of record. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial, unless it has been sufficiently referred to in such abstract, which, on motion, may be made more specific, and may be amended as other proceedings.

SEC. 3252. [**Answer.**]—The answer of the defendant, and of each if more than one, must set forth what part of the land he claims, and what interest he claims therein generally, and if as mere tenant, the name and residence of his landlord.

See *Phillips v. Blair*, 38 Iowa, 649, cited in notes to section 3250, *ante*.

SEC. 3253. [**Landlord substituted for defendant.**]—Whenever it appears that the defendant is only a tenant, the landlord may be substituted by the service upon him of original notice, or by his voluntary appearance, and the judgment shall be conclusive against him.

While under this section the landlord may be substituted in an action of right, when it appears that the defendant is only a tenant, such substitution is not imperatively required, and the action may proceed against the tenant alone. But in that case, it seems, the landlord would not be bound unless he had been notified of the action. *The State v. Orwig*, 34 Iowa, 112.

SEC. 3254. [**Possession.**]—Where the defendant makes defense, it is not necessary to prove him in possession of the premises.

SEC. 3255. [**Alienation: effect of.**]-An action for the recovery of real property against a person in possession, cannot be prejudiced by any alienation made by such person after the commencement of the action.

SEC. 3256. [**Power to enter and survey land.**]-The court, on motion and after notice to the opposite party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the land in controversy and make survey and admeasurement thereof, for the purposes of the action.

SEC. 3257. [**Same.**]-The order must describe the property, and a copy thereof must be served upon the owner or person having the occupancy and control of the land.

SEC. 3258. [**Verdict: form of.**]-The verdict may specify the extent and quantity of the plaintiff's estate, and the premises to which he is entitled, with reasonable certainty, by metes and bounds and other sufficient description according to the facts as proved,

SEC. 3259. [**General verdict.**]-A general verdict in favor of the plaintiff without such specifications, entitles the plaintiff to the quantity of interest or estate in the premises as set forth and described in the petition.

SEC. 3260. [**Judgment for damages only.**]-If the interest of the plaintiff expire before the time in which he could be put in possession, he can obtain a judgment for damages only.

A conveyance by the plaintiff of the title to the property, involved in a pending action of right, will not abate the action; and the prosecution thereof may be continued in his name notwithstanding such conveyance. This section applies only to cases where the plaintiff holds a limited and determinable estate in the premises, which expires by lapse of time, or the like, during the pendency of the action. *Jordan v. Ping*, 32 Iowa, 64.

SEC. 3261. [**Limitation of damages.**]-The plaintiff cannot recover for the use and occupation of the premises for more than six years prior to the commencement of the action.

A dowress is entitled to recover damages for the detention of her dower, from the alienee of her husband, or his grantee, as measured by the use and profits at least, from the time of the demand of dower, provided such demand was not more than six years prior to the commencement of the suit. If the demand was more than six years before the action was commenced, she can only recover for the six years. *O'Farrel v. Simplot*, 4 Iowa, 381.

In an action to recover real property, the plaintiff, where he holds the legal title and right of possession thereto, may recover for the use and occupation of the land, as well as the title and possession. *Dunn v. Starkweather*, 6 Id., 466.

In an action of right against the ancestor, and to which the heirs are made parties after his death, the heirs are not liable for damages for the rents and profits while the ancestor was in possession of the premises. They are only liable for damages after such time as they are shown to have been in possession. *Cavender v. Smith*, 8 Id., 360.

In such a case, if the plaintiff seeks to recover damages from the ancestor, his administrator should be made a party, with the heirs, or a separate action should be instituted against him. *Id.*

The limitation in this section has no application to the right of an occupying claimant to recover for improvements. *Parsons v. Moses*, 16 Id., 440.

An action to recover for the use and occupation of real property must be brought within five years from the time when the cause of action accrued. It is not of the class of actions contemplated in this section which may be brought within six years. *Gibbets v. Morris*, 42 Id., 120. See *Mewr v. Bozarth et ux.*, 44 Id., 499.

SEC. 3262. [**Improvements set off against damages.**]-When the plaintiff is entitled to damages for withholding, or using, or injuring his property, the defendant may set off the value of any permanent improvements made thereon to the extent of the damages, unless he prefers to avail himself of the law for the benefit of occupying claimants.

A tenant who leases real estate of the apparent legal owner, to whom he pays the rent, cannot afterwards be made liable therefor to one who, by a proceeding in equity against the lessor to quiet title, but in which the tenant was not made a party, was decreed to be the rightful owner of the premises, although such proceeding was commenced before, though not decided until after, the expiration of the tenancy and the payment of the rent. The tenant in such case would only be

liable for rents accruing after the decree; nor would the case be varied by the fact that he was notified not to pay his lessor. This holding is not in conflict with section 3274 of the code. The proceeding to quiet title is not a suit brought for the recovery of the land within the meaning of this section. *Gardner v. Gardner*, 25 Id., 102.

When the plaintiff in an action to recover real property is entitled to damages for the wrongful detention thereof, or injury thereto, the defendant may set off the value of any permanent improvements made thereon to the extent of the damages, unless he prefers to avail himself of the law for the benefit of occupying claimants. *Parsons v. Moses*, 16 Id., 440, 444.

SEC. 3263. [Wanton aggression.]—In case of wanton aggression on the part of the defendant, the jury may award exemplary damages.

SEC. 3264. [Tenant: extent of liability.]—A tenant in possession in good faith, under a lease or license from another, is not liable beyond the rent in arrear at the time of suit brought for the recovery of land, and that which may afterward accrue during the continuance of his possession.

See *Gardner v. Gardner*, 25 Iowa, 102, cited in note to section 3262, *ante*.

SEC. 3265. [Where crop is sowed, planted or growing: finding.]—If the defendant aver that he has a crop sowed, planted or growing on the premises, the jury finding for the plaintiff, and also finding that fact, shall further find the value of the premises from the date of the trial until the first day of January next succeeding, and no execution for possession shall be issued until that time, if the defendant executes, with surety to be approved by the clerk, a bond in double such sum to the plaintiff, conditioned to pay at said date the sum so assessed. This bond shall be part of the record, and shall have the force and effect of a judgment, and if not paid at maturity, the clerk, on the application of plaintiff, shall issue execution thereon against all the obligors.

A tenant in possession of land sold on execution, under lease from the defendant in execution, can have no higher or better rights than his lessor, and he is charged with notice of the sale and of the expiration of the time of redemption, and if he sows a crop which he cannot reap within that time, it is his own folly, and he cannot hold the land for the purpose of reaping the crop, under this section of the code. *Wheeler v. Kirkendall*, 67 Iowa, 612.

SEC. 3266. [Writ of possession.]—When the plaintiff shows himself entitled to the immediate possession of the premises, judgment shall be entered and a writ of possession issued accordingly.

See *Dunn v. Starkweather*, 6 Iowa, 470.

SEC. 3267. [Judgment for rent accruing after judgment and before possession.]—The plaintiff may have judgment for the rent of the possession which accrues after judgment and before delivery of possession, by motion in the court in which the judgment was rendered, ten days' notice thereof in writing being given, unless judgment is stayed by appeal and bond given to suspend the judgment, in which case the motion may be made after the affirmance thereof.

NEW TRIAL.

SEC. 3268. [When granted: grounds of.]—In any of the cases provided for by this chapter, the court, in its discretion, may grant a new trial on the application of any party thereto, or those claiming under a party, made at any time within one year after the former trial, although the grounds required for a new trial in other cases are not shown; but only one such new trial shall be granted.

An appeal may be taken from an order of the court below granting a new trial, but such an order will not be interfered with, unless it is shown that the discretion vested in the court has been abused, or that great injustice has been done to the appellant. A stronger case must be made than would be required to justify the reversal of an order refusing a new trial. *Newell v. Sanford*, 10 Iowa, 396.

Greater latitude is given to the discretion of the court below as to new trials in actions of right than in any other actions. *Id.*; *White v. Poorman*, 24 Id., 108.

A mistake made by a third person in selecting a paper to be used as documentary evidence in the trial of an action of right, when not discovered in time to correct the same before the conclusion of the trial, is good cause for a new trial. *Floyd v. Hamilton*, 1d., 552.

The unsuccessful party in an action of right is entitled to the benefit of the provisions of the statute relating to new trials in such cases, as well as where the defense is equitable in its nature, as where it is legal. *Butterfield v. Walsh*, 25 Id., 263.

The fact that the petition, in addition to asking that plaintiff's title be quieted, prays other equitable relief in regard to the land, will not take the case out of the provisions of this section, in relation to the granting of new trials in actions to quiet title. *The County of Buena Vista v. The I. F. & S. C. R. Co.*, 49 Id., 657.

A new trial in such case will be decreed, where a judgment has been rendered because of a failure to make defense through the mistake of the attorney respecting the time of the term at which the judgment was rendered, when the mistake is from misinformation, and not neglect. *Id.*

A new trial will not be granted to relieve a party from the results of his own negligence, or from a mistake on his part as to the law. *Russell v. Nelson*, 32 Id., 215.

A new trial will be granted, when a judgment has been rendered because of a failure to make defense through the mistake of the attorney respecting the time of the term at which the judgment was rendered, when the mistake arose from misinformation, and not from neglect. *The County of Buena Vista v. The I. F. & S. C. R. Co.*, 49 Id., 657.

The fact that the petition, in addition to asking that plaintiff's title be quieted, prayed other equitable relief in respect to the land, was held not to take the case out of the provisions of this chapter of the code. *Id.*

This section does not contemplate a trial upon an application for a new trial made under its provisions, and it is not error to refuse a party permission to answer and controvert such application. *Id.*

The court has a discretion, under this section of the code to grant or refuse a new trial in an action to quiet title; and it cannot be said that such discretion has been abused in denying a new trial where it does not appear that a different result might reasonably be expected should such trial be granted. *Coleman v. Case*, 66 Id., 534.

SEC. 3269. [**Notice of application to adverse party.**—If the application for new trial is made after the close of the term at which the judgment was rendered, the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term at which the action stands for trial.

SEC. 3270. [**Not to affect rights of other parties.**—The result of such new trial, if granted after the close of the term at which the first trial took place, shall in no case affect the rights of third persons acquired in good faith for a valuable consideration since the former trial.

SEC. 3271. [**Damages.**—But the party who, on such new trial, shows himself entitled to lands which have thus passed to a purchaser in good faith, may recover the proper amount of damages against the other party, either in the same or a subsequent action.

SEC. 3272. [**Writ of restitution.**—The party who has been successful in such new trial, shall, if the case require it, have his writ of restitution to restore him his property.

QUIETING TITLE.

SEC. 3273. [**Who may bring action.**—An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto though not in possession.

Under this section an action in the nature of an action of right may be brought to quiet title to real property, against another claiming title thereto. *Fejervary v. Langer*, 9 Iowa, 159.

The action provided for in this section cannot be maintained against one holding a certificate of tax sale, not claiming title to the lands. *Eldridge v. Kuehl*, 27 Id., 160, 176.

Where the possession and control of real property is given to the executors for the purpose of carrying out the provisions of the will, they are authorized to maintain an action to quiet the title thereto. *Laverty v. Sexton & Son*, 41 Id., 435.

An action under this section may be maintained against a non-resident defendant, and to such action the provisions of the statute relating to the service of notice by publication, or personal service of notice on the defendant out of the state, apply. *Miller v. Davison*, 31 Id., 435.

An action to quiet the title to real property may be maintained in all cases where the defendant makes some claim adverse to the estate of the plaintiff, even if the defendant is in the actual possession of the land. *Lewis v. Soule*, 52 Id., 11. And see *Barrett v. Love*, 48 Id., 103, 107.

An action to quiet the title, authorized by this section, may be maintained against a non-resident defendant, and to such action the statute respecting the service of notice by publication, or personal service without the state, applies. *Miller v. Davidson*, 31 Id., 435.

SEC. 3274. [**Petition: form of.**—The plaintiff must file his petition under oath, setting forth the nature and extent of his estate, and describing the premises as accurately as may be, and averring that he is credibly informed and believes that the defendant makes some claims adverse to the estate of the petitioner, and praying for the establishment of the plaintiff's estate against such adverse claims, and that the defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to the plaintiff. The notice in such action shall accurately describe the property, and in general terms, the nature and extent of plaintiff's claim, and shall be served as in other cases.

Where an owner in possession of real property brings an action against adverse claimants to quiet his title thereto, this section of the statute will entitle him to the relief sought, if sustained by the proofs, under a general prayer for relief, if the petition embodies the essential averments of the statute, notwithstanding it is manifest that it was not framed with special reference thereto. *Patton v. Lancaster*, 33 Iowa, 494.

SEC. 3275. [**If defendant disclaim title.**—If the defendant shall appear and disclaim all right and title adverse to the plaintiff, he shall recover his costs. In all other cases the costs shall be in the discretion of the court.

SEC. 3276. [**To be prosecuted by equitable proceedings.**—In all other respects, the action contemplated in the three preceding sections shall be conducted as other actions by equitable proceedings, with the modifications prescribed by this chapter so far as the same may be applicable.

CHAPTER 3.

OF PARTITION.

SECTION 3277. [**By equitable proceedings.**—The action for partition shall be by equitable proceedings, and no joinder or counter-claim of any other kind shall be allowed therein, except as provided by this chapter.

In an action to foreclose a title bond, conditioned to convey the undivided half of certain real estate, one holding part thereof under a deed from the vendee is properly made a defendant, and by a pleading in the nature of a cross-bill may ask a partition, and the enforcement of the lien upon the land not claimed by him. *Hammond v. Perry*, 38 Iowa, 217.

Section 3277 of the code is not applicable to such case; equity has jurisdiction, and may grant the relief asked. *Id.*

Where the grant of a part of the water-power stipulated that the grantee should have "the right to use water to the amount of the issue of the wheel now in use in said mill, supposed to be six hundred inches, more or less, of water:" *Held*, 1. That the amount of water which the grantee might use, was to be measured by the capacity of the wheel in the mill at the time of the execution of the deed. 2. That the terms in the deed specifying the amount, six hundred inches, was descriptive only and not a limitation. 3. That the grantee was not limited to the use of one wheel, but could put in operation any number, provided, they did not use in the aggregate more water than the issue of the one wheel originally in the mill. *Doan v. Metcalf*, 46 Id., 120.

In an action for the partition of a water-power the partition should be made by referees under rules established by the court. *Id.*

In apportioning the amount of water permitted to be used under a grant a fixed and unvarying measure should be adopted, and an allowance of the water requisite to carry "two sets of buhrs and the necessary machinery for bolting," does not furnish such measure. *Id.*

Where parties own, in common, a water-power and mills, machinery, dam and other appurtenances, a partition of the whole property may be made. And where either party insists upon such partition, it must be made, regardless of the inconvenience or hardship thereby occasioned. *Cooper v. The Cedar Rapids Water Power Co.*, 42 Id., 398; *Doan v. Metcalf*, 46 Id., 120.

When the partition of a water-power is to be made, the rules governing it should be certain, definite and self-adjusting, so that they will readily apply to all conditions of the power. *Id.*

To effect such partition, the land covered by the water and dam may be divided by metes and bounds, and one part thereof assigned to each party, subject to the charge of keeping the dam in repair by the one to whom the part including it is assigned and the right to use such portion of the water as may be assigned to each owner, the extent of which may be indicated by some visible monument or by controlling the flowage through the gates. *Id.*

PLEADINGS—PARTIES—TRIAL.

SEC. 3278. [**Petition: form of.**—The petition must describe the property and respective interests of the several owners thereof, if known. If any interests, or the owners of any interests are unknown, contingent, or doubtful, these facts must be set forth in the petition with reasonable certainty.

SEC. 3279. [**Abstract of title to be attached to pleading.**—The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page on which the same appears of record. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial, unless it has been sufficiently referred to in such a bstract, which, on motion, may be made more specific, and may be amended as other pleadings.

SEC. 3280. [**Contingent interests.**—Persons having contingent interests in such property may be made parties to the proceedings, and the proceeds of the property so situated, or the property itself in case of partition, shall be subject to the order of the court until the right becomes fully vested. The ascertained share of any absent owner shall be retained, or the proceeds invested for his benefit under like order.

SEC. 3281. [**Lien creditors.**—Creditors having a specific or general lien upon the entire property may be made parties at the option of the plaintiff or defendant. See *Hammond v. Perry*, 38 Iowa, 217.

SEC. 3282. [**Answer: statements of.**—The answers of the defendants must state among other things the amount and nature of their respective interests. They may deny the interest of any of the plaintiffs, and, by supplemental pleading, if necessary, may deny the interests of any of the other defendants.

SEC. 3283. [**Issue: trial.**—Issues may thereupon be joined and tried between any of the contesting parties, the question of cost on such issues being regulated between the contestants agreeably to the principles applicable to other cases.

Where a defendant in an action for partition disclaims all right, title or interest in and to the premises described in the plaintiff's petition, at the time the action is brought or afterwards, and is not in possession doing any act inconsistent with such disclaimer, he is entitled to be dismissed with his costs. *Urban v. Hopkins*, 17 Iowa, 105.

ENCUMBRANCES.

SEC. 3284. [**Reference to ascertain encumbrances.**—Before making any order of sale or partition, the court may refer to a clerk, or a referee, to report the nature and amount of general encumbrances by mortgage, judgment, or otherwise, if any there be upon any portion of the property.

SEC. 3285. [**Proof of.**—The referees shall give the parties interested at least five days' notice of the time and place when he will receive proof of the amounts of such encumbrances.

SEC. 3286. [**Issue as to encumbrance: how tried.**—If any question arise as to the validity or amount of an encumbrance, or the payment of the same, the court may direct an issue to be made up between the encumbrancer and an owner, which

shall be decisive of their respective rights; and upon a sale it may order the money to be retained or invested to await a final action in relation to its disposition, and notice thereof to be forthwith given to the encumbrancer unless he has already been made a party.

SEC. 3287. [**Undivided interests: lien on.**—If the lien is upon one or more undivided interests, the holder thereof shall be made a party, and the lien shall, after partition or sale, remain a charge upon the particular interests of the proceeds thereof, but the amount of costs is a charge upon those interests, paramount to all other liens.

Where the answer in an action for partition of a grist mill set up that rents were due to the defendant, and that the plaintiffs, while in possession under a lease, allowed the mill to become out of repair to the extent of from \$200 to \$400, for which they are liable under their lease: *Held*, that the court below should have heard the parties upon these allegations. *Metcalf et al. v. Hoopingardner*, 45 Iowa, 510, 512.

The mortgagor of an undivided interest in real property is not bound by a partition to which he is not a party. *Lewis v. Atkinson*, 39 Id., 596.

Equity will give relief from a decree in a partition action, which, through the fraud of one of the parties, divided and distributed the land in violation of the rights of the others, as settled by the pleadings and interlocutory orders. *Id.*

The fraud in partition proceedings can only be taken advantage of by one who had a prior interest in the estate, and not by one who, subsequent to the fraud purchases an interest therein. *Telford v. Barney*, 1 G. Greene, 575; *Brace v. Reed*, Id., 422.

SEC. 3288 [**Not to delay distribution.**—The proceedings in relation to encumbrances shall not delay the distribution of the proceeds of other shares in respect to which no such difficulties exist.

SEC. 3289. [**Judgment of confirmation.**—After all the shares and interests of the parties have been settled in any of the methods aforesaid, judgment shall be rendered confirming those shares and interests, and directing partition to be made accordingly.

In a suit for the partition of real property the court is justified in ordering a sale of the property, although it is capable of division, if such division will greatly depreciate its value. *Branscombe v. Gillian*, 55 Iowa, 235.

A decree settling and confirming the shares and interests of the respective parties, contemplated by this section, is the proper judgment to be rendered upon an appeal by the parties, who are excluded from any interest in the land. *Ramsey v. Abrams*, 58 Id., 512.

Proceedings for the partition can be maintained under the code, only in cases of joint ownership of real property and not when it is owned in severalty. *Johnson v. Moser*, 34 N. W. R., 314.

PARTITION.

SEC. 3290. [**Referees appointed to.**—Upon entering such judgment, the court shall appoint referees to make partition into the requisite number of shares, or if it is apparent, or the parties so agree, that the property cannot be equitably divided into the requisite number of shares, a sale may be ordered.

Where the property owned in common cannot be equitably divided, it is competent for the court to direct in action for partition, that the common property be sold and the proceeds divided. *Metcalf v. Hoopingardner*, 45 Iowa, 510.

Although this section provides that the court shall appoint referees to set apart the shares of the respective parties, their appointment is not required in cases wherein, from the nature of the property and the character of the partition which the law makes, they can render no aid to the court in the just division of the property. *Doan v. Metcalf*, 46 Id., 120, 128.

SEC. 3291. [**Shares marked out.**—When a petition is deemed proper, the referees must mark out the shares by visible monuments, and may employ a competent surveyor and the necessary assistants to aid them therein.

The rules and regulations of the code as to partition have reference alone to real property. *Cooper v. The C., R. W. P. Co.*, 42 Iowa, 398, 401.

In the partition of the real estate of the husband in cases in which the widow, as his heir at law, takes one-half of his estate, she cannot be compelled to take the homestead as a part of her share. *Nichols v. Purczell*, 21 Id., 265.

SEC. 3292. [**Report of referees.**].—The report of the referees must be in writing, signed by at least two of them. It must describe the respective shares with reasonable particularity, and be accompanied by a plat of the premises, and must allot the shares to their several owners.

SEC. 3293. [**Special allotments.**].—For good and sufficient reasons appearing to the court, the referees may be directed to allot particular portions of the land to particular individuals. In other cases the shares must be made as nearly as possible of equal value.

Under this section the homestead may be awarded to the proper owner or tenant without the slightest detriment to his co-tenants. *Thorn v. Thorn*, 14 Iowa, 49, 55.

Slight deviations by the referees, where it is necessary in the partition of property, are not fatal to the proceedings, and the final judgment may properly correct any erroneous computation or inaccuracy in the report of the referees. *Wright v. Marsh*, 2 G. Greene, 94.

SEC. 3294. [**Partition of part.**].—When partition can be conveniently made of part of the premises, but not of all, one portion may be partitioned and the other sold as hereinafter provided.

SEC. 3295. [**Report set aside.**].—On good cause shown, the report may be set aside and the matter again referred to the same or other referees.

While under this section the report of the referees may be set aside and the matter re-referred, yet where the court dismissed the suit as to one defendant and rendered judgment against the other, upon setting aside the report, held erroneous. *Lyons et al. v. Harris et al.*, 34 N. W. R., 864.

If the report be unsatisfactory to the parties, on good cause shown, it may be set aside and the matter again referred to the same or other referees. Per ROTHROCK, J., in *Doan v. Metcalf*, 46 Id., 131.

SEC. 3296. [**Judgment.**].—Upon the report of the referees being confirmed, judgment thereon shall be rendered that the partition be firm and effectual forever.

SEC. 3297. [**Costs.**].—All the costs of the proceedings in partition shall be paid, in the first instance, by the plaintiffs, but eventually by all the parties in proportion to their interests, except those costs which are created by contests above provided for.

In an action which is essentially one to determine the title to land, though in form an action for partition, and where the defense is not frivolous, the fees of the plaintiff's attorney cannot properly be taxed as part of the costs and apportioned as provided in this section. *McClain v. McClain et al.*, 52 Iowa, 272.

Whether in any case the plaintiff in a partition case can have his attorney's fees taxed as part of the costs, not decided; but this cannot be done in a suit where there is a contest, as contemplated in these sections. *Duncan v. Duncan*, 63 Id., 150.

See chapter 184, laws of twentieth general assembly.

SALE.

SEC. 3298. [**Referees to give bond before selling.**].—Before proceeding to sell, the referees shall give a bond, in a penalty to be fixed by the court, payable to the parties who are entitled to the proceeds, with sureties to be approved by the clerk, conditioned for the faithful discharge of their duties. At any time thereafter the court may require farther and additional security, and upon the failure of the referees to comply with such order, they may be removed by the court and others appointed, and the court may at any time, for satisfactory reasons, remove such referees and appoint others.

SEC. 3299. (*As amended by ch. 130, 21st g. a.*) [**Notice: land may be sold at private sale: appraised.**].—The same notice of sale shall be given as when lands are sold on execution by the sheriff, and the sales shall be conducted in like manner. [*Provided*, that whenever in the discretion of the court such lands can be disposed of to better advantage and with less expense at private sale than in the manner hereinbefore provided, the same may be sold in compliance with such terms as are ordered by the court; but in such case the real estate shall be duly appraised

by three disinterested freeholders to be appointed by the court, and sold for not less than the appraised value.]

SEC. 3300. [**Report.**—After completing said sale, the referees must report their proceedings to the court, with a description of the different parcels of land sold to each purchaser and the price bid therefor, which report shall be filed with the clerk.

SEC. 3301. [**Conveyance.**—If the sale be approved and confirmed by the court, an order shall be entered directing the referees, or any two of them, to execute conveyances pursuant to such sale. But no conveyances can be made until all the money is paid, without receiving from the purchaser a mortgage of the land so sold, or other equivalent security.

A sale by referees in an action for the partition of real estate is not complete until approved and confirmed by the court; and when it appears that the sale was made for an inadequate price, it is the duty of the court, when moved by the parties in interest, to set aside the sale and order a re-sale of the land. *Lloyd et al. v. Lloyd et al.*, and *Wisner, Intervenor*, 61 Iowa, 243.

SEC. 2302. [**Validity of.**—Such conveyance so executed, being recorded in the county where the premises are situate, shall be valid against all subsequent purchasers, and also against all persons interested at the time who were made parties to the proceedings in the mode pointed out by law.

SEC. 3303. [**When parties are married.**—If the owner of any share thus sold has a husband or wife living, and if such husband and wife do not agree as to the disposition that shall be made of the proceeds of such sale, the court must direct it to be invested in real estate, under the supervision of such person as it may appoint, taking the title in the name of the owner of the share sold as aforesaid.

SEC. 3304. [**Sales disapproved.**—If the sales are disapproved, the money paid and the securities given must be returned to the persons respectively entitled thereto.

SEC. 3305. [**Security to refund money.**—The court, in its discretion, may require all or any of the parties, before they receive the moneys arising from any sale authorized in this chapter, to give satisfactory security to refund such moneys, with interest, in case it afterward appears that such parties were not entitled thereto.

SEC. 3306. [**Life estates.**—If a tenant for life or years be entitled as such to a part of the proceeds of sale, and if the parties cannot agree upon the sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the incumbered property to be invested, and the proceeds to be paid to the incumbrancer during the lifetime of the incumbrance.

Lands assigned to a widow as dower prior to the institution of an action by the heirs for partition are not subject to partition or sale in such action. She has the right to claim and hold the specific property assigned to her as her dower, though her dower be but a life estate. *Clark v. Richardson*, 32 Iowa, 399.

(CHAPTER 184, LAWS OF 1884.)

An Act in relation to attorney's fees in partition cases of real estate. [Additional to code, chapter 3, title XX.]

SECTION 1. [**Where no defense: attorney fee shall not exceed that allowed in section 2.**—*Be it enacted by the general assembly of the state of Iowa:* That in all actions for partition of real estate where there is no defense made, no greater attorney fee shall be allowed by the court to be taxed for and as attorney fees in such action for partition, than provided in section two hereof.

SEC. 2. [**Fee allowed.**]—For the first two hundred dollars or less in value of the property to be partitioned ten per cent, for the excess of two hundred dollars to five hundred dollars, five per cent, and for the excess over five hundred to one thousand dollars, three per cent, for all excess over one thousand, one per cent.

Approved April 7, 1884.

CHAPTER 4.

OF THE FORECLOSURE OF MORTGAGES.

SECTION 3307. [**Of personal property: how foreclosed.**]—Any mortgage of personal property to secure the payment of money only, and where the time of payment is therein fixed, may be foreclosed by notice and sale as hereinafter provided, unless a stipulation to the contrary has been agreed upon by the parties, or may be foreclosed by action in the proper court.

Where mortgaged chattels have been seized by the sheriff, to be sold under the mortgage, the balance of the proceeds after the satisfaction of the mortgage, is the property of the mortgagor, and in an action against the latter is subject to garnishment process served upon the officer. *Hoffman v. Wetherell*, 42 Iowa, 89.

The foreclosure of a chattel mortgage is the subject of equity jurisdiction. *Packard v. Kingman*, 11 Id., 219.

SEC. 3308. [**Notice.**]—The notice must contain a full description of the property mortgaged, together with the time, place, and terms of sale.

SEC. 3309. [**Service, on whom.**]—Such notice must be served on the mortgagor, and upon all purchasers from him subsequent to the execution of the mortgage, and all persons having recorded liens upon the same property which are junior to the mortgage, or they will not be bound by the proceedings.

It is not indispensable that subsequent mortgagees should be made parties in an action to foreclose, but unless they are, and are served with notice, they will not be bound by the proceedings. *Street v. Beal*, 16 Iowa, 68; *Bleidorn v. Abel*, 6 Id., 5; *Semple v. Lee*, 13 Id., 304; *Chase v. Abbott*, 20 Id., 154; *Parrott v. Hughes*, 10 Id., 459; *Donnelly v. Rush*, 15 Id., 99; *Johnson v. Harmon*, 19 Id., 56.

SEC. 3310. [**Return.**]—The service and return must be made in the same manner as in the case of the original notice by which civil actions are commenced, except that no publication in the newspapers is necessary for this purpose, the general publication directed in the next section being a sufficient service upon all the parties in cases where service is to be made by publication.

SEC. 3311. [**Notice of sale.**]—After notice has been served upon the parties, it must be published in the same manner, and for the same length of time as is required in cases of sale of like property on execution, and the sale shall be conducted in the same manner.

SEC. 3312. [**Title of sale.**]—The purchaser shall take all the title and interest on which the mortgage operated.

SEC. 3313. [**Bill of sale.**]—The sheriff conducting the sale shall execute to the purchaser a bill of sale of the personal property, which shall be effectual to carry the whole title and interest purchased.

SEC. 3314. [**Evidence of service perpetuated.**]—Evidence of the service and publication of the notice aforesaid, and of the sale made in accordance therewith, together with any postponement or other material matter, may be perpetuated by proper affidavits thereof.

SEC. 3315. [**Same.**]—Such affidavits shall be attached to the bill of sale, and shall then be receivable in evidence to prove the facts they state.

SEC. 3316. [**Validity of sales.**]—Sales made in accordance with the above

requirements, are valid in the hands of a purchaser in good faith, whatever may be the equities between the mortgagor and mortgagee.

A sale made under a deed of trust after payment of the debt secured thereby is absolutely void. There must be a valid subsisting power under the deed to render the sale valid. *Penney v. Cook*, 19 Iowa, 538.

SEC. 3317. [Contest: how effected.]—The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceeding may be transferred to the district or circuit court, for which purpose an injunction may issue if necessary.

Where the foreclosure of a chattel mortgage by notice and sale is restrained by injunction, on the ground of usury, and transferred to the district court, it there stands as a foreclosure in court, and the power of the court to render a judgment of forfeiture, in favor of the school fund, is as complete, if the contract be usurious, as if the proceeding to foreclose had been originally commenced in that court. *Harlin v. Parsons*, 33 Iowa, 207.

This section authorizes an injunction, but has no reference to the appointment of a receiver. *Silverman v. Kuhn*, 53 Id., 453.

The right to an injunction restraining the foreclosure of a chattel mortgage, and for a removal of the proceedings therefor into the district court, given by this section, is not an absolute one, and does not exist where the applicant has a full and complete remedy in a pending action at law. *Sweet v. Oliver*, 56 Id., 744.

A proceeding in equity to enjoin the foreclosure of a chattel mortgage by notice and sale, in order to contest in the district court the amount due and the right to foreclose, was under the revision, triable by the second method of equitable trials, and the finding of the court stood, on appeal, the same as the verdict of a jury. *Braith v. Guelick*, 37 Id., 212.

SEC. 3318. [Deeds of trust.]—Deeds of trust of real or personal property may be executed as securities for the performance of contracts, and shall be considered as, and foreclosed like mortgages.

Deeds of trust may be treated like mortgages and foreclosed by civil action. *Newman v. De Lorimer*, 19 Iowa, 244.

OF REAL PROPERTY.

SEC. 3319. [By equitable proceedings.]—No deed of trust, or mortgage of real estate, with or without power of sale, made since the first day of April, A. D. 1861, shall be foreclosed in any other manner than by action in court by equitable proceedings.

In an action to foreclose a mortgage where the mortgagor is dead, his administrator is a proper, if not a necessary, party to the foreclosure proceeding, and in such proceeding the administrator may, upon his own motion, be made a party. *Darlington v. Effey*, 13 Iowa, 177.

Equity will recognize and enforce a sale and conveyance of the dower interest before the dower has been assigned or admeasured, and will accordingly recognize and enforce the right which a purchaser of the dower interest of the husband or wife, as the case may be, acquires at a foreclosure sale under a mortgage in which both have joined. *Huston v. Seeley, et al.*, 27 Id., 183.

Where a party, who was indebted to another, executed a conveyance to secure the indebtedness and received from the grantee an instrument binding him to re-convey upon the payment of the debt, held, that the transaction constituted a mortgage, and that it was not competent for the grantor to insist upon the foreclosure thereof, but that he must pay the amount due before he could ask a cancellation of the conveyance. *White v. Lucas*, 46 Id., 319.

In equity a conveyance of land to a trustee as security for the payment of a debt, with power to sell in default of payment, is treated as a mortgage. *Newman v. Samuels*, 17 Id., 528.

Where it is doubtful whether a transaction is a mortgage or a conditional sale a court of equity will treat it as a mortgage. *Trucks v. Lindsey*, 18 Id., 504.

A deed absolute in form will be treated as a mortgage, when it is shown that it was executed for the purpose of securing the payment of a debt existing at the time of its execution. *Hall v. Savill*, 3 G. Greene, 37; *Usher v. Livermore*, 2 Iowa, 117; *Vennum v. Babcock*, 13 Id., 194; *Key v. McCleary*, 25 Id., 191; *Gardner v. Weston*, 18 Id., 533; *Holliday v. Arthur*, 25 Id., 19; *Maple v. Nelson*, 31 Id., 322.

A deed absolute on its face may be shown by parol evidence to have been intended only as a mortgage. *Key v. McCleary*, 25 Id., 191.

Equity will regard any conveyance of land, intended to operate as a security for a debt or the performance of a contract, as a mortgage. *Green v. Turner*, 38 Id., 112; *Clinton National Bank v. Manwaring*, 39 Id., 281; *The N. Y. P. F. Co. v. Mueller*, 42 Id., 467; *White v. Lucas*, 46 Id., 319.

There is but one method by which a mortgage on real property can be foreclosed in this state. It must be by action in court by equitable proceedings. *Todd, Pollock & Granger v. Johnson*, 51 Id., 192, 195.

Sec. 3320. [Separate suits on note and to foreclose.]—If separate suits are brought in the same county on the bond or note, and on the mortgage given to secure it, the plaintiff must elect which to prosecute. The other will be discontinued at his cost.

Where a promissory note is executed by one party, and a mortgage to secure the same by another, the maker of the note is not a necessary party to an action to foreclose the mortgage, or at least not so as to enable the defendant to take advantage of the failure to join the maker of the note in the action, by demurrer to the petition. *Deland v. Mershon*, 7 Iowa, 70.

A mortgage conditioned that the maker of the note therein described shall pay the same when it becomes due, "with interest at the rate of ten per cent per annum from date, payable annually, according to the tenor and effect of said note," may be foreclosed for interest due before the maturity of the note. *Bahr v. Arndt*, 9 Id., 39.

The mortgagee may proceed in equity against the mortgagor and other encumbrancers of the mortgaged property, to determine the priority and amount of such encumbrances, and to foreclose the mortgage, after recovering a judgment in an action at law, and the note secured by the mortgage. *Wahl v. Phillips*, 12 Id., 81.

As between the parties to the mortgage, a judgment at law upon a note secured by mortgage is a lien from the date of the recording of the mortgage. But a judgment on a note secured by mortgage does not attach as a lien upon the mortgaged premises from the date of the mortgage unless the property is described and it is so ordered in the decree of foreclosure. *The State, for use of School Fund v. Lake et al.*, 17 Id., 215.

The merger of the note into a judgment at law thereon, does not extinguish the lien of the mortgage executed to secure the payment of the same. But where, at an execution sale on such judgment, the mortgagee became the purchaser for the amount of his debt, it was held, that the mortgage lien was thereby extinguished, there being no ignorance or mistake of fact that a junior mortgage existed. *Id.*

A valid covenant may be inserted in a mortgage, binding the mortgagor to pay the amount secured thereby at the time specified, and this may be enforced, although there was no note or bond given for such amount. *Brown v. Cascaden*, 43 Id., 103; *Newbury v. Rutter et ux.*, 38 Id., 179.

A mortgagee is not confined to the remedy of foreclosure, but may maintain an action at law upon the note, bond, or other obligation secured by the mortgage. If the covenant for payment is contained in the mortgage, that may be made the basis of an action at law. *Id.*; *Banta v. Woods*, 32 Id., 469.

The fact that a judgment has been obtained upon a note without reference to the mortgage given to secure it will not operate to merge or extinguish the lien of the mortgage. *Morrison v. Morrison et al.*, 38 Id., 73; *Hendershott v. Ping*, 24 Id., 134; *Shearer v. Mills*, 35 Id., 499.

A mortgagee is not confined to the remedy of foreclosure, but may sue at law upon the note, bond, or other obligation secured by the mortgage. *Brown v. Cascaden*, 43 Id., 103.

Sec. 3321. [Judgment: sale and redemption.]—When a mortgage or deed of trust is foreclosed by equitable proceedings, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the same, with interests and costs. A special execution shall issue accordingly, and the sale thereunder shall be subject to redemption as in cases of such sale under general execution.

In a proceeding in equity to enjoin the summary foreclosure of a mortgage, under the code of 1851, it was held, that the court might decree a foreclosure of the mortgage, in favor of the respondent without his filing a cross-petition praying for that relief, or his making such prayer in his answer. *Westfall et ux v. Lee*, 7 Iowa, 12.

In a proceeding to foreclose mortgage, where the answer admits the execution of the note and mortgage, and does not deny that the amount claimed in the petition is due and owing, there is nothing for the plaintiff to prove. *Cooley v. Hobart*, 8 Id., 358.

The fact that a mortgage was executed to secure the payment of a debt previously contracted, will not invalidate it, nor does it make any difference that it was made by one of the members of a partnership and his wife, to secure a debt of the firm. *Id.*

Where a petition to foreclose a mortgage asks a judgment on a note, and a foreclosure of the mortgage there is no mingling of law and equity in one proceeding, and the judgment prayed for is authorized by the statute. *Id.*

A note and mortgage provided that the interest should be paid semi-annually; that if the mortgagor should fail to pay said installments of interest, within thirty days after the several times fixed for the payment thereof, the entire indebtedness; including both principal and interest,

should be considered due, and the mortgagee should have power to sell the mortgaged premises, after giving notice as stipulated in the mortgage, and apply the proceeds to the satisfaction of the indebtedness: *Held*, that upon a failure to pay interest as stipulated in the note and mortgage the mortgagee had the right to declare the whole debt due and enforce a foreclosure of the mortgage. *Cramer v. Rebman*, 9 Id., 114.

The foreclosure of a mortgage is a proceeding in equity. A court of law may render judgment for the debt, but cannot order a sale of the mortgaged property. *Id.*

Under the code of 1851, the sale of mortgaged property pursuant to a foreclosure proceeding barred and cut off all equity of redemption. The mortgagor or any incumbrancer might redeem at any time before, but not after the sale. *Id.*

No greater relief can be given in a decree of foreclosure than is prayed for in the petition. *McLaughlin v. O'Rourke*, 12 Id., 459.

No personal judgment can be rendered against the wife of a mortgagor, in a foreclosure proceeding, when it is not alleged in the petition that the debt secured by the mortgage is one for which her separate property is liable. *Id.*

Where mortgaged premises have subsequently been sold in parcels to different purchasers, each must bear or contribute proportionally to the discharge of the incumbrance, and not in the inverse order of alienation. *Barney v. Myers*, 28 Id., 472; *Massie v. Wilson*, 16 Id., 390; *Bates v. Rudick*, 2 Id., 423; *Griffith v. Lovell*, 26 Id., 226.

After sale of lands on mortgage foreclosure the mortgagor has the right to redeem within one year, and in the meantime is entitled to possession of the land. *Mills v. Heaton*, 52 Id., 215, 216.

A decree of foreclosure should direct a sale of so much of the mortgaged premises as may be necessary to satisfy the mortgage debt and costs. It is error to order a sale of the entire premises, and the payment of the balance remaining after satisfying such debt and costs into court. *Maloney v. Fortune et uxor*, 14 Id., 417.

A surety who was the owner of real estate executed a mortgage upon the same, "to be void upon condition that I pay or cause to be paid a certain promissory note for \$1200, given by B., dated with this instrument, and payable to A. or order, one year from the date with ten per cent interest," it was *held*, 1. That the mortgagor assumed only the liability of a security. 2. That an extension of the time of payment by the payee to the maker, for a consideration, and without the consent of the surety, operated to discharge him from liability. 3. That the payment of interest in advance was a sufficient consideration to sustain a contract for the extension of time. *Christner v. Brown*, 16 Id., 130.

Where a decree of foreclosure ordered "that special execution issue against said defendants for the sale of said property according to law;" *held*, that while the decree should have followed the statute and ordered the sale of so much property as was necessary to satisfy the mortgage, the defect was one of form merely, and did not vitiate the decree. *Frieber v. Shaffer*, 18 Id., 29.

An incumbrancer not made a party to a foreclosure proceeding is not bound by the decree therein, and is not cut off from his right to redeem, by a sale thereunder. *White v. Watts*, 18 Id., 74. See, also, *Heimstreet v. Winnie*, 10 Id., 430; *Street v. Beal and Hyatt*, 16 Id., 68; *Bleidorn v. Able et al.*, 6 Id., 5; *Parrott v. Hughes et al.*, 10 Id., 459; *Donnelly v. Rush*, 15 Id., 99; *Johnson v. Harmon*, 19 Id., 56.

In an action by a mortgagor who was not made a party to the foreclosure proceedings, to redeem from a sale made thereunder, the amount necessary to redeem should be determined with reference, both to the right to rents and the liability to pay for improvements. *Barrett v. Blackmar*, 47 Id., 565.

The mortgagor cannot, in a separate action, recover from the purchaser in possession for rents and profits, unless he shows that he was prevented by accident, surprise, fraud or mistake, from considering the rents and profits when he made his offer to redeem. *Id.*

The foreclosure of a mortgage in this state, can be affected only by a sale of the mortgaged premises, in pursuance of an order of the court. The strict foreclosure of the old chancery practice is not recognized by our statute. *Cramer v. Rebman*, 9 Id., 114.

A personal judgment cannot properly be rendered against a subsequent purchaser of the mortgaged property, when he was not a party to the note or mortgage. *Carleton v. Byington*, 24 Id., 172.

Where, however, the purchaser of mortgaged premises, has assumed the payment of the mortgage as a part of the consideration of the land, the mortgage may be foreclosed, and a personal judgment rendered against him; and parol evidence is competent to prove such agreement. *Bowen v. Kurtz*, 37 Id., 239.

SEC. 3322. [General execution: when.]—If the mortgage property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise.

This section of the code does not apply to mortgages executed by others than the debtor, and a general execution cannot properly issue against the mortgagor in such case for any de-

iciency existing after the sale of the mortgaged property. *Chittenden & Co. v. Gossage*, 18 Iowa, 157.

Where the court renders a decree of foreclosure on a mortgage, and awards a special execution, it possesses no power to order a stay of the execution for a given time. *Carroll v. Reddington*, 7 Id., 336.

Where the debt was not evidenced by note or bond, and the mortgagors covenanted: "We are justly indebted, etc.," and that "if, from any cause, said property shall fail to satisfy said debt, interest and charges, we covenant and agree to pay the deficiency; *held*, that the instrument amounted to an acknowledgment of indebtedness and a promise to pay, and that the mortgagee might maintain an action upon the debt without first foreclosing the mortgage. *Newberry v. Rutter et ux.*, 38 Id., 179.

SEC. 3323. [**Junior encumbrances entitled to assignment.**]*—*At any time prior to the sale, a person having a lien on the property which is junior to the mortgage, will be entitled to an assignment of all the interest of the holder of the mortgage, by paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. He may then proceed with the foreclosure or discontinue it at his option.

While junior and senior mortgagees may properly be made parties to an action for foreclosure, they are not necessary parties thereto. *Heimstreet v. Winnie*, 10 Iowa, 430.

A decree of foreclosure concludes the rights of those persons only who are made parties to the bill. *Id.*

A junior mortgagee named in a petition as a party defendant in a foreclosure case, may, on motion of the plaintiff be dismissed, unless he appears and insists upon an adjustment of his rights by the decree. A defendant cannot object to an order dismissing a co-defendant. *Id.*

To entitle a junior incumbrancer to be subrogated to the rights of a senior mortgagee, under section 3323, it is sufficient if the junior incumbrancer tender to the mortgagee, the amount secured by his mortgage, with interest and costs, *before* the foreclosure sale, though the amount tendered be not accepted until after such sale. *Martin et ux. v. Ruddick et al.*, 23 Id., 487.

See note to section 1993 *ante*, from *Grant v. Parsons*, 69 Id., 31, respecting right of junior mortgagee to assignment.

Where the plaintiff, being a junior mortgagee, paid the amount of a senior mortgage to an attorney who had commenced an action to foreclose it, in which the plaintiff was made the defendant, *held* that the attorney was authorized to receive it. *Harbach v. Colvin*, 35 N. W. R., 663

SEC. 3324. [**Overplus.**]*—*If there is an overplus remaining after satisfying the mortgage and costs, and if there is no other lien upon the property, such overplus shall be paid to the mortgagor.

While the surplus moneys arising from the sale of mortgaged premises in foreclosure, when remaining in the hands of the sheriff, or under the control of the court, belongs to subsequent lien-holders in the order of their priority, and should be so awarded by the court; but when the execution does not direct the disposition, of such surplus, and the sheriff, acting in good faith and without knowledge of subsequent liens, applies the money upon other executions in his hands, against the mortgagor, he is not liable therefor to such lien-holders. *Polk County for the use. et c., v. Sypher*, 17 Iowa, 353.

Where mortgaged chatties have been seized and sold by the sheriff under the mortgage, the surplus of the proceeds, after satisfying the mortgage is the property of the mortgagor, and in an action against him may be garnished in the hands of the officer. *Hoffman v. Wetherell*, 42 Id., 89.

SEC. 3325. [**In case there are other liens.**]*—*If there are any other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order. And if the money secured by any such lien is not yet due, a suitable rebate of interest must be made by the holder thereof, or his lien on such property will be postponed to those of a junior date, and if there are none such, the balance will be paid to the mortgagor.

In the foreclosure of a mortgage no personal judgment can properly be rendered against a subsequent purchaser of the mortgaged premises, who is not a party to either the note or mortgage. *Carleton v. Byington*, 24 Iowa, 172.

Under a decree of foreclosure for failure to pay an installment of interest due, the court may order a sale of the mortgaged property for the payment of the principal of the note, with a rebate of interest. *Stafford v. Maus*, 38 Id., 133; *Carleton v. Byington*, 24 Id., 172, 175.

SEC. 3326. [**How much sold.**]*—*As far as practicable, the property sold must be only sufficient to satisfy the mortgage foreclosed.

In the foreclosure of a mortgage, if the property is susceptible of division, only so much should be sold as may be necessary to satisfy the debt; and a refusal by the sheriff to sell in parcels when the value of the property exceeds the debt, and it may be divided, invalidates the sale. *Grapen-gether v. Fejervary*, 9 Iowa, 163.

Where under a mortgage made by joint tenants, a part of the property is sold on the execution upon a plan of division prejudicial to the rights of one of such owners, the validity of sale is not thereby affected, and the judgment creditor cannot complain, if the judgment is satisfied by the sale. *Miller v. Felkner*, 42 Id., 458.

The owner who has been wronged by the division and sale, in such case may maintain an action against his co-tenant for reimbursement. *Id.*

SEC. 3327. [Satisfaction to be acknowledged.]—Whenever the amount due on any mortgage is paid off, the mortgagee, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the mortgage, or by execution of an instrument in writing, referring to the mortgage, and duly acknowledged and recorded. If he fails to do so within sixty days after being requested, he shall forfeit to the mortgagor the sum of twenty-five dollars.

No precise formality is necessary to release the lien of a mortgage. No conveyance is required. Satisfaction may, by the statute, be entered upon the margin of the record of the mortgage. But this method prescribed by the statute is not exclusive. *Waters v. Waters & Jones*, 20 Iowa, 363, 366.

The assignee of a mortgage, by an assignment not recorded, is not subject to the statutory penalty imposed upon a mortgagee for a failure to enter satisfaction of his mortgage upon the record when paid. *Low v. Fox*, 56 Id., 221.

The penalty prescribed in section 3327, for a failure to enter satisfaction on the margin of the record, when the mortgage is paid, is incurred, if the mortgagee shall fail to enter satisfaction within six months after being requested to do so; and an entry of satisfaction after that time, even if made before suit brought for the penalty, will not avoid a recovery thereof by the mortgagor. *Deter v. Crossley*, 26 Id., 180.

SEC. 3328. [Same: duty of clerk.]—Whenever a judgment of foreclosure shall be entered in any court, the clerk thereof shall make upon the margin of the record of the mortgage foreclosed, in the recorder's office, a minute showing that said mortgage was foreclosed, in what court foreclosed, and giving the date of the decree; and when such decree shall be fully paid off and satisfied upon the judgment docket of such court, the clerk of said court shall enter satisfaction in full upon the margin of such mortgage, and he shall be allowed as compensation for such service the sum of twenty-five cents, to be taxed as a part of the costs in the case.

SEC. 3329. [Bond given by vendors treated as mortgages.]—In cases where the vendor of real estate has given a bond or other writing to convey the same on payment of the purchase money, and such money or any part thereof remains unpaid after the day fixed for payment, whether the time is or is not of the essence of the contract, such vendor may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property.

It was held under the code of 1851, that a vendor of real estate, when the purchase money remains unpaid, was not compelled to pursue the remedy indicated in sections 2094 and 2095 of the code, which were substantially identical with sections 3329 and 3330, of this code. These sections were held not to take away other rights. *Page v. Cole*, 6 Iowa, 153.

It was accordingly further held in that case that, where the vendee takes possession of the real estate purchased, with the consent of the vendor, and fails to pay the purchase money according to his contract, the vendor may maintain an action against the vendee for the possession, without returning such part of the purchase money as has been paid, or tendering back the notes of the vendee given for the balance of the purchase money. *Id.*

This holding was based mainly upon the doctrine that an equitable title could not be set up against the legal title in an action to recover possession. *Id.*

Where the vendor of real property to which he retains the legal title, having executed a bond for a deed, assigns the promissory note received for the purchased money of the land, and agrees that the assignee shall be substituted to the benefit of all the security held by him, the assignee of such note is entitled to the same rights of the vendor himself, in case of the non-payment of the note by the purchaser; and he may bring an action of foreclosure in his own name against the vendee and all persons claiming under him, with notice. *Blair v. Marsh*, 8 Id., 144.

An action to foreclose a title bond is local in its nature, and is properly brought in the county where the land is situated. *Johns v. Orcutt*, 9 Id., 350.

The vendor of real estate may treat the bond executed for a conveyance as a mortgage, and may recover a judgment against the vendee for the amount due thereon and for the foreclosure of the same in one action. *Hartman v. Clarke*, 11 Id., 510.

The vendor may bring his action to foreclose for an installment of the purchase money remaining unpaid. *Tupple v. Viers and Nichols*, 14 Id., 575.

This section is permissive only, and simply provides a remedy which did not before exist; it does not prohibit the vendor from declaring a forfeiture of the contract in accordance with its terms. *Mickelwait et al. v. Leland et al.*, 54 Id., 662; *The Iowa Railroad Land Co. v. Mickel*, 41 Id., 402; *Johnson v. Thornton et al.*, 54 Id., 144.

Under sections 3329, 3330, the vendee of real estate, under a bond, or written contract, conditioned for the conveyance upon the payment of purchase money, is regarded as the owner of the land, and stands in the same relation as a mortgagor in case of a conveyance and mortgage back to secure the purchase money; and he is to be viewed in this light until the vendor, if he may do so under the contract, declares that it is forfeited. And possession under such equitable title will support a defense based upon the statute of limitations. *Montgomery County v. Severson et al.*, 64 Id., 326; following *Hamilton v. Wright*, 30 Id., 480.

So, also, he may recover for an installment of interest due and unpaid. *Hershey v. Hershey*, 18 Id., 24.

The vendor of real estate who has made a bond for a deed is not confined to the remedy of foreclosure prescribed in sections 3329 and 3330. He may at his election treat the vendee as a mortgagor and foreclose as in case of an express mortgage, or he may proceed at law for the purchase money, or any unpaid and matured installment thereof. *Id.*

A foreclosure for an installment due, according to the terms of the title bond, before the maturity of the principal amount, and a sale of the property thereunder, exhausts the remedy of the creditor in respect to the land and passes a clear title thereto to the purchaser. *Poweshiek Co. v. Dennison*, 36 Id., 244.

This section of the code (3329) does not defeat the right to claim a forfeiture, and requires foreclosure when the parties have stipulated otherwise in their contract. *The Iowa R. Land Co. v. Mickel*, 41 Id., 402.

The rights of parties to a title bond and promissory note made for the purchase and sale of real estate are the same as those of parties to a mortgage, and persons not made parties to a foreclosure of such bond are not affected by the decree therein. *Dukes v. Turner*, 44 Id., 575.

If the land covered by the bond has been divided into parcels, each parcel must contribute its share to the payment of the debt, in redeeming the same from a foreclosure sale of the whole. *Id.*

In an action at law upon a promissory note executed for the whole or a part of the purchase price of land, which the payee covenants to convey upon its payment, the grantor cannot recover without showing performance on his part, either by tender of a deed or offer to convey. *Zebley v. Sears*, 38 Id., 507; *School District v. Rodgers*, 8 Id., 316; *Berryhill v. Byington*, 10 Id., 223.

A vendor's lien for the purchase money of real property must be enforced by foreclosure as a mortgage. *Scott v. Mewhirter*, 49 Id., 487, 489.

In an action on a title bond for real property, to recover a balance of the purchase money remaining unpaid, the court should not declare the bond forfeited, and the land discharged from the same. In such case judgment should be rendered for the amount due, the bond foreclosed as a mortgage, and the property ordered to be sold to satisfy the judgment. *Gaunt v. Gregg*, 37 Id., 573.

The assignee of a contract for the sale of real property, by accepting the assignment thereof, becomes a party to the contract, and personally liable thereon for the purchase money then unpaid. *Wightman v. Spofford*, 56 Id., 145.

The conveyance of the legal title to land for the purpose of securing the grantee, with a separate agreement to reconvey upon payment of the secured debt, is only a mortgage in effect, and may be foreclosed as such, under this section. *Rubleman v. Rummel et al.*, 72 Id., 40.

SEC. 3330. [Parties in such case.]—The vendee shall in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner.

The design of this section and the next preceding one (3329, 3330) was to place the vendor and vendee of real property in the same position as relates to the remedy, as the mortgagor and mortgagor of express mortgages. *Pierson v. David et al.*, 1 Iowa, 23, 34; *Blair & Co. v. Marsh*, 8 Id., 144; *Walker v. Kynett*, 32 Id., 524, 530.

In an action on a title bond for real estate to recover a balance of the purchase money remaining unpaid, it is erroneous for the court to declare the bond forfeited, and the land discharged from

the same. In such case judgment should be rendered for the amount due, the bond should be foreclosed as a mortgage and the property ordered to be sold to satisfy the judgment. *Gamut v. Gregg*, 37 Id., 573.

CHAPTER 5.

OF ACTIONS FOR NUISANCE, WASTE, AND TRESPASS.

SECTION 3331. [Nuisance: definition of.]—Whatever is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought thereon by any person injured thereby; in which action the nuisance may be enjoined or abated, and damages also recovered therefor.

A public nuisance, consisting in the obstruction of a public highway, may not only be abated and the offender punished under indictment against him, but a court of equity will also grant relief by way of injunction upon the application of an individual who suffers an injury, distinct from the public, as a consequence of the nuisance. *Ellwell v. Greenwood*, 26 Iowa, 377.

Any person whose property is injuriously affected, or whose personal enjoyment is lessened, by the erection of a nuisance, may, under the statute, maintain an action for the abatement thereof and recovery of damages. *Id.*

A party may, with his own hand, abate that which to him is a nuisance; but he cannot needlessly destroy the property, as it is only the offensive use of it that he is justified in abating. *Morrison v. Marquardt*, 24 Id., 35; *Moffit v. Brewer*, 1 G. Greene, 348.

If a mill dam be erected so high as to flow the water back upon a dam above it under circumstances which might justify the injured party in abating it by his own acts, he must confine his operations to the dam itself and to such portions of it only as caused, and the destruction of which would remove, the injury. *Id.*

Where water flowing through the premises of the plaintiff was diverted from its natural course by an artificial channel made by the road supervisor in the construction of a highway over the stream, it was held, that the plaintiff might dam up the artificial channel and thus restore the natural flow of the water over his premises. *McCord v. High*, 24 Id., 336.

A city council has no power to declare that to be a nuisance which is not such at common law, or has not been declared to be such by statute. *Everett v. The City of Council Bluffs*, 46 Id., 66.

Trees growing in a street or highway do not constitute a nuisance unless they obstruct public travel. *Id.*; and *Bills v. Belknap*, 36 Id., 583; *Patterson v. Vail*, 43 Id., 142.

Where the supervisor fails to remove trees that obstruct public travel on the highway *mandamus* is the appropriate remedy to compel him to perform his duty. *Patterson v. Vail*, Id., 142.

So also the road supervisor may be restrained by injunction at the suit of a land owner from removing trees standing in the highway adjacent to and in front of such owner's premises, where such removal is not demanded by the wants of the public travel and convenience. *Bills v. Belknap*, 36 Id., 583.

A nuisance may be both public and private in its character, and in so far as it is private it gives a right of action to the party who suffers special damage therefrom. *Park v. The C. & S. W. R. Co.*, 43 Id., 636.

Injuries resulting from the obstruction of highways leading to the premises of a party complaining, and interfering with access to them, are proper grounds of recovery by the party, even though many others sustain like injuries from the same cause. *Id.*

A party cannot successfully urge that a structure standing on his neighbor's premises is a nuisance, and have the same abated, when he maintains a like structure, equally offensive, on his own premises. *Casady v. Cavenor*, 37 Id., 300.

To abate a nuisance caused by a pond of water, one injured thereby has not the right to fill up the bed of the water, but may remove the cause rendering it impure, or restrain the one whose conduct produced the result. *Finley v. Hershey*, 41 Id., 359; see, also, *The State v. Kaster*, 35 Id., 221.

The remedy given by this section for the abatement of a nuisance does not supersede or take away the jurisdiction of courts of equity that existed prior to its enactment. *Bushnell v. Robeson & Co.*, 62 Id., 540.

Where a railroad company laid a side-track upon the street of a city within six feet of the line of the street, in violation of the city ordinance granting the right of way, which prohibited the

construction of any track within eighteen feet of such line, it was held that such track, and the use thereof, constituted a nuisance, for the maintenance of which a property holder who had sustained special damage by reason thereof might maintain an action against the railroad company. *Cain v. C., R. I. & P. R. Co.*, 54 Id., 255; see, also, *Cadle v. The Muscatine W. R. Co.*, 44 Id., 11; *Frith v. The City of Dubuque*, 45 Id., 406.

SEC. 3332. [**Waste by guardian or tenants: damages.**]—If a guardian, tenant for life or years, joint tenant or tenant in common, of real property commit waste thereon, he is liable to pay three times the damages which have resulted from such waste, to the person who is entitled to sue therefor.

SEC. 3333. [**Forfeiture and eviction.**]—Judgment of forfeiture and eviction may be rendered against the defendant, whenever the amount of damages so recovered is more than two-thirds the value of the interest such defendant has in the property wasted, and when the action is brought by the person entitled to the reversion.

SEC. 3334. [**Who deemed to have committed.**]—Any person whose duty it is to prevent waste, and who has not used reasonable care and diligence to prevent it, is deemed to have committed it.

SEC. 3335. [**Treble damages: who liable for.**]—For willful trespass in injuring any timber, tree or shrub on the land of another; or in the street or highway in front of another's cultivated ground, yard or town lot, or on the public grounds of any town, or any land held by this state for any purpose whatever, the perpetrator shall pay treble damages of [at] the suit of any person entitled to protect or enjoy the property aforesaid.

SEC. 3336. [**Actual value: when assessed on highway.**]—Nothing herein contained authorizes the recovery of more than the just value of the timber taken from uncultivated woodland, for the repair of a public highway or bridge upon the land in its immediate neighborhood.

SEC. 3337. [**Remainder and reversion.**]—The owner of an estate in remainder or reversion, may maintain either of the aforesaid actions for injuries done to the inheritance, notwithstanding any intervening estate for life or years.

SEC. 3338. [**Heir.**]—An heir, whether a minor or of full age, may maintain these actions for injuries done in the time of his ancestor as well as in his own time, unless barred by the statute of limitations.

SEC. 3339. [**Purchaser under execution.**]—Whenever lands or tenements are sold by virtue of an execution, the purchaser at such sale may maintain his action against any person for either of the causes above mentioned, occurring or existing after his purchase.

SEC. 3340. [**Suitable repairs.**]—This provision is not intended to prevent the person who occupies the lands in the meantime, from using them in the ordinary course of husbandry, or from using timber for the purpose of making suitable repairs thereon.

SEC. 3341. [**Same.**]—But if for this purpose he employs timber vastly superior to that required for the occasion, he will be deemed to have committed waste and will be liable accordingly.

SEC. 3342. [**Settlers on public lands.**]—Any person settled upon and occupying any portion of the public lands held by the state, is not liable as a trespasser for improving it or cultivating it in the ordinary course of husbandry, nor for taking and using timber or other materials necessary and proper to enable him to do so, provided the timber and other materials be taken from land properly constituting a part of the "claim" or tract of land so settled upon and occupied by him.

SEC. 3343. [**Certificate for land sold for taxes.**]—The owner of a treasurer's certificate of purchase of land sold for taxes, may recover treble damages of any person committing waste or trespass thereon as hereinbefore provided.

SEC. 3344. [**Disposition of money.**]—All moneys recovered in an action brought under the preceding section shall be paid by the officer collecting the same, to the auditor of the county in which such lands are situated, and the same shall be held by such auditor, and an entry thereof made by him in a book kept for that purpose, until such lands are redeemed or a treasurer's deed therefor shall have been executed to the holder of said certificate. If redemption be made, the money shall be paid to the owner of the land, and if not redeemed, to the person to whom such deed is executed.

CHAPTER 6.

ON ACTIONS TO TEST OFFICIAL AND CORPORATE RIGHTS.

SECTION 3345. [**Where state is plaintiff: for what causes brought.**]—A civil action by ordinary proceedings may be brought in the name of the state as plaintiff in the following cases:

1. Against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by this state;
2. Or against any public officer who has done or suffered any act which works a forfeiture of his office;
3. Or against any person acting as a corporation within this state without being authorized by law;
4. Or against any corporation doing or omitting acts, which amount to a forfeiture of their rights and privileges as a corporation, or exercising powers not conferred by law;
5. Or against any person claiming under any letters patent, granted by the proper authorities of this state, for the purpose of annulling or vacating the same, as having been obtained by fraud, or through mistake or ignorance of a material fact, or when the defendants have done or omitted an act in violation of the terms or conditions on which the letters were granted, or have by any other means forfeited the interest acquired under the same.

Under our statute an action in the nature of a *quo warranto* against persons claiming to hold office must generally be brought in the name of the state; it can be prosecuted only by the public officer, although he may do so upon the *relation* of an individual, and even for his benefit; it *seems* if the proper prosecutor should refuse, he may be directed to prosecute it, by the governor, legislature, or district court. *Scott v. Clark*, 1 Iowa, 70. [But, see section 3348, of the code as to the prosecution of the action when the district attorney refuses.]

The right to a municipal or city office, may be contested in an action in the nature of a *quo warranto*. *State ex rel v. Funck*, 17 Id., 365.

Where an office or franchise is being usurped, an injunction, *as an independent means of relief*, is not a proper remedy. An action in the nature of *quo warranto* is the only remedy. *Cochran v. McCleary*, 22 Id., 75, 90; *Desmond v. McCarhty*, 17 Id., 525, 527.

An action under this chapter will not lie to annul a city ordinance passed in the irregular and improper exercise of a power conferred by law. *The State, ex rel., v. The City of Lyons*, 31 Id., 432.

An action to test the right of certain persons claiming to be a corporation, to act as such must be against the individuals themselves and *not* against the alleged corporation. When a corporation is brought into court by its *corporate name*, its existence is admitted. *The State v. The Ind. Sch. Dist. of Dallas Center*, 44 Id., 227.

The right to preside over the proceedings of a city council is a "*franchise*" within the meaning of this chapter, the right to which may be tested by an action in the nature of *quo warranto*. *Cochran v. McCleary*, 22 Id., 75.

When an incumbent of an office holds it by color of right, though he is not an officer *de jure*, his right will not be inquired into on *habeas corpus*. It can be determined only in a direct proceeding instituted for that purpose. *Ex parte Stahl*, 16 Id., 369.

But if a mere usurper should, without color of right, attempt to imprison a person, the legality of the restraint may be inquired into on *habeas corpus*. *Id.*

Where one claims to have been duly appointed to fill a vacancy in an office, the duties of which he alleges are being, without authority, performed by another, his remedy is *quo warranto*, notwithstanding the fact that his claim to the office is based upon an appointment and not upon an election. *The State v. Minton*, 49 Id., 591.

SEC. 3346. [**Joinder: counter-claim.**].—To such action there shall be no joinder of any other cause of action, nor any counter-claim.

SEC. 3347. [**When and by whom commenced.**].—Such action may be commenced by the district attorney, at his discretion, and must be so commenced when directed by the governor, the general assembly, or a court of record.

SEC. 3348. [**By private person.**].—If the district attorney, on demand, neglect or refuse to commence the same, any citizen of the state having an interest in the question, may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, may prosecute the action to final judgment in other respects as provided.

SEC. 3349. [**Petition: statements of.**].—The petition shall contain a plain statement of the facts which constitute the grounds of the proceeding, and, with the notice, and all the subsequent pleadings and proceedings, shall conform to the rule given for procedure in civil actions in title seventeen of this code, except so far as the same are modified by this chapter.

SEC. 3350. [**Private individual: costs.**].—When such action is brought upon the relation of a private individual, that fact shall be stated in the petition, and the order allowing him to prosecute may require that he shall be responsible for costs in case they are not adjudged against the defendant. In other cases the payment of costs shall be regulated by the same rule as in criminal actions.

SEC. 3351. [**When defendant holds an office.**].—When the defendant is holding an office to which another is claiming the right, the petition shall set forth the name of such claimant, and the trial must, if practicable, determine the rights of the contesting parties.

SEC. 3352. [**Same.**].—When several persons claim to be entitled to the same office or franchise, a petition may be filed against all or any portion thereof, in order to try their respective rights thereto, in the manner provided by this chapter.

The proper form of action is by information in the nature of *quo warranto*. *Cochran v. McCleary*, 22 Iowa, 75.

JUDGMENT.

SEC. 3353. [**Effect of.**].—If judgment be rendered in favor of such claimant, he shall proceed to exercise the functions of the office after he has qualified as required by law.

SEC. 3354. [**Books and papers.**].—The court, after such judgment, shall order the defendant to deliver over all books and papers in his custody or under his control belonging to said office.

SEC. 3355. [**Execution for damages.**].—When the judgment has been rendered in favor of the claimant, he may at any time within one year thereafter bring suit against the defendant and recover the damages he has sustained by reason of the act of the defendant.

SEC. 3356. [**Judgment of ouster from corporation.**].—If the defendant be found guilty of unlawfully holding or exercising any office, franchise, or privilege, or if a corporation be found to have violated the law by which it holds its existence, or in any manner to have done acts which amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted and altogether excluded from such office, franchise, or privilege, and also that he pay the costs of the proceeding.

SEC. 3357. If the defendant be found to have exercised merely certain individual powers and privileges to which he was not entitled, the judgment shall be the same as above directed, but only in relation to those particulars in which he is thus exceeding the lawful exercise of his rights and privileges.

SEC. 3358. [**Pretended corporation: costs.**]—In case judgment is rendered against a pretended but not real corporation, the cost may be collected from any person who has been acting as an officer or proprietor of such pretended corporation.

SEC. 3359. [**Action against officers.**]—When judgment of ouster is rendered against a corporation on account of the misconduct of the directors or officers thereof, such officers shall be jointly and severally liable to an action by any one injured thereby.

TRUSTEES APPOINTED.

SEC. 3360. [**When corporation is dissolved.**]—If a corporation is ousted and dissolved by the proceedings herein authorized, the court shall appoint three disinterested persons as trustees of the creditors and stockholders.

SEC. 3361. [**Bond.**]—Said trustees shall enter into a bond in such a penalty and with such security as the court approves, conditioned for the faithful discharge of their trust.

SEC. 3362. [**Action on.**]—Suit may be brought on such bond by any person injured by the negligence or wrongful act of the trustees in the discharge of their duties.

SEC. 3363. [**Duty of trustees.**]—The trustees shall proceed immediately to collect the debts and pay the liabilities of the corporation, and to divide the surplus among those thereto entitled.

SEC. 3364. [**Books delivered to.**]—The court shall, upon application for that purpose, order any officer of such corporation or any other person having possession of any of the effects, books, or papers of the corporation, in any wise necessary for the settlement of its affairs, to deliver up the same to the trustees.

SEC. 3365. [**Inventory.**]—As soon as practicable after their appointment, the trustees shall make and file in the office of the clerk of the court, an inventory of all the effects, rights, and credits which come to their possession or knowledge, the truth of which inventory shall be sworn to.

SEC. 3366. [**Power of.**]—They shall sue for and recover the debts and property of the corporation, and shall be responsible to the creditors and stockholders respectively, to the extent of the effects which come into their hands.

SEC. 3367. [**Penalty for refusing to obey order of court.**]—Any person who, without good reason, refuses to obey any order of the court, as herein provided, shall be deemed guilty of contempt of court, and shall be fined in any sum not exceeding five thousand dollars and imprisoned in the county jail until he comply with said order, and shall be farther liable for the damages resulting to any person on account of his refusal to obey such order.

CHAPTER 7.

OF ACTIONS ON OFFICIAL SECURITIES, AND FINES AND FORFEITURES.

SECTION 3368. [**Official bonds construed.**]—The official bond of a public officer is to be construed as a security to the body politic or civil corporation of which he is an officer, and also to all the members thereof, severally, who are intended to be thereby secured.

Suit may be brought on the bond of a county officer executed in the ordinary form by any person intended to be secured thereby. *Wells v. Stomback*, 59 Iowa, 376, 378.

The bond of a county treasurer which was executed "unto the county of Warren and state of Iowa," held to be a bond given for the security of the county and not of the state. *The State v. Henderson et al.*, 40 Id., 242.

SEC. 3369. [**Judgment no bar.**]—A judgment in favor of a party for one delinquency, does not preclude the same or another party from an action on the same security for another delinquency, except that sureties can be made liable in the aggregate only to the extent of their undertaking.

A judgment rendered against a sheriff for a breach of official duty, is not a bar to another action for the same cause against the sureties on his official bond. *Charles v. Haskins*, 11 Iowa, 329.

A sheriff and his sureties are liable on his official bond for trespasses committed by him in attempting to perform his official duties. *Id.*

A mistake as to the name of the obligee in an official bond will not operate to vitiate the instrument. *Id.*

Where a constable acting in his official capacity levied upon and sold property which was exempt from execution, he and his sureties were held liable on his official bond for the damages thereby sustained. *Strunk v. Ocheltree*, 11 Id., 158.

Where a deputy sheriff collects money on execution and fails to pay it over, the remedy is by an action against the sheriff on his official bond, and not against the deputy and his sureties. *Brayton v. Town*, 12 Id., 346.

Sureties on official bonds are liable only for acts done by their principal during the term for which the bond was given, even when the principal holds over after the expiration of such term. *Wapello County v. Bigham*, 10 Id., 39.

SEC. 3370. [**Fines and forfeitures.**]—Fines and forfeitures not otherwise disposed of, go into the treasury of the county where the same are collected for the benefit of the school fund.

Where certain criminal cases were taken on change of venue from the plaintiff to the defendant county, where they were tried, and fines imposed on the defendants, a transcript of the judgment and an execution in each case was sent to the plaintiff county, where the defendant resided, but before any levy was made the defendants paid to the sheriff the amounts of the several judgments, and he returned the executions and paid over the money to the clerk of the defendant county. Held, that the fines were "collected" in the defendant county, within the meaning of this section of the code. *Pottawattamie County v. Carroll County*, 67 Iowa, 456.

Under this section, the county in which a forfeited appearance bond is collectible is entitled to the proceeds thereof for the use of the school fund. *Lucas County v. Wilson*, 61 Id., 141.

SEC. 3371. [**Who prosecuted by.**]—Actions for the recovery thereof may be prosecuted by the officers or persons to whom they are by law given in whole or in part, or by the public officer into whose hands they are to be paid when collected.

SEC. 3372. [**Collusion.**]—A judgment for a penalty or forfeiture rendered by collusion, does not prevent another prosecution for the same subject matter.

CHAPTER 8.

OF ACTIONS OF MANDAMUS.

SECTION 3373. [Definition of.]—The action of mandamus is one brought in a court of competent jurisdiction, to obtain an order of such court commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion.

Under the code of 1851 the proceeding by *mandamus* was a prosecution and ran in the name of the state. It was commenced by the filing of an information under oath, and on motion presented in open court, whereupon the court granted a rule to show cause why an alternative writ should not issue or, ordered the alternative writ to issue. To this writ the defendant made return or answer upon which the issues were tried and either granted or refused the peremptory writ. *Chance v. Temple*, 1 Iowa, 178.

The office of a writ of *mandamus* is to compel the party to whom it is addressed to perform a duty which results from an office, trust or station. *The State ex rel. Dox v. The County Judge, etc.*, 12 Id., 237, 246; *Patterson v. Vail*, 43 Id., 142; *Larkin v. Harris*, 36 Id., 98.

The district court has the power to enforce, by *mandamus*, the discharge of an official duty involving no exercise of discretion, by an executive officer of the state. *Bryan v. Cattell*, 15 Id., 538.

The court may, by writ of *mandamus*, compel the auditor of state to issue his warrant upon the treasurer of state for a sum due a public officer on his salary. *Id.*

The duty of the council of a municipal corporation to levy a tax not exceeding the maximum limit of the power of taxation, for the payment of a judgment against the corporation, upon which an execution has been issued and returned *nulla bona*, may be enforced by *mandamus*. *Coy v. The City Council of Lyons*, 17 Id., 1.

The proprietor of a newspaper has no such private or personal interest in the publication of the laws or the proceedings of the board of supervisors, as that he can maintain, in his own name, an action of *mandamus* to compel the board to order such publication in his paper. *Welch v. The Board, etc.*, 23 Id., 199.

Where a discretion is allowed to the board or officer, such discretion cannot be controlled by *mandamus*, though the discretion may be exercised unwisely. *Clark v. The Board of Directors, etc.*, 24 Id., 266; *Jones et al. v. Trustees, etc.*, 26 Id., 594.

Where the clerk of the board of supervisors issued county warrants pursuant to an order of the board, but neglected to affix the seal of the county thereto it was held that his successor in office, the county auditor, might be compelled by *mandamus* to supply the omission by affixing the seal. *Prescott v. Gonser*, 34 Id., 175.

Where the remedy in a *mandamus* proceeding requires more than one act, the action continues until they are all ordered by the court, and fully performed. *Palmer v. Jones et al.*, 49 Id., 405.

Where the railway track of the defendant crossed the farm of the plaintiff between his house and the highway, and the plaintiff constructed a lane from his house to the highway, being open at the end intersecting the highway, and requested the railroad company to make an open crossing at the point where the lane intersected its track, it was held, that on a refusal to do so on the part of the railroad company it might be compelled to do so by *mandamus* proceedings. *Boggs v. The C. B. & Q. R. Co.*, 54 Id., 434.

The action of *mandamus* will lie to compel the county treasurer, holding money collected upon tax to pay a judgment against the county, to pay the same over to the judgment creditor on demand. *Brown v. Crego*, 32 Id., 498.

The directors of a school district, on their refusal to levy a tax to pay a judgment against the district, may be compelled to do so by *mandamus*, the electors of the district having failed and refused to provide therefor, by voting the necessary tax. Section 3049 of the code applies as well to school districts as to other civil corporations. *Boynton v. The District Tp. of Newton, etc.*, 34 Id., 510.

That the board of directors have issued an order on the treasurer of the district under section 79 of chapter 172 laws of 1862, for the amount of the judgment against the district, was held, not to operate as payment or satisfaction, or to change the rule above stated. *Id.*

Mandamus is the appropriate remedy to compel the board of supervisors, acting as canvassers of election returns, to declare elected and issue certificates to the persons receiving the highest number of votes cast at an election. *Bradfield v. Wart et al.*, 36 Id., 291; *The State ex rel. Rice v. The County Judge of Marshall Co.*, 7 Id., 186.

The action of *mandamus* will not lie to compel the officers of a county to strike from the tax books an assessment alleged to be erroneous. *Meyer v. the County of Dubuque*, 43 Id., 592.

Nor to compel the board of supervisors to levy a tax to pay a judgment rendered upon warrants issued for ordinary expenses and bridge purposes, when it appears that they have levied the maximum rate allowed by law for those purposes for that year. *Polk & Hubbel v. Winett*, 37 Id., 34; *The Iowa R. & L. Co. v. Sac County*, 39 Id., 126.

Mandamus will not lie to compel the issuance of a teacher's certificate by the county superintendent; the superintendent being vested with a discretionary power, the court cannot control his discretion, but may compel him to act upon an application. *Bailey v. Ewart*, 52 Id., 111.

The electors of a school district, having determined that the school-houses of the district may at proper times be used for religious meetings and Sunday schools, the duty of the directors to open the houses for these purposes may be enforced by *mandamus*. *Davis v. Boget*, 50 Id., 11.

The writ of *mandamus* may be properly issued to compel the county treasurer to pay over to a railroad company entitled thereto a tax voted and collected. *The McGregor & S. C. R. Co. v. Birdsall*, 30 Id., 255.

Mandamus, and not replevin, is the proper remedy for a municipal corporation for the wrongful detention of its books and papers by a public officer after his resignation. *The City of Keokuk v. Merriam*, 44 Id., 432.

A *mandamus* proceeding to enforce the collection of a judgment rendered in the United States circuit court is not in the nature of an original or new action in a jurisdictional sense, but auxiliary to, and in continuation of the original judgment. *Ex-parte Holman*, 28 Id., 83.

Although township trustees have bought land for a cemetery, they still have a discretion as to its use, and they cannot be compelled by *mandamus* to devote it to that purpose, if for any reason they deem it unsuitable. *Christy v. Whitmore*, 67 Id., 60.

SEC. 3374. [Issued by whom.]—The order may be issued by the district or circuit court, to any inferior tribunal, or to any corporation, officer, or person; and by the supreme court, to any district or circuit court, if necessary, and also in any other case where it is found necessary for that court to exercise its legitimate power.

See cases cited above to section 3373.

The writ of a *mandamus* can issue from the supreme court only when directed to the district or circuit court and in aid of the execution of its own powers and orders. *Westbrook v Wicks*, 36 Id., 382.

The action may be brought in the circuit court, as well as in the district court. *Brown v. Crego*, 29 Id., 321.

SEC. 3375. Extent of remedy by.]—The plaintiff in any action, except those brought for the recovery of specific real or personal property, may also as an auxiliary relief have an order of *mandamus* to compel the performance of a duty established in such action. But if such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust, or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance.

The circuit court has jurisdiction in *mandamus* proceedings, a proceeding of this character being "a civil action at law" within the meaning of the statute. *Brown v. Crego*, 29 Iowa, 321.

An action of *mandamus* will lie against a road supervisor to compel him to remove a fence or other obstruction improperly placed by him on a highway. *Larkin v. Harris*, 36 Id., 93.

So, also, *mandamus* will lie to compel the road supervisor to remove trees standing in and obstructing the highway, when he fails to perform his duty in this respect. *Patterson v. Vail*, 43 Id., 142.

SEC. 3376. [When not to issue.]—An order of *mandamus* shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law, except as herein provided.

A party aggrieved by the action of a board of school directors having an adequate remedy by appeal to the county superintendent, and from him to the superintendent of public instruction, is not entitled to maintain an action of *mandamus*. *Marshall v. Sloan*, 35 Iowa, 445.

An action of *mandamus* will not lie to compel the officers of a county to strike out an assessment alleged to be erroneous. The proper remedy in such case is by application to the board of equalization, from whose decision an appeal may be taken to the circuit court. *Meyer v. The County of Dubuque*, 43 Id., 592.

Where the petition, in an action of *mandamus*, shows that the plaintiff has a plain, speedy and adequate remedy in the ordinary course of the law, the pleading should be assailed by demurrer and not by motion to dismiss. *Id.*

Where a judgment has been rendered against a municipal corporation and an individual in an

action for injuries resulting from the negligence of the co-defendant, the plaintiff is not compelled to resort to the property of the latter for the satisfaction of the judgment, but may proceed by *mandamus* to compel the corporation to levy a tax for the payment of the judgment. That the co-defendant has property subject to execution does not afford such a remedy as will prevent proceedings by *mandamus*. *Palmer v. Stacy*, 44 Id., 340.

Where it is the duty of a county treasurer to collect and pay over a tax voted in aid of a railroad, yet the company cannot enforce this duty, under chapter 48, laws of 1868, by *mandamus*, until it shows itself fully entitled to the tax by presenting to the treasurer an order of the president or managing director accompanied by certified estimates of the engineer, showing that an amount equal to the tax has been expended by the company within the county. *Harwood & M. E. Co. v. Case*, 37 Id., 692.

The writ of *mandamus* cannot properly issue where there is any other plain, speedy and adequate remedy. *Smith v. Powell*, 55 Id., 215, 216.

A writ of *mandamus* will not issue to compel an officer to do what is not within his power to do. If he has put it out of his power to do what his duty required, he may be liable in damages to the person injured by his act, but *mandamus* will not lie in such case. *Rice v. Walker*, 44 Id., 458.

SEC. 3377. [Who entitled to benefit of.]—The order of *mandamus* is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state, or on the petition of the state by the district attorney, when the public interest is concerned, and is in the name of such private party or of the state, as the case may be in fact brought.

A debt while it remains in its original form, as a simple contract not reduced to a judgment, cannot be made the basis of an action of *mandamus* to compel the levy of a tax to pay the same, unless it was contracted under a law or vote authorizing such proceedings to enforce payment. *Coy v. The C. of L. C.*, 17 Iowa, 1.

SEC. 3378. [Petition: form of.]—The plaintiff in such action shall state his claim, and shall also state facts sufficient to constitute a cause for such claim, and shall also set forth that the plaintiff, if a private individual, is personally interested therein, and that he sustains and may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected, and shall pray an order of *mandamus* commanding the defendant to fulfill such duty.

Where the ordinary expenses of carrying on the government of a municipal corporation requiring all of the proceeds arising from a tax which is up to the full limit which the corporation is authorized by law to levy, it cannot be compelled by *mandamus* to apply a part of such fund to the payment of a judgment against the corporation. *Coffin v. The City of Davenport*, 26 Iowa, 516.

Where the plaintiff, a private person, sought by writ of *mandamus* to compel school directors to observe and enforce the law forbidding sectarian instruction in the public schools, it was held that the relief was properly refused, because it did not appear that plaintiff had demanded of the directors the performance of the duty sought to be enforced. *Scripture v. Burns et al.*, 59 Id., 70.

But if it appear that the valuation and assessment of property within the corporation is purposely made too low in order to avoid the payment of its outstanding indebtedness, it will be compelled, by *mandamus* to make a fair assessment, and apply in payment of the judgment, of proceeds arising from the maximum tax levied thereon, such surplus as may remain after deducting the amount required for the current expenses. *Id.*

SEC. 3379. [Other pleadings.]—The pleadings and other proceedings in any action in which a *mandamus* is claimed, shall be the same in all respects as nearly as may be, and costs shall be recoverable by either party as in an ordinary action for the recovery of damages.

At the common law, a *mandamus* proceeding was not an action proper, nor was it a writ of right, but a prerogative writ obtained upon an information under oath, showing good cause for its issuance. *Chance v. Temple*, 1 Iowa, 178.

Under the code *mandamus* is an ordinary action at law triable as nearly as may be, like an ordinary action for the recovery of damages, and is not triable *de novo* in the supreme court. *Dove v. The Ind. School Dist. of Keokuk*, 41 Id., 639.

The writ of *mandamus* cannot properly be issued as preliminary or intermediate process, but only after hearing and judgment. *Wright v. Connor et al.*, 34 Id., 240.

SEC. 3380. [Injunction may issue, when: joinder.]—When the action is brought by a private person, it may be joined with a cause of action for such

an injunction as may be obtained by ordinary proceedings, or with the causes of action specified in section three thousand three hundred and seventy-five, but no other joinder, and no counter-claim shall be allowed.

The rule that a party cannot bring an action at law against a partnership, board of trustees, or other board of which he is a member, does not apply to the action of *mandamus*. *Cooper v. Nelson*, 38 Iowa, 440.

SEC. 3381. [**Peremptory.**]—When the plaintiff recovers judgment, the court may include therein a peremptory order of *mandamus*, directed to the defendant, commanding him forthwith to perform the duty to be enforced, together with a money judgment for damages and costs, upon which an ordinary execution may issue.

SEC. 3382. [**Same: no return but compliance allowed.**]—The order shall simply command the performance of the duty, shall be directed to the party and not the sheriff, and may be issued in term or vacation, and returnable forthwith, and no return except that of compliance shall be allowed; but time to return it may, upon sufficient grounds, be allowed by the court or judge, either with or without terms.

SEC. 3383. [**Acts performed by another at defendant's costs.**]—The court may, upon application of the plaintiff, besides, or instead of proceeding against the defendant by attachment, direct that the act required to be done, may be done, by the plaintiff or some other person appointed by the court at the expense of the defendant, and upon the act being done, the amount of such expense may be ascertained by the court, or by a reference appointed by the court, as the court or judge may order, and the court may render judgment for the amount of such expenses and costs, and enforce payment thereof by execution.

SEC. 3384. [**Temporary orders.**]—During the pendency of the action, the court, or judge in vacation, may make temporary orders for preventing damage or injury to the plaintiff until the case is decided.

SEC. 3385. [**Security.**]—When the state is a party, it may appeal without security.

CHAPTER 9.

OF INJUNCTIONS.

SECTION 3386. [**When and for what causes obtained.**]—An injunction may be obtained as an independent remedy in the action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adoption of this code; and in all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress.

A creditor is not entitled to an injunction to restrain the sale of real property by his debtor before he has recovered a judgment upon his demand, which is a lien upon such property. *Buchanan v. Marsh*, 17 Iowa, 494.

The right to a public office or franchise cannot be determined in an independent action for an injunction. *Cochran v. McLeary*, 22 Id., 75.

In an action for a breach of contract, the plaintiff may, in the same proceeding, under this section, have an injunction against the continuance of the breach which injuriously affects his property or right. *Ewell v. Greenwood*, 26 Id., 377; *Berger & Yeiser v. Armstrong*, 41 Id., 447.

The liberal provisions of our code in relation to the subjects of amendments are, so far as reasonable and proper, to be applied to injunction suits as well as others. *Des Moines Nav. & R. Co. v. Carpenter*, 27 Id., 487.

An injunction restraining a public officer from executing conveyances from the state to individuals who have purchased lands from it, but who are not made parties to the proceeding, will not be continued when it is alleged in the petition upon which the writ is issued, that the plaintiff has the full and complete title to the land, and it appears that there is no obstacle in the way of the plaintiff bringing suits against the individuals claiming adversely, and thus have the question of title settled, and the injunction has been in force for several years and no such actions have been commenced. *Id.*

In an action for damages for breach of a contract that the defendant would not engage, in the same town, in a certain business purchased of him by the plaintiff, in order to entitle the plaintiff to an injunction, the petition should allege a continuance and present engagement in the business by the plaintiff. *Berger & Yieser v. Armstrong*, 41 Id., 447.

An injunction may, in a proper case made, be granted a stay of proceedings at law, either before or after judgment. *Hampson v. Ware*, 4 Id., 13; *Dunham v. Collier*, 1 G. Greene, 54; *Smith v. Short*, 11 Iowa, 523; *Givens v. Campbell*, 20 Id., 79; *Crawford v. Paine*, 19 Id., 172; *Way v. Lamb*, 15 Id., 80; *Kreichbaum v. Bridges*, 1 Id., 1; *Butch v. Lash*, 4 Id., 215; *Schricker v. Field*, 9 Id., 366; *Haight v. The City of Keokuk*, 4 Id., 199; *The Key City G. L. & C. Co. v. Munsell*, 19 Id., 305; *Litchfield v. Polk County*, 18 Id., 70; *Humphrey v. Darlington*, 15 Id., 207; *Taggart v. Woods*, 20 Id., 236; *Reno v. Teagarden*, 24 Id., 144; *Crocker v. Robertson*, 8 Id., 404; *Town of Anamosa v. Wurzbacher*, 37 Id., 25; *Chicago & S. W. R. Co. v. Swinney*, 38 Id., 182; *Brigham v. Ward*, 44 Id., 677.

An injunction will sometimes be granted to restrain the making and negotiation of negotiable paper. *Stokes v. Scott County*, 10 Id., 186; *Hull & Argalls v. The County of Marshall*, 12 Id., 142.

The writ may also be granted to suppress the continuance of a public or private nuisance. *Horton v. Hoyt*, 10 Id., 496; *Connelly v. Griswold*, 7 Id., 416; *Iowa College v. City of Davenport*, Id., 213; *Coates & Patchen v. City of Davenport*, 9 Id., 227; *McMahon v. City of Council Bluffs*, 12 Id., 268; *Musser v. Hershey*, 42 Id., 356; *Ewell v. Greenwood*, 26 Id., 377; *Hougham v. Harvey*, 33 Id., 203.

It is not error to overrule a motion to dissolve an injunction on defects in the petition upon which it was granted, when an amended petition has been filed curing such defects and taking the place of the original without changing the cause of action. *Sweatt v. Farille*, 23 Id., 321.

The rule is well settled in Iowa that a court of equity will restrain by injunction the collection of an illegal tax. *Zorger v. The Tp. of Rapids et al.*, 36 Id., 175; *Rood v. Board of Supervisors, et c.*, 39 Id., 444. See, also, *Spencer v. Wheaton*, 14 Id., 38; *Langworthy v. City of Dubuque*, 13 Id., 86; *Litchfield v. Polk County*, 18 Id., 70; *Olmstead v. Board of Supervisors of Henry County*, 24 Id., 33; *Williams v. Peinny*, 25 Id., 436; *Cattell v. Lowrey et al.*, 45 Id., 478.

But equity will not enjoin the collection of taxes for mere irregularities in the assessment. *Patterson v. Baumer*, 43 Id., 477; *The C. R. & M. R. R. et al. v. Carroll County*, 41 Id., 153; *Conway v. Younkin*, 28 Id., 295; *The Iowa R. L. Co. v. Carroll County*, 39 Id., 151; *The Same v. Sac County*, Id., 124; *The S. C. & St. Paul R. Co. v. The County of Osceola et al.*, 45 Id., 168.

A court of equity has jurisdiction of an action to enjoin repeated and continuing acts of trespass, where the party committing the same is insolvent. *Gibbs v. McFadden*, 39 Id., 371.

A party may have an incorporeal interest in a street such as will entitle him to an injunction to restrain a diversion of it to objects and uses inconsistent with the purposes for which it was granted to the city. *Ingraham, Kennedy & Day v. The C. D. & M. R. Co.*, 38 Id., 669.

One who is not injured by the fencing up of a street so that it cannot be used, cannot restrain the inclosure thereof by injunction. *Price v. McCoy*, 40 Id., 53.

After a railroad company has effected the condemnation of land for a right of way, it will be restrained by injunction from entering upon the land condemned until payment of the damages awarded. *Richards v. The D. V. R. Co.*, 18 Id., 260; *Henry v. The D. & P. R. Co.*, 10 Id., 540; *Hibbs v. The Chicago & N. W. R. Co.*, 39 Id., 340.

Where a foreign railroad corporation is using by sufferance the line of a domestic corporation, a land owner is entitled to an injunction restraining it from the use of that portion of the line running through his land until compensation shall be made for the right of way. *Holbert v. The St. L. C. & N. W. R. Co.*, 45 Id., 23.

A preliminary injunction will not be dissolved on the bare allegations of an answer, but proof must be introduced in support thereof. *Mills et al. v. Hamilton*, 49 Id., 105.

In an action asking damages for a trespass, the plaintiff may also pray for an injunction restraining a repetition of the trespass, and the fact that he has erroneously entitled his action an equitable one will not defeat his right to ask for the injunction, nor is it essential in such case, to allege in the petition that the injury threatened will be irreparable. *Id.*

While courts of equity will, under certain circumstances, interfere by injunction to prevent repeated trespasses upon real property, yet in such case it must be made to appear that the injury would be irreparable, or that adequate compensation could not be obtained therefor. *The City of Council Bluffs v. Stewart*, 51 Id., 335.

A citizen and resident of the county, who, as such, is interested in the public welfare, shows

such an interest as entitles him to present a petition for, and obtain an injunction to, restrain a public officer from the commission of an act which would be a public wrong. *Collins v. Ripley*, 8 Id., 129.

Where defendant sold to plaintiff his business and the good will of the same, and entered into bond in the penalty of \$100, not to engage in the same business at the same place, held that the one hundred dollars was in the nature of stipulated damages for breach of the bond, that the whole penalty was incurred by a single breach; that plaintiff's remedy was exhausted on receiving that amount, and that he was not entitled to an injunction under this section to restrain a continuation of the breach of the contract, notwithstanding defendant was insolvent, so that the penalty of the bond could not be collected of him. *Stafford v. Shortread* 62 Iowa, 524.

Our statutes enlarge the powers of courts of law, so that in the classes of cases mentioned they may grant relief for injuries already committed, and by injunction restrain a continued commission of the same wrongs by the same parties. It is sufficient for the applicant for the writ to substantially comply with the requirements of the statute, without bringing himself within the rules and usage of courts of chancery. *Hall v. Crouse et al.*, 14 Id., 487. But the statute does not confer upon the law courts, either general or special, chancery jurisdiction, or power to grant remedies beyond the issuing and enforcing an injunction against the repetition of breaches of contract or other injuries which constitute the foundation of actions pending therein. *Richmond v. The D. & S. C. R. Co., et al.*, 33 Id., 422.

In an action for damages for a breach of contract, the party injured may also pray for an injunction restraining a repetition or continuance of the breach. *Berger et al. v. Armstrong*, 41 Id., 447. See further: *Brandt et al. v. Harrison County et al.*, 50 Id., 164; *Rice v. Smith*, 9 Id., 570; *Macklot v. The City of Davenport*, 17 Id., 379.

SECTION 3387. [Same.]—In any of the cases mentioned in the preceding section, the injunction may either be a part of the judgment rendered in the action, or it may, if proper grounds therefor are shown, be granted by order at any stage of the case before judgment, and shall then be known as a temporary injunction.

SECTION 3388. [Same.]—Where it appears by the petition therefor, which must be supported by affidavit, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act which would produce great or irreparable injury to the plaintiff; or where, during litigation, it appears that defendant is doing, or threatens, or is about to do, or is procuring, or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute.

Where a petition is sworn to, and the affidavit is to the effect that the contents thereof are true, as the party making the affidavit believes, is sufficient. When the petition sets forth the facts upon which the relief is demanded, an affidavit of their truth is all that is required. *Kelley v. Briggs*, 58 Iowa, 332, 335.

Where a defendant in his answer in an injunction suit alleged that he did not desire or intend to do the act enjoined, held, that in an action on an injunction bond, he could not recover the expense of procuring a dissolution of the injunction. *Bank of Monroe v. Gifford et al.*, 70 Id., 580.

SEC. 3389. [By whom granted.]—A temporary injunction may be granted:

1. By the court or judge thereof in which the action is pending or is to be brought;

2. By any judge of the district or circuit court of such district;

3. By any judge of the supreme or a judge of any other district or circuit court.

But in cases where an action is pending, and it is applied for to affect the subject matter of such action, it can only be granted by the court or judge thereof, in which such action is pending. Nor shall it be granted by any judge mentioned in the second subdivision hereof, unless it satisfactorily appears by affidavit that the court or judge thereof in which the action is brought, cannot, for want of time sickness, or other disability, hear the same, or that the residence of the judge is inconvenient, or that it is for some sufficient reason impracticable to make the application to him. Nor shall it be granted by any judge mentioned in the third subdivision hereof, unless it be made satisfactorily to appear to such judge, by affidavit, that the application therefor cannot, for some sufficient reason, be made to either of the courts or judges mentioned in the first or second subdivision of this section.

In an action by attachment in the circuit court upon a note not yet due, the attachment is the subject matter of action in such a sense that an injunction will not be granted by the district court restraining the defendant from committing waste of the property attached. *Cooney v. Moroney*, 45 Iowa, 292.

A judge has authority to grant an injunction in vacation under sections 3389, 3394 and the word vacation as here used means when the court is not in actual session, and is not to be restricted to the time between terms. *Thomson v. Benepe et al.*, 67 Id., 79.

SEC. 3390. [Notice: when required.]—An injunction shall not be granted against a defendant who has answered, unless he has had notice of the application.

SEC. 3391. [Same.]—An injunction to stop the general and ordinary business of a corporation, or the operations of a railway, or of a municipal corporation, or the erection of any building or other work, or the board of supervisors of any county, or to restrain a nuisance, can only be granted upon reasonable notice of the time and place of the application to the party to be enjoined.

The removal of a school house by a school district township taken from another district township is not the general and ordinary business of a district township, and an injunction restraining such removal may be granted without notice of the time and place of application therefor. *Dist. Tp. of Lodomillo v. Dist. Tp. of Cass*, 54 Iowa, 115, 117.

The question as to who is legally employed to teach a school, and who is authorized to make such employment, cannot properly be determined in an action to restrain by injunction one who assumes to act as sub-director, or a teacher employed by him. *The Dist. Tp., etc., v. Barrett*, 47 Id., 110.

An injunction to restrain a nuisance can only be granted after notice to the party to be enjoined, and the error in granting an injunction in such case without notice is not waived by an appearance and motion to dissolve. *Hughes v. Eckerson*, 55 Id., 641.

The "operations of a railway," referred to in this section, means the operation of a constructed railway, and not the operations of a railway company in building or constructing a railway. *Johnston v. The C., M. & St. P. R. Co.*, 58 Id., 537.

SEC. 3392. No injunction shall be granted by a judge, after the application therefor has been overruled by the court; nor by a court or judge when it has been refused by the court or judge thereof in which the action is brought. A judge refusing an injunction, shall, if requested by either party, give him a certificate thereof.

SEC. 3393. [Motion to dissolve.]—The defendant may move to dissolve the injunction, either before or after the filing of the answer.

An order dissolving an injunction will not operate as a dismissal of the action in which it was issued and it is error for the court to so order. *Massie v. Mann*, 17 Iowa, 131; *Watters v. Fredricks*, 11 Id., 181; *Russell v. Wilson*, 37 Id., 377; *Sennett v. Moles*, 38 Id., 25.

A temporary injunction granted by a judge in vacation is not dissolved at the next term of court by the mere failure to procure an order making it perpetual. *Curtis v. Crane*, 38 Id., 459.

If the motion to dissolve is made after answer filed, and the answer plainly and fully, without evasion, denies in substance all the facts relied on in the petition, the injunction will be dissolved, unless there are circumstances making the case an exception, as that irreparable mischief will result from the dissolution. *Taylor v. Dickinson*, 15 Id., 483; *Stevens v. Myers*, 11 Id., 183; *Anderson v. Reed*, Id., 177; *Shricker v. Field*, 9 Id., 366; *Russell v. Wilson*, 37 Id., 377.

It is the right of the defendant to file his motion to dissolve, either before or after answering and to have the same disposed of as soon as practicable thereafter. *Taylor v. Dickinson*, 15 Id., 483.

Where the answer of the defendant admits the facts stated in the petition as grounds for the injunction, but seeks to avoid their force and effects by pleading affirmative matter, the injunction should not be dissolved without proof of the averments of the answer. In such case the burden rests on the defendant. *Judd v. Hatch*, 31 Id., 491; *Bennett v. Hanchett*, 49 Id., 71.

Where the equity of a petition for injunction is admitted or not denied, and the answer sets up new matter in avoidance, or contains matter which amounts to a defense, such answer is equivalent to a denial of the plaintiff's equities, and the injunction should not be dissolved, but continued to a final hearing. *Fargo & Co. v. Ames*, 45 Id., 494; *Shricker v. Field*, 9 Id., 366.

SEC. 3394. [Issued by clerk.]—If the order is made by the court the clerk shall make an entry thereof in the court record and issue the order accordingly. If made in vacation, the judge must indorse said order upon the petition.

This section, directing the judge to indorse his order for an injunction, made in vacation, on the petition, is directory merely, and writing the order on a separate piece of paper will not vitiate the injunction. *Jordan v. Circuit Court of Wapello County*, 69 Iowa, 177.

SEC. 3395. [Bond.]—In the cases contemplated in the preceding sections, the order of allowance must direct the injunction to issue only after the filing of a bond in the office of the clerk of the proper court, in a penalty to be therein fixed, with sureties to be approved by such clerk, and conditioned for the payment of all damages which may be adjudged against petitioner by reason of such injunction.

An injunction bond is to secure such damages as may be adjudged against the obligors in an action brought to determine whether any damages have been sustained—a question which cannot be determined in the injunction cause; and the value of the services of an attorney employed in procuring a dissolution of the injunction is an element of such damages, of which proper evidence should be admitted. *Fountain v. West et al.*, 68 Iowa, 330.

SEC. 3396. [Condition of bond when to restrain judgment.]—When proceedings in a civil action, or on a judgment or final order, are sought to be enjoined, suit must be brought in the county and court in which such action is pending, or the judgment or order was obtained. The bond must also in that case be further conditioned to pay such judgment, or comply with such final order if the injunction is not made perpetual, or to pay any judgment that may be ultimately recovered against the party obtaining the injunction on the cause of action enjoined.

The district court of a county in which an execution issued from the supreme court is levied on real property, has jurisdiction to enjoin the sale thereunder, upon a proper showing being made. *Davis v. Bonar et al.*, 15 Iowa, 171.

To restrain a special execution the remedy by injunction must be pursued in the county and court where the judgment was rendered upon which the special execution issued. *Lockwood v. Kitteringham*, 42 Id., 257.

The remedy is not thus limited when it is sought to restrain a sale under a general execution, of property alleged to belong, not to the judgment debtor, but to a third person, who seeks the injunction. *Id.*

The fact that the judgment was rendered in a county whose court had no jurisdiction, will not vary the rule that, to restrain the enforcement of a judgment by execution, the remedy must be sought in the county and court where the judgment was rendered on which the execution issued. *Anderson v. Hall*, 48 Id., 346.

An action to set aside a judgment and restrain the collection thereof, on the ground that it had been rendered without jurisdiction, must be brought in the county and court in which the judgment was rendered. *Grattan v. Matteson*, 51 Id., 622.

Where it is sought to restrain the collection of a judgment, the injunction bond must be for double the amount of the judgment; but this rule does not apply where it is sought to restrain the sale of certain specific property under the execution issued on the judgment. *Hardin v. White*, 63 Id., 633.

The district court has jurisdiction of an action to set aside an execution sale of exempt property though the execution issued from the circuit court upon a transcript of judgment of a justice of the peace. *Visek et al. v. Doolittle et al.*, 69 Iowa, 602.

An action for damages being a mere personal action should be brought in the county of defendant's residence, and an injunction in aid thereof, conceding it to have been properly allowed, did not necessitate the bringing of the action in the county in which (Scott) the action was brought because it was not based upon any alleged defect or invalidity of the judgment, but on facts subsequently arising, and to such case this section does not apply. *Baker v. Ryan*, 67 Id., 708.

SEC. 3397. [Penalty.]—The penalty of the bond must be fixed by the court or judge who makes the order, and must be doubly sufficient to cover any probable amount of liability to be thereby incurred.

SEC. 3398. [Defendant to show cause.]—The court or judge before granting the writ, may, if deemed advisable, allow the defendant an opportunity to show cause why such order should not be granted.

See *Curtis v. Crane*, 33 Iowa, 460.

VACATION OF.

SEC. 3399. [Application for: to whom made.]—If the order is granted without allowing the defendant to show cause, he may, at any time before the next term of the court, apply to the judge who made the order to vacate or modify the same or the application may be made to the judge of the court in which the action is pending.

Under this section, where an injunction has been allowed without an opportunity to defendant to show cause against it, defendant may, *upon his answer alone*, move the judge for its vacation; and in such case the plaintiff may support his petition by affidavits. *The Palo Alto B. & I. Co. v. Mahar et al.*, 65 Iowa, 74.

SEC. 3400. [**Notice of application.**].—Such application must be with notice to the plaintiff, and may rest upon the ground that the order was improperly granted, or it may be founded on the answer of defendants and affidavits. In the latter case the plaintiff may fortify his application by counter affidavits, and have reasonable time therefor.

SEC. 3401. [**Dissolution.**].—The judge may thereupon decide the matter at once, unless some good cause for delay is shown. But the vacation of the order shall not prevent the cause from proceeding if anything be left to proceed upon.

SEC. 3402. [**Only one motion.**].—Only one motion to dissolve or modify an injunction upon the whole case shall be allowed.

While under this section only one motion to dissolve an injunction may be made in a case, yet where the circuit judge who granted the injunction, overruled a motion to dissolve, with leave to renew and present the same to the district court, in which the main cause was pending since renewal, was not *another* motion in contemplation.

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VIOLATION OF.

SEC. 3403. [**Disobedience of: how punished.**].—Any judge of the supreme, district, or circuit court, being furnished with an authenticated copy of the injunction, and also with satisfactory proof that such injunction has been violated, shall issue his precept to the sheriff of the county where the violation of the injunction occurred, or to any other sheriff, naming him, more convenient to all parties concerned, directing him to attach said defendant, and bring him forthwith before the same or some other judge, at a place to be stated in said precept.

The basis of a precept for violating an injunction is an authenticated copy of the injunction and satisfactory proof that it has been violated, and this fact may be established by affidavits. *The State v. Myers*, 44 Iowa, 580

SEC. 4404. [**Contempt purged.**].—If, when thus produced, he files his affidavit denying or sufficiently excusing the contempt charged, he shall be released, and the affidavit shall be filed with the clerk of the court for preservation.

SEC. 3405. [**Bond required.**].—But if he fails to do so, the judge may require him to give bond, with surety, for his appearance at the next term of the court, and also for his future obedience to the injunction, which bond shall be filed with the clerk.

SEC. 3406. [**Committed to jail.**].—If he fails to give such security, he may be committed to the jail of the county where the proceedings are pending until the next term of the court.

SEC. 3407. [**Contempt punished.**].—If the security be given, the court at the next term shall act upon the case and punish the contempt in the usual mode.

CHAPTER 10.

OF SUBMITTING CONTROVERSIES WITHOUT ACTION OR IN ACTION.

SECTION 3408. [**Agreed statement of facts.**].—Parties to a question in difference which might be the subject of a civil action, may, without action, present an agreed statement of the facts thereof to any court having jurisdiction of the subject matter.

SEC. 3409. [**Controversy real.**].—It must be shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto.

The courts of Iowa have no jurisdiction to entertain a cause presented without action upon an agreed statement of facts unless it is shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto. *Keeline v. The City of Council Bluffs*, 62 Iowa, 450.

SEC. 3410. [**Judgment.**].—The court shall thereupon hear and determine the case, and render judgment thereon as if an action were pending.

SEC. 3411. [**Record.**].—The statement, the submission and the judgment, shall constitute the record.

SEC. 3412. [**How enforced.**].—The judgment shall be with costs, and it may be enforced, and shall be subject to review, in the same manner as if it had been rendered in an action, unless otherwise provided for in the submission.

SEC. 3413. [**Pending cause.**].—The same may be also done at any time before trial in any action then pending, subject to the same requirements and attended by the same results as in a case without action, and such submission of a stated case shall be an abandonment by both parties of all pleadings filed in such cause, and the cause shall stand on the agreed case alone, which must provide also for any lien had by any attachment, and for any property in the custody of the law, else such lien and such legal custody shall be held waived.

SEC. 3414. [**Agreement when facts are found: judgment accordingly.**]. The parties may, if they think fit, enter into an agreement in writing, that upon the judgment of the court being given in the affirmative or negative of the questions of law raised by such special case, particular property therein described, or a sum of money fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, shall be delivered to and vested in one of the parties by the other, or in case of money, shall be paid by one of such parties to the other of them, either with or without costs of the action, and the judgment of the court may be entered for the transfer and delivery of such property, or for such sum as shall be so agreed or ascertained, with or without costs, as the case may be.

SEC. 3415. [**Costs.**].—In case no agreement shall be entered into as to the costs of such action, the same shall follow the event, and be recovered by the successful party.

CHAPTER 11.

OF ARBITRATIONS.

SECTION 3416. [What may be.]—All controversies which might be the subject of civil action, may be submitted to the decision of one or more arbitrators, as hereafter provided.

At common law parties may by parol submit any matters in controversy between them to arbitration; and this right has not been taken away by this chapter of the code. *Conger v. Dean*, 3 Iowa, 463.

Where parties seek the aid of the courts for judgment upon an award of arbitrators, the submission to arbitrators must be in the manner required by the statute. *Id.*

But if parties do not design to ask such aid of the courts, they may, without complying with the regulations of the statute, make such a submission as will be binding upon them. *Id.*

The remedy upon an award of arbitrators, where the submission has not been in conformity with the statute, is by action thereon. *Id.*

The term "civil action," used in the statute, includes every kind of action, legal and equitable, except those which come under the criminal jurisdiction of the courts; and matters of purely equitable cognizance may be submitted to arbitration under the statute. *Thomlinson v. Hammond*, 3 Id., 40.

Where parties to a controversy enter into an agreement to submit a matter to arbitrators, whose award shall be filed in the office of a justice of the peace who shall render judgment thereon as upon the verdict of a jury, the parties thereby submit themselves to the jurisdiction of the justice, and a judgment on the award for an amount within the jurisdiction of the justice is valid and binding. *Van Horn v. Bellar*, 20 Id., 255.

A submission to arbitrators by parties residing in the county, provided that if the award did not exceed \$500, judgment should be entered thereon by a justice of the peace named; that if the amount should exceed the jurisdiction of a justice "judgment shall be entered in any court having jurisdiction of the same:" *Held*, that it was competent for the district court of the county to render judgment on the award if it exceeded the sum of four hundred dollars. *McKnight v. McCullough*, 21 Id., 111.

An action may be maintained upon an award and to foreclose a mortgage, where the mortgage had been made to indemnify the grantee of certain real property for breach of warranty, and after such breach the matter had been submitted to a common law arbitration, and an award made. *McKinnis v. Freeman*, 33 Id., 364.

A submission to arbitration at common law is always construed most liberally; and where parties submit their "business pertaining to a trade in land," to which the arbitrators confined their deliberations, embracing all the points involved in the controversy, it was held sufficiently certain. *Id.*

In the absence of a showing of fraud or partiality, an award in a common law arbitration will be sustained, even if the relief granted lie outside of the legal rights of the parties. *Id.*

Where parties have submitted their controversy to arbitration, the one who seeks to set aside the award, on the ground of mistake, must not only clearly establish the mistake, and that he was prejudiced thereby, but must also show that if the mistake had not occurred the award would have been different. *Gorham v. Millard*, 50 Id., 554.

SEC. 3417. [How done.]—The parties themselves, or those persons who might lawfully have controlled a civil action in their behalf for the same subject matter, must sign and acknowledge a written agreement, specifying particularly what demands are to be submitted, the names of the arbitrators and court by which the judgment on their award is to be rendered.

In whatever manner a controversy is to be settled, the subject matter of it must be ascertained and made definite. The only exception to this rule is, where parties submit to arbitrators all matters in controversy between them, which will embrace every particular matter. *Woodward v. Atwater*, 3 Iowa, 61.

Where the parties to an action pending in court, submit the matters involved therein to arbitrators, by agreement, and without any order of court, the agreement of submission must be acknowledged as required by this section. *Fink v. Fink*, 3 Id., 313.

If the submission is not acknowledged, the award cannot be received and adopted by the court as one made under the statute; but it may still be good at common law, and an action maintained thereon, as upon any other agreement. *Id.*

The same degree of particularity is not required in the acknowledgment of the execution of a submission to arbitrators as in the acknowledgment of the execution of a deed of conveyance. *McKnight v. McCullough*, 21 Id., 111.

Where matters in controversy are submitted to arbitrators, all of the essential requirements of the statute must be complied with in order to authorize the court to act upon the award. *Love v. Burns*, 35 Id., 150.

Where the agreement of submission fails to provide for rendering judgment on the award, the court has no power to render such judgment, or to reject the award and recommit the matter to the arbitrators. *Id.*

It is necessary to name the arbitrators in the agreement of submission, if the parties intend to ask judgment on the award under the statute. *McKnight v. McCullough*, 21 Id., 111.

This section of the code, requiring an agreement to arbitrate to be in writing and signed and acknowledged by the parties does not apply to suits already commenced. *The City of Marion v. Granby et al.*, 68 Id., 142.

If parties design to ask the aid of the courts for judgment upon an award of arbitrators, the agreement to submit to arbitrators must specify the court in which the judgment is to be rendered, and conform to the requirements of the statute in other respects. *Foust v. Hastings*, 66 Id., 522.

SEC. 3418. [**What submitted.**—The submission may be of some particular matters or demands, or of all demands which the one party has against the other, or of all mutual demands on both sides.

SEC. 3419. [**Of action pending.**—A submission to arbitration of the subject matter of a suit, may also be made by an order of court, upon agreement of parties after suit is commenced.

Parties to an action may, by agreement, and without any order of the court, submit to arbitration any and all matters involved in any action then pending between them. *Higgins v. Kennedy*, 20 Iowa, 474.

A proceeding begun in court to condemn land for the extension of a city street is a "suit" within the meaning of section 3419, and may be submitted to arbitration by order of the court upon the agreement of the parties. *The City of Marion v. Granby et al.*, 68 Id., 142.

SEC. 3420. [**Rules.**—All rules prescribed by law in cases of referees, are applicable to arbitrators except as herein otherwise expressed, or except as otherwise agreed upon by the parties.

The statute empowers the parties to agree upon the rules that shall govern an arbitration. *Thompson v. Blanchard*, 2 Iowa, 43, 47.

Arbitrators are not required, like referees, to return a separate finding of facts and their conclusions of law based thereon. *McKnight v. McCullough*, 21 Id., 111.

SEC. 3421. [**Revocation.**—Neither party shall have the power to revoke the submission without the consent of the other.

SEC. 3422. [**Neglect to appear.**—If either party neglect to appear before the arbitrators after due notice, except in case of sickness, they may, nevertheless, proceed to hear and determine the cause upon the evidence which is produced before them.

SEC. 3423. [**Award.**—If the time within which the award is to be made is fixed in the submission, no award made after that time shall have any legal effect, unless made upon a recommitment of the matter by the court to which it is reported.

SEC. 3424. [**Same.**—If the time of filing the award is not fixed in the submission, it must be filed within one year from the time such submission is signed and acknowledged, unless by mutual consent the time is prolonged.

SEC. 3425. [**Same.**—The award must be in writing, and shall be delivered by one of the arbitrators to the court designated in the agreement, or it may be enclosed and sealed by them and transmitted to the court, and not opened until the court so orders.

The award must be in writing and filed in the court named in the agreement of submission. *Love v. Burns*, 35 Iowa, 150, 153.

The arbitrators may deliver their award to the clerk personally in vacation. *Id.*

HEARING IN COURT.

SEC. 3426. [**Hearing in court.**]—The cause shall be entered on the docket of the court at the term to which the award is returned, and shall be called up and acted upon in its order. But the court may require actual notice to be given to either party, when it appears necessary and proper, before proceeding to act on the award.

SEC. 3427. [**Rejection: re-hearing.**]—The award may be rejected by the court for any legal and sufficient reasons, or it may be recommitted for a rehearing to the same arbitrators, or any others agreed upon by the parties.

An award can be set aside for fraud, mistake, misconduct or partiality of the arbitrators. *Sullivan v. Frink & Co.*, 3 Iowa, 66.

Where the action of the arbitrators, prejudiced, or had a strong tendency to prejudice, the rights of one of the parties, even though there was no wrong intention, the award should be set aside. *Id.*

The report of arbitrators is entitled to, at least, the same consideration as the verdict of a jury. It will require something more than the mere opinion of the party complaining, to overthrow the finding of arbitrators. If there is error or mistake in their finding, it must be made apparent. *Dunn v. Starkweather*, 6 Id., 466.

This section does not confer upon the court the right to reject or recommit the award at mere discretion. Per DAY, J., in *Brown v. Harper*, 54 Id., 549.

An appeal does not lie from a judgment of a justice of the peace on an award of arbitrators. The action of the justice, in refusing to set aside the award, or to recommit the cause to the arbitrators, may be reviewed upon writ of error from the circuit court; but no trial of the cause upon its merits can be had after the return of the award. *White v. Culver*, 25 Id., 30.

A justice of the peace may render judgment on an award of arbitrators under an agreement of parties, when the amount does not exceed his jurisdiction to render judgments by consent. *Id.*

When the arbitrators have determined a question, their decision should stand undisturbed, until it is shown, in some manner, that they have abused the discretion given them by law, and the agreement of submission. *Ratliff v. Mann and Edwards*, 5 Id., 423.

An award of arbitrators will not be set aside because it was not "inclosed and sealed and transmitted to the court," when the record shows that it was placed in the hands of the clerk by one of the arbitrators. *Higgins v. Kennedy*, 20 Id., 474.

An award of arbitrators, who by the terms of submission are empowered and required to determine *all questions at issue*, may be set aside if not final and conclusive of the rights of the parties. It is objectionable for that reason. *The M. & M. R. Co. v. The S. C. & St. P. R. Co. et al.*, 49 Id., 604.

Where a party to an award of arbitrators seeks to have it set aside on the ground of mistake, he must not only clearly establish the alleged mistake, but must also show that if the mistake had not occurred the award would have been different and more favorable to him. *Gorham v. Millard et al.*, 50 Id., 554.

In an action upon an award of arbitrators, the defendant may show, by way of defense, matters submitted to the arbitrators upon which they did not pass in making their award. *Sharp & O'Neal v. Woodbury*, 18 Id., 195.

While an arbitrator is protected from civil liability for his acts as such, the fact that his willful misconduct rendered the award invalid and unavailing to the parties, may be shown by them to defeat a recovery in an action to recover for his services as arbitrator. *Bever v. Brown et al.*, 56 Id., 565.

SEC. 3428. [**Force and effect of award.**]—When the award has been adopted, it shall be filed and entered on the records, and shall have the same force and effect as the verdict of a jury. Judgment may be entered and execution issued accordingly.

A justice of the peace has jurisdiction to render judgment upon an award returned to him for that purpose, pursuant to the agreement of the parties to the arbitration, when the amount of the award does not exceed the jurisdiction of a justice of the peace to render judgments by consent. *White v. Culver*, 25 Iowa, 30.

SEC. 3429. [**Appeal.**]—When an appeal is brought on such judgment, copies of the submission and award, together with all affidavits, shall be returned to the supreme court.

SEC. 3430. [**Costs.**]—If there is no provision in the submission respecting costs the arbitrators may award them in their discretion.

Where a submission to arbitration provided that, "said arbitrators to be governed by the laws in and of Iowa, and said award of said arbitrators to be a full settlement of the cause of replevin, now agreed to be referred to their arbitrament and award"; and where the arbitrators made a report to the district court, finding in favor of the plaintiff as to the property in controversy, and awarding that defendant pay all costs; and where in the district court it was ordered, without any action against the action of the arbitrators, that the award be recommitted to the arbitrators, "to determine the question of costs according to the broad principles of right and justice," and thereupon the arbitrators made a return awarding one-half the costs against the plaintiff and one-half against one of the defendants, and releasing the other from all costs, it was *held*, that the order recommitting the award to the arbitrators to reconsider as to the question of costs, was erroneous. *Ratliff v. Mann et al.*, 5 Iowa, 423.

SEC. 3431. [**Rights saved.**—Nothing herein contained shall be construed to affect in any manner the control of the court over the parties, the arbitrators, or their award; nor to impair or affect any action upon an award, or upon any bond or other engagement to abide an award.

(CHAPTER 20, LAWS OF 1886.)

TRIBUNALS OF VOLUNTARY ARBITRATION.

An Act to authorize the creation and to provide for the operation of tribunals of voluntary arbitration to adjust industrial disputes between employers and employed.

SECTION 1. [**District judge have power to establish arbitration tribunals.**—*Be it enacted by the general assembly of the state of Iowa:* That the district court of each county, or a judge thereof in vacation, shall have the power, and upon the presentation of a petition, or of the agreement hereinafter named, it shall be the duty of said court, or a judge thereof in vacation, to issue in the form hereinafter named, a license or authority for the establishment within and for each county of tribunals for voluntary arbitration and settlement of disputes between employers and employed in the manufacturing, mechanical, or mining industries.

SEC. 2. [**Petition or agreement: signed by twenty persons.**—The said petition or agreement shall be substantially in the form hereinafter given, and the petition shall be signed by at least twenty persons employed as workmen, and by four or more separate firms, individuals, or corporations within the county, or by at least four employers, each of whom shall employ at least five workmen, or by the representative of a firm, corporation or individual employing not less than twenty men in their trade or industry; *provided*, that at the time the petition is presented, the judge before whom said petition is presented, may, upon motion require testimony to be taken as to the representative character of said petitioners, and if it appears that said petitioners do not represent the will of a majority, or at least one-half of each party to the dispute, the license for the establishment of said tribunal may be denied, or may make such other order in this behalf as to him shall seem fair to both sides.

SEC. 3. [**License to issue: when.**—If the said petition shall be signed by the requisite number of both employers and workmen, and be in proper form and contain the names of the persons to compose the tribunal, being an equal number of employers and workmen, the judge shall forthwith cause to be issued a license substantially in the form hereinafter given, authorizing the existence of such tribunal and fixing the time and place of the first meeting thereof, and an entry of the license so granted shall be made upon the journal of the district court of the county in which the petition originated.

SEC. 4. [**To continue one year: jurisdiction.**—Said tribunal shall continue in existence for one year from date of the license creating it, and may take juris-

diction of any dispute between employers and workmen in any mechanical, manufacturing, or mining industry, or business who shall have petitioned for the tribunal, or have been represented in the petition therefor, or who may submit their disputes in writing to such tribunal for decisions. Vacancies occurring in the membership of the tribunal shall be filled by the judge or court that licensed said tribunal, from three names, presented by the members of the tribunal remaining in that class, in which the vacancies occur. The removal of any member to an adjoining county, shall not cause a vacancy in either the tribunal or post of umpire. Disputes occurring in one county may be referred to a tribunal already existing in an adjoining county. The place of umpire in any of said tribunals and vacancies occurring in such place, shall only be filled by the mutual choice of the whole of the representatives, of both employers and workmen constituting the tribunal, immediately upon the organization of the same, and the umpire shall be called upon to act after disagreement is manifested in the tribunal by failure during three meetings held and full discussion had. His award shall be final and conclusive upon such matters only as are submitted to him in writing and signed by the whole of the members of the tribunal, or by parties submitting the same.

SEC. 5. [**Number of members of tribunal.**]-The said tribunal shall consist of not less than two employers or their representatives, and two workmen or their representatives. The exact number which shall in each case constitute the tribunal, shall be inserted in the petition or agreement, and they shall be named in the license issued. The said tribunal, when convened shall be organized by the selection of one of their members as chairman and one as secretary, who shall be chosen by a majority of the members, or if such majority cannot be had after two votes, then by secret ballot, or by lot, as they prefer.

SEC. 6. [**Compensation: expenses.**]-The members of the tribunal shall receive no compensation for their services from the city or county but the expenses of the tribunal, other than fuel, light and the use of the room and furniture, may be paid by voluntary subscription, which the tribunal is authorized to receive and expend for such purposes. The session of said tribunal shall be held at the county seat of the county where the petition for the same was presented, and a room in the court house or elsewhere for the use of said tribunal shall be provided by the county board of supervisors.

SEC. 7. [**Chairman to administer oaths in absence of umpire.**]-When no umpire is acting, the chairman of the tribunal shall have power to administer oaths to all witnesses who may be produced, and a majority of said tribunal may provide for the examination and investigation of books, documents and accounts pertaining to the matters in hearing before the tribunal, and belonging to either party to the dispute; *provided*, that the tribunal may unanimously direct that instead of producing books, papers and accounts before the tribunal, an accountant agreed upon by the entire tribunal may be appointed to examine such books, papers and accounts, and such accountant shall be sworn to well and truly examine such books, documents and accounts, as may be presented to him, and to report the results of such examination in writing to said tribunal. Before such examination, the information desired and required by the tribunal shall be plainly stated in writing, and presented to said accountant, which statement shall be signed by the members of said tribunal, or by a majority of each class thereof. Attorney at law or other agents of either party to the dispute, shall not be permitted to appear or take part in any of the proceedings of the tribunal, or before the umpire.

SEC. 8. [**Umpire to preside while acting.**]-When the umpire is acting he shall preside and he shall have all the power of the chairman of the tribunal, and his determination upon all questions of evidence, or other questions in conducting the inquiries there pending, shall be final. Committees of the tribunal con-

sisting of an equal number of each class may be constituted to examine into any question in dispute between employers and workmen which may have been referred to said committee by the tribunal, and such committee may hear, and settle the same finally, when it can be done by a unanimous vote; otherwise the same shall be reported to the full tribunal, and be there heard as if the question had not been referred. The said tribunal in connection with the said umpire shall have power to make or ordain and enforce rules for the government of the body when in session to enable the business to be proceeded with, in order, and to fix its sessions and adjournments, but such rules shall not conflict with this statute, nor with any of the provisions of the constitution, and laws of Iowa.

SEC. 9. [**Question to be plainly defined in writing.**]-Before the umpire shall proceed to act, the question or questions in dispute shall be plainly defined in writing and signed by the members of the tribunal, or a majority thereof of each class, or by the parties submitting the same, and such writing shall contain the submission of the decision thereof to the umpire by name, and shall provide that his decision thereon, after hearing, shall be final. The umpire shall be sworn to impartially decide all questions that may be submitted to him during his term of office. The submission and his award may be made in the form hereinafter given, and said umpire must make his award within ten days from the time the question or questions in dispute are submitted to him. Said award shall be made to the tribunal; and if the award is for a specific sum of money, said award may be made a matter of record by filing a copy thereof in the district court of the county wherein the tribunal is in session. When so entered of record it shall be final and conclusive, and the proper court may, on motion of any one interested, enter judgment thereon; and when the award is for a specific sum of money may issue final and other process to enforce the same.

SEC. 10. [**Form of petition.**]-The form of the joint petition or agreement praying for a tribunal under this act shall be as follows:

To the district court of . . . county, (or to a judge thereof, as the case may be): The subscribers hereto being the number, and having the qualifications required in this proceeding, being desirous of establishing a tribunal of voluntary arbitration for the settlement of disputes in the (here name the branch of industry) trade, and having agreed upon A, B, C, D and E, representing the employers, and G, H, I, J and K, representing the workmen, as members of said tribunal, who each are qualified to act thereon, pray that a license for a tribunal in the . . . trade may be issued to said persons named above.

EMPLOYERS.	NAMES.	RESIDENCE.	WORKS.	NUMBER EMPLOYED.
.....
.....

EMPLOYES.	NAMES.	RESIDENCE.	BY WHOM EMPLOYED.
.....
.....

SEC. 11. [Form of license.]—The license to be issued upon such petition may be as follows:

STATE OF IOWA, } ss:
..... County, }

WHEREAS, The joint petition and agreement of four employers (or representatives of a firm or corporation or individual employing twenty men, as the case may be) and twenty workmen have been presented to this court (or if to a judge in vacation so state) praying the creation of a tribunal of voluntary arbitration for the settlement of disputes in the workman trade within this county, and naming A, B, C, D and E, representing the employers, and G, H, I, J and K, representing the workmen. Now, in pursuance of the statute for such case made and provided, said named persons are hereby licensed and authorized to be and exist as a tribunal of voluntary arbitration for the settlement of disputes between employers and workmen for the period of one year from this date, and they shall meet and organize on the day of, A. D....

.....,
Clerk of the District Court of County.

SEC. 12. When it becomes necessary to submit a matter in controversy to the umpire it may be in form as follows:

FORM OF SUBMISSION.

We, A, B, C, D, and E, representing employers, and G, H, I, J, and K representing workmen composing a tribunal of voluntary arbitration hereby submit, and refer unto the umpirage of L (the umpire of the tribunal of the..... ... trade) the following subject matter viz.: (Here state full, and clear the matter submitted), and we hereby agree that his decision and determination upon the same shall be binding upon us, and final, and conclusive upon the question thus submitted, and we pledge ourselves to abide by, and carry out the decision of the umpire when made.

Witness our names this.....day of..... ..
A. D..... ..

(Signatures)
.....
.....
.....

SEC. 13. [Award to be in writing.]—The umpire shall make his award in writing to the tribunal, stating distinctly his decisions on the subject matter submitted, and when the award is for a specific sum of money, the umpire shall forward a copy of the same to the clerk of the proper court.

Approved March 6, 1886.

CHAPTER 12.

OF ACTIONS AGAINST BOATS OR RAFTS.

SECTION 3432. [Boats: when and for what liable.]—In an action brought against the owners of any boat to recover any debt contracted by such owner, or by the master, agent, clerk, or consignee thereof, for supplies furnished, or for labor done, in, about, or on such boat, or for materials furnished in building, repairing, fitting out, furnishing or equipping the same, or to recover for the non-performance of any contract relative to the transportation of persons or property thereon, made by any of the persons afore-mentioned, or to recover for injuries to persons or property by such boat, or the officers or the crew thereof, done in connection with the business of such boat, a warrant may issue for the seizure of such boat, as hereinafter provided.

In an action against a steamboat for supplies, etc., under the statute which is in effect a proceeding *in rem*, it was held, that in order to give the court jurisdiction, it was necessary that a warrant should issue for the seizure of the boat, and that it should be seized thereunder. *Ham v. Steamboat Hamburg*, 2 Iowa, 460.

It was held that the seizure and sale of a steamboat under the laws of the state of Missouri, or Illinois, will not divest the lien of a citizen of Iowa, for supplies furnished the boat, while navigating the waters of Iowa. *Haight & Bro. v. Steamboat Henrietta*, 4 Id., 472; *Ogden v. Ogden*, 13 Id., 176.

Where a steamboat carried freights from the terminus of a railroad and delivered them to the different consignees, and the officers of the boat under a contract with the railroad company collected from the consignees the charges on the freight for transportation over the railroad, it was held that the amount thus collected could not be recovered in an action against the boat under the statute. *The C., B. & Q. R. Co. v. The Steamboat W. S. Woodsides*, 10 Id., 465.

A claim against a steamboat for supplies may be assigned; and such an assignment transfers to the assignee the statutory lien upon the boat, etc. *Strother v. The Steamboat Hamburg*, 11 Id., 59.

The jurisdiction of the admiralty courts of the United States held not exclusive in all cases of maritime torts. *Trevor v. The Steamboat Ad Hine*, 17 Id., 349.

It was further held that under the act of congress of February 26, 1845, the state courts have concurrent jurisdiction with the admiralty courts of the United States of maritime torts on navigable rivers, where one of the parties is a steamer or other vessel employed in the commerce or navigation of such river. *Id.*

It has been subsequently held that the jurisdiction conferred upon the courts of the United States by the ninth section of the judiciary act of 1789 in civil causes of admiralty and maritime jurisdiction, is *exclusive*. *Walters v. The Steamboat Mollie Dozier*, 24 Id., 192.

It was therefore further held that so much of chapter 148 of the revision as undertook to give a remedy *in rem*, against a boat or vessel for a cause of action of admiralty cognizance, was in conflict with the constitutional legislation of congress conferring exclusive admiralty jurisdiction on the district courts of the United States. *Id.*

The admiralty jurisdiction, under the ninth section of the judiciary act of 1789, extends to the public navigable rivers of the United States, and to all public waters capable of being navigated by maritime or commercial vessels, propelled by wind or steam. *Id.*

Admiralty will take cognizance of maritime torts. *Id.*

SEC. 3433. [Petition and warrant.]—The original petition must be in writing, sworn to and filed with the clerk or justice of the peace, who shall thereupon issue a warrant to the proper officer, commanding him to seize the boat, its apparel, tackle, furniture and appendages, and detain the same until released by due course of law.

SEC. 3434. [Warrant issued on Sunday.]—And the warrant may be issued on Sunday, if the plaintiff, his agent or attorney, shall state in his petition and swear thereto, that it would be unsafe to delay proceedings till Monday.

SEC. 3435. Service of notice.]—It shall be sufficient service of the original notice in such an action, to serve it on the defendant, or on the master, agent, clerk or consignee of such boat; and if none of them can be found, the notice may

be served by posting up a copy thereof on some conspicuous part of the boat. The warrant shall be served according to the direction it contains.

SEC. 3436. [**By whom served.**—Any constable or marshal of any corporate town may serve and execute the warrant provided for in said section, whether the same issue from the office of the clerk of the district or circuit court, or of a justice.

SEC. 3437. [**Who may appear for boat.**—Any person interested in the boat may appear for the defendant by himself, his agent or attorney, and conduct the defense of the suit, and no continuance shall be granted to the plaintiff while the boat is held in custody.

SEC. 3438. [**Discharge by giving bond.**—The boat may be discharged at any time before final judgment, by the giving of a bond with sureties, to be approved by the officer serving the warrant, or by the clerk or justice who issued it, in a penalty double the plaintiff's demand, conditioned that the obligors therein will pay the amount which may be found due to the plaintiff, together with the costs.

A bond executed under this provision of the statute, and returned by the sheriff as the bond taken by him for the release of a boat seized by him, is valid, and should be enforced though no formal entry of approval appears thereon. *White v. Tisdale*, 12 Iowa, 75.

SEC. 3439. [**Special execution.**—If judgment be rendered for the plaintiff before the boat is thus discharged, a special execution shall issue against it. If it have been previously discharged, the execution shall issue against the principal and sureties on the bond without further proceedings.

Under this section, an order for an execution against the principal and sureties on a bond executed in accordance with the provisions of section 3438, may be made, though no formal entry of the discharge of the boat has been made. *White v. Tisdale*, 12 Iowa, 75.

SEC. 3440. [**What first to be sold.**—The officer may sell any of the furniture or appendages of the boat, if by so doing he can satisfy the demand. If he sell the boat itself, he must sell it to the bidder who will advance the amount required to satisfy the execution, for the lowest fractional share of the boat, unless the person appearing for the boat desire a different and equally convenient mode of sale.

SEC. 3441. [**Fractional share sold.**—If a fractional share of the boat be thus sold, the purchaser shall hold such share or interest jointly with the other owners.

SEC. 3442. [**Appeal.**—If an appeal be taken by the defendant before the boat is discharged as above provided, the appeal bond, if one be filed, will have the same effect in discharging the boat as the bond above contemplated, and execution shall issue against the obligors therein after judgment in the same manner.

SEC. 3443. [**Saving clause.**—Nothing herein contained is intended to affect the rights of the plaintiff to sue in the same manner as though the provisions of this chapter had not been enacted.

SEC. 3444. [**Petition: allegation of.**—In actions commenced in accordance with the provisions of this chapter it is sufficient to allege the contract to have been made with the boat itself.

In an action against a barge for labor and material furnished, it is sufficient to allege in the petition that the work was done and the materials furnished at the instance and request of the barge for the repair of the same. *West & Co. v. Barge Lady Franklin*, 2 Iowa, 522.

The petition should aver that the vessel was navigating the waters of the state at the time of the liability incurred. *Steamboat Kentucky v. Brooks et al.*, 1 G. Greene, 388.

RAFTS.

SEC. 3445. [**Rafts: liability of.**—Any raft found in the waters of this state shall be liable for all debts contracted by the owner, agent, clerk, or pilot thereof, on account of work done or services rendered for such raft.

Where the owner of a raft of lumber contracted with a third party to the effect that the latter should run the raft to a point named on the Mississippi river, and bear all the expenses of the trip, for a certain sum per thousand feet of the lumber, the contractor to act as pilot of the raft, it was held that the raft was liable, under this section, for the wages of a hand employed thereon by the contractor. *Hanson v. Hiles*, 34 Iowa, 350.

SEC. 3446. [**Lien.**—Claims growing out of either of the above cases shall be liens upon the raft, its tackle, and appendages, for the term of twenty days from the time the right of action therefor accrued.

SEC. 3447. [**Action against raft.**—The action may be brought directly against the raft, and the same rules shall govern, and the same process shall be had in such action, as are in this chapter prescribed for actions against owners of boats.

SEC. 3448. [**Appearance: what deemed.**—The execution by or for the owner of such boat or raft, of a bond, whereby possession of the same is obtained or retained by him, shall be an appearance of such owner as a defendant to the action.

CHAPTER 13.

OF HABEAS CORPUS.

SECTION 3449. [**Petition sworn to: statements of.**—The petition for the writ of *habeas corpus* must be sworn to, and must state:

1. That the person in whose behalf it is sought is restrained of his liberty, and the person by whom, and the place where he is so restrained, mentioning the names of the parties, if known, and if unknown, describing them with as much particularity as practicable;

2. The cause or pretense of such restraint, according to the best information of the applicant; and if it be by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence;

3. It must state that the restraint is illegal, and wherein;

4. That the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character to the best knowledge and belief of the applicant;

5. It must also state whether application for the writ has been before made to, and refused by any court or judge, and if such application has been made, a copy of the petition in that case, with the reasons for the refusal thereto appended, must be produced, or satisfactory reasons given for the failure to do so.

The judgment and proceedings of a competent court cannot be reversed in another court on *habeas corpus*. *Platt v. Harrison*, 6 Iowa, 79; *Zelle v. McHenry*, 2 N. W. Reporter, 322.

After a conviction of a criminal offense, by a court having jurisdiction, though the conviction be irregular or erroneous, the party convicted is not entitled to the writ of *habeas corpus*. *Id.*

A person who is held in custody under an order issued by a court of the United States, in the regular course of procedure, is not entitled to be released on *habeas corpus* by a state court. A state court has no right to thus interfere with the proceedings and process of the United States court. *Ex parte Holman*, 28 Id., 88.

Every court is the sole judge of matters of contempt of its orders or authority; and when a

court, having jurisdiction of a cause, is proceeding to arrest a party for contempt, no other court can intermeddle with, or stay the proceeding, or on *habeas corpus* release the party who is thus being proceeded against. *Id.* See, also, *Robb v. McDonald*, 29 *Id.*, 330.

In the exercise of the jurisdiction confided, respectfully to the state and federal courts, neither has any right to interfere with, or control the proceedings of the other. *Id.*

Where the incumbent of an office holds it by color of right, though he is not an officer *de jure*, his right cannot be inquired into on *habeas corpus*. It can be determined only in a direct proceeding instituted for that purpose. *Ex parte Strahl*, 16 *Id.*, 369.

But if a mere usurper should, without color of right, attempt to imprison a person, the legality of the restraint might be inquired into on *habeas corpus*. *Id.*

The state courts have concurrent jurisdiction with the federal courts to inquire into the validity of an enlistment into the army of the United States, upon a writ of *habeas corpus*. *Ex parte Anderson* before DILLON, J., at Chambers, 16 *Id.*, 595.

SEC. 3450. [**Same.**].—The petition must be sworn to by the person confined, or by some one in his behalf, and presented to some court or officer authorized to allow the writ.

SEC. 3451. [**Writ: by whom allowed.**].—The writ of *habeas corpus* may be allowed by the supreme, district, or circuit court, or by any judge of either of those courts, and may be served in any part of the state.

Prior to the code of 1873, an appeal to the supreme court did not lie from an order or decision of one of the judges of that court, in a *habeas corpus* proceeding. *In re Curley*, 34 *Iowa*, 154.

SEC. 3452. [**Application: to whom made.**].—Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to for the writ, may refuse the same unless a sufficient reason be stated in the petition for not making the application to the more convenient court, or a judge thereof.

The allegations of a petition for a writ of *habeas corpus*, that minor children were concealed by the respondent in Polk or Dallas counties, were sufficient to give the court in Polk county jurisdiction to order the issuance of the writ; and the fact set up in the answer, that the children were in a foreign jurisdiction did not deprive the court of jurisdiction, or excuse the respondent for not producing the children in court in obedience to the writ. *Rivers v. Mitchell*, 57 *Iowa*, 193.

Where the mother residing in one judicial district, made application to the judge of that district for a writ of *habeas corpus* for the possession of her daughter, a minor, alleged to be restrained of her liberty in another judicial district, it was held that the person restrained was the applicant within the meaning of the statute, and that the application should have been made to the judge or court nearest to her. *Thompson v. Oglesby*, 42 *Id.*, 598.

The only limitations on the duty of a judge to grant the writ of *habeas corpus* are, that the application must be made to the most convenient judge, and it may be refused if from the showing made by the petitioner, the judge or court applied to is of opinion that he is not entitled to any relief whatever. *Shaw v. McHenry*, 52 *Id.*, 182, 184.

SEC. 3453. [**May refuse writ.**].—If, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the court or judge may refuse to allow the writ.

If from the showing made by the petitioner, the court or judge applied to is of opinion that he is not entitled to any relief whatever, such court or judge may refuse to allow the writ. *Shaw v. McHenry*, 52 *Iowa*, 182, 186.

SEC. 3454. [**Reasons for indorsed on.**].—If the writ is disallowed, the court or judge shall cause the reasons of said disallowance to be appended to the petition and returned to the person applying for the writ.

WRIT ALLOWED.

SEC. 3455. [**Form of writ.**].—But if the petition show a sufficient ground for relief, and is in accordance with the foregoing requirements, the writ shall be allowed, and may be substantially as follows:

THE STATE OF IOWA,

To the sheriff of, &c., (or to A B, as the case may be).

You are hereby commanded to have the body of C D by you unlawfully detained, as is alleged, before the court (or before me, or before E

F.....judge, &c., as the case may be) at....., on.....) or immediately after being served with this writ], to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises.

SEC. 3456. [**By court: issued by clerk.**]-When the writ is allowed by a court it is to be issued by the clerk, but when allowed by a judge he must issue the writ himself, subscribing his name thereto without any seal.

SEC. 3457. [**Penalty for refusing.**]-Any judge, whether acting individually or as a member of the court, who wrongfully and willfully refuses such allowance of the writ when properly applied for, shall forfeit to the party aggrieved the sum of one thousand dollars.

SEC. 3458. [**Judge to issue on his own motion.**]-Whenever any court or judge authorized to grant this writ, has evidence, from a judicial proceeding before them, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of his liberty, such court or judge shall issue or cause to be issued, the writ as aforesaid, though no application be made therefor.

SEC. 3459. [**District attorney notified.**]-The court or officer allowing the writ, must cause the district attorney of the proper county to be informed of the issuing of the writ, and of the time and place, where and when it is made returnable.

When the notice required by section 3459 to be given to the district attorney to attend the hearing of a *habeas corpus* case has not been given, the court or judge cannot, by the appointment of another member of the bar, to appear for the defendant, confer upon him the right to demand of the county payment for his services. Whether in the case the district attorney should fail to attend or provide a substitute, after due notice, the court or judge would have power to appoint a substitute, and whether such substitute would be entitled to compensation from the county, *quære. Miller v. Buena Vista County*, 68 Iowa, 711.

SERVICE.

SEC. 3460. [**By whom.**]-The writ may be served by the sheriff, or by any other person appointed for that purpose, in writing, by the court or judge by whom it is issued or allowed. If served by any other than the sheriff, he possesses the same power, and is liable to the same penalty for a non-performance of his duty, as though he were the sheriff.

SEC. 3461. [**How.**]-The proper mode of service is by leaving the original writ with the defendant, and preserving a copy thereof on which to make the return of service.

SEC. 3462. [**When defendant not found.**]-If the defendant cannot be found or if he have not the plaintiff in custody, the service may be made upon any person having the plaintiff in his custody, in the same manner and with the same effect as though he had been made defendant therein.

A *habeas corpus* proceeding cannot be regarded as criminal in its nature. The person restrained of his liberty is denominated plaintiff, and the proceedings properly should be instituted in his name, and where the applicant is remanded to the custody of the defendant the costs cannot be taxed to the county. *The State v. Collins et al.*, 54 Iowa, 441.

SEC. 3463. [**Power of officer when defendant is concealed.**]-If the defendant conceal himself, or refuse admittance to the person attempting to serve the writ, or if he attempt wrongfully to carry the plaintiff out of the county or the state, after the service of the writ as aforesaid, the sheriff or the person who is attempting to serve or who has served the writ above contemplated, is authorized to arrest the defendant, and bring him, together with the plaintiff, forthwith before the officer or court before whom the writ is made returnable.

SEC. 3464. [**Arrest.**]-In order to make such arrest, the sheriff or other person having the writ, possesses the same power as is given to a sheriff for the arrest of a person charged with felony.

SEC. 3465. [**Same.**]-If the plaintiff can be found, and if no one appear to have the charge or custody of him, the person having the writ may take him into cus-

tody, and make return accordingly. And to get possession of the plaintiff's person in such a case, he possesses the same power as is given by the last section for the arrest of the defendant.

SEC. 3466. [**Want of form.**].—The writ of habeas corpus must not be disobeyed for any defects of form or misdescription of the plaintiff or defendant, provided enough is stated to show the meaning and intent of the writ.

SEC. 3467. [**Penalty for eluding writ.**].—If the defendant attempt to elude the service of the writ of habeas corpus, or to avoid the effect thereof by transferring the plaintiff to another, or by concealing him, he shall, on conviction, be imprisoned in the penitentiary or county jail not more than one year, and fined not exceeding one thousand dollars. And any person knowingly aiding or abetting in any such act, shall be subject to the like punishment.

SEC. 3468. [**Refusal to give copy of process.**].—An officer refusing to deliver a copy of any legal process by which he detains the plaintiff in custody, to any person who demands such copy, and tenders the fees therefor, shall forfeit two hundred dollars to the person so detained.

PRECEPT.

SEC. 3469. [**When to issue.**].—The court or judge to whom the application for the writ is made, if satisfied that the plaintiff would suffer any irreparable injury before he could be relieved by the proceedings as above authorized, may issue a precept to the sheriff, or any other person selected instead, commanding him to bring the plaintiff forthwith before such court or judge.

SEC. 3470. [**Evidence.**].—When the evidence aforesaid is farther sufficient to justify the arrest of the defendant for a criminal offense committed in connection with the illegal detention of the plaintiff, the precept must also contain an order for the arrest of the defendant.

SEC. 3471. [**How served.**].—The officer or person to whom the precept is directed, must execute the same by bringing the defendant, and also the plaintiff if required, before the court or judge issuing it, and thereupon the defendant must make return to the writ of habeas corpus in the same manner as if the ordinary course had been pursued.

SEC. 3472. [**Examination.**].—The defendant may also be examined and committed, or bailed, or discharged, according to the nature of the case.

PLEADINGS—TRIAL—JUDGMENT.

SEC. 3473. [**Presumption.**].—Any person served with the writ is to be presumed to be the person to whom it is directed, although it may be directed to him by a wrong name or description or to another person.

SEC. 3474. [**Appearance.**].—Service being made in any of the modes hereinbefore provided, the defendant must appear at the proper time and answer the said petition, but no verification shall be required to the answer.

SEC. 3475. [**Body of plaintiff.**].—He must also bring up the body of the plaintiff, or show good cause for not doing so.

The respondent to a writ of *habeas corpus* must produce the bodies of the persons deprived of their liberty before the court, or judge, or show in his return to the writ that he does not have the power to do so in obedience to the writ. *Rivers v. Mitchell*, 57 Iowa, 193.

SEC. 3476. [**Penalty for willful failure.**].—A willful failure to comply with the above requisitions, renders the defendant liable to be attached for contempt, and to be imprisoned until a compliance is obtained, and also subjects him to the forfeiture of one thousand dollars to the party thereby aggrieved.

SEC. 3477. [**Attachment: how served.**].—Such attachment may be served by the sheriff, or any other person thereto authorized by the judge, who shall also be empowered to bring up the body of the plaintiff forthwith, and has, for this purpose, the same powers as are above conferred in similar cases.

SEC. 3478. [**Answer.**].—The defendant in his answer must state plainly and unequivocally whether he then has, or at any time has had, the plaintiff under his control and restraint, and if so, the cause thereof.

SEC. 3479. [**Same.**].—If he has transferred him to another person, he must state that fact, and to whom, and the time thereof, as well as the reason or authority therefor.

SEC. 3480. [**Same.**].—If he holds him by virtue of a legal process or written authority, a copy thereof must be annexed.

SEC. 3481. [**Demur or reply.**].—The plaintiff may demur or reply to the defendant's answer, but no verification shall be required to the reply, and all issues joined therein shall be tried by the judge or court.

SEC. 3482. [**Replication: statement of.**].—Such replication may deny the sufficiency of the testimony to justify the action of the committing magistrate, on the trial of which issue all written testimony before such magistrate may be given in evidence before the court or judge in connection with any other testimony which may then be produced.

The waiver of a preliminary examination before a committing magistrate will not deprive the defendant of the right, in a *habeas corpus* proceeding, to introduce testimony for the purpose of showing that he is detained upon insufficient evidence to sustain the charge. *Howell v. Patterson*, 49 Iowa, 514.

The warrant of commitment issuing to the sheriff of the county in which the examination is held, will authorize his detention and custody by the sheriff.

Where the police court, having jurisdiction of the subject matter and of the person charged, erroneous rulings by such court cannot be corrected on *habeas corpus*. *Zella v. McHenry et al.*, 51 Id., 572.

After conviction by a court having jurisdiction, though the conviction be erroneous, the defendant is not entitled to a writ of *habeas corpus*, as he has a complete remedy in the regular and usual method by appeal. *Platt v. Harrison*, 6 Id., 79; *Morrow v. Weed*, 4 Id., 77; *Ex parte Grace*, 12 Id., 208; *Robb v. McDonald*, 29 Id., 330; *Ex parte Holman*, 23 Id., 88.

SEC. 3483. [**Grand jury.**].—But it is not permissible to question the correctness of the action of the grand jury in finding a bill of indictment, or of the trial jury in trial of a cause, nor of a court or judge when acting within their legitimate province and in a lawful manner.

SEC. 3484. [**Discharge.**].—If no sufficient legal cause of detention is shown the plaintiff must be discharged.

Where a child has by permission of her parents resided for a certain time with others, who seek to detain her after the expiration of the time, and with whom she prefers to remain, it was held, that while the wishes of the child should not be disregarded, yet the controlling consideration should be the best interests of the child, with a due regard to the natural rights of the parent. *State ex rel. Shaw v. Nachtwey*, 43 Iowa, 623.

SEC. 3485. [**Irregularity of commitment.**].—Although the commitment of the plaintiff may have been irregular, still, if the court or judge is satisfied from the evidence before them, that he ought to be held to bail, or committed, either for the offense charged or any other, the order may be made accordingly.

SEC. 3486. [**Bail increased or diminished.**].—The plaintiff may also, in any case, be committed, let to bail, or his bail be mitigated or increased, as justice may require.

SEC. 3487. [**Defendant retained in custody.**].—Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in his custody, and may use all necessary and proper means for that purpose.

SEC. 3488. [**Right to be present waived.**].—The plaintiff, in writing, or his attorney, may waive his right to be present at the trial, in which case the pro-

ceedings may be had in his absence. The writ will in such cases be modified accordingly.

SEC. 3489. [**Penalty for disobeying any order.**].—Disobedience to any order of discharge subjects the defendant to attachment for contempt, and also to the forfeiture of one thousand dollars to the party aggrieved, besides all damages sustained by him in consequence of such disobedience.

SEC. 3490. [**Papers filed with clerk.**].—When the proceedings are before a judge, except when the writ is refused, all the papers in the case, including his final order, shall be filed with the clerk of the district court of the county wherein the final proceedings were had, and a brief memorandum thereof shall be entered by the clerk upon his judgment docket.

CHAPTER 14.

OF CONTEMPTS.

SECTION 3491. [**What are.**].—The following acts or omissions are deemed to be contempts, and are punishable as such by any of the courts of this state, or by any judicial officer acting in the discharge of an official duty, as hereinafter provided:

1. Contemptuous or insolent behavior towards such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority;

2. Any willful disturbance calculated to interrupt the due course of its official proceedings;

3. Illegal resistance to any order or process made or issued by it;

4. Disobedience to any subpoena issued by it and duly served, or refusing to be sworn, or to answer as a witness;

5. Unlawfully detaining a witness or party to an action or proceeding pending before such court, while going to or remaining at the place where the action or proceeding is thus pending;

6. Any other act or omission specially declared a contempt by law.

To constitute a contempt under the first subdivision of this section, the act or conduct complained of must have taken place in the actual or constructive presence of the court; and the contemptuous or insolent behavior must be *towards* the court—the court must be engaged in the *discharge* of any official duty—and the behavior must tend to impair the respect due to its authority. *Dunham v. The State*, 6 Iowa, 245.

The contemptuous and insolent conduct need not be in the court room and under the very eye of the court, in order to amount to a contempt. *Id.*

The publication of articles in a newspaper upon the conduct of a judge, in respect to causes pending in his court, and which were disposed of before the publication, or the publication of the evidence and the arguments of counsel in a case undisposed of, in which there was no rule of court against such publication, however unjust and libelous the publication may be, do not amount to contemptuous or insolent behavior towards the court under this chapter; nor are they so calculated to impede, embarrass, or obstruct the court in the administration of the law, as to justify the summary punishment of the offender under the statute. *Id.*; also, *The State v. Anderson*, 40 Id.. 207.

A refusal to obey a subpoena issued in a matter within his authority, or his refusal to answer when brought before the justice, is a contempt for which the person refusing may be committed by the justice. *Robb v. McDonald*, 29 Id., 330.

Nor does it furnish a sufficient excuse for the witness in refusing to answer, or any ground for releasing him from such commitment on *habeas corpus*, that the affidavit which he was subpoenaed to give, would not be admissible in the proceeding in which it was intended to be used. *Id.*

In a proceeding for the punishment of a contempt, growing out of publications alleged to be

false, scandalous and defamatory, evidence is admissible to show the meaning and intent of the publications. *Henry v. Ellis*, 49 Id., 205.

This section confers general authority upon the courts of this state, and upon any judicial officer acting in the discharge of any official duty, to punish for contempts. *Brown v. Davidson*, 59 Id., 461, 463—Per DAY, J.

Where a contention arose between counsel as to whether a witness had not already answered a certain question, and the court, after hearing the reporter's notes read, decided that she had answered it, whereupon one of the attorneys sprang to his feet, and turning to the court, said, in loud tones and insulting manner: "She has not answered the question." Held, that the attorney was guilty of contempt, regardless of the question whether the decision of the court was right or wrong. *Russell v. French*, Circuit Judge, 67 Id., 102.

SEC. 3492. [In courts of record.]—In addition to the above, any court of record may punish the following acts or omissions as contempts:

1. Failure to testify before a grand jury, when lawfully required to do so;
2. Assuming to be an officer, attorney or counselor of the court, and acting as such without authority;
3. Misbehavior as a juror, by improperly conversing with a party, or with any other person in relation to the merits of an action in which he is acting or is to act as a juror, or receiving a communication from any person in respect to it with out immediately disclosing the same to the court;
4. Disobedience by an inferior tribunal, magistrate or officer, to any lawful judgment, order or process of a superior court, or proceeding in any matter contrary to law, after it has been removed from such tribunal, magistrate or officer.

SEC. 3493. [How punished.]—The punishment for contempts may be by fine or imprisonment, or both, but where not otherwise specially provided, courts of record are limited to a fine of fifty dollars, and an imprisonment not exceeding one day and all other courts are limited to a fine of ten dollars.

SEC. 3494. [Same.]—But if the contempt consists in an omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it. In that case the act to be performed must be specified in the warrant of the commitment.

SEC. 3495. [When affidavit necessary.]—Unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises.

It was held that the district court (and the same reasoning applies to the circuit court) has no authority to order a party to deliver to the sheriff the key of a safe, which, with the contents the party claims as his own property, and upon his refusing to obey the order, to punish him as for a contempt. *The State v. Start*, 7 Iowa, 501.

The affidavit required by this section as a basis for proceedings for contempt need not show that the deponent has personal knowledge of the acts constituting the alleged contempt. *Jordan v. The C. C. of Wapello Co.*, 69 Id., 177.

SEC. 3496. [Notice to show cause.]—Before punishing for contempt, unless the offender is already in the presence of the court, he must be served personally with a rule to show cause against the punishment, and a reasonable time given him therefor; or he may be brought before the court forthwith, or on a given day, by warrant, if necessary. In either case he may, at his option, make a written explanation of his conduct under oath, which must be filed and preserved.

A witness who is in contempt for refusing to answer questions propounded to him by the grand jury, is entitled, as of course, to a reasonable time before punishment in which to prepare and file an explanation of his conduct. *The State v. Duffy*, 15 Iowa, 425.

A witness who is in contempt may be arrested upon a warrant directing the arrest in vacation, but the court may also order his discharge by the officers interested with the writ, upon bail fixed by the court. These proceedings, however, are authorized only in cases of actual contempt, and when necessary to the proper administration of justice. *The State v. Archer*, 43 Id., 310.

One charged with contempt committed in the presence of the court has the right to file a written explanation of his conduct, under oath, for the purpose of excusing the contempt or reducing the punishment, and a reasonable opportunity must be given for such purpose before the infliction of punishment. *Russell v. French*, Judge, 67 Id., 102.

SEC. 3497. [Testimony reduced to writing.]—Where the action of the court is founded upon evidence given by others, such evidence must be in writing, and be filed and preserved, and if the court act upon their own knowledge in the premises, a statement of the facts upon which the order is founded must be entered on the records of the court, or be filed and preserved when the court keeps no record.

In proceedings to punish for contempt the directions as to the evidence and judgment of facts contained in this section must be complied with. *Skiff v. State*, 2 Iowa, 550; *The State v. Utley*, 13 Id., 593.

Proceedings to punish for contempt are in their nature criminal, and are not entitled of the case wherein the contempt occurs. *First Cong. Ch. v. Muscatine*, Id., 69.

A party in contempt for failure to comply with a rule awarded against him may be refused leave to plead until he has purged himself of the contempt. *Saylor v. Mockbie*, 9 Id., 209.

A writ of attachment against an officer for contempt should run against him in his individual name. *The State ex rel., etc., v. Smith, etc.*, 9 Id., 334.

It is error without prejudice to permit oral evidence to be given in a hearing for contempt, when the action of the court is sufficiently supported by affidavit. *The State v. Meyers*, 44 Id., 580.

Ordinarily the presumptions are in favor of the regularity of the proceedings of courts of record, and that there was sufficient evidence to justify their judgment; but in cases of contempts the statute has provided otherwise, and the evidence or facts must be entered of record, or filed and preserved. *Skiff v. The State*, 2 Id., 550.

When the court acts upon its own knowledge in the premises, a statement of the facts upon which the order punishing for contempt was based must appear of record; and when the court acts upon evidence given by others, the record must show the evidence upon which the court acted. *The State v. Utley*, 13 Id., 593; *The State v. Dougherty*, 32 Id., 261; *The State v. Fulsom*, 34 Id., 583; *The State v. White*, Id., 583; *Skiff v. The State*, 2 Id., 550.

A record entry that "H. J. S., fined for contempt of court, fifty dollars; for a second contempt, fined one hundred dollars, and ordered to be committed to jail for three days. Mitimus issued to sheriff of Polk county to confine H. J. S. in the jail of said county for three days," is too barren of every legal requisite to justify either the fine or imprisonment of a citizen in this country. *Skiff v. The State*, 2 Id., 550.

A judgment that the defendant pay a fine and stand committed until it is satisfied, for a contempt of court, should specify the extent of the imprisonment, which cannot exceed one day for every three and one-third dollars. *The State v. Meyers*, 44 Id., 580.

In the absence of the statute each court of record is the sole and final judge in matters of contempt. *The First Cong. Ch. of B. v. The City of Muscatine*, 2 Id., 69; *Ex parte Holman*, 28 Id., 88.

This section of the code, providing that the evidence in proceedings for contempt shall be reduced to writing and filed, does not apply to a writ of injunction introduced in evidence, where the alleged contempt is the violation of the injunction. *Jordan v. The C. C. of Wapello Co.*, 69 Id., 177.

Where on a hearing before a judge a party is committed for contempt the judge must file and preserve a statement of the facts on which the order was founded; but where all of the proceedings were taken down by a shorthand reporter, and his notes were extended and filed, and the transcript thus preserved contained a statement of all the necessary facts; held, that this was a sufficient compliance with the statute. *Lutz v. Aylesworth*, 66 Id., 620.

A contempt may be punished irrespective of the regularity of the original proceedings. *Id.*

A proceeding against a corporation is necessarily personal: while the corporation cannot be imprisoned those acting in its aid in the violation of an injunction, may. *Id.*

The power to punish for contempt is a necessary one, but should be carefully exercised. *Skiff v. The State*, 2 Id., 69.

The writ of *habeas corpus* will not lie by one court, or a judge thereof, to examine or review the proceedings of another in cases of commitment for contempt, excepting cases so grossly defective as to render them void. *Rob v. McDonald*, 29 Id., 330; *Ex parte Holman*, 28 Id., 88.

The district court possesses no power to order a party to deliver to a sheriff the key of a safe, which with the contents, the party claims as his own property; and upon his refusal to obey such order, to fine him, summarily, as for a contempt. *The State v. Start*, 7 Id., 501.

The publication by an attorney of an article in a newspaper, criticising the ruling of the court in a cause tried and determined prior to such publication, does not constitute contemptuous or violent behavior toward the court, punishable as a contempt. *The State v. Anderson*, 40 Id., 207.

The publication of an article in a newspaper by one not an attorney, reflecting on the conduct of a judge in respect to a cause pending in his court, which had been disposed of prior to the publi-

cation however unjust and libelous the publication might be, was not punishable as a contempt. *Dunham v. The State*, 6 Id., 245.

SEC. 3498. [**Warrant: statement of.**]-When the offender is committed, the warrant must state the particular facts and circumstances on which the court acted in the premises, and whether the same was in the knowledge of the court, or was provided by witnesses.

SEC. 3499. [**Certiorari.**]-No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari.

In the absence of a statute allowing it, no appeal lies from an order of a court punishing or refusing to punish for a contempt; each court of record is the sole and final judge in matters of contempt. *The First Cong. Ch. of Bloomington v. City of Muscatine*, 2 Iowa, 69; *Dunham v. The State*, 6 Id., 245.

The statute, while it does not allow an appeal, does provide for a review of proceedings for contempt by certiorari. *Id.* See, also, *Henry v. Ellis*, 49 Id., 205, 206.

SEC. 3500. [**No bar to indictment.**]-The punishment for a contempt constitutes no bar to an indictment; but if the offender is indicted and convicted for the same offense, the court in passing sentence must take into consideration the punishment before inflicted.

SEC. 3501. [**"Court" defined.**]-Any officer authorized to punish for contempt, is a court within the meaning of this chapter.

The judge from whose court an order has been issued respecting the disposition or possession of property, may in vacation, punish by fine and imprisonment any one guilty of hindering or obstructing the execution of such order. *The State v. Myers*, 44 Id., 580.

CHAPTER 15.

OF CHANGING NAME.

SECTION 3502. [**Courts may.**]-The district or circuit court has power to change the names of persons in the following manner.

A change in name of a partnership does not have the effect to revoke or annul an agency conferred upon it, when the firm under the new name is composed of the same persons as that under the old one. *Billingsley v. Dawson*, 27 Iowa, 210.

SEC. 3503. [**Petition.**]-The applicant for such change must file his petition verified by his oath, stating that he is a resident of the county, and has for one year then last past, been an actual resident of the state. It must also give a description of his person, stating his age, height, the color of his hair and eyes, the place of his birth, and who were his parents.

SEC. 3504. [**Order.**]-An order of the court shall thereupon be made and entered of record, giving a description of the applicant as set forth in the petition the new name given, the time at which the change shall take effect, which shall not be less than thirty days thereafter, and directing in what newspaper of general circulation in the county, notice of such change shall be published.

SEC. 3505. [**Publication.**]-Previous to the time thus prescribed for the taking effect of such change, the applicant shall cause notice thereof to be published for four successive weeks in the newspaper directed by the court.

SEC. 3506. [**Proof filed.**]-The ordinary proof of such publication being filed in the office of the clerk of the court, shall be by him filed for preservation, and on the day fixed by the court as aforesaid the change shall be complete.

TITLE XXI.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

CHAPTER 1.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

SECTION 3507. [**Jurisdiction: local.**—The jurisdiction of justices of the peace, when not specially restricted, is co-extensive with their respective counties; but does not embrace suits for the recovery of money against actual residents of any other county, except as provided in section three thousand five hundred and thirteen of this chapter.

Where in an action before a justice of the peace against a resident of another county, the defendant appeared, it was held that such appearance did not confer jurisdiction, and that even after such appearance a motion to dismiss for want of jurisdiction should be sustained. *Boyer v. Moore*, 42 Iowa, 544; *Post v. Brownell & Co.*, 37 Id., 497.

A justice of the peace has jurisdiction to render judgment upon an award of arbitrators returned to him for that purpose, pursuant to the agreement of submission, when the amount of the award does not exceed the justice's jurisdiction in cases of consent. *White v. Culver*, 25 Id., 30; *Van Horn v. Bellar*, 20 Id., 255.

Section 2589 code, providing that if suit be brought in the wrong county the defendant may have a change of venue to the proper county, is not applicable to actions before justices of the peace. *Post v. Brownell & Co.*, 36 Id., 497.

A partnership may be sued before a justice of the peace of the county where the partnership had its place of business, one member of the firm residing therein, and service of notice upon the resident member will give the justice jurisdiction of the partnership, and he may render judgment against it, as such, which may be enforced against the partnership property, and that of such partners as have been served with notice or have appeared in the action; but where the action is brought against the partners as individuals, the justice has no jurisdiction to render judgment against a partner who resided and was served with notice in another county, except where the action is on a written contract for the payment of money in the township where the action is brought. *Ebersole & Son v. Ware*, 59 Id., 663.

A justice of the peace cannot acquire jurisdiction in action for the recovery of money against a resident of another county, even though the defendant may have been served with notice in the township where the action is commenced. *Hamilton v. Millhouse*, 46 Id., 74.

Nor can a justice acquire jurisdiction in such case, even though the action be aided by attachment. *Gates v. Wagner*, 46 Id., 355.

A resident of one county in the state, who removed with his family to another county for a temporary purpose, and with the intention of returning when such purpose should be accomplished, was held to have remained a resident of the former county for the purpose of determining the jurisdiction of a justice of the peace in an action against him, under this section. *Bradley v. Fraser*, 54 Id., 289. See, also, *Church v. Crossman*, 49 Id., 444; *Vanderpool v. O'Hanlon*, 53 Id., 246.

SEC. 3508. [**As to amount.**—Within the prescribed limit, it extends to all civil cases, except cases by equitable proceedings, where the amount in controversy does not exceed one hundred dollars; and, by consent of parties, it may be extended to any amount not exceeding three hundred dollars.

In an action before a justice of the peace, the amount claimed is the criterion of jurisdiction, and not the amount that may appear to be due on the instrument upon which the suit is based;

hence a justice has jurisdiction of an action on a penal bond for three hundred dollars, when the plaintiff only claims to recover one hundred dollars. *Stone v. Murphy*, 2 Iowa, 35.

A clause in a promissory note consenting that a justice of the peace may have jurisdiction in an action for its collection to the amount of three hundred dollars, is valid, and confers jurisdiction upon any justice who would otherwise have jurisdiction in such action but for the statutory limitation to one hundred dollars. *Marshalltown Bank v. Kennedy et al.*, 53 Id., 357.

A petition in an action before a justice of the peace, claiming one hundred dollars, confers jurisdiction on the justice, notwithstanding the original notice states that if the defendant fails to appear judgment will be rendered for the whole amount with interest and costs. *Moran v. Murphy et al.*, 49 Id., 68.

The amount claimed is the criterion of jurisdiction, and a justice of the peace has no authority to render judgment for one hundred dollars with accrued interest thereon and costs. *Galley v. The County of Tama*, 40 Id., 49.

Where the jurisdiction of a justice of the peace is by consent of parties extended to a case involving more than one hundred dollars it will, in the absence of a showing to the contrary, be presumed that such consent was given before the institution of the suit and the issuing of an attachment therein. The rule that courts and officers are presumed to act rightly, extends to inferior courts. *Honda v. Ruggles et al.*, 36 Id., 42.

In such case, the consent of a garnishee under the attachment issued, is not necessary in order to bind him. *Id.*

A justice of the peace has no equitable jurisdiction, and therefore, an equitable defense cannot be pleaded in an action before a justice. *David v. Ryan et al.*, 47 Id., 642, 646.

The amount in controversy, in an action by attachment before a justice of the peace, is not the value of the property attached, but the amount of the debt and costs. *Hoppe v. Byers & Jennings*, 39 Id., 573.

A judgment rendered by a justice of the peace for more than one hundred dollars is valid, provided the parties, as a matter of fact, have consented to his jurisdiction in the case, notwithstanding he fails to make such consent a matter of record. *Schlisman, Assignee, v. Webber et al.*, 65 Id., 114.

Where a justice has rendered a judgment in an action wherein he had jurisdiction, for an amount which, including costs, exceeds one hundred dollars, he has power to enforce such judgment by garnishment, and may render judgment against the garnishee for the amount of judgment and costs. *Id.*

In an action before a justice of the peace in which more than one hundred dollars are claimed the justice has no jurisdiction even to render judgment for an amount not exceeding one hundred dollars. *Gilbert & Jennison v. Richards*, 46 Id., 625.

This section does not deprive a justice of the peace of jurisdiction to render judgment against a partnership doing business in his county though all the partners reside elsewhere, provided the suit grows out of the business of an agency established within his county, and notice is served upon the agent in charge. *Fitzgerald v. Grimmel et al.*, 64 Id., 261.

Where one rents a house and sets up housekeeping with his family in a certain county, with the design of remaining there until he has completed a certain job of work, he thereby becomes an actual resident of that county, and under this section an action for the recovery of money may be maintained against him before a justice of the peace in that county, although his domicile (permanent place of abode), to which he intends to return, may be in another county. *Fitzgerald v. Arel*, 63 Id., 104.

WHERE SUITS MAY BE BROUGHT.

SEC. 3509. [Where parties reside.]—Suits may in all cases be brought in the township where the plaintiff or defendant, or one of several defendants, resides.

The statute does not authorize a change of venue to the proper township where an action has been commenced before a justice of the peace in the wrong township. *Meunch v. Brettenbach*, 41 Iowa, 527.

Where the want of jurisdiction does not appear on the face of the petition, the objection should be made by plea in abatement. *Id.*

Where a change of venue was taken from a justice of the peace, and the parties thereupon stipulated that the justice to whom the cause was changed might try it in another township than his own, it was held that he was not ousted of his jurisdiction by so trying the cause. *Rogers v. Loop et al.*, 51 Id., 41.

The provisions of section 2519 of the code authorizing a change of venue when an action has been brought in the wrong county does not apply to a justice of the peace. *Post v. Brownell & Co.*, 36 Id., 497.

Where the plaintiff resided in one township in the county and the defendant in another, in

which notice was served on him, but the suit was brought before a justice of the peace in still another township, held that while the justice did not obtain jurisdiction of the person of the defendant by such service, yet when the defendant appeared and without objection consented to an order continuing the case, he thereby conferred jurisdiction on the justice. *Auspach v. Ferguson*, 71 Id., 144.

SEC. 3510. [**Where served.**].—They may also be brought in any other township of the same county, if actual service on one or more of the defendants is made in such township.

SEC. 3511. [**To recover personal property: attachment.**].—Actions to recover personal property, and suits commenced by attachment, may be commenced in any county and township wherein any portion of the property is found, and justices shall have jurisdiction therein within the county.

The jurisdiction of a justice of the peace, in attachment and replevin cases, is not limited to the township in which the justice resides, or in which the property sought to be attached may be found, but is coextensive with the county. *Knowles v. Pickett*, 46 Iowa, 503; *Leversee v. Reynolds*, 15 Id., 310; *Biddle v. Alexander et al.*, 14 Id., 410.

The statute makes no provision for a change of venue to the proper township where an action before a justice of the peace has been commenced in the wrong township, and the want of jurisdiction, in such case, may be pleaded in abatement. *Meunch v. Breitenbach*, 41 Id., 527.

The jurisdiction of a justice of the peace, in a suit transferred to him by another justice of the same county on a change of venue, cannot be questioned in a collateral proceeding on the ground that he was not the nearest justice to the one from whence the change was taken. *Tennis v. Anderson*, 55 Id., 625.

Wherein in an action of replevin commenced before a justice of the peace, the property is removed to another county before service of the writ, this does not take away the jurisdiction of the justice before whom the action was brought. *Craft v. Franks*, 34 Id., 504.

The language of section 3511 of the code is construed to relate to the location of the property at the time the action is commenced, and not to that where the property is found when seized under the writ. *Id.*

In actions for the recovery of money, justices of the peace do not have jurisdiction of residents of another county, even though the action be aided by attachment, except as provided in section 3513 of the code. *Gates v. Wagner*, 46 Id., 355.

SEC. 3512 [**Non-resident.**].—If none of the defendants reside in the state, suit may be commenced in any county and township wherein either of the defendants may be found.

SEC. 3513. [**Contracts in writing.**].—On written contracts, stipulating for payment at a particular place, suit may be brought in the township where the payment was agreed to be made.

In an action upon a promissory note by its terms made payable in a particular township named therein, a justice of the peace of such township has jurisdiction of the maker who resides and is served with notice in another county. *Klingel v. Palmer*, 42 Iowa, 166.

SEC. 3514. [**In adjoining township.**].—If there is no justice in the proper township qualified or able to try the suit, it may be commenced in any adjoining township in the same county.

JUSTICE'S DOCKET.

SEC. 3515. [**Docket and contents.**].—Every justice of the peace shall keep a docket in which shall be entered, in continuous order, with the proper date to each act done:

1. The title to each cause;
2. A brief statement of the nature and amount of the plaintiff's demand, and defendant's counter-claim, if any, giving date to each where dates exist;
3. The issuing of the process, and the return thereof;
4. The appearance of the respective parties;
5. Every adjournment, stating at whose instance and for what time;
6. The trial, and whether by the justice or by a jury;
7. The verdict and judgment;

8. The execution, to whom delivered, the renewals, if any, and the amount of debt, damages and costs indorsed thereon;

9. The taking and allowance of an appeal, if any;

10. The giving a transcript for filing in the clerk's office, or for counter-claim, if one is given;

11. A note of all motions made, and whether refused or granted.

The third sub-division of this section is directory to the justice, and if he fails to obey its directions, the proper remedy is against him by compelling him, under proper proceedings, to make the entry, but is not ground for writ of error. *Houston v. Walcott & Co.*, 1 Iowa, 86, 90.

After an appeal has been allowed from the judgment of a justice of the peace, the justice has no jurisdiction or authority to make entries on his docket in the case appealed. *Kimson v. Hunt*, 4 Id., 340.

Where a transcript of a justice of the peace, after reciting the verdict of the jury, continued: "And judgment was entered by me thereon accordingly," it was held, that this entry, though informal, was a judgment or final adjudication within the meaning of the statute. *Moore v. Manser*, 9 Id., 47. See also, *Stowers v. Milledge*, 1 Id., 150.

In determining a question of fact by the records of a justice of the peace, the whole record must be considered together. *Id.*

Sub-division eleven of this section does not require a justice of the peace to enter on his docket motions made to exclude or reject evidence offered on the trial. *Miller v. O'Neal*, Id., 446.

The failure of a justice of the peace to note in his docket the return of process issued, or service of notice on the defendant, does not affect his jurisdiction or the validity of the judgment rendered by him in the case. *Bridges v. Arnold*, 37 Id., 221.

SUITS—HOW BROUGHT.

SEC. 3516. [Practice.]—The parties to the action may be the same as in the circuit court, and all the proceedings prescribed for that court, so far as the same are applicable and not herein changed, shall be pursued in justices' courts. The powers of the court are only as herein enumerated.

Where a cause of action in a justices' court consists of a book account embracing several items, the defendant is entitled to a bill of particulars, or to have the several items entered upon demanding the same. *McKinney v. Hopkins*, 20 Iowa, 495.

An application for a change of venue from a justice of the peace, made after the commencement of the trial, was too late, and properly overruled. *Id.*

Where the original notice with the return of the service thereon, is lost or destroyed, parol evidence is admissible to prove the fact of service and return thereof. *Bridges v. Arnold*, 37 Id., 221.

The appearance of a party by attorney or agent in a justices' court will have the same effect to waive the sufficiency of service of notice as in the circuit court. *Church v. Crossman*, 49 Id., 444.

A justice of the peace has only such powers as are enumerated in the statutes, and, as the statute does not confer upon him the power to instruct a jury in a trial before him, he has no such power, and consequently questions as to the correctness of instructions given by a justice will not be considered on appeal to the supreme court. *The St. Joseph Mf. Co. v. Harrington*, 53 Id., 380.

If a justice of the peace has jurisdiction of the subject matter, jurisdiction of the person will be conferred by a voluntary appearance of the parties. An appearance by defendant's attorney to cross-examine plaintiff's witnesses, where the cause has been retained by the justice after a change of venue had been ordered, will have the effect of a full appearance, and confer jurisdiction. *Rohn v. Greer*, 37 Id., 627.

SEC. 3517. [Same.]—Actions in justices' courts are commenced by voluntary appearance or by notice.

SEC. 3518. [Petition not necessary.]—When by notice, no petition need be filed, except where the petition must be sworn to, but the notice must state the cause of action in general terms, sufficient to apprise the defendant of the nature of the claim against him.

The action in a justice's court may be commenced simply by the service of a notice upon the defendant, except where a writ of replevin or other writ is asked for, in which case a petition duly verified must be filed. In an action of detinue, the filing of a petition forms no necessary part of the commencement of the action, and need be done only upon the day of trial. *Duffy v. Dule*, 42 Iowa, 215.

In an action before a justice of the peace the notice need not contain a *technical* setting forth of the cause of action. It is sufficient if the cause of action be stated in terms sufficient to apprise the defendant of the nature of the claim against him. *Fauble v. Stewart*, 15 Id., 379; *Blake v. Graves*, 18 Id., 313; *Dillery v. Nusum*, 17 Id., 238; *Greff v. Blake*, 16 Id., 223.

Where a notice issued by a justice of the peace is defective, being served it gives the justice jurisdiction to determine the sufficiency of the notice and service, and although he may decide erroneously in holding both or either to be sufficient, it does not affect his jurisdiction or the validity of the subsequent proceedings in the case. Such a case is not one of no notice; upon the sufficiency of which he had the power to pass. *Dougherty v. McManus*, 36 Id., 657. See, also, *Shea v. Quinton*, 30 Id., 58; *Shawhan v. Loffer*, 24 Id., 217; *Ballenger v. Tarbell*, 16 Id., 491.

Where in a suit before a justice of the peace the original notice stated that the plaintiff claimed of the defendant a certain sum of money, as due her for the labor of her son, A, and that the amount claimed was justly due her as the balance of accounts for said labor of her son; it was held, that the plaintiff's cause of action was sufficiently stated; and that there was no error in permitting the plaintiff, in the absence of a bill of particulars, to give evidence under it, to show an indebtedness to her for the labor of her son, A. *Cain v. Devitt*, 8 Id., 116.

Where in the notice in the justice's court the notice stated that the plaintiff claimed of the defendant on a promissory note, although the latter was merely a guarantor of the note, it was held to be sufficient. *Francis v. Bentley*, 50 Id., 59.

SEC. 3519. [Notice to whom.]—It must be addressed to the defendant by name, but if his name is unknown, a description of him will be sufficient. It must be subscribed by the plaintiff, or the justice before whom it is returnable.

SEC. 3520. [State amount.]—It must state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer at the time and place therein fixed.

A defect in the original notice, retured "not found," in the attachment proceeding in a justice's court, does not affect the jurisdiction of the *res*. *Johnson v. Dodge*, 19 Iowa, 106.

An omission to name the township in which the action is pending, in the notices posted by order of the court in an attachment suit before a justice, is not a fatal defect. *Id.*

SEC. 3521. [Limit of time.]—The time thus fixed in the notice must not be more than fifteen days from the date, and the notice must be served not less than five days previous to the trial.

A judgment by default rendered by a justice of the peace, upon a notice served only four days before the day on which the judgment was rendered, is not invalid for want of jurisdiction. It is not a case of no notice, but merely defective notice, and the error of the justice in holding it sufficient must be corrected, if at all, in the manner provided for the correction of other errors. *Shea v. Quintin*, 30 Iowa, 58; *Shawhan v. Loffer*, 24 Id., 217; *Ballinger v. Tarbell*, 16 Id., 491.

A defective notice does not affect the jurisdiction of the court or validity of the proceedings. Such a case is not one of no notice, but of defective notice, upon the sufficiency of which the court has jurisdiction to pass. *Dougherty v. McManus*, 36 Id., 657, and cases cited.

SEC. 3522. [Service and return.]—The service and return thereto must be made in the same manner as in the circuit court, except that no service shall be made by publication other than is herein provided, nor shall any return made by another than the sheriff or a constable of the county be valid unless sworn to.

A defendant cannot after he has by his own act, or that of his attorney, recognized the validity of a service of notice upon his agent, object to the jurisdiction of the justice. *Baker v. Kerr*, 13 Iowa, 384.

Where in the in original notice issued by a justice of the peace there was a material misnomer, and the service was made by leaving a copy at the usual place of residence of the defendant during her temporary sojourn at another place, and she was ignorant of the pending of the action until after judgment and the levy of execution, when she offered to pay the amount she admitted to be due the plaintiff, after which the plaintiff and the officer sold her property under the execution to satisfy the judgment, it was held: 1. That the defendant not being personally served, and having no actual notice of the pendency of the action, was not bound to take notice of the misnomer by plea in abatement. 2. That under the circumstances the plaintiff in execution and the officer who executed the writ were trespassers. *Journey v. Dickerson et al.*, 21 Id., 308.

SEC. 3523. [Defendant may pay officer.]—The defendant may at any time pay to the officer having the process, or to the justice of the peace, the amount of the claim, together with the costs which have been accrued, and thereupon the proceedings shall cease.

APPEARANCE OF PARTIES.

SEC. 3524. [**Agent's authority.**].—An agent appearing for another may be required by the justice to show his authority, if written, or prove it by his own oath or otherwise, if verbal.

A defendant may appear by an agent and consent to judgment before a justice of the peace, and it is not necessary that the authority of the agent to do so should be entered of record. *Brown v. Newman*, 13 Iowa, 546.

SEC. 3525. [**One hour given.**].—The parties in all cases are entitled to one hour in which to appear after the time fixed for appearance, and neither party is bound to wait longer for the other.

Although a defendant appeared and filed an answer in an action before a justice of the peace within fifteen minutes after the hour at which the notice was returnable, yet the plaintiff was not required to give any attention to the case until one hour after the return hour, and "the time of joining issue" did not expire until he had a reasonable time, after appearing within the hour, to examine the answer, and to determine what course he would pursue in relation thereto; and a demand for a jury within such reasonable time, to try the issue raised by the answer, was not too late, though made more than an hour after the return hour. Where the hour for appearance has been extended by agreement, the time for joining issue will be correspondingly extended. *Hall v. The C., B. & Q. R'y Co.*, 65 Iowa, 258.

Where a justice of the peace renders judgment by default before the expiration of the hour after the return hour, and the defendant afterwards and within the hour appears to the action, such judgment is irregular, but not void, and the remedy is by appeal or writ of error, and cannot be restrained by injunction. *The Central Iowa Railway Co. v. Pierson*, Id., 498.

SEC. 3526. [**Postponement.**].—Upon the return day, if the justice be actually engaged in other official business, he may postpone proceedings in the case until such business is finished.

SEC. 3527. [**Adjournment.**].—If from any cause the justice is unable to attend to the trial at the time fixed, or if a jury be demanded, he may adjourn the cause for a period not exceeding three days, nor shall he make more than two such adjournments.

SEC. 3528. [**Same.**].—In case of the absence of witnesses, either party at his own cost may obtain an adjournment, not exceeding sixty days, by filing an affidavit like that required to obtain a continuance in the circuit court for the like cause.

SEC. 3529. [**Condition of.**].—Either party applying for an adjournment must, if required by the adverse party, consent that the testimony of any witness of the adverse party who is in attendance be then taken to be used on the trial of the cause.

SEC. 3530. [**Pleadings.**].—The pleadings must be substantially the same as in the circuit court. They may be written or oral. If oral, they must in substance be written down by the justice in his docket, and sworn to when such verification is necessary.

A reply to a set-off, pleaded before a justice of the peace, based upon the account composed of several items, which denies owing the defendant the sum claimed or other sums as alleged, was held sufficient. *Godfrey v. Cruise*, 1 Iowa, 92.

The pleadings in an action before a justice of the peace may be written or oral, and when oral they must, in substance, be entered by the justice in his docket, but not with that technical particularity required in formal pleadings, and in an action on a bond it is not necessary to specify the breaches complained of. *Stone v. Murphy*, 2 Id., 35; *Glidden v. Higbee*, 31 Id., 379, 381; *Hall v. Monahan*, 1 Id., 554; *West v. Moody*, 33 Id., 137.

When pleadings before a justice of the peace are written, nice technicality of pleading or exact correspondence of proof is not required; but they are required to be substantially the same as in the circuit court. *Glidden v. Higbee*, 31 Id., 379, 381. See, also, *Greff v. Blake*, 16 Id., 222; *Blake v. Graves*, 20 Id., 312; *West v. Moody*, 33 Id., 137.

Where a trial of a cause has been had before a justice of the peace, it will be presumed on appeal that the trial was on the merits, and that a set-off pleaded by the defendant was orally denied. The statute directing oral pleadings to be entered upon the docket of the justice is merely directory. *West v. Moody*, 33 Id., 137.

In an action before a justice the defendant may prove payment at the time he received the goods under a general denial of indebtedness. *Id.*

In an action before a justice of the peace, a notice that the plaintiff claimed of the defendant upon a promissory note, although the defendant was merely a guarantor of the note, was held sufficient. *Francis v. Bently*, 50 Id., 59.

It is not necessary to the maintenance of an action in a justice's court against a railroad company for double damages for killing stock, that a petition in writing be filed; an oral statement embodying in substance the plaintiff's claim is sufficient. *Finch v. The Central R. Co.*, 42 Id., 304.

A petition in an action before a justice of the peace claiming one hundred dollars is within the jurisdiction of the justice, notwithstanding the notice states that if the defendant does not appear judgment will be rendered for the whole amount, with interest and costs. *Moran v. Murphy*, 49 Id., 68.

Where the defendant in an action before a justice of the peace makes an appearance and there is a full trial on the merits under the testimony introduced by both parties, the plaintiff's claim will, on appeal, be considered as denied, though it appears that there was no formal denial thereof by the defendant in writing or orally before the justice. *Richman v. Brown*, 25 Id., 33; *Sinamon v. Milburn*, 4 G. Greene, 309; *Hall v. Denise*, 6 Iowa, 534; *Clark v. Barnes*, 7 Id., 6; *Brock v. Manatt*, 5 Id., 270; *Heath v. Cottenback*, Id., 490; *West v. Moody*, 33 Id., 137; *Greff v. Blake*, 15 Id., 222.

It is not necessary to the maintenance of an action before a justice of the peace against a railroad company for double damages for killing stock that a petition in writing be filed; an oral statement embodying in substance plaintiff's claim is sufficient. *Finch v. The Central R. of Iowa*, 42 Id., 381.

SEC. 3531. A counter-claim must be made, if at all, at the time the answer is put in.

The plaintiff in an action before a justice of the peace may dismiss the same without the consent of the defendant, at any time before a counter-claim is pleaded, by filing a written answer, or by an oral answer entered on the justice's docket. *Kuhn v. Bone*, 10 Iowa, 392.

Conversations between parties or their attorneys, in respect to the action pending, should not be entered on the docket of the justice. *Id.*

SEC. 3532. The original, or a copy of all written instruments upon which a cause of action or counter-claim is founded, must be filed with the claim founded thereon, or a sufficient reason given for not doing so.

In the trial of a cause in court upon appeal from a justice of the peace, it may be shown by parol, that a written contract, which was the basis of the action, was delivered to the justice by the plaintiff for the purpose of having it filed; that the justice neglected to file it, but that it was offered and received in evidence on the trial below; and upon such showing the contract may be received in evidence on the trial of the case on appeal. *Eggleston v. Collis*, 10 Iowa, 554.

SEC. 3533. [Change of place of trial.]—Either party, before the trial is commenced, may have the place of trial changed, upon filing an affidavit that the justice is prejudiced against him, or is a near relation to the other party, or is a material witness for the affiant, or that the affiant cannot obtain justice before him; but no more than one change shall be allowed to each party, unless the justice to whom the case shall be transmitted is related to either party by consanguinity or affinity within the fourth degree, or is a witness, or has been an attorney employed in the action, in either of which events, a second change may be allowed to the same party.

An application for a change of venue is in time, when made after one trial in which the jury disagreed and were discharged, and the cause continued to another day, and a second jury was summoned, but not sworn. *Marshall & McKee v. Kinney*, 1 Iowa, 580.

Where a proper affidavit is made and filed for a change of venue, it is error to refuse it. *Berner v. Frazier*, 8 Id., 77.

But an affidavit for a change of venue made after the trial has been commenced should be overruled. *McKinney v. Hopkins*, 20 Id., 495.

SEC. 3534. [Case sent to another justice.]—When said change is allowed, said justice shall transmit all the original papers in said case, and a transcript of his proceedings to the next nearest justice in the township, if there be any, if not, to the next nearest justice in his county, and said justice shall proceed to try said case, and if he cannot try the same immediately, he shall then fix a time therefor, of which all parties shall take notice.

Upon a proper application being filed for a change of venue from a justice of the peace, the case must be sent to the nearest justice of the same township, if there be any; if not, to the next nearest in the county. *Tennis v. Anderson*, 55 Iowa, 625, 626.

When a justice of the peace grants a change of venue, it is his duty to send the papers to the "next nearest justice," and must designate by name who the next nearest justice is. Until this is done he retains jurisdiction of the cause, and no other justice to whom the papers may be taken can acquire jurisdiction. *Bremner v. Hollowell et al.*, 53 Id., 433.

SEC. 3535. [When title to real property is pleaded.]—If the title to real property be put in issue by the pleadings, supported by affidavit, or shall manifestly appear from the proof on the trial of the issue, the justice shall, without further proceedings, certify the cause and papers, with transcript of his docket, showing the reason of such transfer to the circuit court, where the same shall be tried on the merits. No cause so transferred shall be dismissed because the justice erred in transferring the same.

A defendant in an action before a justice of the peace cannot have the case dismissed by filing an answer which raises the question of title to real property. The answer of the defendant is not the test of jurisdiction of the justice. *Cox v. Graham*, 3 Iowa, 347.

When it is made to appear on the trial that the title to real estate is involved, the fact operates to transfer the cause to the circuit court, but not to dismiss it. *Id.*

Where in an action of forcible entry and detainer before a justice of the peace, the petitioner does not set up title in the plaintiff, an answer denying plaintiff's title and averring title in the defendant is not responsive to the petition and does not raise an issue of title to the property which requires the removal of the cause to the circuit court. *Jordon v. Walker*, 56 Id., 686.

SEC. 3536. [Same.]—But when a case is thus transferred, or dismissed on account of the title to land being involved, if there are other causes of action not necessarily connected, they may be severed and the latter tried before the justice.

THE TRIAL.

SEC. 3537. [By justice.]—Unless one of the parties demand a trial by jury at or before the time for joining issue, the trial shall be by the justice.

SEC. 3538. [Dismissal of action.]—If the plaintiff fails to appear by himself, his agent or attorney, on the return day, or at any other time fixed for the trial, the justice shall dismiss the case and render judgment against him for costs, except in the case provided in the next section.

SEC. 3539. [Not when founded on writing.]—When the suit is founded on an instrument of writing, purporting to have been executed by the defendant, in which the demand of the plaintiff is liquidated, if the signature of the defendant is not denied under oath, and if the instrument has been filed with the justice previous to the day for appearance he may proceed with the cause whether the plaintiff appear or not.

SEC. 3540. [Default.]—In the case provided for in the last section, if the defendant does not appear, judgment shall be rendered against him for the amount of the plaintiff's claim.

SEC. 3541. [Same.]—But if, where the plaintiff's claim is not founded on such written instrument, the defendant does not appear, the justice shall proceed to hear the allegations and proofs of the plaintiff, and shall render judgment thereon for the amount to which he shows himself entitled, not exceeding the amount stated in the notice.

A justice of the peace is entitled to a trial fee in default cases, and in cases coming under this and the following sections he is authorized to charge both a trial fee and a fee for entering judgment by default. *Shaw v. Kendig*, 57 Iowa, 390.

SEC. 3542. [Counter-claim.]—In the cases contemplated in the last two sections, if the defendant has previously filed a counter-claim, founded on a written instrument purporting to have been signed by the plaintiff, calling for a certain sum, the justice shall allow such counter-claim in the same manner as though the defendant had appeared, and shall render judgment accordingly.

SEC. 3543. [Judgment set aside.]—Judgment dismissing the cause, or by default, may be set aside by the justice at any time within six days after being rendered, if the party applying therefor can show a satisfactory excuse.

A defendant in an action before a justice of the peace, who has appealed and answered, but fails to make a further appearance on the day to which the cause is continued, cannot be said to be in default within the meaning of this section, and the justice has no power to open the judgment rendered against him on the testimony of the plaintiff, and order a rehearing of the cause. —*Dougllass v. Langdon & Bro.*, 29 Iowa, 245.

Pleas filed when the defendant is in default, should on motion of plaintiff, be stricken from the files. *Brayton v. Delaware Co.*, 16 Id., 44.

When a defendant is in default, before a justice of the peace he will not be permitted to plead until the default has been set aside by a compliance with section 2871 of the code. *Id.*

Where in an action before a justice of the peace after the trial had commenced and testimony given to the jury, the justice rendered a judgment for the amount of plaintiff's claim on motion of plaintiff for want of an answer; and where the defendant four days thereafter made oath that he had orally denied plaintiff's claim on the trial, and the justice had failed to enter the denial on his docket, on which affidavit the justice set aside the judgment rendered, and appointed another day for the trial, it was held, that the judgment rendered by the justice, was not a judgment by default, and that the justice had no power to set it aside. *Rhodes v. De Bow*, 5 Id., 260.

The term "judgment by default," in this section is to be understood in its strictly technical sense, as a judgment for want of an appearance. *Id.*

The appellate court will not interfere with an order of a justice of the peace setting aside a judgment by default, if made within the time prescribed by law, unless where there has been a clear abuse of discretion. *Stivers v. Thompson*, 15 Id., 1.

The law does not contemplate notice to the opposite party of an application to set aside a default before a justice of the peace. When it is set aside and a new trial ordered, notice of the time of such trial is necessary. *Id.* Also *Parle v. Rutcliffe*, 42 Id., 42.

An appeal from the judgment of a justice of the peace may be withdrawn and an application to set aside the judgment be made within the time fixed by the statute (six days) for doing so, provided the appeal has not been perfected or the transcript set up. *Id.*

This section applies only to cases where there has been personal service of notice, but does not apply to cases where the action was by attachment and the service by publication and no appearance for the defendant. In the latter cases the defendant may have the judgment set aside and the case retried by proper application within two years. *Taylor & Farley Organ Co. v. Plumb et al.*, 57 Id., 33.

The judgment by default of a justice of the peace cannot be impeached by affidavits showing that the default was taken before the proper time therefor. The record showing that the judgment was rendered at the proper time is conclusive as to that fact. *Cory v. King & Co.*, 49 Id., 365.

SEC. 3544. [New trial.]—In such case a new day shall be fixed for trial, and notice thereof given to the other party or his agent.

SEC. 3545. [Costs.]—Such orders shall be made in relation to the additional costs thereby created as the justice shall think equitable.

Upon setting aside a judgment by default, the justice will make such order as to the costs as shall be equitable. *Stivers v. Thompson*, 15 Iowa, 1.

SEC. 3546. [Execution recalled.]—Any execution which may in the meantime have been issued, shall be recalled in the same manner as in cases of appeal.

SEC. 3547. [Jury summoned.]—If a jury trial be demanded, the justice shall issue his precept to some constable of the township, directing him to summon the requisite number of jurors possessing the same qualifications as are required in the circuit court.

SEC. 3548. [Number of jurors.]—The jury shall consist of six jurors, unless a smaller number be agreed upon between the parties. Each party is entitled to three peremptory challenges and no more. Any deficiency in their number, arising from any cause, may be supplied by summoning others in the manner above directed.

SEC. 3549. [Discharge of jury.]—The justice may discharge the jury, when satisfied they cannot agree, and shall immediately issue a new precept for summoning another, to appear at a time therein fixed, not more than three days distant, unless the parties otherwise agree.

SEC. 3550. [Motion in arrest.]—No motion in arrest of judgment, or to set aside a verdict, can be entertained by a justice of the peace.

A motion in arrest of judgment, or to set aside the verdict of a jury cannot be entertained by a justice of the peace. *Rhodes v. De Bow*, 5 Iowa, 260; *Dupont v. Downing*, 6 Id., 172.

Where in a justice's court, there was an issue of tender, and a judgment for costs based on the trial of that issue, the justice had no jurisdiction to entertain a motion to re-tax the costs; for to do so would be equivalent to setting aside the verdict as to that issue; and that he cannot do. And consent of the parties could give jurisdiction only of the persons, and not of the subject matter. *Miller v. Haley*, 66 Id., 260.

A point of law involved in a cause before a justice of the peace cannot be reviewed on a writ of error unless it was in some proper way raised before the justice, and ruled on by him. And when the question was as to the right of plaintiff to recover exemplary damages, as claimed by him in his petition, but no ruling was asked on that point or secured until after a verdict had been rendered awarding such damages, it was then too late to raise the point; for the justice had no power to set the verdict aside or to arrest the judgment. And he had no alternative but to render judgment on the verdict. *Atkinson v. The C. & N. W. Ry Co.*, 70 Id., 68.

SEC. 3551. [Verdict.]—The verdict of the jury must be general. But where there are several plaintiffs or defendants, the verdict may be for or against one or more of them.

JUDGMENT AND PROCEEDINGS INCIDENT THERETO.

SEC. 3552. [Judgment.]—In cases of dismissal, confession, or on the verdict of a jury, the judgment shall be rendered and entered upon the docket forthwith. In all other cases, the same shall be done within three days after the cause is submitted to the justice for final action.

Upon the rendition of a verdict of the jury, it is the duty of the justice to enter judgment thereon forthwith, and he has no power or authority to enter it at any other time. *Guthrie v. Humphrey*, 7 Iowa, 23.

A judgment rendered by the justice on the verdict after the time allowed by law, has no force or effect, and an appeal therefrom cannot be sustained. *Id.* Also, *Harper v. Albee*, 10 Id., 389.

Where a verdict of a jury was returned in the justice's court at half past ten o'clock at night and the judgment was entered thereon by the justice at eleven o'clock A. M. the following day, it was held, that giving the statute a liberal construction, this was in time, and valid. *Davis v. Simma*, 14 Id., 154.

The term "forthwith" as used in the statute means in a reasonable time. *Id.* Also, *Burchett v. Cassady*, 18 Id., 342, 344; *Lyon v. Comstock*, 9 Id., 306.

Where a garnishee appeared before a justice of the peace and answered admitting his indebtedness to the defendant, and the docket of the justice failed to show that the cause was then finally submitted, his jurisdiction to render judgment against the garnishee was not lost by the fact that more than three days elapsed after filing the answer before the judgment was entered. *Moore v. Reeves*, 47 Id., 30.

The appellant in an action appealed from a justice of the peace may dismiss his own appeal in the appellate court. *Harper v. Albee*, 10 Id., 389; *Goodenow v. Perry*, 12 Id., 350.

SEC. 3553. [In excess of jurisdiction.]—If the sum found for either party exceed the jurisdiction of the justice, such party may remit the excess and take judgment for the residue, but he can never afterward sue for the amount so remitted.

A judgment was rendered by a justice of the peace for \$35. On the same day the plaintiff remitted all thereof above \$24.99. The next day defendant appealed. Held, that the amount in controversy was only \$24.99, and that an appeal would not lie. *Milner v. Gross*, 66 Id., 252.

SEC. 3554. [Same.]—Instead of so remitting the excess, the party obtaining such verdict may elect to have judgment dismissing the action in which case the plaintiff shall pay the costs.

SEC. 3555. [Mutual judgments.]—Mutual judgments between the same parties, rendered by the same or different justices, may be set off against each other.

SEC. 3556. When rendered by the same court, the same course shall be pursued as is prescribed in the circuit court.

SEC. 3557. [**By different justices.**]—If the judgment proposed to be set off was rendered by another justice the party offering it must obtain a transcript thereof, with a certificate of the justice who rendered it endorsed thereon, stating that no appeal has been taken, and that the transcript was obtained for the purpose of being used as a counter-claim in that case.

SEC. 3558. [**Time.**]—Such transcript shall not be given until the time for taking an appeal has elapsed.

SEC. 3559. [**Docket entry.**]—The justice so giving a transcript shall make an entry of the fact in his docket, and all other proceedings in his court shall thenceforth be stayed.

SEC. 3560. [**Execution for balance.**]—Such transcript being presented to the justice who has rendered a judgment between the same parties as aforesaid, if execution has not been issued on the judgment rendered by him, he shall strike a balance between the judgments and issue execution for such balance.

SEC. 3561. [**Same.**]—If execution has already issued, the justice shall also issue execution on the transcript filed with him, and deliver it to the same officer who has the other execution.

SEC. 3562. [**Duty of officer.**]—Such officer shall treat the lesser execution as so much cash collected on the larger, and proceed to collect the balance accordingly.

SEC. 3563. [**Costs.**]—The above rules as to counter-claim are subject to the same prohibition as to setting off costs, when the effect will be to leave an insufficient amount of money actually collected to satisfy the costs of both judgments, as is contained in the rules of proceedings in the circuit court.

SEC. 3564. [**Transcript filed.**]—When the judgment of another justice is thus allowed to be set off, the transcript thereof shall be filed among the papers of the case in which it is to be so used, and the proper entry made in the justice's docket.

SEC. 3565. [**Refusal to allow counter-claim.**]—If the justice refuses the judgment as a set-off, he shall so certify on the transcript, and return it to the party who offered it. When filed in the office of the justice who gave it, proceedings may be had by him in the same manner as though no transcript had been certified by him.

SEC. 3566. [**Judgment by confession.**]—A judgment by confession without action may be entered by a justice of the peace for an amount within his jurisdiction, and the provisions of law regulating judgments by confessions in courts of record, shall, as far as applicable, apply to confessions of judgment before a justice of the peace, and the justice shall enter such judgments on his docket, and may issue execution thereon as in other cases.

For cases as to judgments by confession in the district and circuit courts see notes to section 2397, *ante*.

FILING TRANSCRIPTS IN THE CLERK'S OFFICE.

SEC. 3567. [**May be done when.**]—The party obtaining a judgment in a justice's court for more than ten dollars, may cause a transcript thereof to be certified to the office of the clerk of the circuit court in the county.

A transcript of a judgment of a justice of the peace filed with the clerk of the courts in another county than that in which the judgment was rendered creates no lien upon the real estate of the defendant in the county where filed. *Blaney v. Hanks*, 14 Iowa, 400.

The only method of making a judgment of a justice of the peace a lien upon lands in another county is by filing a transcript of the judgment in the office of the clerk of the courts in the same county where the judgment was rendered, and then by filing a transcript of the judgment and memorandum in such clerk's office, in the office of the clerk in the other county where the lands are situated. *Id.*

SEC. 3568. [**Manner and effect.**]-The clerk shall forthwith file such transcript, and enter a memorandum thereof in his judgment docket, noting the time of filing the same, and from the time of such filing it shall be treated in all respects, as to its effect and mode of enforcement, as a judgment rendered in the circuit court as of that date. And no execution can thereafter be issued by the justice on the judgment.

When the transcript of a judgment rendered by a justice of the peace is filed in the office of the clerk of the circuit court of the same county, it amounts, in effect, from that time to a judgment of the circuit court, and can only be enforced by execution issued thereon by the clerk of such court. *Anderson v. Hall*, 48 Iowa, 346, 347.

Under this section the filing of a transcript of a judgment from a justice of the peace in the circuit court renders the judgment enforceable by execution for the period of twenty years from the date of such filing. *McCoy & James v. Cox*, 54 Id., 595.

EXECUTIONS AND PROCEEDINGS THEREON.

SEC. 3569. [**When and by whom issued.**]-Executions for the enforcement of judgment in a justice's court, may be issued as provided in this chapter, at any time within ten years from the entry of the judgment, but not afterward.

Under section 3911 of the revision, an execution could not be lawfully issued on a judgment of a justice by the justice after the lapse of five years from the entry of the judgment. *Givens v. Campbell*, 20 Iowa, 79.

Where a judgment was rendered by a justice of the peace in December, 1868, less than five years prior to the taking effect of the Code of 1873, and execution was issued thereon in 1877, it was held that the execution was lawfully issued, because the limitation in force when the judgment was rendered had not fully run when this section of the code took effect and extended the time for the issuance of the execution to ten years from the date of the judgment. *Woods v. Haviland et al.*, 59 Ia., 476.

SEC. 3570. [**Substance of.**]-Such execution shall be against the goods and chattels of the defendant therein, and shall be directed to any constable of the county.

SEC. 3571. [**Return.**]-It must be dated on the day on which it is issued, and made returnable within thirty days thereafter.

SEC. 3572. [**Renewable.**] If not satisfied when returned, it may be renewed from time to time by an endorsement thereon to that effect, signed by the justice, and dated of the date of such renewal.

A sale of personal property under an execution issued by a justice of the peace, made after the life of the execution under which the levy was made has expired, and without its renewal, was held to pass a valid title to the purchaser. *Walton v. Wray*, 54 Iowa, 531.

SEC. 3573. [**For thirty days.**]-Such endorsement must state the amount paid on such execution, and shall continue the execution in full force for thirty days from the date of renewal.

SEC. 3574. [**Property.**]-Property levied on before such renewal, may be retained by the officer and sold after renewal.

APPEALS.

SEC. 3575. (*As amended by ch. 163, 18th g. a.*) [**When allowed.**]-Any person aggrieved by the final judgment of a justice, may appeal therefrom to the circuit court in the county. [But no appeal shall be allowed in any case where the amount in controversy does not exceed twenty-five dollars.]

There must be a judgment entered before an appeal can be taken. *Kimble v. Riggins*, 2 G. Greene, 245; *Brown v. Scott*, Id., 454; *Guthrie v. Humphrey*, 7 Id., 23.

No appeal lies from the verdict of a jury. *Id.*

Whenever a final judgment is rendered by a justice of the peace an appeal may be taken by the party deeming himself aggrieved. *Griffin v. Moss*, 3 Id., 261.

The proper mode to review a question of fact is by appeal, and not by writ of error. *Taylor v. Rockwell*, 10 Id., 530.

An appeal lies from a judgment of nonsuit, or on default. *Gilson v. Johnson*, 4 Id., 463; *Griffin v. Moss*, 3 Id., 261; *Butler v. Heeb*, 38 Id., 429.

This section does not give the right of appeal to a surety in a replevin bond, from the judgment in the case. *Crites v. Littleton*, 23 Id., 205.

Where, before trial in a justice's court a tender of a certain sum was made but not accepted, and trial was had, it was held that the portion of the claim not tendered was the amount in controversy under this section. *Young v. McWaid*, 57 Id., 101.

An appeal lies from an order or judgment of a justice of the peace which is in its effect final, whether it be one of law or fact. It was accordingly held that an appeal lies from an order of a justice dissolving an attachment on motion of a garnishee and discharging him thereon; such order being a disposition of the garnishment, and a final judgment thereon within the meaning of the law. *Hodge v. Ruggles et al.*, 36 Id., 42.

An appeal will not lie from a justice of the peace on an award of arbitrators. The action of the justice, in refusing to set aside the award or to recommit the cause, may be reviewed on writ of error, but no trial on the merits can be had after the return of the award. *White v. Culver*, 25 Id., 30.

Where a cause is dismissed because of the non-appearance of the plaintiff, and judgment is rendered against him for costs only, an appeal will not lie from such judgment because not final. *Stricker v. Holtz*, 40 Id., 291.

Where in an action before a justice of the peace the plaintiff claimed \$24.50 and there was a counter-claim for \$30, and upon the trial the justice rendered judgment against the plaintiff for costs, from which he appealed, held that the amount in controversy was that shown by the pleadings, and not the amount of the judgment, and that the amount in controversy being over \$25, the circuit court had jurisdiction of the appeal, under this section of the code. *Perry v. Conger & Norris*, 65 Id., 588. To the same effect is *Lundak v. The C. & N. W. R'y. Co.*, Id., 473.

Where plaintiff in a justice's court, claimed to recover \$100, but he recovered judgment for only \$20, and the defendant appealed to the circuit court. Before the appeal, however, plaintiff filed with the justice a paper withdrawing his claim for \$100, and claiming only \$20. Held, that the effect of this paper was to reduce the amount in controversy, as shown by the pleadings to less than \$25, and that an appeal to the circuit court would not lie. *Bateman v. Sisson*, 70 Id., 518. To the same effect is *Milner v. Gross*, 66 Id., 252.

Where a party consents to a judgment before a justice of the peace, he cannot claim to be aggrieved thereby, and hence he cannot appeal therefrom. *Stever v. Heald*, 61 Id., 709.

This section as amended, held, not in conflict with section 9 article 1 of the state constitution, nor with article 2 of the ordinance of 1787. *Higgins & Adams v. The Farmer's Ins. Co.*, 60 Id., 50.

When a party consents to a judgment before a justice of the peace, he cannot claim to be "aggrieved" thereby, and hence he cannot appeal therefrom. *Stever v. Heald*, 61 Id., 709.

SEC. 3576. [Time.]—The appeal must be taken and perfected within twenty days after the rendition of the judgment.

A cause was tried on the 8th day of the month, and the original transcript showed that an appeal bond was filed on the 19th day of the same month, while the bond was marked filed on the 29th, and an amended transcript showed that the appeal was taken on the 29th. Held that the court did not err in holding that the appeal was not taken in time. *Brown v. Beesett*, 13 Id., 185.

On appeal the court may hear evidence to explain a mistake in the record of a justice of the peace. *Id.*

An appeal from a justice of the peace in a civil action must be taken within twenty days from the rendition of the judgment. When taken later there is no appeal in law, and a motion to strike the case from the docket is the proper practice; but where an order is made, upon a motion, to dismiss the appeal, the court has no jurisdiction to render judgment on the appeal bond, or any other judgment, except for costs. *Martin & Sellers v. Crocker*, 62 Id., 328.

Where an entry in the transcript, sent up on appeal from a justice of the peace, showed that the appeal bond was filed and approved March 25th, two days after judgment was rendered, notice of appeal was served on the 27th of the same month, and the transcript filed on the 29 of April, but the bond was indorsed as filed and approved on the 27th day of May; it was held: 1. That the justice was not required to make the indorsement on the bond, and was required to make the entry in his docket, and that the latter must control; 2. That the record showed the appeal to have been perfected within twenty days after the rendition of the judgment. *Moore v. Manser*, 9 Id., 47.

Appeal, and not writ of error, is the proper remedy for the review of the final decision of a case before a justice of the peace. *Lane et al. v. Goldsmith*, 23 Id., 240.

SEC. 3577. [By clerk.]—If within twenty days the appellant is prepared to take his appeal, and is prevented only by the absence or death of the justice, or his inability to act, he may apply to the clerk of the circuit court of the county for the allowance of his appeal.

SEC. 3578. [**And how.**]-Such application shall be founded on an affidavit, stating the amount and nature of the judgment, and the time of the rendition thereof, as nearly as practicable, and the reason why he thus applies.

SEC. 3579. [**Same.**]-The clerk has thereupon the same power to act in the premises as the justice would have had. He may require the books and papers of the justice to be delivered to him, for which purpose he may issue a precept to the sheriff to that effect, if necessary, and may make out and file the transcript. After this he shall return to the office of the justice of the peace all the papers proper to be kept by the justice.

SEC. 3580. [**Form of bond.**]-The appeal shall in no case be allowed until a bond in the following form, or its equivalent, is taken and filed in the office of the justice or clerk as above provided, in an amount sufficient to secure the judgment and costs of appeal:

The undersigned acknowledge ourselves indebted to.....in the sum of..... dollars, upon the following condition: Whereas.....has appealed from the judgment of.....a justice of the peace, in an action between.....as plaintiff and.....defendant.

Now, if said appellant pays whatever amount is leagally adjudged against him in the further progress of this cause, then this bond to be void.

Approved.

A....B...., principal.

E.... . . ., justice.

C....D...., surety.

If the judgment be affirmed, or if on a new trial the appellee recovers, or if the appeal be withdrawn or dismissed, judgment shall be rendered against the principal and surety in said bond.

An appeal bond which is equivalent to the form given in section 3580 is sufficient. A substantial compliance with the provisions of the statute is all that is necessary in attesting and approving the bond. *Moore v. Manser*, 9 Iowa, 47.

Where an appeal is taken from the judgment of a justice of the peace to the circuit court, in a case where an appeal is not allowed, because less than \$25 is involved, and the appeal is dismissed, on motion, for that reason, while the circuit court has no jurisdiction to entertain the appeal, it has jurisdiction under these sections to render judgment against the appellant and his sureties for the costs made on the appeal, and for the amount of the judgment appealed from. *Prescott v. Bacon*, 64 Id., 792.

The filing of an appeal bond with approved sureties, in the office of the justice of the peace, within the time prescribed by law, supersedes all action on the judgment appealed from beyond what is necessary in transmitting the transcript to the appellate court. *McKeever v. Horine et al.*, 12 Id., 227.

Where in an action in justice's court, the plaintiff demanded judgment for \$100 only, and judgment was rendered for him for that amount and costs, and the judgment bore 6 per cent interest, and the defendant appealed to the circuit court where judgment, as limited by the prayers of the petition, was again rendered for \$400 and costs, held that the supreme court had no jurisdiction to entertain an appeal from the circuit court without a certificate from the trial judge. *Hays v. The C. B. & Q Ry Co.*, 64 Id., 593.

SEC. 3581. [**Proceedings suspended.**]-Upon the appeal being taken in accordance with the foregoing provisions, all farther proceedings in the cause by him shall be suspended.

SEC. 3582. [**If execution is issued.**]-If, in the meantime, an execution has been issued, the justice shall give the appellant a certificate that the appeal has been allowed. Upon that certificate being presented to the constable, he shall cease farther action, and release any property that may have been taken in execution.

SEC. 3583. [**Papers filed.**]-Upon the taking of any appeal, the justice shall file in the office of the clerk of the circuit court, all the original papers relating to the suit, with the transcript of all the entries in his docket.

To insure a trial in the circuit court on appeal from a justice, the law requires that the justice shall file in the office of the clerk of said court, all the original papers relating to the suit, with a transcript of the entries on his docket. *Cain v. Devitt*, 8 Iowa, 116, 119.

A justice of the peace is not entitled to a fee for the approval and filing of an appeal bond pre-

pared by the attorney of the appellant, nor can he demand from such party the payment to him of the clerk's fee for docketing the case in the circuit court, before allowing the appeal. He may, however, require the payment of his fee for making and certifying the transcript before allowing the same to go out of his possession. *McKay v. Maloy*, 53 Id., 33.

SEC. 3584. [Upon the return of the justice being filed in the office of the clerk, the cause will be deemed in the circuit court.]

Where an appeal was taken from a judgment rendered by a justice of the peace, and allowed more than ten days before the next term of the district court, after the appeal was taken, and the justice failed to return and file the transcript and papers until after the said term of court had passed, it was *held*, that such failure of the justice constituted no ground for affirming the judgment of the justice, on motion of the appellee, at a subsequent term. *Holloway v. Baker*, 6 Iowa, 52.

The circuit court has power to make and enforce a rule to the effect, that if the appellant, in an appeal from a justice of the peace, fails to have the transcript filed and the filing fee paid or secured by the second day of the term, that then the appellee may file the transcript and appeal bond and have the judgment of the justice affirmed against the appellant and his sureties on the bond. *Pinders v. Yager*, 29 Id., 468. See, also, *McManus v. Humes*, 6 Id., 159; *The State v. Glass*, 9 Id., 325.

Under this section, an appeal is deemed in the appellate court by the filing of the justice's return in the office of the clerk. *Goodman v. Allen*, 34 N. W. R., 445.

SEC. 3585. [Return amended.]—The circuit court may, by rule, compel the justice to allow an appeal, or to make or amend his return according to law.

SEC. 3586. [Mistakes corrected.]—Where an omission or mistake has been made by the justice in his docket entries, and that fact is made unquestionable, the circuit court may correct the mistake or supply the omission, or direct the justice to do so.

When a mistake in the transcript of a justice of the peace is unquestionably established, it may be corrected so as to fully try the cause in the appellate court, upon the same issues which were tried before the justice. *Cooper v. Woodrow*, 3 Iowa, 189.

A return of the justice amending his transcript is a part of his record, and may be read to the jury to show the matters in issue. *Id.*

Under section 3586 the court may hear evidence to explain a mistake in the record of a justice of the peace. *Brown v. Beesett*, 13 Id., 185.

SEC. 3587. [Return: when made.]—If an appeal is allowed ten days before the next term of the circuit court, the justice's return must be made at least five days before that term. All such cases must be tried when reached, unless continued for cause.

The failure of a justice of the peace to return the transcript and papers to the clerk of the circuit court five days before the commencement of the next term does not authorize an affirmance of the judgment on motion of the appellee. *Fisher v. Harber*, 10 Iowa, 293.

If ten days have not elapsed between the time of taking the appeal and the first day of the term, neither party can be compelled to go to trial in the case. *Seeberger v. Miller*, 20 Id., 428.

It was therefore erroneous for the court to affirm the judgment on motion for non-payment of the docket fee, under a rule of court, when the appeal had been taken seven days before the first day of the term. *Id.*

An appeal from a justice of the peace is returnable at the next *regular* term of the court, and the judgment cannot be affirmed on motion of the appellee at a *special* term. *Coon v. Mathews*, 10 Id., 290.

SEC. 3588. [Notice of appeal.]—If an appeal is not allowed on the day on which judgment is rendered, written notice thereof must be served on the appellee or his agent, at least ten days before the term of court to which the cause is returnable, provided there be ten days intervening, or the suit, on motion of the appellee, shall be continued at the cost of the appellant.

To give the appellate court jurisdiction of an appeal from a justice of the peace of the person of the appellee, it must be shown either that the appellee had the notice required by statute, or that he made a voluntary appearance in the appellate court. *Quillan v. Windsor*, 6 Iowa, 296.

Notice to the appellee is not necessary to perfect an appeal from a justice of the peace, nor does a failure to give such notice authorize the dismissal of the appeal. *Bond v. Davis*, 37 Id., 163.

If the notice is not served as required by this section, the suit may, on motion

of the appellee, be continued at the cost of the appellant, but it cannot be dismissed for that cause. *Id.*

On the neglect or refusal of the appellant to take any measures to get the cause into the appellate court; after an appeal has been taken, the appellee may have the cause docketed and the appeal dismissed or the judgment affirmed. *Holloway v. Baker*, 6 Id., 52.

Where an appeal is allowed and perfected on the day the judgment is rendered, the law does not require that notice of appeal shall be served on the appellee. *Id.*

When the return of the justice is filed in the clerk's office, the cause is to be deemed in the circuit court. *Id.*

When the appellate court has jurisdiction of the subject matter, a mere irregularity in the taking of an appeal or in giving notice thereof, is waived by a voluntary appearance. *Wilgus v. Gettings*, 19 Id., 82.

SEC. 3589. [How served.]—Such notice may be served like the original notice, and if the appellee or his agent have no place of residence in the county, it may be served by being left with the justice.

SEC. 3590. [Effect of appeal.]—An appeal brings up a cause for trial on the merits, and for no other purpose. All errors, irregularities, and illegalities are to be disregarded under such circumstances, if the cause might have been prosecuted in the circuit court.

On appeal from a justice of the peace the cause is to be tried on its merits, and errors and irregularities before the justice disregarded. *Gilson v. Johnson*, 4 Iowa, 463.

A party appealing from a final decision of a justice of the peace is entitled to have the case tried *de novo* on appeal. *Taylor v. Rockwell*, 10 Id., 530.

The appellate court will not review the decision of a justice of the peace on an issue of fact on a writ of error. *Id.*

On an appeal from a justice of the peace, the erroneous ruling of the justice upon a demurrer may be reviewed and disregarded. *Oleson v. Hendrickson*, 12 Id., 222.

An appeal from the judgment of a justice of the peace operates as a waiver of all errors, irregularities and illegalities, and brings the case up for trial on the merits. *Leftwick v. Thornton*, 18 Id., 56.

Where in an action before a justice of the peace upon a promissory note, the original notice described the plaintiffs as heirs of the payee, it was held that the notice did not, under the circumstances, show that they sued as heirs. *King v. Gottschalk*, 21 Id., 512.

An appeal does not lie from a judgment of a justice of the peace on an award of arbitrators. The action of the justice in refusing to set aside an award, or to re-commit the cause to the arbitrators, may be reviewed upon writ of error; but no trial of the cause upon the merits can be had after the return of the award. *White v. Culver*, 25 Id., 30.

By going to trial on the merits, in a case appealed from a justice, the plaintiff waives the right to object to the ruling of the court on a demurrer to the defendant's answer. *Warren v. Scott et al.*, 32 Id., 22.

In an action of tort before a justice of the peace, the defendant being in default, the justice, after hearing the evidence, rendered judgment for the plaintiff; upon appeal to the circuit court, the defendant failing to appear, a judgment of affirmance may properly be entered on motion of the plaintiff, without further trial; such affirmance cannot be entered until the case is reached for trial in regular order. *Hartz v. The D. M. & M. R. Co.*, and *Berry v. The same*, 54 Id., 327.

Where a justice of the peace entertains an action the subject-matter of which is not within his jurisdiction by an appeal, even though as an original action, it might have been properly commenced in that court. *McMeans v. Cameron*, 51 Id., 691.

An appellant in the circuit court may dismiss his own appeal. 12 Id., 35.

Where the circuit court rendered judgment for the plaintiff for one hundred dollars, the amount demanded in the petition, held, that the supreme court had no jurisdiction of an appeal therefrom without the proper certificate of the trial judge. *Hays v. The C., B. & Q. R'y Co.*, 64 Id., 593.

SEC. 3591. [New demand.]—No new demand or counter-claim can be introduced into a case after it comes into the circuit court, unless by mutual consent.

After an appeal to the circuit court from a judgment of a justice of the peace, a party cannot, as a matter of right, file additional or new pleadings. He may, however, be allowed to do so under equitable circumstances and upon proper terms, after satisfactorily excusing his failure to plead before the justice. *Warren v. Scott*, 32 Iowa, 22.

On an appeal from a justice of the peace the circuit court may allow an answer to be so amended as to set up the defense of payment not pleaded before the justice. Such defense being neither a new demand nor a counter-claim within the meaning of this section. *St. Louis Type Foundry v. Medes*, 60 Id., 525.

Amendments to the pleadings, in a case appealed from a justice of the peace, may be allowed by the circuit court, in furtherance of justice and in the exercise of a sound discretion. *Clow v. Murphy*, 52 Id., 695.

Where a judgment was obtained before a justice of the peace on a note on which there could be no legal recovery, it was error for the circuit court, on appeal, to allow the plaintiff, against the defendant's objection, to amend his petition by setting up a mistake in the making of the note, and asking equitable relief in the reformation of the instrument. This was in violation of this section, which provides that "no new demand or counter-claim can be introduced into a case after it comes into the circuit court, unless by consent." *Hollin v. Davis et al.*, 59 Id., 444.

SEC. 3592. [Appellant pay costs.]—The appellant must pay the costs of the appeal, unless he obtains a more favorable judgment than that from which he appealed.

Where a defendant appeals from a judgment rendered against him by a justice of the peace, and the plaintiff on appeal recovers a less judgment than was rendered by the justice, he (the plaintiff) is entitled to recover the costs made subsequent to the appeal. *Best v. Dean*, 8 Iowa, 519.

Where the judgment on appeal was the same as that before the justice, the costs was properly taxed against the party appealing. *Fisher v. Moore*, 19 Id., 84.

Where the plaintiff appeals and does not obtain a more favorable judgment than that rendered before the justice, he must pay the costs of the appeal. *Traer v. Filkins*, 10 Id., 563.

Where, in an action before a justice of the peace upon four separate items of demand, the judgment of the justice in favor of the plaintiff for twelve dollars was appealed from, and the plaintiff recovered one dollar in the circuit court, it was held, that the case was a proper one for an apportionment of the costs. *Houder v. Overholser*, 48 Id., 365.

SEC. 3593. [When appellee pay.]—If the judgment below is against the appellant, he may proffer to pay a certain amount, with costs, and if the final amount recovered be less favorable to the appellee than such proffer, he shall pay costs of appeal.

Under this section, where a defendant appeals from a judgment of a justice of the peace against him, in order to avoid the liability for the costs on the appeal, although the amount of the judgment is reduced, on appeal, to the sum he proffered to pay, he must have offered to pay such sum with costs. *Powell v. The Western Stage Co.*, 2 Iowa, 50.

Where a defendant appeals from a judgment of a justice, and a less judgment is rendered against him, he is liable for the costs on appeal, unless he has tendered an amount equal to or greater than that recovered with costs. *Best v. Dean*, 8 Id., 519. See, also, *Houder v. Overholser*, 48 Id., 365, 367.

Pending an action in a justice's court the defendant offered to confess judgment for a part of plaintiff's claim, which was less than the amount for which judgment was rendered, but equal to the sum recovered on appeal in the circuit court; it was held, that the plaintiff was liable for all costs incurred after the offer to confess was made. *Watts v. Lambertson*, 39 Id., 272.

A party appealing from a judgment of a justice of the peace may dismiss his appeal, but it must be at his own costs. *Harper v. Albee*, 10 Id., 339; *Goodenow v. Perry*, 12 Id., 350.

SEC. 3594. [Sureties.]—Any judgment in the circuit court against the appellant shall be entered up against him and his sureties jointly.

On an appeal from a judgment of a justice, rendered by default for want of an appearance, it is not irregular for the appellate court to affirm the judgment, on motion of the plaintiff, where the appellant does not appear. *Atkins v. McCready*, 8 Id., 214.

And where the appellant appears after the judgment has thus been affirmed for want of appearance on his part, he must demand a trial on the merits, before he can object that the judgment of the justice was improperly affirmed on plaintiff's motion. *Id.*

A judgment by default may be entered against a party who appears before a justice of the peace, but fails or refuses to plead. *McFarland v. Lowery*, 40 Id., 467.

Upon appeal to the circuit court from a judgment by default in the justice's court, the appellant is, under section 3596 of the code, entitled to plead in the appellate court. *Id.*

Prior to the code of 1873, where a defendant in an action before a justice, after being duly served, made default, and judgment was rendered against him, he could not, on appeal, file an answer or demurrer as a matter of right. *Ruddick v. Vail*, 7 Id., 44; *Leftwick v. Thorton*, 18 Id., 56.

The circuit court has jurisdiction of the persons and of the subject matter to render a judgment against the sureties in an appeal bond, when judgment is rendered against the appellant, and if judgment is rendered for more than the penalty of the bond it is erroneous only and not void. *Freeman v. Hart*, 61 Id., 525.

The circuit court has jurisdiction of the persons and of the subject matter to render a judgment against the sureties in an appeal bond, when judgment is rendered against the appellant; and if

judgment is rendered for more than the penalty of the bond, it is erroneous only and not void. *Id.*

SEC. 3595. [Damages.]—If an appeal is taken for delay, the circuit court shall award such damages, not exceeding ten per cent on the amount of the judgment below, as may seem right.

SEC. 3596. [Pleadings filed in circuit court.]—If the appeal is taken from a judgment by default, the defendant may file in the circuit court, and the plaintiff reply thereto, any pleadings necessary to properly set forth any defense he may have to the action. In such case, the costs of the trial before the justice shall be taxed to the defendant.

If by reason of a mistake of the justice in rendering a judgment by default, the defendant is deprived of the opportunity to put in his defense, he can do so on appeal in the circuit court, and if he is deprived of setting up a counter-claim he can bring his action thereon. *Cory v. King & Co.*, 49 Iowa, 365.

A judgment rendered by a justice of the peace on default without notice to the defendant, should be taken up by a writ of error, and not by appeal. *Crane v. Fulton*, 10 Id., 457.

The circuit court will not review the finding of a justice of the peace on an issue of fact, on a writ of error. *Taylor v. Rockwell*, Id., 530.

On appeal from a judgment by default rendered by a justice of the peace, the defendant is entitled, as a matter of right, under this section to plead, upon payment of the costs accrued before the justice, at any time before the cause is reached for trial. *Harty v. The D. M. & M. R. Co.*, 54 Id., 327.

This section has no application to appeals from justices except in cases where the judgment is rendered by default. *Griswold v. Bowman*, 40 Id., 367, 368.

Except in default cases, our statutes have given no fixed legal right to file a further answer or pleading in a cause after it has been tried before a justice and is pending on appeal in the circuit or district court; but the leave to file, even upon cause shown, is a matter of discretion. *Id.* See also, *Ruddick v. Vail*, 7 Id., 44; *Dunton v. Thornton*, 15 Id., 217; *Leftwick v. Thornton*, 18 Id., 56; *Stanton v. Warwick*, 21 Id., 76; *May v. Wilson*, Id., 79; *Nettman v. Schramm*, 23 Id., 521; *Warren v. Scott*, 32 Id., 22.

WRITS OF ERROR.

SEC. 3597. [When allowed.]—Any person aggrieved by an erroneous decision in a matter of law, or other illegality in the proceedings of a justice of the peace, may remove the same, or so much thereof as is necessary, into the circuit court for correction.

A writ of error does not lie to a justice of the peace because of an error that can be corrected by the justice on motion, unless a motion for that purpose has been made and overruled by the justice. *Leonard v. Hallem*, 17 Iowa, 564; *Smith v. Parker*, 28 Id., 359.

This rule applies where the error complained of was the rendering of judgment upon insufficient service of notice. *Id.*

An error committed by a justice of the peace in ruling on a demurrer, should be corrected on writ of error, and not on appeal. *Leftwick v. Thornton*, 18 Id., 56.

The proper remedy of a party aggrieved by the dismissal of an action by a justice of the peace, for want of jurisdiction is by writ of error. An appeal lies only from a final judgment. *Belding v. Torrence*, 39 Id., 516.

A writ of error does not lie from the district court to an inferior court in criminal cases. The defendant has the right of appeal upon which he may have a new trial on the merits. *The State v. Flinn*, 51 Id., 133.

A writ of error will not lie to the final decision of a justice of the peace upon the evidence, though erroneous. Appeal is the proper remedy. *Lane & Wilson v. Goldsmith*, 23 Id., 240.

SEC. 3598. [Affidavit.]—The basis of the proceedings is an affidavit filed in the office of the clerk, setting forth the errors complained of, and must be filed in the same time, and the notice must be the same as in case of appeal.

The affidavit of a writ of error to a justice of the peace may be made by an attorney of a party applying therefor, who knows the facts. *Dixon v. Brophay*, 29 Iowa, 460.

The statements in an affidavit for a writ of error amount to nothing unless there is a response thereto in the return of the justice. The affidavit lays the foundation for the writ, but cannot be regarded as evidence of the errors alleged. *Vance v. Kirfman*, 20 Id., 13; *Rhodes v. DeBow*, 5 Id., 260; *Lane & Wilson v. Goldsmith*, 23 Id., 240.

When the return to the writ completely negatives the errors alleged in the affidavit the writ will not be sustained. 23 Id., 240.

A writ of error requires only so much of the case to be removed as is necessary to secure a correction of the error complained of. *Spiesberger Bros. v. Thomas*, 59 Id., 606. And the affidavit for the writ must set forth the errors complained of. *Id.*

An affidavit is a written declaration under oath, signed by the affiant, and where a written statement on which a writ of error was not thus signed. A motion to strike it from the files should have been sustained. *Cresshaw v. Taylor*, 70 Id., 386.

SEC. 3599. [**Writ.**—The clerk shall thereupon issue an order commanding the justice to certify the record and proceedings, so far as they relate to the facts stated in the affidavit.

SEC. 3600. [**Copy.**—A copy of the affidavit shall accompany the order, and be served upon the justice, who shall, with the least practicable delay, make the return required.

SEC. 3601. [**Proceedings stayed.**—All proceedings in the justice's court subsequent to judgment, may be stayed by a bond, entered into like that required in cases of appeals, and on which judgment shall be entered against the principal and surety in like manner and under like circumstances.

Where an appeal has been taken from a judgment of a justice of the peace and no *supersedeas* bond filed, an execution may issue to enforce the judgment after the appeal has been taken, and a levy of the same will not make the constable liable as a trespasser. *Thomas v. Nicklas*, 58 Iowa, 49.

SEC. 3602. [**Amended return.**—The circuit court may compel an amended return when the first is not full and complete.

SEC. 3603. [**Judgment.**—The circuit court may render final judgment, or it may remand the cause to the justice for a new trial, or such further proceedings as shall be deemed proper, and may prescribe the notice necessary to bring the parties again before the justice.

Where the ruling of a justice of the peace, in dissolving an attachment, is reversed upon writ of error, the court reversing such ruling should not render final judgment against the defendant, but remand that branch of the cause to which the writ of error reached, with directions to the justice to enforce the judgment rendered by him against the defendants in the main proceeding, with the lien of the attachment retained. *Gowley v. Carmody*, 23 Iowa, 212.

SEC. 3604. [**Restitution.**—If the circuit court render a final judgment, reversing the judgment of the justice of the peace after such judgment has been collected in whole or in part, it may award restitution with interest, and issue execution accordingly, or it may remand the cause to the justice for this purpose.

The circuit court may in its discretion render final judgment on writ of error to a justice of the peace in certain cases. *Broadwell v. Wilcox*, 22 Iowa, 568, 569.

RECOVERY OF PERSONAL PROPERTY—ATTACHMENT.

SEC. 3605. [**Action to recover personal property.**—The proceedings to gain possession of personal property wrongfully withheld, will be the same as are prescribed in such cases in the circuit court, except as modified in this chapter.

SEC. 3606. [**Attachments.**—Attachments are not allowable in justice's courts, if the sum claimed is less than five dollars. And if more is claimed and less recovered, the plaintiff shall pay all the costs of the proceedings so far as they relate to the attachment.

SEC. 3607. [**Garnishee.**—The constable has the same power to administer an oath to the garnishee and to take his answer, as is given to the sheriff in cases of attachment in the circuit court.

SEC. 3608. **Garnishees may be required to appear** and answer at the time fixed for the appearance of the parties to the action.

SEC. 3609. [**Against non-residents.**—When an attachment or order for the delivery of property has been issued by any justice of the peace in any action, and it shall be found that the defendant is absent so that personal service cannot be

had, the justice, upon the return day, unless the defendant appear, shall make an order fixing the day for trial, not less than sixty days thereafter, and requiring notice to be given by any constable as provided in the next section.

In an action before a justice of the peace in which property of the defendant has been attached, but no personal service of notice has been made on the defendant, it is error to render a personal judgment. *Johnson v. Dodge*, 19 Iowa, 106.

SEC. 3610. [Notice to be given.]—Upon such order being made, at least sixty days notice of the pendency of such action shall be given by posting up written or printed notices in three public places in the township where the action was commenced, and such notices shall have the effect of a service by publication in the circuit court, and the justice shall proceed to hear the cause upon the day specified for that purpose; but no bond shall be required of the plaintiff after judgment as may be in the circuit court.

An omission to name the township in which the action is pending in the notices posted by order of a justice of the peace in an attachment suit before him, is not a fatal defect. *Johnson v. Dodge*, 19 Iowa, 106.

FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY.

SEC. 3611. A summary remedy for forcible entry or detention of real property is allowable:

1. Where the defendant has by force intimidation, or fraud, or stealth, entered upon the prior actual possession of another in real property, and detains the same;

2. Where a lessee holds over after the termination, or contrary to the terms of his lease;

3. Where the defendant continues in possession after a sale by foreclosure of a mortgage, or on execution, unless he claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale; in either of which cases, such title shall be clearly and concisely set forth in the defendant's pleading.

A person who enters on land, intending to take possession of the entire tract, no part of which is held adversely at the time of his entry is in actual possession to the extent of his entry. *Langworthy v. Myers*, 4 Iowa, 18, 39.

If the plaintiff or owner of land, by force intimidation, fraud, or stealth, has entered upon the prior actual possession of the defendant, and detains the same, such prior occupant is entitled to his summary remedy for such entry and detention; and in that action the title cannot be investigated. *Webster v. Stewart*, 6 Id., 401, 404.

In an action of forcible entry and detainer the plaintiff alleged that the defendant had obtained possession of the premises in controversy, by fraud and stealth, and the answer denied the allegations of the petition, and are set up as a defense on a special contract; it was held, that the demurrer to that portion of the answer setting up the special contract was improperly sustained; that it was competent for the defendant to show by evidence that he entered into possession with plaintiff's consent, under a contract of purchase. *Oleson v. Hendrickson*, 12 Id., 222.

Where a tenant takes possession of real property under an agreement that he is to occupy only so long as he shall continue in the employment of the landlord, he will not be regarded a tenant at will, but one holding under a definite lease, and if after quitting the service of his landlord, he refuses to yield up the possession of the premises, he will be regarded as one holding over after the termination of his lease, and liable to an action of forcible entry and detainer by the landlord, after three days notice to quit. *Grosvernor v. Henry*, 27 Id., 269.

Justices of the peace have exclusive original jurisdiction of actions of forcible entry and detainer, and such action cannot by consent be transferred to the district court for trial. *Easton v. Fleming*, 51 Id., 305.

At the expiration of the term of a lease the tenancy ceases, and a tenant holding over, unless after the termination of his lease he has been allowed by the landlord to plant a crop, is entitled to only the three days' notice to quit provided in this section. *Kellogg v. Groves et al.*, 53 Id., 395.

See *Gifford v. King et al.*, 54 Id., 525, for a discussion of facts under which it was held that the entry of the defendants into a house owned by plaintiffs was not by stealth, but tending to show them entitled to notice to quit as tenants holding over.

SEC. 3612. [**Rent in arrear.**].—The mere non-payment of rent by the time stipulated in the lease, does not enable a plaintiff to resort to this action unless expressly so stipulated in the lease.

SEC. 3613. [**Who may bring.**].—The legal representative of a person who might have been plaintiff if alive, may bring this suit after his death.

At common law an executor or administrator could not maintain an action of forcible entry and detainer for the lands of the decedant, but this section of the statute now permits such action to be brought by the personal representative. But it does not deprive the heir of his common law right to bring the action. *Beezley v. Burgett*, 15 Iowa, 192.

A saw mill built in a permanent manner and attached to the soil, will, as between the heir and the administrator, be regarded as part of the realty; and it is, therefore, *held*, that an action will not lie by the administrator against a third person for its conversion. *Kinsell v. Billings*, 35 Id., 154.

SEC. 3614. [**Notice to quit.**].—Before suit can be brought in any except the first of the above classes, three days notice to quit must be given to the defendant in writing.

Where the action is brought under the first clause of section 3611, no notice to quit is required. *Dicks v. Hatch*, 10 Iowa, 380, 383.

SEC. 3615. [**Petition.**].—The petition must be in writing and sworn to.

SEC. 3616. [**Before what justice brought.**].—The proceedings may be had before a justice of the peace of the township where the premises are situated, or if there is no justice therein able or qualified to act, they may be brought before some justice of an adjoining township. They shall be governed by the same rules as other cases before justices of the peace except as herein modified.

Want of jurisdiction of the justice can be taken advantage of by demurrer, only when it appears on the *face of the petition*. A demurrer cannot be aided by extrinsic proof. *Childs v. Limback*, 30 Iowa, 398.

An appearance by the defendant waives all defects in the original notice. *Id.*

SEC. 3617. [**Time for appearance.**].—The time for appearance and pleading must not be less than two, nor more than six days from the time the notice is served on the defendant.

SEC. 3618. [**Adjournment.**].—No adjournment shall be made for more than ten days, nor to any other place except by consent of parties.

SEC. 3619. [**Judgment.**].—If the defendant is found guilty, judgment shall be entered that he be removed from the premises, and that the plaintiff be put in possession thereof, and an order of removal shall issue accordingly, to which shall be added a clause commanding the officer to levy the costs as in ordinary cases.

SEC. 3620. [**Title not investigated.**].—The question of title cannot be investigated in this action. And nothing herein contained prevents a party from suing for a trespass, or from testing the right of property in any other manner.

The question of title cannot be investigated in an action for forcible entry and detainer. It is simply a question as to possession. *Beezley v. Burgett*, 15 Iowa, 192, 194.

The question of title being in no way involved in an action for forcible entry and detainer, evidence thereof is inadmissible. *Stevens et al. v. McCloy*, 36 Id., 659; *Settle v. Hanson*, Mor., 111.

In this action the question of title or *right* of possession is not involved and cannot be tried. The facts of actual possession by plaintiff, and an entry by force, fraud or stealth, or an unlawful detainer by the defendant, are the only ones to be determined. It is immaterial in what capacity or relation the plaintiff is in possession, whether as owner, tenant, agent or a mere trespasser. It is the *fact* of possession alone that is material. *Emsley v. Bennett*, 37 Id., 15.

SEC. 3621. [**Bar.**].—Thirty days peaceable and uninterrupted possession with the knowledge of the plaintiff after the cause of action accrued, is a bar to this proceeding.

SEC. 3622. [**No joinder.**].—An action of this kind cannot be brought in connection with any other, nor can it be made the subject of counter-claim.

SEC. 3623. [**Order for removal.**].—The order for removal can be executed only in the day time.

[SEC. 3623½. (*Omitted in code. Restored by ch. 41, 15 g. a.*) An appeal or writ of error, taken in the usual way, if the proper security is given, suspends the

execution for costs, and may, with the consent of the plaintiff, prevent the warrant of removal from being executed, but not otherwise.]

SEC. 3624. [**Restitution.**]—The circuit court, on the trial of the appeal, may issue an order of removal or restitution as the case may require.

GENERAL PROVISIONS.

SEC. 3625. [**Official papers to successors.**]—Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official docket, as well as those of his predecessors which may be in his custody, there to be kept as public records. All his official papers shall also be turned over to his successor.

SEC. 3626. [**Or county auditor.**]—If his office becomes vacant by death, removal from the township, or otherwise, before his successor is elected, the said docket and papers shall be placed in the hands of the county auditor, to be by him turned over to the successor of the justice when elected and qualified.

SEC. 3627. [**Successor may issue execution.**]—The justice with whom the docket of his predecessor is thus deposited, may issue execution on or give a transcript of any judgment there entered, in the same manner and with like effect as the justice who rendered the judgment might have done; and in case of the death, absence or inability to act of any justice, or in case of the vacation of the office of any justice from any cause, then in such case execution may be issued from the docket of said justice or transcript given therefrom, by any other justice in said township with like effect as might have been done by the justice who rendered the judgment.

SEC. 3628. [**Successor: how determined.**]—When two or more justices are equally entitled to be deemed the successor in office of any justice as aforesaid, the county auditor shall determine by lot which is the successor, and certify accordingly; such certificate shall be in duplicate, one copy of which shall be filed in the office of such auditor, and the other given to such successor.

SEC. 3629. [**Interchange.**]—In case of sickness or other disability, or necessary absence of a justice at the time fixed for a trial of a cause or other proceeding, any other justice of the township may, at his request, attend and transact the business for him without any transfer to another office. The entries shall be made in the docket of the justice at whose office the business is transacted, and the same effect shall be given to the proceedings as though no such interchanging of official service had taken place.

Whether a justice of the peace of one township may hold a court in another township at the request of the resident justice, *query?* *Ely v. Dillon*, 21 Iowa, 47.

That the justice who tried the cause had no jurisdiction is not sufficient ground for dismissing the *action*, when the justice before whom the case was commenced did have jurisdiction. Only those acts are void which were done by the justice who had no jurisdiction. *Id.*

SEC. 3630. [**Special constables.**]—Any justice of the peace may, in writing, specially depute any person of suitable age to perform any particular duty properly devolving upon a constable, and for that particular purpose he shall be subject to the same obligations and receive the same fees. If such person be appointed to serve an attachment, execution or order, for the delivery of property, he shall, before levying upon such property, execute a bond to the state of Iowa in a penal sum of not less than two hundred dollars, to be fixed by the justice, with one or more freeholders as sureties, to be approved by and filed with the justice making the appointment, and the usual official oath shall be indorsed thereon and signed. For any breach of such bond, any person injured thereby may bring suit thereon, in his own name, and recover the same damages as upon a constable's bond in like cases.

SEC. 3631. [**No process.**]—No process can issue from a justice's court into another county, except when specially authorized.

SEC. 3632. [**Sheriff and constable.**]—The constable is the proper executive officer in a justice's court, but the sheriff may perform any of the duties required of him. The powers and duties of the sheriff in relation to the business of the circuit court, so far as the same are applicable and not modified by statute, devolve upon the constable in relation to the justice's court.

SEC. 3633. [**Justice his own clerk.**]—The justice may be regarded as his own clerk and perform the duty of both judge and clerk.

SEC. 3634. [**Successor to renew execution.**]—When the term of office of a justice of the peace for any cause expires, his successor may issue execution, or renew execution, in the same manner and under the same circumstances as the former justice might have done if his term of office had not expired.

An execution which showed that the judgment upon which it was issued was "recovered before G. S. M.," without stating that he was a justice of the peace, was not absolutely void in the hands of the constable, so as to enable him to protect himself from liability on his bond for improper or negligent treatment of property levied upon by virtue thereof. *Dean v. Goddard*, 13 Iowa, 292.

It is the duty of a justice of the peace, upon the expiration of his term of office, to deposit with his successor his official docket and papers, to be kept as public records. His successor is then invested with power to issue executions on unsatisfied judgments on such docket, thus coming into his hands, in the same manner and with like effect as the justice rendering the judgment could do. *Id.*, 295.

SEC. 3635. [**Board of supervisors furnish docket.**]—The board of supervisors of each county shall furnish to each justice of the peace of such county, a well bound blank record book of not less than four quires, with index, suitable for a docket, upon the certificate of such justice that the same is necessary for the business of the office.

TITLE XXII.

OF EVIDENCE.

CHAPTER 1.

OF GENERAL PRINCIPLES OF EVIDENCE.

SECTION 3636. (As amended by ch. 168, 17th g. a.) [Who competent.]—Every human being with sufficient capacity to understand the obligation of an oath is a competent witness in all cases, both civil and criminal, except as herein otherwise declared. [Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state, and should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial, refer to the fact that the defendant did not testify in his own behalf; and should he do so, such attorney or attorneys shall be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial.

Where two or more defendants are jointly indicted and tried, each may call upon and use his co-defendant as a witness, the same as though separate trials had been granted. *The State v. Gisher*, 23 Iowa, 318.

Where the prosecuting attorney, on the trial of a criminal cause, refers to the fact that the defendant did not testify in his own behalf, the defendant is entitled to a new trial, under this section, as a matter of law, regardless of whether the remark is addressed to the court or to the jury, or whether the defendant is prejudiced thereby or not. *The State v. Ryan*, 70 Id., 154.

The plaintiff in an action of slander is a competent witness, and the jury may, if they believe her testimony, and it proves the words charged, find a verdict upon her testimony alone. *Hess et ux. v. Fockler et ux.*, 25 Id., 9, 11.

In a criminal prosecution the wife of an accomplice may testify, and the weight of her testimony is for the jury. *The State v. Moore*, 25 Id., 128.

The feeling or interest manifested by a witness should be considered by the jury as affecting his credibility, and for no other purpose. *Holloway v. Griffith*, 32 Id., 409.

The general rule of the statute which makes parties of record competent and compellable to testify, will not compel a party who is a witness for himself to disclose on cross-examination communications made by him to his attorney in regard to the case. *Barker v. Kuhn*, 38 Id., 392.

A person indicted for a criminal offense was held not a competent witness in his own behalf prior to the taking effect of chapter 168, laws of 1878, amending section 3636 of the code. *The State v. Laffer*, 38 Id., 422.

When one of two defendants testifies on behalf of the other, he is liable to impeachment as a witness, under the same conditions as he would be if he were not himself on trial. *The State v. Hardin*, 46 Id., 623.

Where a motion was made for a new trial on the ground that the attorney for the state referred to the fact that the defendant did not testify in his own behalf, and there was a controversy as to the exact language used by the attorney, it was held that as it would be presumed that the district court heard what was said, it would also be presumed that that court was justified in overruling defendant's motion for a new trial based on the alleged misconduct of the attorney in that regard. *State v. Black*, 59 Id., 390.

No presumption arises against a defendant in a criminal case on account of his failure to call an alleged accomplice as a witness in his behalf. *The State v. Cousins*, 58 Id., 250.

Prior to the amendment of this section by chapter 168 of the acts of the seventeenth general

assembly, it was *held*, that a defendant indicted for a criminal offense was not a competent witness in his own behalf. *The State v. Laffer*, 33 Id., 422; *The State v. Bixby*, 39 Id., 465.

Since the taking effect of that chapter defendants in criminal cases may be witnesses in their own behalf, and when they thus testify they are subject to the same rules regulating cross-examination and impeachment as other witnesses. *The State v. Red*, 53 Id., 69. See, also, *The State v. Hudson*, 50 Id., 157, 161; *The State v. Moelchen*, 53 Id., 310, 316.

SEC. 3637. [Credibility.]—Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility.

The common rule that one defendant in an indictment cannot be called as a witness for his co-defendant on a separate trial, unless acquitted, or convicted and not rendered infamous, was held to be abrogated by this section as it stood in the code of 1851, in connection with section 4 of article 1 of the new constitution. *The State v. Nash*, 10 Iowa, 81.

A surety in a replevin bond is a competent witness for the plaintiff in the action. *Cook v. Lyon*, Id., 433.

Under the common law, persons insensible to the obligation of an oath from defect of religious sentiment and belief were incompetent to testify as witnesses. This fact under this section of the statute no longer excludes such person as a witness, but may still be shown to affect his credibility. *The State v. Elliott*, 45 Id., 486.

The fact that a person, whose dying declarations offered in evidence, was a materialist is admissible in evidence for the purpose of affecting the credibility and weight of such dying declarations. *Id.*

An instruction to the effect that in a criminal trial where the defendant has been a witness in his own behalf, the fact that such witness was a party to the action was proper to be considered by the jury as affecting his credibility, *held*, to be proper. *The State v. Moelchen*, 53 Id., 310, 316.

The religious belief of a witness may be shown for the purpose of affecting his credibility. An inquiry of this character is not prohibited by section 4 of article 1 of the constitution. But the want of such religious belief cannot be shown by the examination of the witness himself on the stand, but must be shown, if at all, by his previous declarations voluntarily made. He cannot be required to divulge his religious opinions. *Searcy v. Miller*, 57 Id., 613.

SEC. 3638. [Interest.]—No person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in this chapter.

It was held under the revision of 1860, that a party to an action was incompetent to testify as a witness where the adverse party was an administrator, but that the administrator was competent in such cases. *Romans v. Hays, Adm'r*, 12 Iowa, 370; *Bradley v. Kavanaugh*, Id., 273; *Terhune v. Henry*, 13 Id., 99; *Hosmer v. Burk*, 26 Id., 353; *Quick v. Brooks*, 29 Id., 484; *Schmid v. Kreisner*, 31 Id., 479; *Wendeling v. Besser*, Id., 243.

SEC. 3639. [Same: when one party is deceased.]—No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane or lunatic; against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator heir-at-law, next of kin, assignee, legatee, devisee, survivor or guardian, shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence.

The administrator of a deceased person was not, by section 3982 of the revision, rendered incompetent as a witness in an action to recover from another the possession of the property of the intestate. *Bradley v. Kavanaugh*, 12 Iowa, 273.

The plaintiff in an action of replevin against a sheriff to recover the possession of property taken under attachment, was not, under section 3982 of the revision, rendered incompetent as a witness, by the death of the plaintiff in the attachment suit in which the sheriff seized the property replevined. *Beran v. Hayden*, 13 Id., 122.

It was also held, under the same section, the plaintiff in an action against an administrator, was not excluded from proving, by his own oath, the loss of a writang, which was the basis of the action, when the facts transpired before the death of the intestate. The prohibition was held to apply

only when the party offered himself as a witness to prove facts, the knowledge of which is not, from their nature, confined to himself. *Nash v. Gibson*, 16 Id., 305; *Keech v. Cowles*, 34 Id., 259.

It was held under this section that in an action by the administrator of the trustee against another concerning the matter of the trust, when the real party was living, the defendant was a competent witness to prove facts transpiring before the death of the trustee. This section was held, applicable, only to cases in which the real party in interest is dead. *Watson v. Russell*, 18 Id., 79.

A person summoned and examined under sections 2366 and 2367 of the revision (code, sections 2379 and 2380), as one suspected of having taken wrongful possession of property of a deceased person, was held not a witness within the meaning of section 3982 of the revision. *Smyth v. Smyth*, 24 Id., 491.

In a proceeding to enforce a claim against an estate the administrator is a competent witness on behalf of the estate to prove that a settlement of the claim was made between the claimant and the decedent prior to his death. *Stiles v. Estate of Bodkin*, 30 Id., 60.

It was further held under section 3982 that in an action against an administrator, the wife of the plaintiff was not disqualified from being a witness for her husband, and that she was competent to give evidence against the estate. *Wendeling v. Besser*, 31 Id., 248.

So in an action by a surviving partner for an injury to property of the firm, the opposite party was held not rendered incompetent under that section. *Brown v. Allen*, 35 Id., 306.

The husband and wife, in civil actions, are not competent witnesses against each other, but objections to their competency should be made when they are sworn, or when it is proposed to examine them, and, if not then made, will be deemed to have been waived. *Watson v. Riskamire*, 45 Id., 231.

In a contest between creditors as to priority respecting the funds in the hands of the administrator of one of the debtors, who was made a party defendant to the proceeding, such administrator was held not "the adverse party," within the meaning of section 3982 of the revision; and one of such contesting creditors who intervened in such contest was held a competent witness as to matters that transpired before death of the decedent. *Gordon v. Kennedy*, 36 Id., 167.

A book of account, when admitted, assumes the character of written testimony which cannot be changed by parol. It was accordingly held, whereon the debit side of the account there was entries as follows: "By cash in money," "To cash in money," that the evidence of the person offering the books was not, where the adverse party was an executor, competent to show that the word "by," thus occurring in the entries, was used by him in the sense of "to." *Cummins v. Hull's Adm'r*, 35 Id., 253.

In an action against an administrator on a promissory note by an assignee thereof, the payee is a competent witness for the plaintiff. *Burroughs v. McLain*, 37 Id., 189.

In an action to compel a conveyance of land under a parol contract with a person since deceased, whose administrator had been made a party, and who was a proper, though not necessary party, the depositions of the plaintiff and his wife to prove the contract were held to have been properly admitted in evidence. *Campbell v. Mayes*, 38 Id., 9.

A party was held not disqualified under section 3982 of the revision, in an action to which an administrator was a party, when his testimony related to no personal transactions or communications between him and the deceased. *Sypher v. Savery*, 39 Id., 258.

The interest which will disqualify a witness when an administrator is a party, under section 3639 of the code, is such an interest as would disqualify him at common law. Where his interest is equally balanced on both sides, he is competent. *Goddard v. Leffingwell*, 40 Id., 249.

In an action against an administrator *de bonis non*, a witness may testify to transactions and communications with the former administrator. Such evidence is not excluded under section 3639 of the code. *Dunne v. Deery*, Id., 251.

In an action to foreclose a mortgage by an assignee from a decedent, the heir is not disqualified by this section of the code from testifying respecting a transaction between the defendant and the deceased. *Swezey v. Collins et ux.*, Id., 540.

Under this section of the code it is not competent for the plaintiff in an action against the administrator, to testify respecting personal transactions between himself and the deceased, for the purpose of rebutting the testimony of the widow of the decedent. *Canaday v. Johnson*, Id., 587.

In an action on a promissory note by the executors of the assignee thereof, in which action the defendant averred that the alleged assignee was really the agent only of the payee, and that he had made payment to the agent, it was held, that the court might, in a trial without a jury exclude the testimony of the defendant in support of this averment. *Williams v. Brown*, 45 Id., 102.

One of the proponents of a will cannot be permitted to testify respecting conversations with the testator, even though his testimony be offered, not in his own behalf, but for the other proponents. *Sisters of Visitation v. Glass et al.*, Id., 154.

In an action against an administrator for services rendered to the decedent, the plaintiff cannot

be permitted to testify in his own behalf to facts which would raise an implied contract to pay for the services. *Smith v. Johnson*, Id., 308.

In an action on a promissory note against an administrator, alleged to have been given for work and labor performed by plaintiff's wife, the testimony of the wife was held to be incompetent to show the amount of labor performed. *Ashworth v. Grubbs*, 47 Id., 353.

In an action by a wife upon a promissory note, which had been executed to her as payee by the procurement of her husband, since deceased, the testimony of the defendant as to what occurred between him and the deceased at the time of the execution of the note is incompetent. *Willcox v. Jackson*, 51 Id., 258.

As to the competency of the widow to testify in her own behalf, in an action between herself and one of her children by her deceased husband, in which she seeks to set aside for fraud a conveyance of land made by the deceased in his lifetime to such child, see *Hatcher et al. v. Day et al.*, 53 Id., 671.

This section is limited in its application to testimony of transactions between a person who at the time of the examination is dead, or insane, and the witness, and does not exclude testimony as to contracts made by the person deceased with another, although the husband or wife of the witness. *Lines v. Lines et al.*, 54 Id., 600; *Johnson v. Johnson*, 52 Id., 589; *Williams v. Barrett et al.*, Id., 637.

In an action by a corporation against an executor, the testimony of a stockholder of the plaintiff, as to statements and agreements made by the defendant's testator, are not admissible under this section. *The First National Bank of Burlington v. Owen et al.*, 52 Id., 187.

In an action on a promissory note by the executor of the assignee of the note, where the defendants averred that the alleged assignee was really but the agent of the payee, and that he had made payment to the agent, it was held, that the court might, in a trial without a jury, exclude the testimony of the defendant in support of his averment. *Williams v. Brown*, 45 Id., 102.

In an action against an administrator to recover upon an implied contract for services rendered the deceased, the plaintiff is not competent to testify to the facts which would raise an implied promise. *Peck v. McKean*, Id., 13; *Smith v. Johnson*, Id., 308.

The interest which will disqualify a witness in an action to which an administrator is a party must be present, certain and vested, and not uncertain, remote, contingent or doubtful. *Wormley v. Hamburg*, 40 Id., 22; *Zerlie v. Reigart et al.*, 45 Id., 229.

In an action by a person against the heirs of his deceased wife to set aside a conveyance made to her, upon the ground that it was a trust to himself, he is not a competent witness to the agreement under which the conveyance was made. *Wood v. Brollier et al.* 40 Id., 591.

Where pending an action the defendant died, and his administrator was substituted, it was held that the deposition of the plaintiff, which was taken in the action prior to the death of the defendant, was not admissible in behalf of the plaintiff, under section 3982 of the Revision. *Quick v. Brooks*, 29 Id., 484.

Declarations of a party, who afterwards became a legatee in a will, made before the execution of the will, are not admissible to affect the validity of the will. Nor are declarations of a legatee made after the execution of the will admissible to show undue influence in its execution. Nor the declarations of an executor who is a legatee and party to the record admissible, where other legatees may be adversely affected by his declaration. In *Matter of Will of Mary Ames*, 51 Id., 596.

Under this section, where one of the parties is dead, the other may give testimony as to all matters, except upon personal transactions between the two. *Haverly v. Alcott*, 57 Id., 171; *Miller v. Dayton*, Id., 423.

A widow, in an action to set aside a deed made by her husband to the defendant, is not competent to testify to a personal communication between herself and her husband, affecting the merits of the action. *Palmer v. Palmer et al.*, 62 Id., 204.

Where the ground of a motion to suppress a deposition is the incompetency of the testimony under this section, it is not necessary that the motion be filed by the morning of the second day of the first term, under section 3751. *Burton v. Baldwin et al.*, 61 Id., 283.

In an action between the heirs of a deceased person, testimony of the defendants relating to personal transactions between them and the deceased is not admissible under this section which excludes such testimony in all actions against the heirs of the deceased. *Neas et al. v. Neas et al.*, Id., 641.

In a proceeding for the probate of a will, where the issue was as to whether testamentary capacity had been impaired or destroyed by sickness, a non-expert who was well acquainted with the testator, both in sickness and health, and who had the care of him in sickness, was allowed, though a party to the proceeding, to testify that he saw no difference between his mental condition in sickness and his mental condition in health. *Severin v. Zache et al.*, 55 Id., 28.

In an action by an administrator against several defendants, upon a note executed by them to the intestate, one of the defendants withdrew his answer upon a stipulation that the plaintiff was to have the right to take judgment against him for a certain amount, being less than the amount of the note and less than the face of the note, it was held that he was no longer a party to the

action, and that his testimony was properly admissible. *Conger Adm's v. Bean et al.*, 58 Id., 321.

Where the testimony of an administrator in an action by him in behalf of the estate is of a negative character, as that a certain transaction did not occur to his knowledge, it will not authorize the other party, under this section, to give testimony showing there had been such a transaction between her and the deceased. *In re Estate of Edwards*, Id., 431.

This section does not prohibit a witness, introduced by an executor himself, from testifying in favor of the executor as to a personal transaction between the witness and the decedent, even though the witness may be personally interested in the event of the suit. *Leasman v. Nicholson Ex'r*, 59 Id., 259.

In an action against an administrator for services rendered the intestate, where the services and their value are admitted, and payment was not set up as a defense, it was not necessary for the plaintiff to prove that he had not been paid; but, had the question of payment been in issue the plaintiff's testimony would not have been admissible under this section. *Van Sandt v. Cramer*, 60 Id., 424.

So also in an action by an administrator to recover property of the estate, an heir of the decedent has an interest (unless the estate is insolvent, which will not be presumed,) and cannot therefore testify against the administrator as to personal communications between himself and the deceased. But the prohibition of this section does not extend to a transaction as to which the administrator has been examined in his own behalf. *Ives v. Ives*, Id., 721.

In an action by the administratrix of an estate against children of the decedent to recover notes and mortgages in their possession which formerly belonged to him, and which the plaintiff claimed as assets of the estate, the burden of proof was held to be on the children to establish the making and delivery of the obligations in controversy, and that the children themselves were incompetent to testify, as against the administratrix as to an agreement with the decedent concerning their delivery of the undertakings made by the children to him for the notes and mortgages, and also that the husband of one of the children, who was alleged to have joined with his wife in executing one of the undertakings made in consideration of the transfer by the decedent of the notes and mortgages to the children, was incompetent to testify to the agreement, under section 3639 of the code. *Sampson v. Sampson*, 67 Id., 256.

In proceeding to prove a will, the husband of the devisee of real property is not incompetent to testify as a subscribing witness, on the ground of being the husband of an interested party and that his testimony will relate to personal transactions between himself and the testator: for it is not necessary, under the laws of this state that there should be any personal transaction between the testator and the subscribing witnesses. *Bates et al. v. Officer*, 70 Id., 343.

In an action by an administrator, the defendant cannot testify in his own behalf as to personal transactions between himself and the deceased, even though it appear that the transaction occurred in the presence of a third party. *Donnell, Adm'r, v. Braden et al.*, 70 Id., 551.

The execution of a promissory note is a "personal transaction" between the persons executing it and the payee, and the wife of a joint maker is incompetent under this section to testify in an action on the note by the administrator of the payee, that her husband signed it only as surety. *Auchambauch, Adm'r, v. Schmitt*, 34 N. W. R., 460.

This section of the code does not prohibit one of the devisees in a will from testifying to a personal transaction between another legatee and the testator in a contested proceeding to probate the will; but a witness whose testimony discloses his interest in the controversy is not competent, under this section, to testify to a personal transaction between himself and the testator. *Smith et al. v. James et al.*, 72 Id., 515.

In an action by an administrator against one of the joint makers of a promissory note given to the intestate in his life time, the wife of the defendant was incompetent as a witness on behalf of the defendant to prove that he signed the note as surety only; the execution of the note being a personal transaction between the defendant and the decedent. *Auchambaugh, Adm'r, v. Schmidt*, 72 Id., 656.

In an action involving the validity of a will, the daughter of the testator, being one of the contestants of the will, is not, under this section of the code, a competent witness to prove conversations had with the testator. *Blake et al. v. Rourke et al.*, 38 N. W. Rep., 392.

SEC. 3640. [Depositions taken conditionally.]—Any person may have his own deposition, or that of any other person, read and used as evidence in all cases where his evidence would be incompetent by the provisions of the preceding section, by causing such depositions to be taken either before or after suit brought during the lifetime or sanity of the person against whom his executor, heir, or other representative, the same is to be used; *provided*, such deposition shall have been taken and filed ten days prior to the death or insanity of such person. If after suit brought, such deposition may be taken in the usual manner; if before, then the same may be taken *de benne esse*, as provided by law.

SEC. 3641. (*As repealed and substituted by ch. 33, 15th g. a.*) [**Husband and wife as witnesses.**]—(Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other; or in a civil action or proceeding one against the other, but they may in all civil and criminal cases be witnesses for each other.)

The wife of a defendant testified against him before the grand jury which returned an indictment against him, *held* that objection could not be made thereto after conviction. *The State v. Houston*, 50 Iowa, 512.

The wife is a competent witness in behalf of the husband in a criminal case, and her credibility is to be tested by the same rules which apply to all other witnesses, and it is error for the court to instruct the jury that her testimony should be examined with peculiar care. *The State v. Bernard*, 45 Id., 234; *The State v. Collins*, 20 Id., 85.

On the trial of an indictment for adultery the husband or the wife is a competent witness against the defendant. *The State v. Bennett*, 31 Id., 24; *The State v. Hazen*, 39 Id., 648.

In an action against husband and wife as joint defendants, but in respect to which action the wife is interested in her own right, though her interests and those of her husband are in a measure connected, the wife may be called by the plaintiff as against her own personal interest, against the objection of her husband. *Richards v. Burden*, 31 Id., 305.

Upon trial of an indictment for bigamy the legal husband or the wife of the defendant is a competent witness in behalf of the prosecution. *The State v. Sloan*, 55 Id., 217.

Where the wife is admitted to testify in behalf of her husband, her testimony is to be received, and her credibility tested, by the same rules which apply to all other witnesses. *The State v. Guyer*, 6 Id., 263.

This section of the code does not prohibit a widow from testifying for the plaintiff in an action upon account against her husband's executor. The prohibition of this section applies only to actions brought against the husband or wife personally. *Parcell v. McKeynolds et. al., Ex'rs*, 71 Id., 623.

The wife of one indicted for the same offense as that for which defendant was alone on trial was a competent witness against defendant, where no communication between her and her husband was sought to be elicited. This section does not exclude her evidence in such case. *The State v. Ramsbarger*, 71 Id., 746.

It was held under section 3983 of the revision that the wife was not a competent witness in a civil action for the husband. *Karney v. Paisley*, 13 Id., 89.

But in *Russ v. The Steamboat War Eagle*, 14 Id., 363, it was held that the wife might under section 3986, be made competent to testify for her husband when he waived the prohibition contained in the statute. To the same effect is *Blake v. Graves*, 18 Id., 312.

It was also held under sections 3983 and 3984 of the revision, that in an action by a vendor of real estate against the heirs of the vendee to enforce a vendor's lien, the widow of the deceased vendee was a competent witness to show a conversation between the plaintiff and her husband, in relation to the subject matter of the action. *Pratt v. Delavan*, 17 Id., 307.

A party could not, under the revision, call as a witness the husband or wife (as the case might be) of the adverse party against the objection of such party. *Stanley v. Morse*, 26 Id., 454.

In a prosecution against the wife and her paramour for adultery, the husband is a competent witness for the state and is not disqualified from testifying against her. *The State v. Bennett*, 31 Id., 24.

Where the husband and wife were indicted for keeping a house where intoxicating liquors were unlawfully sold, and were tried together, it was *held*, that the wife was a competent witness for her husband, with the restriction that her testimony should not be considered in her own behalf. *The State v. Donovan*, 41 Id., 587.

Under section 3641 of the code, as amended by chapter 33 of the acts of the fifteenth general assembly, husband and wife are not competent witnesses against each other in a civil action, but objections to their competency should be made when they are sworn, or when it is proposed to examine them, and, if not then made, will be deemed to have been waived. *Watson v. Riskamire*, 45 Id., 231.

SEC. 3642. **Neither husband nor wife** can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.

This section is identical with section 3984 of the revision, and section 2392 of the code of 1851—ED.

This section relates only to the communications made by the husband and wife to each other during the marriage. It does not render the wife incompetent after the death of the husband to testify as to matters which she knew of her own knowledge. *Romans v. Hay's Adm'r*, 12 Iowa, 270.

SEC. 3643. [**Professional confidence.**—No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases, where the party in whose favor the same are made waives the rights conferred.

Communications relating to the subject matter of an action, made by one of the parties thereto, to a person whom he supposed to be an attorney at law, and with a view to engage him as such in said suit, when such person was not an attorney of any court, but was receiving business as one, and was expecting to be, and was admitted to practice at the next term of the district court, were held not privileged under section 2393 of the code of 1851. *Sample v. Frost*, 10 Iowa, 266.

Communications made to an attorney in the course of a professional consultation, which do not relate to the subject matter of the consultation, are not privileged. *The State v. Mewherter*, 46 Id., 88. See, also, *Pierson v. Steertz*, Morris, 136.

Where a physician, sworn as a witness, in an action for breach of promise of marriage, was asked if the plaintiff had consulted him in respect to "getting rid of a child with which she was pregnant at the time," it was held, that since there was no showing of an unlawful purpose, such communication was privileged under this section. *Guptill v. Verback*, 58 Iowa, 98.

If a client chooses to make a statement to his attorney in the presence of persons not employed in the business of the attorney, such persons are competent witnesses to prove the statement. *The State v. Sterrett*, 68 Id., 76.

Where one injured upon a railway was attended by the company's surgeon, a communication made by him to the surgeon in response to a question asked for the purpose of ascertaining the facts in order properly to treat him, was a privileged communication, within the meaning of this section of the code. *Raymond v. The B., C. R. & N. R'y Co.*, 65 Id., 152.

SEC. 3644. [**Public officers.**—A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

SEC. 3645. [**Judge competent.**—The judge of the court is a competent witness for either party, and may be sworn upon the trial. But in such case it is in his discretion to order the trial to be postponed or suspended and to take place before another judge.

SEC. 3646. [**Civil liability.**—No witness is excused from answering a question upon the mere ground that he would be thereby subjected to a civil liability.

SEC. 3647. [**Criminal.**—But when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, he is not compelled to answer except as provided in the next section.

The plaintiff in an action for seduction may, as a witness, refuse to answer whether she had previously had intercourse with other men, on the ground that the matter sought to be elicited tends to expose her to public ignominy. *Brown v. Kingsley*, 33 Iowa, 220.

The agent of an express company and of a railway company is not excused by section 3647 of the code, from obeying a subpoena of the grand jury, requiring him to produce certain books of the corporation, for the purpose of showing thereby that the corporations have been guilty of transporting intoxicating liquors contrary to law, on the ground that the books would criminate his employers; and for refusing to obey, the witness may be adjudged guilty of contempt. *The U. S. Express Co. v. Henderson*, Judge, 65 Id., 40.

When one of two defendants testifies in a criminal prosecution in behalf of the other, he is liable to impeachment as a witness under the same conditions as he would be if he were not himself on trial. *The State v. Hardin et al.*, 46 Id., 623.

SEC. 3648. [**Provisions: conviction.**—A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof.

Under section 3648 of the code providing that "a witness may be interrogated as to his previous conviction for a felony, etc., the question, "were you ever convicted of a crime," is improper; a crime is not necessarily a felony. *Hanners v. McClelland*, 37, N. W. R., 389.

SEC. 3649. [**Moral character.**—The general moral character of a witness may be proved for the purpose of testing his credibility.

In this section allowing the "general moral character" of a witness to be proven for the purpose of affecting his credibility, the word "character" means reputation; and testimony which

does not relate to the reputation of the witness as to moral character but is intended to show his moral character as known to the witness, independent of reputation, is not admissible. *State v. Egan*, 59 Id., 636.

A witness who showed that he had known defendant for many years, ever since he was a small boy, was competent to testify as to his moral character as a test of his credibility as a witness. *The State v. Hart*, 67 Id., 142.

The general moral character of a witness—that is, his reputation for morality in the vicinity of his residence, may be shown as a test of his credibility; and it is error to exclude an inquiry of that kind. *The State v. Froelick*, 70 Id., 213.

Under sections 3748 and 3649 a witness cannot be asked the question “whether he has not been under arrest and indictment for assault and battery,” that offense not being a felony; and an indictment therefore would not necessarily impair the moral character of the witness. *Kitteringham v. Dance*, 58 Id., 632.

The general moral character of a witness cannot be affected by evidence of a want of chastity, and an inquiry as to the latter is not proper for this purpose. *Kilburn v. Mullen*, 22 Id., 493, 502.

The doubt cast upon the testimony of a witness by evidence of his bad character may be removed by corroborating evidence. *Snediker v. Poorbaugh*, 29 Id., 488.

Testimony is admissible to impeach a witness by showing that his mind and memory have become impaired by disease and are in an abnormal condition. *Alleman v. Stepp*, 52 Id., 626.

SEC. 3650. When part of an act, declaration, conversation, or writing, is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus when a letter is read, all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood or to explain the same, may also be given in evidence.

Where in an action on a promissory note, given in part payment for a reaper, in which the defendant claimed damages on the ground of a breach of warranty under which the reaper was sold, a witness for the defendant on cross-examination, testified that after the reaper was delivered, defendant told him he was going across the river to Rock Island, to get some castings for the reaper, and thereupon the defendant offered to prove by the witness, what he told him afterwards in another conversation, about the working of the reaper, with the castings thus obtained, which was admitted. *Held*, that the evidence was not admissible under this provision of the statute. *Williams v. Donaldson*, 8 Id., 108.

If a part of a conversation is given in evidence by one party, the opposite party may enquire into all of it which relates to the same subject, on the cross-examination of the witness by whom the conversation is proved. *Gaddes v. Lord et al.*, 10 Id., 141; *Wilhelmi v. Leonard*, 13 Id., 330; *Jones v. Hopkins*, 32 Id., 503; *Courtright v. Deeds*, 37 Id., 533, 314; *Baker v. Mygatt*, 14 Id., 131.

The rule that when a part of a conversation has been introduced, the other party may insist upon the whole of it relating to the same subject, does not apply where a party seeks to introduce his own statements in evidence for himself, because a portion of a conversation in which they were made, has been stated by his own witness, at his instance, without objection from the opposite party. *The State v. Elliott*, 15 Id., 72.

The other act or declaration of a party, contemplated in this section, to be admissible in evidence, must be something which is necessary to make the previous or subsequent detached act or declaration fully understood, or to explain it. *Dougherty v. Posegate*, 3 Iowa, 88.

It is not all that a party may have said at other times, with regard to the subject of the suit, or matter in controversy, that is admissible in evidence under this section of the code. *Id.*

It is not a sufficient objection to the introduction of a letter in evidence, that the letter to which it was a reply, and which was in the possession of the opposite party, was not called for and put in evidence, when the introduction of such letter is not necessary to an understanding of the contents of the one offered. *Brayley v. Ross*, 33 Id., 505.

Where a letter written defendant is introduced in evidence, his reply thereto is admissible under this section. *The B. C. R. & N. Ry Co. v. Sherwood*, 62 Id., 309.

A party seeking to have the benefit of an admission or declaration of another, must take the whole admission or declaration together, and will not be allowed to select what makes in his favor and exclude that which makes against him. *Veiths v. Hagge*, 8 Id., 163.

So where a party against whom entries are made in books of account, or against whom an account is rendered, seeks to avail himself of credits entered therein in his favor, he will not be allowed to do so without, at the same time, making the whole account evidence against himself. *Id.*

The defendant having testified that at a certain time and place he informed the holder of the notes sued on in the action, that he had never seen them before, it was held competent to prove what such party said at the time, it being a part of the same conversation. *Hess v. Wilcox et al.*, 58 Id., 380.

Where a letter written to defendant is introduced in evidence, his reply thereto is admissible under this section. *The B. C. R. & N. R'y Co. v. Sherwood*, 62 Id., 309.

SEC. 3651. [**Writing and printing.**—When an instrument consists partly of written and partly of printed form, the former controls the latter when the two are inconsistent.

When the granting clause in a deed is in writing, and the general covenants are printed, the former will govern when the two are inconsistent. *McNear v. McComber*, 18 Iowa, 12, 17.

SEC. 3652. [**Understanding of Parties.**—When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.

Evidence tending to show how plaintiff understood the contract prior to its consummation, but not shown to have been communicated to the defendant, and which would not throw any light upon the real contract between the parties, was properly excluded. *Garretson v. Bitzer*, 57 Iowa, 469.

SEC. 3653. [**Historical and works of science.**—Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest.

A map of a city purporting to be a correct plat thereof, made by United States Commissioners, who, under an act of congress, laid off and platted the city, is not admissible in evidence in an action of right, when it appears that the map offered is but a copy, and it is not shown that it is a true copy. *Pfotzer v. Mulloney*, 30 Iowa, 197.

This section of the statute making books of science and art admissible as evidence, does not render inadmissible any other respecting matters to which they relate, which was before admissible. Hence, medical or surgical authorities are not the best or only evidence as to whether there is any difference among them as to the mode of treatment or proper course to be pursued, but the same may be shown by the testimony of physicians or surgeons. *Brodhead v. Wiltse*, 35 Id., 429.

Such witnesses are also competent to testify who are standard authors, and the treatment they prescribe. *Id.*

The county auditor's plat book is not competent evidence to aid a defective description in a deed, it not being a published map or chart within the meaning of this section of the code. *Heinrichs v. Terrill*, 65 Id., 25.

Under this section a city map purporting to be made by the city engineer, proven to be recognized and used in the city as substantially correct, is admissible in evidence, without further proof, in an action against a railway company for injuries caused by a collision at a street crossing in the city. *Nosler v. The Chicago, B. & Q. R'y Co.*, 34 N. W. R., 850.

SEC. 3654. [**Subscribing witness.**—When a subscribing witness denies or does not recollect the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence.

SEC. 3655. [**Handwriting.**—Evidence respecting handwriting may be given by comparison made by experts, or by the jury, with writings of the same person which are proved to be genuine.

Handwriting may be proved by comparison made by experts, or by the jury, with the writing of the same person which is proved to be genuine. *Baker v. Mygatt*, 14 Iowa, 131; *Hyde v. Woolfolk et al.*, 1 Id., 159; *Lay v. Wissman*, 36 Id., 305.

Where it is sought to prove handwriting by comparison, the *standard writing* must be proved to be genuine by the testimony of a witness who saw the party write it, or by the party's admission or the like, and the certificate of an acknowledgement of a deed is not competent to establish the genuineness of the signature of the grantor thereto as a standard. *Hyde v. Woolfolk et al.*, 1 Id., 159.

On the trial of an equitable action on appeal in the supreme court, the court may compare the signature to a writing in controversy with writing of the same person which is proved to be genuine, as evidence of handwriting. *Morris v. Sargent et al.*, 18 Id., 90.

The determination by the court below of the question of the genuineness of a signature upon the evidence of experts, by comparison of handwriting, is entitled on appeal, to the same consideration as the verdict of a jury. *Lay v. Wissman*, 36 Id., 305.

While the evidence of experts to establish the genuineness of handwriting is competent under the statute, it is evidence of the lowest order and most unsatisfactory character. *Whitaker v. Parker*, 42 Id., 585.

In order to render a witness competent as an expert to testify of handwriting by comparison, it

is not necessary that he should possess the highest skill or information on the subject, or that he should testify that he is an expert, for the inquiry does not require a witness of a particular calling as an expert, but his admissibility depends on his means of knowledge as a business man and his intelligence. *Hyde v. Woolfolk et al.*, 1 Id., 159.

It is error to permit persons not shown to be experts to testify respecting the authorship of handwriting by comparison. *Mixer v. Bennett et al.*, 70 Id., 329.

The name of defendant written by him in a hotel register in 1883 is competent evidence in a prosecution for forging a promissory note which he sold in 1884, to prove the forgery by comparison of handwriting. *State v. Calkins*, 34 N. W. R., 777.

Upon an issue respecting the signature to a note, where letters of the alleged maker of the note were given in evidence, both to prove a written admission that the note was unpaid, and to show that the signature was the same as the signature of the note, it was held error for the court to instruct the jury that the letters could not be considered by them upon the question of what note was referred to therein. *Saunders v. Howard*, 51 Id., 517.

When the genuineness of a signature is in issue, it is competent for the person whose signature it purported to be, as well as of the adverse party, to introduce in evidence other writings and signatures of his, proved or admitted to be genuine, for comparison with the one in dispute; and the fact that a signature so offered was made after the commencement of the action will not render it incompetent, but may be considered by the jury as affecting its weight. *The Singer Mfg. Co. v. McFarland*, 53 Id., 540.

SEC. 3656. [Private writing.]—Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without farther proof.

SEC. 3657. [Entries by deceased persons.]—The entries and other writings of a person deceased, made at or near the time of the transaction and in a position to know the facts therein stated, are presumptive evidence of such facts when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct, or when made in the performance of a duty specially enjoined by law.

Entries made by a party who is dead, in respect to his own business transactions, in a book kept for that purpose, are admissible in evidence as to such transactions, when clearly against the interest of the party making such entries. *The State v. Woodard*, 20 Iowa, 541.

The jury, however, should be told that while this evidence is competent, the right of cross-examination does not exist, that it is not highly favored by the law, and that they should give it such weight as, under all the circumstances, they deem it entitled to. *Id.*

BOOKS OF ACCOUNT.

SEC. 3658. [When and how admitted in evidence.]—Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility:

1. The books must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books;

2. It must be shown by the party's oath or otherwise that they are his books of original entries;

3. It must be shown in like manner that the charges were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof;

4. The charges must also be verified by the party or clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why such verification is not made.

Where on the trial, the plaintiff produced a small book, containing the account on which the suit was brought, in which were charges against the defendants and other persons, which among other things charged the defendants with a certain quantity of stone; and the plaintiff testified that the charges in the book against the defendant, were not made at or near the time of the transaction, for the reason that he was not present when the defendants were getting the stone,

that the defendants told him, after they had finished getting the stone, the amount, which he then entered as appeared in said book, that this was his book of original entries, and that the charges therein made were true; it was held: 1. That the book, so far as it related to the stone, was properly admitted in evidence; 2. That as to the other items of the account, the book should have been rejected; 3. That the showing of the plaintiff brought the book within the reason and spirit of the statute. *Anderson v. Ames & Co.*, 6 Iowa, 486.

Prior to the statute making parties competent witnesses in their own behalf, the plaintiff, in an action on an account was competent to show the preliminary matters required by law in order to introduce his books of account in evidence. *Hastings & Co. v. Devoran*, 7 Id., 319.

Whenever the law provides for the admission of books of account in evidence, it is based upon the idea of the presence of the books themselves on the trial, and in their absence evidence of their contents cannot be substituted. *Churchill et al. v. Fulliam*, 8 Id., 45.

The book itself, when admitted, becomes the witness, and is still subject to any objections which may be made by the opposite party respecting its credibility, arising from the manner in which it has been kept—its appearance, erasures, alterations, confusion and irregularity, and whatever may tend to diminish its credibility in the minds of the jury. *Id.*

To render books of account admissible in evidence, the necessary preliminary facts must be shown by the oath of the person who made the entries, unless his absence, or the absence of his testimony is satisfactorily accounted for. *Karr v. Stivers*, 34 Id., 123.

It must appear that the charges sought to be proved were made in the ordinary course of the party's business. *Id.* See, also, *Veiths v. Hagge*, 8 Id., 163; *Young v. Jones*, Id., 219; *Lord v. Ellis*, 9 Id., 301; *Snell et al. v. Eckerson*, 8 Id., 284; *Sloan v. Ault*, Id., 229; *Cummins v. Hull's Admr's*, 35 Id., 253.

It must be shown that the entries in the book were made at or about the time when the transactions therein entered occurred, or a satisfactory reason must be shown why they were not so entered. *Anderson v. Ames & Co.*, 6 Id., 487.

An item of charge in a book of account "for four months' work," cannot be established by the book specifying dates between which the work was performed. *Karr v. Stivers*, 34 Id., 123.

Books of account are not admissible for the purpose of proving cash items, as "for money loaned" or "money paid," unless it be shown that the person offering the books is engaged in a business to justify such charges, as that of banking or receiving money on deposit and paying it out. *Cummins v. Hull's Admr's*, 35 Id., 253; *Veiths v. Hagge*, 8 Id., 163; *Young v. Jones*, Id., 220; *Sloan v. Ault*, Id., 229.

Whether a book of account is admissible in evidence or not, is a question for the court upon the preliminary proof offered under this section of the code; the degree of credit to be given to it after it is admitted, is a question for the jury under the instructions of the court. *Eyre v. Cook*, 9 Id., 185.

Where a party against whom entries are made in books of accounts, or against whom an account is rendered, relies upon or seeks to avail himself of credits entered in his favor, he will not be allowed to do so without at the same time making the whole account evidence against him. *Veiths v. Hagge*, 8 Id., 163.

Books of account cannot be proved by depositions, by proving their character and contents, with copies of the accounts annexed to the depositions, unless the books themselves are produced in court. *Churchill v. Fulliam et al.*, 8 Id., 45.

A book which was called a book of original entries, but which was taken up with memoranda of purchases of hogs, with the computation of their weights, prices, and amounts paid thereon, was held inadmissible as a book of original entries. *Whisler v. Drake*, 35 Id., 103; *Hart v. Livingston*, 29 Id., 217.

Entries in the books of a trustee of subscribers to a loan of money received by him from subscribers and paid over by him to the borrower, are inadmissible as evidence in an action by a subscriber to the loan against such borrower. *Sypher v. Savery*, 39 Id., 258.

(CHAPTER 36, LAWS OF 1876.)

EVIDENCE IN ACTIONS ON ACCOUNT.

An Act in relation to evidence in actions upon accounts. [Additional to code, chapter 1, title XXII: "Of evidence."]

SECTION 1. [In action on open account.]—Be it enacted by the general assembly of the State of Iowa, That in all actions for money due upon an open account when the defendant has been personally served with the original notice therein and the petition is duly verified, and where a bill of particulars of said account is incorporated into or attached to the petition, if the defendant makes

default or fails to controvert or deny the same or any of the items thereof, by pleading duly verified, the account or so much thereof as is not so controverted or denied, shall be taken as true and admitted.

Approved, March 4, 1876.

INSTRUMENTS AFFECTING REAL PROPERTY.

Sec. 3659. [Evidence.]—Every instrument in writing affecting real estate, which is acknowledged or proved, and certified as hereinbefore directed, may be read in evidence without farther proof.

Where a sworn answer does not deny the execution of a deed, but avers that it was not executed for a valuable consideration, if it is properly acknowledged, proof of its genuineness and validity is not, under the statute, necessary to its admission in evidence. *Savery v. Browning*, 18 Iowa, 246.

As between the grantee and a creditor of the grantor, the date which a deed bears is *prima facie* evidence of the time of its execution, especially when it does not appear that the party was a creditor at the date of the deed. *Id.*

Secondary evidence of the contents of a deed cannot be given to prove title in an action of right, unless the deed be shown to be lost, or not belonging to, nor within the control of, the party wishing to use the same. *Williams v. Heath*, 22 Id., 519.

In the absence of evidence to the contrary, it will be presumed that a deed in the custody of the grantee was delivered by the grantor and accepted by the grantee at the date of its execution. *Wolverton v. Collins*, 34 Id., 238.

An acknowledgment of a deed by the grantor as his voluntary act is a sufficient execution, though the signature may have been affixed thereto by another. *Morris v. Sargent et al.*, 18 Id., 90.

Sec. 3660. [Record or certified copy.]—The record of such instrument, or a duly authenticated copy thereof, is competent evidence whenever by the party's own oath or otherwise the original is shown to be lost, or not belonging to the party wishing to use the same, nor within his control. And in such case no objection to the record that no official seal is appended to the recorded acknowledgment thereof, if, when the acknowledgment purports to have been taken by an officer having an official seal, there be a statement in the certificate of acknowledgment that the same if made under his hand and seal of office, and the records show by a scroll or otherwise that there was such a seal, which will be presumptive evidence that the official seal was attached to the original certificate.

The recording laws of this state have no application to patents issued for lands sold by the United States; and a copy of such a patent contained in the record books of a county, is not admissible in evidence under this section of the statute. *Curtis v. Hunting*, 6 Iowa, 536.

The single fact that a mortgage of lands is found upon the records of a county, raises no presumption of its delivery to, and acceptance by, the mortgagee, against the positive and unqualified denial of the mortgagee and those claiming under him, that he ever received the mortgage, or had any knowledge thereof. *Foley v. Howard*, 8 Id., 56.

An agent of a party to an action who had held possession of title deeds which are lost, is competent to make the necessary preliminary proof to admit secondary evidence of their contents. *Corbin v. Bebe*, 36 Id., 336.

The possession of a written instrument furnishes presumptive evidence of ownership in the person having such possession. *Courtright v. Deeds*, 37 Id., 503.

Where the original deed is not in the possession or under the control of the party wishing to use it, the record copy of the same is competent. It is not necessary to the competency of such copy that resort shall first have been had to legal process to procure the original. *McNichols v. Wilson*, 42 Id., 385.

Upon proof that a deed had been sent to another county and was there in possession of the court, the record of the deed was held properly admitted. *Ingle v. Jones*, 43 Id., 286.

Secondary evidence of the contents of a deed cannot be introduced to prove title in an action for possession of real property, unless it be shown to be lost, or not belonging to, nor within the control of, the party wishing to use the same. *Williams v. Heath*, 22 Id., 519; *Ackley v. Sexton*, 24 Id., 320; *Byington v. Oaks*, 32 Id., 483.

Proof of the original instrument is not necessary when the original is shown to be not under the party's control, and the record is offered in evidence. *Carter v. Davidson et al.*, 34 N. W. R., 603.

SEC. 3661. [**Retrospective.**]—The provisions of the preceding section are intended to apply to all instruments heretofore recorded, as well as those hereafter to be recorded.

SEC. 3662. [**Not conclusive.**]—Neither the certificate nor the record, nor the transcript thereof, is conclusive evidence of the facts therein stated.

STATUTE OF FRAUDS.

SEC. 3663. [**Written evidence only admissible.**]—Except when otherwise specially provided, no evidence of the contracts enumerated in the next succeeding section is competent, unless it be in writing and signed by the party charged or by his lawfully authorized agent.

SEC. 3664. [**Contracts.**]—Such contracts embrace:

1. Those in relation to the sale of personal property, when no part of the property is delivered, and no part of the price is paid;

2. Those made in consideration of marriage;

3. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of their principal from their own estate;

4. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year;

5. Those that are not to be performed within one year from the making thereof.

Although the language of our statute of frauds (section 3663) is different from the fourth section of 29 Charles II, which provides "that no action shall be brought," while ours provides that "no evidence of the contracts enumerated * * * is competent," yet the meaning is the same, no action can be maintained under either, unless the contract be in writing, with the exceptions stated in the statute. *Westheimer v. Peacock*, 2 Iowa, 527.

A defendant cannot be held liable upon a parol promise to pay the debt of another, made subsequent to the creation of the debt, and while the original debtor continues liable the consideration of the original debt will not attach to the subsequent promise; but if the subsequent promise is distinct in its nature and arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties, the promise is not within the statute of frauds, and may be enforced. *Westheimer v. Peacock*, 2 Id., 527. See, also, *Chadwick v. Brown*, Mor., 482; *Bumford v. Purcell*, 4 G. Greene, 488; *Morgan v. McLaren*, Id., 536.

In the sale of personal property delivery is essential to vest the title in the vendee. *Courtright v. Leonard*, 11 Iowa, 32.

No evidence is competent to establish a parol contract for the purchase of personal property, where no part of the same has been delivered, nor any portion of the price paid, except that of the party against whom the contract is sought to be enforced. *Burnside & Co. v. Ransom & Co.*, 37 Id., 639.

The statute of frauds will not exempt from liability one who has received part of the consideration of a note, notwithstanding he was not a maker thereof. *Dee v. Downs*, 50 Id., 310.

A promise to pay the debt of another, when made to subserve some purpose of the promisor, is not within the statute of frauds. *Mills v. Brown*, 11 Id., 314.

A parol agreement by the vendee of land, that in case he sells the land for more than the price paid, one-half the excess shall be paid to the grantor, does not create an interest in real estate, and is not within the statute of frauds. *Miller v. Kendig*, 55 Id., 174.

A contract for work and labor to be performed, and to be paid for after the death of the employer, may be proved by oral evidence; and such contract is not within the statute of frauds, since the death *might* occur within the year. *Riddle v. Backus*, 38 Id., 81.

The statute of frauds applies to the duration of the *term* of a lease, and not to the time at which possession of the premises commences. *Jones v. Marcey*, 49 Id., 188.

An oral agreement to relinquish an interest in real property not occupied as a homestead, made by husband and wife for a valuable consideration received, is a valid agreement and may be enforced. *Hotchkiss v. Cox*, 47 Id., 655.

A resulting trust cannot be sustained by parol evidence where no part of the purchase money was paid by the person claiming to be the *cestui que trust*. *Burden v. Sheridan*, 36 Id., 125.

A resolution of the board of supervisors of a county proposing to convey a portion of its swamp lands in compromise of an action pending against the county, to recover for services rendered in securing to it the title to swamp lands from the United States, and the written acceptance of such

proposition by the person to whom it was made, constitutes a contract in writing and will be specifically enforced against the county. A formal written contract signed by the parties is not required. *Grimes v. Hamilton County*, 37 Id., 290.

An agreement to foreclose a mortgage and convey the land acquired thereunder is not within the statute of frauds and may be proved by parol. *Cooley v. Osborne*, Id., 526.

The provisions of our statute of frauds, unlike the English statute of 29 Charles II, relate merely to the evidence of proof of contracts, and not to their validity. Accordingly, where A agreed to sell B an interest in lands, and to receive in consideration thereof B's note, to be indorsed by C, D and E, B accordingly executed a note, and procured the indorsement of C and D. E was not present, but D, though without authority, agreed for him that he would indorse the note, which E subsequently did, with full knowledge of all the facts; *held*: 1. That D's agreement that E would indorse the note was not void by reason of the statute of frauds; 2. That E's subsequent indorsement operated as a ratification of said agreement by D; 3. That the indorsement by E related back to the date of the note and as between him and A was not open to the plea of want of consideration. *Berryhill v. Jones*, 35 Id., 335.

Where the promise to pay a debt or discharge the obligation of another arises out of a new and original consideration between the payer and debtor, the case is not within the statute of frauds, and the contract is not required to be evidenced in writing and signed by the party to be charged. *The Blair T. L. & L. Co. v. Walker*, 39 Id., 406; *Johnson v. Knapp*, 36 Id., 616; *Chamberlin v. Ingalls*, 33 Id., 300.

The plaintiff in his petition alleged that the defendant, being engaged in procuring subscriptions to aid in the construction of a certain railroad, verbally promised the plaintiff that if he would subscribe a certain amount, he, the defendant, would, in case the defendant sold his farm before the payment of all of said subscription, assume plaintiff's obligation, refund to him the amount paid, and pay the balance himself. *Held*, that parol evidence was not admissible to prove the agreement alleged, in an action against the defendant thereon. *Kauffman v. Hartsock*, 31 Id., 472.

Where a parol contract for the sale of real property, is followed by the taking possession by the purchaser, and the payment of a small portion of the purchase money, such facts will take it out of the statute of frauds; the doctrine of part performance assumes the admissibility of parol evidence to explain it. *Collins v. Vandever*, 1 Id., 573.

A parol contract for the sale of improvements on the public lands is not within the statute. *Zickafoose v. Hurleck*, Mor., 175.

The facts which remove a parol contract from the operation of the statute of frauds may be shown by parol. *Bennett v. Nye*, 4 G. Greene, 410.

In order that possession shall have the effect to take a parol contract out of the statute of frauds, the possession must have been taken under the contract, and with the consent of the vendor; and when so taken the contract is good. *Carrolls v. Cook & Shelley*, 15 Iowa, 455; *Baldwin v. Thompson*, Id., 504.

The fourth subdivision of section 3664 of the code, as respects leases, has reference to the duration of the term of the lease, and not to the time of the performance of the contract, with reference to the date of making or entering into the same. Subdivision five does not apply to contracts for the creation or transfer of an interest in lands. *Sobey v. Bisbee*, 20 Id., 105.

A parol license to mine should be accompanied by possession under the license to exempt it from the operation of the statute of frauds. *Anderson v. Simpson*, 21 Id., 399.

A party cannot claim exemption from liability where he has received a part of the money for which a note was executed, merely because he did not sign the note. *Dee v. Downs et al.*, 50 Id., 310.

An agreement to foreclose a mortgage and convey the land acquired thereunder to another is not within the statute of frauds, and may be proved by oral evidence. *Cooley v. Osborne et al.*, 50 Id., 526.

Where a party in the sale of cattle pointed out certain ones of his which were running with others in a pasture, and designated their price, which the other party agreed to take as they were, at the stipulated price, it was held that this was a sale and delivery of the cattle, and took the case out of the statute of frauds. *Brown v. Wade*, 42 Id., 647.

Where an ante-nuptial contract for the conveyance of land was alleged to have been made by letters which were lost, it was held that oral evidence of their contents, to be admissible, should purport to give their language, and that testimony as to the propositions made and accepted thereon, as construed by the witnesses, was incompetent. *Elwell v. Walker et ux.*, 52 Id., 356.

A verbal acceptance of an order is valid only where the drawee has funds in his hands belonging to the drawer, so that by payment of the order he satisfies his own debt. *Walton v. Madeville et al.*, 56 Id., 597.

An assignment of a chose in action, by parol, in payment of services rendered and to be rendered, is not within this provision of the statute of frauds. *Howe & Co. v. Jones*, 57 Id., 130, 141.

In order to exclude evidence of an oral contract, on the ground that it is not to be performed

within a year from the making thereof, the contract must show, either by express terms or necessary implication, that its performance within the year is prohibited or impossible. *The Blair T. L. & L. Co. v. Walker*, 39 Id., 406.

The statute of frauds relates only to the evidence of the promises enumerated therein, and does not render invalid their voluntary execution. *Putnam v. Swinney*, 63 Id., 385.

Sections 3663 and 3664 do not preclude parol evidence of an oral contract for the conveyance of land, where the vendor has received the consideration therefor in the services of the vendee, under the terms of the contract,—such consideration being “purchase money,” within the meaning of section 3665 of the code. *Stem v. Nysonger*, 69 Id., 512.

The provisions of section 3664, requiring the evidence of any contract for the creation or transfer of an interest in real estate, except cases for a term not exceeding one year, to be in writing, does not apply when the vendor has received the purchase money, or any portion of it. *Dunlap et al. v. Thomas et al.*, 69 Id., 358.

SEC. 3665. [Exceptions.]—The provision of the first sub-division of the preceding section, does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery; but labor, skill, or money, are necessarily to be expended in producing or procuring the same; nor do those of the fourth sub-division of said section apply where the purchase money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract, or when there is any other circumstances, which by the law heretofore in force, would have taken a case out of the statute of frauds.

Where a party residing in one place, purchases goods of another, residing at a different place, through an agent where the contract was made, which goods belonged to the vendor and ready for delivery, to be forwarded by express, and paid for with a secured note, payable in six months, it was held that the contract did not come within the exception of this section, and to be valid should have been in writing. *Partridge v. Wilsey*, 8 Iowa, 459.

Where land is purchased by one party from another by a parol contract, the consideration or part thereof paid, or possession taken, in pursuance of, and under the contract of purchase, the purchaser will be entitled to, and may enforce, specific performance of such contract. *Humphrey v. Moore*, 17 Id., 193, 194; *Collins v. Vandever*, 1 Id., 573; *Fairbrother v. Shaw*, 4 Id., 570; *Moore v. Pearson*, 6 Id., 279; *Devin v. Himer*, 29 Id., 297; *White v. Butt*, 32 Id., 335.

A parol license to mine should be accompanied with possession to take it out of the statute of frauds. *Anderson v. Simpson*, 21 Id., 399.

The first subdivision of section 3664 does not, under the provisions of section 3665 apply where the article sold is not at the time owned by the vendor and ready for delivery, and labor, skill or money are necessarily to be expended in producing the same. The same applies to an agreement for a lien upon, and respecting the possession of property in this condition. *Brown v. Allen*, 35 Id., 306.

The objection that a contract for the sale of lands is not evidenced by writing is not tenable where a part of the purchase-money was paid, and the vendee entered into possession under the contract. *Thompson v. Wilson*, 26 Id., 120; *Chamberlain v. Robertson*, 31 Id., 408.

Possession of the paper title to land is not conclusive evidence of ownership, and where by agreement between the holder of such title and another the latter takes possession as owner in fact, there is a sale to him which may be proved by parol evidence. *Tuttle v. Becker*, 47 Id., 486; see also *Baldwin v. Thompson*, 15 Id., 504.

The possession which will be sufficient to take a parol contract for the sale of land out of the statute of frauds, must have been taken and held by the actual or implied assent of the vendor, and under and by virtue of the contract. *Carrolls v. Cox et al.*, 15 Id., 455; see also *Baldwin v. Thompson*, Id., 504.

Where the owner of land wrote to his agent that he would sell the same at a price named, whereupon the plaintiff agreed to purchase, it was held that possession of the latter by the agent was not sufficient to take the case out of the statute of frauds. *Steel & Son v. Fife et al.*, 48 Id., 99.

In order to enforce a parol contract for the sale and conveyance of real property, the existence of the contract and its terms must be shown, and that the vendee, either paid a part of the purchase money, or took possession in pursuance of the contract. *Fairbrother v. Shaw*, 4 Id., 570.

Parol evidence is admissible to establish a contract for the sale of real property when it has been proven that the party to be charged has received rent for the same under claim of ownership based upon the sale. *Sweeney v. O'Hara*, 43 Id., 34.

A parol gift of an ancestor to a son and heir, followed by possession thereunder, the payment of taxes, and the making of permanent improvements thereon is not within the statute of frauds,

and the title of the donee will be quieted as against the other heirs. *Hughes v. Lindsey*, 31 Id., 329.

Where a parol promise of a parent to convey real property to his child, is clearly, definitely and conclusively established, and the child, on the faith of such promise, has entered into possession and made permanent improvements upon the land, the parent will be decreed to specifically perform his promise. *Moore v. Pearson*, 6 Id., 279.

The term "purchase money" as used in this section of the statute, means the consideration received, in whatever form it may be. It was accordingly held, where the plaintiff agreed to convey to the defendant a certain parcel of land for a certain parcel to be conveyed by the defendant to the plaintiff, that a conveyance by the plaintiff in accordance with the contract, was a payment of the purchase money within the meaning of the statute. *Devin v. Himer*, 29 Id., 297.

Where a sale of land was evidenced by the notice specifying the terms and conditions upon which it would be sold; a plat of the property on which was entered the name of the purchaser and the price bid; a letter of the purchaser relating to the purchase, all of which was connected by the parol evidence of the clerk of the sale, who made the entries upon the plat, it was held that the evidence was admissible to prove the contract of sale. *Lee v. Mahoney*, 9 Id., 344.

The memorandum in writing transferring an interest in land need not be in one paper. Nor is it necessary that all the parts should be contemporaneous, or so complete when brought together as to preclude the necessity of oral evidence to explain them. *Id.*

For a case where evidence was held sufficient to establish an oral contract between the defendant and one deceased, in pursuance of which the latter transferred the possession of certain real property to the defendant, in consideration of his support during the remainder of his natural life; see *Rink et al. v. Sample et al.*, 56 Id., 100.

SEC. 3666. [When not denied in the pleadings.]—The above regulations relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless in cases where the contract is sought to be enforced, or damages to be recovered for the breach thereof, against some person other than him who made it.

Under this section, when the plaintiff is otherwise entitled to specific performance, and the defendant either admits, or does not deny in his answer an unwritten contract for the purchase of land, it may be enforced, notwithstanding the benefit of the statute is insisted upon in the answer. *Auter v. Miller*, 18 Iowa, 405.

The petition alleged that on a certain day named, the plaintiff entered into a verbal contract with the defendant for the purchase of certain lands; the answer denied that on the day named the defendant entered into such contract; denied that at the time stated, the defendant, by any valid contract, agreed to sell and convey the real estate described; and denied that the defendant made any lawful contract with the plaintiff for the sale of the real estate upon the terms alleged; held, that the allegations of the petition were sufficiently denied to put the plaintiff upon proof of the contract by competent evidence. *Mahana v. Blunt*, 20 Id., 142.

A parol contract, which is within the statute of frauds, may be established if not denied in the pleadings or if admitted by the party against whom it is sought to be enforced, but in such case the petition should state the manner in which it is expected that the contract will be proved, otherwise it will be subject to demurrer. *Babcock v. Meek*, 45 Id., 137.

SEC. 3667. [Party made witness.]—Nothing in the above provisions shall prevent the party himself against whom the unwritten contract is sought to be enforced, from being called as a witness by the opposite party, nor his oral testimony from being evidence.

The party against whom a parol contract, which is within the statute of frauds, is sought to be enforced, is the only competent witness to prove such contract. An agent of the party does not come up to the letter or spirit of the statute. *Burnside & Co. v. Rawson & Co.*, 37 Iowa, 639.

When the plaintiff calls the defendant as a witness under this section to establish a parol agreement within the statute of frauds, he will not be permitted to introduce evidence to contradict or impeach that of the defendant. *Hunt v. Coe et al.*, 15 Id., 197.

Where a parol contract within the statute of frauds is proved by the testimony of the party against whom such contract is sought to be enforced, it is thereby taken out of the statute and the contract will be enforced. *Hobbs v. Brayton*, 24 Id., 596, 598; *Smith v. Phelps*, 32 Id., 537; *Lyon v. Thompson*, 16 Id., 62; *Auter v. Miller*, 18 Id., 405; *Mahana v. Blunt*, 20 Id., 62; *Anderson v. Simpson*, 21 Id., 399.

Where the contract sued on, is fairly established by the defendant's testimony, his plea of the statute of frauds, in an action to enforce an oral agreement for the sale of land, will not avail them as a defense. *Dewey et al. v. Life et al.*, 60 Id., 361.

SEC. 3668. [Notary public: certificate of.]—The usual protest of a notary public without proof of his signature or notarial seal, is prima facie evidence of

what it recites concerning the dishonor and notice of a bill of exchange or promissory note, and a copy from his record, properly certified to by him, shall receive such faith and credit as it is entitled to by the law and custom of merchants.

A certificate of protest by a notary, in the "usual form," is evidence only of the facts recited therein; and where it states that the notice of protest was sent by mail to the address of the indorser at a certain place, it will be assumed that the place named is the residence of the indorser. *Bradshaw v. Hedge et al.*, 10 Iowa, 402.

A certificate of protest by a notary is not evidence of notice to the drawer of a bill of exchange when it does not recite that such notice was given. It is evidence only of the facts recited therein. *Thorp et al. v. Craig*, Id., 461.

It is not necessary that the certificate of protest by a notary should have annexed to it, or set out therein, the notices referred to in the certificate; nor that the certificate should in words formally refer to the notarial seal. *Jones v. Berryhill*, 25 Id., 289.

The provisions of this section respecting the effect of the certificate of protest of a notary when given in evidence, relates to civil cases only. It cannot be received in a criminal prosecution for obtaining money on false pretenses, to prove that he had no money on deposit in a bank on which he had drawn drafts. *The State v. Reidel*, 26 Id., 430.

The certificate of a notary public, showing the manner in which notice of protest was served upon parties, is not inadmissible in evidence, for the reason that it was not made at the time of the presentation and protest. *Chatham Bank v. Allison*, 15 Id., 357.

When a certificate of protest of a notary public shows that he deposited in the postoffice a notice of presentation and non-payment, properly addressed, but is silent as to the pre-payment of postage, it will be presumed that the postage was paid. *Brooks et al. v. Day*, 11 Id., 46.

Where the certificate of a notary public expressly stated that he notified the endorser of a promissory note of the non-payment by the maker and then stated that he gave the notice by depositing a written and printed copy thereof in the mail, directed to the indorser at a place named, it was held, that such certificate established a *prima facie* case against the indorser, and that the burden was on him to show that the place named was not his postoffice address and that the notice did not accomplish the result certified to. *Wamsly v. Rivers*, 34 Id., 463.

SEC. 3669. [**Inferior tribunals: presumption.**].—The future proceedings of all officers, and of all courts of limited and inferior jurisdiction within this state, shall, like those of a general and superior jurisdiction, be presumed regular, except in regard to matters required to be entered of record, and except when otherwise expressly declared.

In an action by attachment the petition was directed to the district court of the proper county, the jurat, to the affidavit on the petition, was as follows: "Subscribed and sworn to before me this 26th day of February, 1858, H. B. M., J. P.," it was held, that the presumption was that the justice administered the oath in the proper county.

Where there was nothing in the record of a sale of the real property of a ward by his guardian, in pursuance of proceedings in the county court, to show that the sale, or the order of sale, was void, it was presumed valid. *Pursley v. Hays*, 17 Iowa, 310, 312.

If the jurisdiction of inferior tribunals has once attached, every intendment will be made in favor of the validity of all subsequent proceedings, and mere irregularities or defects will not avail in collateral proceeding. The power to decide is not lost because erroneously exercised. *Same v. Same*, 22 Id., 11, 33.

Where a justice of the peace has jurisdiction the defendant is bound by the judgment rendered and precluded from retrying questions which must have been involved and determined in the original action. *Haggerty v. Burr*, 22 Id., 219.

In an action upon a recognizance, taken by a magistrate upon an adjournment of a preliminary examination before him of one charged with a felony, for the appearance of the party charged on the day to which the case is adjourned, the petition need not state the particular facts which show that the magistrate had authority to take bail. The existence of such facts will be presumed. The want of such facts may be set up or shown on the trial. *The State v. Hufford*, 23 Id., 579.

That a petition for a road is not offered in evidence in a prosecution for obstructing a highway, constitutes no valid objection to the admission of the road record when it appears therefrom that the petition was presented, filed and acted upon. *The State v. Lane*, 26 Id., 223.

Where the jurisdiction of a justice of the peace is by consent extended to a sum greater than one hundred dollars, it will, in the absence of a showing to the contrary, be presumed that such consent was given before the commencement of the suit and the issuing of an attachment therein. The rule that courts and officers are presumed to act rightly, is extended by the statute to inferior courts. *Hodge v. Ruggles*, 36 Id., 42.

Under chapter 240, acts of the sixth general assembly, it was held, that an affidavit that the person to be served with notice could not be found within the state must have appeared of record

to confer jurisdiction upon the court to make an order for publication. It will not be presumed under section 3669 of the code. *Bradley v. Jamison*, 46 Id., 68.

The proceedings of all courts of record, and including those of limited and inferior jurisdiction, are presumed to be regular in respect to all matters not required to be entered of record, and where in an action before a justice of the peace, the justice decided that he had jurisdiction, such adjudication will be presumed correct until the contrary is shown by evidence. *Church v. Crossman*, 49 Id., 444, 449.

The supreme court will exercise the presumption that an inferior court, in making an order for service of notice in a matter within its jurisdiction, rightly exercised its jurisdiction and required all things to be done and shown which the law prescribed. *Lees v. Wetmore*, 58 Id., 170, 181.

While it may be conceded that under this section, a decision of a justice of the peace that he has jurisdiction is presumed to be right until the contrary is shown, yet when it appears on the face of the record that he had not jurisdiction, the presumption is rebutted. *Brown v. Davis*, 59 Id., 641.

SEC. 3670. [Records of court in same county.]—The records and papers properly filed in a cause in either the district or circuit court of a county, are equally evidence in the other court. Depositions taken for either court may be used in the other with the same effect, subject to like objection, as if taken in such court.

HOW TESTIMONY IS TO BE PROCURED.

SEC. 3671. [Clerks to issue subpoenas.]—The clerks of the several courts shall, on the application of any person having a cause or any matter pending in court, issue a subpoena for witnesses under the seal of the court, inserting all the names required by the applicant in one subpoena, which may be served by the sheriff, coroner, or any constable of the county, or by the party or any other person. When a subpoena is not served by the sheriff, coroner, or constable, proof of service shall be shown by affidavit; but no costs of serving the same shall be allowed.

SEC. 3672. [To whom directed: contents of.]—The subpoena shall be directed to the person therein named, requiring him to attend at a particular time or place to testify as a witness, and it may contain a clause directing the witness to bring with him any book, writing, or other thing under his control, which he is bound by law to produce as evidence.

SEC. 3673. [How far witnesses in civil cases can be compelled to attend.]—Witnesses in civil cases cannot be compelled to attend the district or circuit court out of the state where they are served, nor at a distance of more than seventy miles from the place of their residence, or from that where they are served with a subpoena, unless within the same county. No other subpoena but that from the district or circuit court can compel his attendance at a greater distance than thirty miles from his place of residence, or of service, if not in the same county.

SEC. 3674. [May demand payment in advance.]—Witnesses are entitled to receive in advance, if demanded, their traveling fees to and from the court, together with their fees for one day's attendance. At the commencement of each day after the first, they are further entitled, on demand, to receive the legal fees for that day in advance. If not thus paid they are not compelled to attend or remain as witnesses.

It is competent for the district court to adopt and enforce a rule limiting the right of witnesses, subpoenaed and attending court in several cases at the same time, to fees for mileage and attendance in one case only. Such a rule is "consistent with law," within the meaning of section 186 of the code. *Meffert v. D. B. M. R. Co.*, 34 Iowa, 430.

Where a garnishee demands the fees and mileage of a witness, which are not paid or tendered, he is not compelled to appear and answer the garnishment. But he is not thereby discharged from the obligation to retain in his possession all the property of the defendant under his control, and to withhold payment of any sum he may owe him. And his attendance may be procured at a subsequent term by another notice, fully complying with the requirements of the statute and paying or tendering his fees if demanded. *Westphal, Heines & Co. v. Clark*, 42 Id., 371.

No limit is placed by the law upon the distance to which a notice of garnishment may be sent, as in the case of a subpoena. *Id.*

SEC. 3675. [**Penalty for failure to obey.**]—For a failure to obey a valid subpoena, without a sufficient cause or excuse, or for a refusal to testify after appearance, the delinquent is guilty of contempt of court. He is also liable to the party by whom he was subpoenaed for all consequences of such delinquency, together with fifty dollars additional damages.

SEC. 3676. [**Same.**]—Before a witness is thus liable for a contempt for not appearing, he must be served personally with the process, by reading it to him, and by leaving a copy thereof with him, if demanded, and it must be shown that the fees and traveling expenses allowed by law were tendered to him, if required; or it must appear that a copy of the subpoena, if left at his usual place of residence, came into his hands, together with the said fees and traveling expenses above mentioned.

SEC. 3677. [**When witness conceals himself: power of officer.**]—If a witness conceal himself, or in any other manner attempt to avoid being personally served with a subpoena, any constable or sheriff having the subpoena may use all necessary and proper means to serve the same, and for that purpose may break into any building or other place where the witness is to be found, having first made known his business and demanded admission.

SEC. 3678. [**Prisoner.**]—A person confined in any prison in this state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, and in a criminal case in any county in the state; but in all other cases his examination must be by deposition.

A defendant in a criminal case possesses no absolute right under the constitution and this section of the code to demand the personal attendance of a convict, under an order of court to testify as a witness on the trial. The exercise of the power to make such order is discretionary, and will not be reviewed on appeal except in a case of manifest abuse. *The State v. Kennedy*, 20 Iowa, 372.

Where a sheriff is directed by order of court to produce as a witness a prisoner in the penitentiary, he is entitled to his mileage and to all expenses incurred in the transportation of the prisoner. *Bringhoff v. Polk County*, 41 *Id.*, 554.

SEC. 3679. [**Deposition of.**]—While a prisoner's deposition is being taken he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the depositions.

SEC. 3680. [**Persons authorized by laws of other states: power of.**]—When by the laws of any other state or country testimony may be taken in this state to be used in the courts of such state or country, and also in all cases herein provided for taking depositions, the persons authorized to take such depositions have power to issue subpoenas and compel obedience thereto, to administer oaths, and to do any other act of a court which is necessary for the accomplishment of the purpose for which they are acting.

SEC. 3681. [**Same.**]—Subpoenas issued by them are valid to the same extent as those emanating from a justice's court, and may be served and returned in the same manner.

SEC. 3682. [**Officers to serve.**]—Any sheriff or constable, when called upon for that purpose, shall serve such subpoenas and make return thereof.

SEC. 3683. [**When party fails to obey subpoena.**]—In addition to the above remedies, if a party to a suit in his own right, on being duly subpoenaed, fail to appear and give testimony, the other party may, at his option, have a continuance of the cause as in cases of other witnesses, and at the cost of the delinquent.

SEC. 3684. [**Same.**]—Or if he shows, by his own testimony or otherwise, that he could not have a full personal knowledge of the transaction, the court may order his pleading to be taken as true; such order, however, is subject to be reconsidered during the term of the court upon satisfactory reasons being shown for such delinquency.

PRODUCTION OF BOOKS AND PAPERS.

SEC. 3685. [**When and how done.**]—The district or circuit court may, by rule, require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them.

Where the district or circuit court deems it material to the just determination of a cause pending before it, it may, in its discretion upon a proper application, direct the production of the tax list in the hands of the collector. *Games v. Robb*, 8 Iowa, 193, 197.

Under this section as well as under section 2730, a defendant in an action on a promissory note alleged to have been made by him, may obtain possession thereof before trial for the purpose of inspecting it. *Lay v. Wissman*, 36 Id., 305, 307.

The granting of an order for the production of books and papers under this section is a matter resting in the discretion of the court. *Allison et al. v. Vaughn*, 40 Id., 421; *Shelden v. Mickel & Head*, Id., 19.

SEC. 3686. [**Petition.**]—The petition for that purpose must state the facts expected to be proved by such books or papers, and that, as the petitioner believes, such books and papers are under the control of the party against whom the rule is sought, and must show wherein they are material. The rule shall thereupon be granted to produce the books and papers, or show cause to the contrary, if the court deem such rule expedient and proper.

SEC. 3687. [**Consequence of failure to obey.**]—On failure to obey the rule, or show sufficient cause for such failure, the same consequences shall ensue as if the party had failed to appear and testify when subpoenaed by the party now calling for the books and papers.

SEC. 3688. [**Writing called for by one party.**]—Though a writing called for by one party is by the other produced; the party thus calling for it is not obliged to use it as evidence in the case.

DOCUMENTARY EVIDENCE.

SEC. 3689. [**Affidavit.**]—An affidavit is a written declaration under oath, made without notice to the adverse party.

SEC. 3690. [**Out of the state.**]—An affidavit may be made within or without this state before any person authorized to administer oaths.

SEC. 3691. [**Before whom made.**]—Affidavits taken out of the state before any judge or clerk of a court of record, or before a notary public, or a commissioner appointed by the governor of the state to take acknowledgement of deeds in the state where such affidavit is taken, are of the same credibility as if taken within the state.

An affidavit annexed to a petition and referring to "the foregoing petition" is sufficient although it does not set out the names of the parties to the action. *Levy & Co. v. Wilson*, 43 Iowa, 605.

Where the affidavit is made in another state before the clerk of a court, an omission to state in the certificate that the court is a court of record does not render the affidavit invalid. Evidence *aliunde* may be given to show the character of the court. *Id.*

SEC. 3692. [**How compelled.**]—When a person desirous of obtaining the affidavit of another who is unwilling to make the same fully, he may apply to any officer competent to take depositions as herein declared, by petition, stating the object for which he desires the affidavit.

Under this section a justice of the peace has power to require the appearance before him by subpoena, issued for that purpose, of a person whose affidavit is desired, and a refusal to obey such subpoena thus issued, or to answer when brought before the justice, is a contempt, for which the justice may commit the witness. *Robb v. McDonald*, 29 Iowa, 330.

Where one is subpoenaed to appear before a justice of the peace to make affidavit, as required under these sections, he must obey the subpoena, notwithstanding the affidavit required may be of no use as evidence in the case in aid of which it is sought, and for refusing obedience in such case

he may be committed for contempt, and he cannot be relieved upon *habeas corpus*. *State v. Seaton*, 61 Id., 563. Following *Robb v. McDonald*, 29 Id., 330, Beck, J., dissenting.

SEC. 3693. [**Same.**].—If such officer is satisfied that the object is legal and proper, he shall issue his subpoena to bring the witness before him, and if he fails then to make a full affidavit of the facts within his knowledge to the extent required of him by the officer, the latter may proceed to take his deposition by question and answer in writing in the usual way, which deposition may afterwards be used instead of an ordinary affidavit.

SEC. 3694. [**Notice.**].—The officer thus applied to may, in his discretion, require notice of the taking of such affidavit or deposition to be given to any other person interested in the subject matter, and allow him to be present and cross-examine such witness.

SEC. 3695. [**Cross interrogatories.**].—The court or officer to whom any affidavit is presented as a basis for some action, in relation to which any discretion is lodged with such court or officer, may, if deemed proper, require the witness to be brought before some proper officer and subjected to cross-interrogatories by the opposite party.

SEC. 3696. [**Signature and seal: presumption.**].—The signature and seal of such of the officers herein authorized to take depositions or affidavits as have a seal, and the simple signature of such as have no seal, are presumptive evidence of the genuineness of such signature as well as of the official capacity of the officer, except as herein otherwise declared.

The official acts of a notary public should be authenticated by his official seal and signature. *Tunis v. Withrow*, 10 Iowa, 305; *Chase v. Street*, Id., 593.

The jurat or certificate to an affidavit, offered in evidence, may be amended by adding thereto a reference to the notarial seal of the notary before whom the affidavit was made, when such reference was omitted in the original jurat. *Hallett v. The C. & N. W. R'y Co.*, 22 Id., 259.

SEC. 3697. [**Publications: how proved.**].—Publications required by law to be made in a newspaper, may be proved by the affidavit of any person having knowledge of the fact, specifying the times when, and the paper in which the publication was made. But such affidavit must, for the purposes now contemplated, be made within six months after the last day of publication.

It is competent to prove the posting of notices of the appointment of an administrator by his own affidavit attached to a copy of the notice as provided in this section. *Brownell v. Williams et al.*, 52 Iowa, 353.

SEC. 3698. [**Posting up papers.**].—The posting up or service of any notice or other paper required by law, may be proved by the affidavit of any competent witness attached to a copy of said notice or paper, and made within six months of the time of such posting up.

A notice of appeal to the supreme court cannot be served and the proof of service be made by the party appealing. *Marion County v. Stanfield*, 8 Iowa, 406.

It was not the intention that the mode of service provided by this section should be exclusive of any other, but simply to provide that such proof should be sufficient. The service may be proved by the oath of any person cognizant of the fact, or in any other way recognized by the rules of evidence. *Shawhan v. Loffer*, 24 Id., 217, 223.

Proof of service of the notice and affidavit under section 1239 of the code, in an action against a railroad company for stock killed, may be established by a return of the sheriff, through his deputy, indorsed on the notice as well as by a sworn return by such deputy. *Brandt v. C., R. I. & P. R'y Co.*, 26 Id., 114, 116.

On a trial to recover damages for injuries to stock on a railway track, a copy of the notice and affidavit served on the company under the statute is admissible when accompanied with the oath or affidavit of the person who served the same, to prove the fact of such service, under section 3698 of the code. *McLenon v. The K. C., St. Joe & C. B. R'y Co.*, 69 Id., 320.

SEC. 3699. [**Other facts.**].—Any other fact which is required to be shown by affidavit, and which may be required for future use in any action or other proceeding, may be proved by pursuing the course above indicated, as nearly as the circumstances of the case will admit.

SEC. 3700. [**How perpetuated.**].—Such proof so made may be perpetuated and preserved for future use, by filing the papers above mentioned in the office of the clerk of the circuit court. And the original affidavit appended to the notice or paper, if there be one, and if not, the affidavit by itself, is presumptive evidence of the facts stated therein, but does not preclude other modes of proof now held sufficient.

MAPS, PLATS, RECORDS, ENTRIES.

SEC. 3701. [**Field notes and plats.**].—A copy of the field-notes of any surveyor, or a plat made by him and certified under oath as correct, may be received as evidence to show the shape or dimensions of a tract of land, or any other fact whose ascertainment requires only the exercise of scientific skill or calculation.

SEC. 3702. [**Copies of record and entries.**].—Duly certified copies of all records and entries, or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed.

Copies of letters belonging to and on file in the office of the register of the state land office, duly certified under the hand and seal of the register, are, under this section, admissible in evidence, and entitled to the same credibility as the original letters of which they are copies. *Bel-lows v. Todd*, 34 Iowa, 18.

A certified copy of a private contract, filed in the office of the county auditor, but not authorized by law to be kept there, is not competent evidence of the contract. Such a paper is not a record belonging to the auditor's office. *Morrison v. Coad*, 49 Id., 571.

The certificate of the governor of the state showing the construction of a railroad in accordance with a land grant thereto, was held competent and sufficient evidence of the fact. *The C., B. & Q. R. Co. v. Lewis*, 53 Id., 101, 107.

When a defendant has been arraigned upon an indictment, and it is afterward lost or abstracted, the court may, upon motion, order the substitution of a copy thereof and proceed with the trial upon the record thus made, the same as on the original indictment. *The State v. Rivers*, 58 Id., 102.

SEC. 3703. [**Books of original entries.**].—The recorder in each of the several counties in this state, shall cause to be produced a book, entitled "copies of original entries" to be kept as a record in his office, in which shall be copied a list of the original entries of land within his county, with name of the person or persons entering the same and the date of such entry, for which he shall receive a reasonable compensation, to be audited and allowed by the board of supervisors of his county.

SEC. 3704. [**Copies of.**].—Said book, containing a copy of such entries when compared with the originals, and certified as true copies by the register of the land office at which such original entries were made, shall be deemed a matter of record, and certified copies thereof under the hand of said recorder may be received and read in evidence in all courts in this state, with like effect as other certified copies of original papers recorded in his office.

Under the statute (sections 3703 and 3704), the certificate of the county recorder is competent evidence to show who entered a particular tract of land in his county. *York v. Sheldon*, 13 Iowa, 569, 570.

The certificate of the commissioner of the general land office, showing that certain lands were contained in the list of lands covered by a railroad grant, and the certificate of the secretary of the interior approving such list, are competent and sufficient evidence that the lands described passed to the railroad company under the grant. *Johnson v. Thornton*, 54 Id., 144.

SEC. 3705. [**Same.**].—Said recorder shall from time to time, as he may deem it necessary, procure in the same manner copies of any additional entries, under the same restrictions and with like effect until all the lands in his county shall have been entered and certified copies of the entries thereof procured.

SEC. 3706. [**Officer to give copies.**].—Every officer having the custody of a public record or writing is bound to give any person, on demand, a certified copy thereof on payment of the legal fees therefor.

SEC. 3707. [**Copies, maps, etc., in office of surveyor general.**—Copies of all maps, official letters and other documents in the office of the surveyor-general of the United States, when certified to by that officer according to law, shall be received by the courts of this state as presumptive evidence of the existence of the originals and that said copies are copies of the original, notwithstanding such maps, official letters, or other papers, may themselves be copied.

SEC. 3708. [**Certificates as to loss of papers.**—The certificate of a public officer that he has made diligent and ineffectual search for a paper in his office, is of the same efficacy in all cases as if such officer had personally appeared and sworn to such facts.

SEC. 3709. [**Duplicate receipts of receiver of land office.**—The usual duplicate receipt of the receiver of any land office, or if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent.

SEC. 3710. [**Certificate of register.**—The certificate of the register or receiver of any land office of the United States as to the entry of land within his district, shall be presumptive evidence of title in the person entering to the real estate therein named.

The original certificate of a register of a land office of the United States, of the location of agricultural college scrip upon land within his district, is *prima facie* evidence of title in the person locating it, under this section of the statute. A showing that scrip of the same number was located upon another tract is not sufficient to overcome such title. *Pierson v. Reed*, 36 Iowa, 257.

This section of the statute relates to the remedy and applies to all actions in the courts of this state, whether the land in controversy is situated in this state or not. *Id.*

SEC. 3711. [**Signature presumed genuine.**—In the cases contemplated in the last seven sections, the signature of the officer shall be presumed to be genuine, until the contrary is shown.

JUDICIAL RECORDS.

SEC. 3712. [**Of this state or federal courts.**—A judicial record of this state, or of any of the federal courts of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.

In an action against a justice of the peace for wrongfully issuing an execution, a copy of the execution issued by him, with a copy of the constable's return indorsed thereon, certified by the justice to be a true copy, may be offered in evidence by the plaintiff, without producing the original, or accounting for its absence. *Dupont v. Downing*, 6 Iowa, 172, 176.

SEC. 3713. [**Of another state.**—That of another state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice or presiding magistrate that the attestation is in due form of law.

A certificate by a presiding judge or one of the judges to the attestation of the clerk with the seal annexed, that the attestation is in due form of law, is a sufficient authentication of a record under this section of our statute, although it may not comply with the act of Congress of 1790. *Lattourett v. Cook*, 1 Iowa, 1; *Simmons & Co. v. Cook*, 29 Id., 324.

The method prescribed by an act of congress for the authentication of records, is not exclusive of any the states may adopt for their own courts, it is entirely competent for the state legislature to control such matters of evidence within their own limits and in their own courts. *Id.*

The attestation of the clerk of the court to a transcript of a foreign judgment, upon which an action is brought in this state, should be in conformity with the form used in the state from whence the judgment comes, and the evidence of this fact should be found in the certificate of the judge of the court of which the attesting officer is the clerk, but, under our law, it is not necessary that such certificate should be signed by the judge who is the presiding officer. It is sufficient if signed by a judge of the court. *Simmons & Co. v. Cook*, 29 Ia., 324.

SEC. 3714. [**Of a justice of the peace.**—The official certificate of a justice of the peace of any of the United States to any judgment and the preliminary

proceedings before him, supported by the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of the peace of that county, and that the signature to his certificate is genuine, is sufficient evidence of such proceedings and judgment.

The authentication of a transcript of a judgment of a justice of the peace in another state, should show that the justice was, at the time of rendering the judgment, a justice of the peace in and for the county of which the certifying officer is clerk; and also that he was an acting justice of the peace at the time the transcript purports to have been certified by him. *Goesdorf v. Gleason*, 10 Iowa; 495.

A transcript, defective in its authentication, cannot be rendered admissible in evidence, by the introduction of another transcript of the same judgment, in which the authentication is correct as to the defect in the first, but which is defective in other respects. *Id.*

Where the transcript of a judgment of a justice of the peace in another state is certified by his successor in office, and such certificate is authenticated by the certificate of the clerk of a court of record of the county in which the certifying justice resides, stating that he is an acting justice of the peace and that his signature to his certificate is genuine, such transcript is admissible in evidence in a suit thereon in this state, without the certificate of the justice who rendered the judgment. *Railroad Bank v. Evans*, 32 Id., 202.

Two transcripts, of the character above shown, may both be properly authenticated by one certificate of the clerk, when they are against the same person and from the same docket of the same justice. A certificate of authentication to each is not necessary in such case. *Id.*

SEC. 3715. [Of a foreign country.]—Copies of records and proceedings in the courts of a foreign country may be admitted in evidence, upon being authenticated as follows:

1. By the official attestation of the clerk or officer in whose custody such records are legally kept; and,
2. By the certificate of one of the judges or magistrates of such court, that the person so attesting is the clerk or officer legally entrusted with the custody of such records, and that the signature to his attestation is genuine; and,
3. By the official certificate of the officer who has the custody of the principal seal of the government under whose authority the court is held, attested by said seal, stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court.

EXECUTIVE AND LEGISLATIVE RECORDS.

SEC. 3716. [Of the executive of U. S. or any state or foreign government.]—Acts of the executive of the United States, or of this or any other state of the union, or of a foreign government, are proved by the records of the state department of the respective governments, or by public documents purporting to have been printed by order of the legislature of those governments respectively, or by either branch thereof.

SEC. 3717. [Of the legislature of this or other state or foreign government.]—The proceedings of the legislature of this or any other state of the union or the United States, or of any foreign government, are proved by the journals of those bodies respectively, or of either branch thereof, and either by copies officially certified by the clerk of the house in which proceeding was had, or by a copy purporting to have been printed by their order.

The journals of the respective houses of the general assembly are the primary and best evidence of a proposed amendment to the constitution, the enrolled resolution is only secondary evidence, and parol testimony of members of either house is inadmissible to contradict the journals as to the language of the proposed amendment as agreed to. *Keohler & Gauge v. Hill*, 60 Iowa, 543.

SEC. 3718. [Printed copies of the statute.]—Printed copies of the statute laws of this or any other of the United States, or of congress, or of any foreign government, purporting or proved to have been published under the authority thereof, or proved to be commonly admitted as evidence of the existing laws in the

courts of such state or government, shall be admitted in the courts of this state as presumptive evidence of such laws.

Under this section, printed copies of the statute law of a state, purporting to be published under the authority thereof, are admissible as presumptive evidence of such laws. *Webster et. al. v. Rees*, 23 Iowa, 269.

When a party introduces what purports to be a volume of the statutes of a state, and it is sufficiently proved to be commonly admitted in evidence in the courts of said state, the court below may properly allow it to be given in evidence. *Davis v. Harper*, 48 Id., 513, 515.

An affidavit of an attorney at law is not competent to prove the statute law of his state. *The State v. Cross*, 68 Id., 181.

SEC. 3719. [Written law.]—The public seal of the state or county affixed to a copy of the written law or other public writing, is also admissible as evidence of such law or writing respectively. The unwritten laws of any other state or government may be proved as facts by parol evidence, and also by the books of reports of cases adjudged in their courts.

SEC. 3720. [Printed copies of ordinances of any city or town.]—The printed copies of the ordinances of any municipal corporation published by its authority, and transcripts of any ordinances or of any act or proceeding of a municipal corporation recorded in any book, or entries on any minutes or journals kept under the direction of such municipal corporation, and certified by its clerk, shall be received in evidence for any purpose for which the original ordinances, books, minutes or journals would be received and with as much effect. The clerk shall furnish such transcripts, and he shall be entitled to charge therefor at the rate that the clerk of the district court is entitled to charge for transcripts of records from that court.

The supreme court will not take judicial notice of the provisions of a city ordinance. *Garvin v. Wells*, 8 Iowa, 286; *Wolf v. The City of Keokuk*, 48 Id., 129.

A party who has taken a deposition in an action may use it or withhold it at his pleasure, or any part of it; he is not required to offer it in evidence, but he cannot withdraw it from the files. *Hale & Bro. v. Gibbs*, 43 Id., 381; *Pelamourges v. Clark*, 9 Id., 1.

If the party taking a deposition does not offer it in evidence, the other party may do so. *Id.*; *Wheeler v. Smith*, 13 Id., 564.

Depositions taken out of the state must be taken on commission and not on notice. *Anderson v. Easton & Son*, 16 Id., 56.

Section 3720, above, is made applicable to cities acting under special charters by chapter 93 of the laws of 1886. See *ante*.

DEPOSITIONS.

SEC. 3721. [When taken and by whom.]—After the commencement of a civil action or other civil proceeding, if a witness resides within this state but in a different county from the place of trial, or is about to go beyond the reach of a subpoena, or is for any other cause expected to be unable to attend court at the time of trial, the party wishing his testimony, may, whenever he deems it expedient, take his deposition in writing before any person having authority to administer oaths; and if the action is by equitable proceedings and to be tried on written evidence, then without any other reason therefor, either party may so take the deposition of any witness.

Where a witness resides within the state but in a county different from that of the place of trial, his deposition may be taken either upon notice, or on written interrogatories. *Fabian v. Davis*, 5 Iowa, 456.

If the witness resides out of the state, a commission must issue to the officer or commissioner taking the same. *Id.*; *Anderson v. Easton & Son*, 16 Id., 56.

A party who has taken a deposition in an action may use it or withhold it at his pleasure, or any part of it; he is not required to offer it in evidence, but he cannot withdraw it from the file. *Hale & Bro. v. Gibbs*, 43 Id., 381; *Pelamourges v. Clark*, 9 Id., 1.

If the party taking a deposition does not offer it in evidence, the other party may do so. *Id.*, *Wheeler v. Smith*, 13 Id., 564.

Depositions taken out of the state must be taken on commission and not on notice. *Anderson v. Easton & Son*, 16 Id., 56.

If the deposition of a witness can be taken in the county where the action is pending, no commission is necessary whether the witness resides in the country or not. *Id.*

Where it appears from a deposition that the witness is a non-resident of the state, it shows sufficient grounds for taking his deposition, although the witness answers that he intended to be personally present at the term of court at which the cause is to be tried, unless it be shown that the witness is present in court at the time of the trial when his deposition is to be used. *Nevin v. Roup*, 8 Id., 207.

SEC. 3722. [**Notice.**]- Reasonable notice of the name of a witness and the time and place when and where the same will be taken, must be given to the opposite party; but if notices are given in the same case by the same party, and of the taking of depositions at different places upon the same day, they shall be invalid; and no party shall be required to take depositions on the day of the general election, or on the fourth day of July.

It is not necessary, in a notice to take depositions to give the names of all the witnesses whose depositions will be taken. *Mumma v. McKee*, 10 Iowa, 107.

Defects in the notice of taking of depositions is cured by the appearance of the party notified. *Id.*

A notice to take depositions having been served upon the attorneys of record of two of the defendants, they cannot object to the depositions on the ground that other co-defendants were not served. *Glenn v. Glenn et al.*, 17 Id., 498.

Where a notice was given of the taking of a deposition "at the office of 'Squire Moore in Ashland, Wapello county, Iowa, on the 10th day of April, 1857," and it appeared from the caption and certificate to the deposition, that it was taken on the same day named in the notice, at the office of Enos Moore a justice of the peace, of Wapello county; *held*, that the deposition was properly suppressed. *McClintock v. Crick*, 4 Id., 453.

Where depositions are to be taken under a commission, the requirement of the statute is express that the names of the witnesses shall be given. *Pilmer v. The Br. of the St. Bk. &c.*, 16 Id., 321.

Where the notice of suing out the commission and the commission described the witnesses whose depositions were to be taken, as one V. "and such other person or persons as were acting as tellers or cashiers of the Marine Bank of Chicago," on a day named, under which the deposition of one D. was taken, in which he stated that he was the cashier of said bank. It was held that the witness was not sufficiently identified. *Id.*

A defective notice of the taking of a deposition is obviated by the appearance and cross-examination of the witness. *Nevin v. Roup*, 8 Id., 207.

SEC. 3723. [**Of witness out of county.**]-The deposition of a witness residing out of the county, may be taken before one or more commissioners on written interrogatories.

When a deposition can be taken in the county of the trial, no commissioner is necessary, although the witness is a resident of another state. *Anderson v. Easton & Son*, 16 Iowa, 56.

SEC. 3724. [**Who commissioners.**]-The party wishing to take such deposition, may select any of the officers mentioned in the next section as such commissioners, or the parties may agree upon, or the court appoint in the commission, any other individual for that purpose.

Where a commission to take deposition, is issued by the clerk, under the seal of the court, it will be presumed to have been issued by the authority of the court. *Plummer v. Roads*, 4 Iowa, 587.

SEC. 3725. [**Same.**]-The clerk, or any judge of any court of record, or any commissioners appointed by the governor of this state to take acknowledgment of deeds in another state, or any notary public, or any consul or consular agent of the United States, may be selected and appointed by the party such commissioner, either by the name of office of such officer, or by his individual name and official style and the name of the court of which such constituted commissioner is clerk or judge, and the name of the state and county; or, if without the United States and Canada, the name of the state and town, or city in which such commissioner of deeds, notary, or consul or consular agent resides, must be stated in the commission issued.

Where a commission to take depositions, was directed to the "clerk of the district court of Morgan county, Indiana," and the deposition was taken and certified by the "clerk of the court of common pleas of Morgan county, Indiana," it was held that the deposition should have been suppressed. *Plummer v. Roads*, 4 Iowa, 587.

So where the commission was directed to the "clerk of G. county, Minnesota," and the officer who took the deposition styled himself as the "clerk of the first judicial circuit of Minnesota territory" it was held that the variance was important and that the deposition should have been excluded. *Jones v. Smith*, 6 Id., 229.

Under this section, it is sufficient in a commission to take a deposition in the United States or Canada, to name the county and state in which the commissioner resides. When the deposition is to be taken in a foreign country, the commission should state the name of the city or town in which the officer resides. *Lyons v. Barrows*, 13 Id., 428.

The statute contemplates the issuing of a commission, to take a deposition, to some officer, either by his name of office, or his individual name and official style, together with the name of the county and state where he resides. It is not regular to direct a commission to several officers in the alternative. *Levalley v. Harmon's Adm'r*, 20 Id., 533.

But where a commission was directed "to any notary public in and for Davidson county in the state of Tennessee" it was held, not sufficient ground for suppressing the deposition. Such direction is sufficiently specific under this section of the statute. *Sheriff v. Hull*, 37 Id., 174.

SEC. 3726. [**Qualification.**—None of the above named officers are permitted to take the depositions aforesaid, by virtue of a commission directed to him merely as such officer, unless within the limits to which his official jurisdiction extends.

SEC. 3727. [**Notice: action before a justice.**—Reasonable notice must be given the adverse party of a time when a commission will be sued out of the office of the clerk of the court in which the action is pending; if such action is in an inferior court, then from the office of the clerk of the circuit court for taking the deposition of the witness, naming him, which notice must be accompanied with a copy of the interrogatories to be asked such witness.

Under a commission to take depositions, only those of the persons named in the commission and notice served on the adverse party can be taken. While the omission of the second initial letter, or a variation in the name which does not change the sound, is immaterial, the deposition of a person whose name is clearly different from the one stated in the commission, although the one intended thereby, is invalid, and will, on motion, be suppressed. *Strayer v. Wilson et al.*, 54 Iowa, 565; *Pilmer v. The Branch of The State Bank*, 16 Id., 321.

SEC. 3728. [**Cross interrogatories.**—At or before the time thus fixed, the opposite party may file cross-interrogatories. If cross-interrogators are not filed, the clerk shall file the following:

1. Are you directly or indirectly interested in this action? and if interested, explain the interest you have;
2. Are all your statements in the foregoing answers made from your personal knowledge? and if not, do your answers show what are made from your personal knowledge, and what are from information, and the source of that information? if not, now show what is from information, and give its source;
3. State everything you know concerning the subject of this action, favorable to either party.

SEC. 3729. [**Rules.**—Subject to the regulations herein contained, the court may establish farther rules for taking depositions and all other acts connected therewith.

NOTICE—SERVICE OF.

SEC. 3730. [**Reasonable notice: what deemed.**—The notice hereinbefore mentioned, is at least, when served on the attorney, ten days, and when served on the party within the county, five days; if served on the party anywhere else, the notice shall be that required under other similar circumstances in the service of an original notice; and when depositions are to be taken in pursuance of the first of the above methods, one day in addition must be allowed for every thirty miles travel from the place where the notice is served, to that where the depositions are to be taken. No party shall be required to take depositions when the court is in actual session.

The provision in this section that a notice to take depositions shall be five days "when served

on the party within the county" means the county in which the depositions are to be taken, and not that in which the court for which they are taken is held. *Kennedy v. Rosier*, 71 Iowa, 671.

SEC. 3731. [**How served.**—The notice, or notice and copy of interrogatories, may be served by the same persons on the same persons in the same manner, and may be returned, and the return shall be authenticated in the same way, as should be an original notice in the same cause when served other than by publication.

SEC. 3732. [**On attorney.**—It may also be served personally on any attorney of the adverse party of record in the cause.

SEC. 3733. [**By filing in clerk's office.**—Whenever the adverse party has been notified by publication only, and has not appeared, he shall be deemed served with the notice, or the notice and interrogatories, by the filing of the same with the clerk in the cause.

Where the plaintiff obtained service of the original notice by publication, and took depositions after depositing notice thereof in the clerk's office, in the manner prescribed by section 3733, and after judgment, on motion of the defendant the same was set aside and a retrial ordered, it was held erroneous to suppress the deposition taken *ex parte* by the plaintiff, upon the motion of the defendant made after the cause had been depending for trial for a considerable time, and after some of the witnesses had died. *Watson v. Russell et al.*, 18 Iowa, 79.

MANNER OF TAKING DEPOSITIONS.

SEC. 3734. [**Commission: form of.**—The commission issues in the name of the court and under its seal. It must be signed by the clerk, and need contain nothing but the authority conferred upon the commissioner, instructions to guide him, and a statement of the cause and court in which the testimony is to be used, and a copy of the interrogatories on each side appended.

SEC. 3735. [**How taken.**—The person before whom any of the depositions above contemplated are taken, must cause the interrogatories propounded, whether written or oral, to be written out, and the answers thereto to be inserted immediately underneath the respective questions. The answers must be in the language, as nearly as practicable, of the witness, if either party requires it. The whole being read over by or to the witness, must be by him subscribed and sworn to in the usual manner.

That a deposition was written by the attorney of the party by whom it was taken instead of by the commissioner designated in the notice, the adverse party not being present, was held sufficient ground for suppressing the deposition. *Hurst & Co. v. Larpin*, 21 Iowa, 484.

Where the certificate of the officer before whom a deposition is taken fails to state that the deposition was "read over by or to the witness" before it was signed and sworn to by him, is insufficient, and should be excluded on motion. *Ball v. Sykes*, 70 *Id.*, 525.

SEC. 3736. [**Exhibits appended.**—All exhibits produced before the person taking the deposition, or proved or referred to by any witness, or correct copies thereof, must be appended to the depositions and returned with them, unless sufficient reason be shown for not so doing.

SEC. 3737. [**Certificate.**—The person taking the deposition shall attach his certificate thereto, stating that it was subscribed and sworn to by the deponent at the time and place therein mentioned. The whole, including the commission and interrogatories, when any such were issued, must then be sealed up and returned to the clerk of the proper county by mail, unless some other mode be agreed upon between the parties.

Where the certificate of the officer taking depositions did not show that the same was read over to the witness before they were subscribed and sworn to, it was held that the officer might subsequently file an amended certificate conforming to the facts. *McKinley v. The C. & N. W. R. Co.*, 44 Iowa, 314.

The certificate of a notary public attached to a deposition, showing that the deposition was read over by the witness and was subscribed and sworn to by him, at the time and place mentioned in the certificate, is a literal compliance with the statute, and is sufficient. *Vaughn v. Smith & Co.*, 58 *Id.*, 553.

SEC. 3738. [**Neither party to be present.**—Where a deposition is taken

upon interrogatories, neither party, nor his agent or attorney, shall be present at the examination of a witness, unless both parties are present or represented by an agent or attorney, and the certificate shall state such fact if party or agent is present.

If it be shown that one of the parties to the action was present in the absence of the other, at the time the deposition was taken upon interrogatories under a commission, the deposition will, on motion, be suppressed. *Sheriff v. Hull*, 37 Iowa, 174.

SEC. 3739. [**Opened: not to be taken from clerk's office.**—The depositions when thus returned, must be opened by the clerk and placed on file in his office, after which he shall at any time furnish any person with an attested copy of the same upon payment of the customary fees, but must not allow them to be taken from his office previous to the next term of the court, unless by the mutual written consent of the parties.

Where a deposition is taken upon interrogatories propounded by both parties, and is returned and filed in the office of the clerk of the court, neither party has a right to withdraw it, and either may use it in evidence. *Pelamourges v. Clark*, 9 Iowa, 1.

The court has no power to change the form of an interrogatory in a deposition after it has been answered by the witness. *Id.*

SEC. 3740. [**Returned by mail.**—The depositions when thus returned by mail, must be directed to the clerk of the court. They shall state on the outside of the envelope the title to the cause in which they are to be used.

SEC. 3741. [**Unimportant deviations.**—Unimportant deviations from any of the above directions shall not cause the deposition to be excluded where no substantial prejudice could be wrought to the opposite party by such deviation.

Evidence contained in the depositions will not be excluded on the trial on the ground that it was elicited in response to leading questions, when no objections have been taken to the form of the questions when the depositions were taken. *Wolverton v. Ellis*, 18 Iowa, 413.

A defective notice of the taking of a deposition is obviated by an appearance and cross-examination of the witness. *Nevin v. Roup*, 8 Id., 207.

While unimportant errors in the taking of depositions are to be disregarded, yet authority to take testimony in this manner being in derogation of the common law, there should be some measure of strictness in the construction of the statute; and where there is a clear departure from the authority given, the deposition should be suppressed. *Jones v. Smith*, 6 Id., 229.

The safer and better practice is to require that objections to the form of interrogatories be made before the commission issues, and not upon the trial of the cause. *Id.*

SEC. 3742. [**Authentication of.**—Where depositions are directed to be taken before a judge or justice of the peace, merely by his name of office, the return must contain an authentication by the clerk of the proper court, under his seal of office, verifying the fact that the person who took the deposition is really such officer.

SEC. 3743. [**Deposition to show reason for taking.**—The deposition in each of the above cases must show that the witness is a non-resident of the county, or such other fact as renders the taking of the deposition legal, and no such deposition shall be read on the trial, if, at the time, the witness himself is produced in court.

Where a deposition has been taken it may be read on the trial if the witness is not in court, notwithstanding the reason given in the deposition for taking it be an invalid one. *Cook v. Blair*, 50 Iowa, 128.

Where it appears from a deposition that the witness is a non-resident of the state, it shows a sufficient reason for taking the same; and it will not be suppressed, although the witness may answer that he intends to be personally present at the term of court at which the cause is to be tried; unless it be shown that the witness is present in court at the time of the trial. *Nevin v. Roup*, 8 Id., 207.

SEC. 3744. [**In justice's court.**—Depositions taken to be used in a justice's court, shall be transferred to the court to which the cause is appealed, and used on the trial of such appeal in the same manner as if regularly taken therein.

An objection to a deposition, taken and used before a justice of the peace, other than for incompetence or irrelevancy will not be considered on appeal, when it was taken before the deposition was read in evidence before the justice. *Averson v. Bell*, 13 Iowa, 308.

PERPETUATING TESTIMONY.

SEC. 3745. [**Testimony.**]—The testimony of a witness may be perpetuated in the following manner:

SEC. 3746. [**Petition: statements.**]—The applicant shall file in the office of the clerk of the district or circuit court, a petition, to be verified in which shall be set forth specially, the subject matter relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and if not known, such general description as he can give of such persons, as heirs, devisees, alienees, or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court of this state, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be the plaintiff.

SEC. 3747. [**Order of court or judge.**]—The court, or the judge thereof, may forthwith make an order allowing the examination of such witnesses. The order shall prescribe the time and place of the examination; how long the parties interested shall be notified thereof, and the manner in which they shall be notified.

SEC. 3748. [**Notice: if cannot be done: proceedings.**]—When it appears satisfactorily to the court or judge that the parties interested cannot be personally notified, such court or judge shall appoint a competent attorney to examine the petition and prepare and file cross interrogatories to those contained therein. The witnesses shall be examined upon the interrogatories of the applicant and upon cross interrogatories where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received which is not responsive to some of them. The attorney filing the cross interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs.

SEC. 3749. [**Before whom taken.**]—Such depositions shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and shall be returned to the clerk's office of the court in which the petition is filed.

SEC. 3750. [**Court or judge to approve.**]—The court or judge, if satisfied that the depositions have been properly taken and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party where the witnesses are dead or insane, or where their attendance for oral examination cannot be obtained as required; but such depositions shall be subjected to the same objections for irrelevancy and incompetency as may be made to depositions therein pending an action.

Exceptions to depositions, on the ground of insufficiency of the notice under which they were taken, held, to be waived if not filed before the commencement of the trial. *Pilmer v. Branch of State Bank, etc.*, 16 Iowa, 321.

When, in the taking of a deposition, the witness is asked as to the contents of a statement in writing, it should be exhibited to the witness; if not, the objection must be made at the time the deposition is taken. *Nelson v. The C., R. I. & P. R. Co.*, 33 Id., 564.

It is error to exclude the answers to cross-interrogatories in a deposition, on the ground of incompetency and irrelevancy, when they relate to what the witness had stated to a particular person at a certain time and place specified, and to the subject matter of his testimony in chief. *Id.*

Where written objections to the taking of depositions were filed with the officer taking the same, but the attention of the court was never called thereto, and they were never passed upon by the court, no question arises thereon, for determination by the supreme court, on appeal. *Neimyer v. The Cass County Bank*, 42 Id., 124.

It is not sufficient objection to a deposition, that while the pleadings, notice and commission give the entire christian names of the witness, they only set it out by the initial. *Grimes v. Martin*, 10 Id., 347.

Depositions taken before a notary public whose commission is unrecorded, but who is acting *de facto* as a notary, will not be suppressed for that reason. *Keeney v. Leas & Lyon*, 14 Id., 464.

An objection to parol proof of the contents of a writing need not be made at the time of taking the deposition, or at any time before the trial, for it cannot be known whether it is competent or not until the time it is offered in evidence. Its admissibility will depend upon whether the proper basis has been laid by other proof, and the objection may be made when the deposition is offered to be read to the jury, or after it is received, or even after the testimony is closed. *Horseman v. Todhunter*, 12 Id., 230.

A motion to suppress depositions, made after the jury is sworn, and the plaintiff has stated his case, comes too late to be regarded by the court. *Frazier v. Smith*, 10 Id., 591.

A deposition should not be suppressed on the ground that the witness had referred to certain deeds which are not set out or annexed to the deposition as exhibits, when it appears that the deeds were not under the control of the witness, and are not the basis of the plaintiff's action. *Lyon v. Barrows*, 13 Id., 428.

Where the defendants were notified that on a certain day named, between the hours of nine o'clock A. M. and six o'clock P. M. the plaintiff would take the deposition of a person named. The deposition was taken between nine and eleven o'clock in the forenoon. At about the latter hour, and after the notary and witness had left the place where the deposition was taken, the attorney for the defendant appeared and desired to cross-examine the witness. Efforts were made by the plaintiff's attorney and the notary to procure the return of the witness, but without success. *Held*, in the absence of any showing of fraud, that the deposition should not be suppressed. *Scharfenbury v. Bishop*, 35 Id., 60.

Exceptions to the cross-examination in a deposition, on the ground that it is not proper cross-examination, must be in the form of a motion, filed by the morning of the second day of the first term after the deposition has been filed. *Johnson v. The C., R. I. & P. R. Co.*, 51 Id., 25.

Courts cannot take judicial notice that a well-known railway company is popularly known by the initial letters of the words constituting its full name; for example that C., B. & Q. R. R. Co. means the Chicago, Burlington & Quincy Railroad Company. So *held* where those initials alone were used to designate the party adversely interested in a petition to take depositions to perpetuate testimony under sections 3745-3750 of the code, and the depositions so taken were not admissible in a subsequent action against said corporation, although some one filed cross-interrogatories, signed "C., B. & Q. R. R. Co." *Accola v. C., B. & Q. R'y Co.*, 70 Id., 185.

SEC. 3751. (*As substituted by ch. 26, 17th g. a.*) [**Notice of filing.**]—(That the clerk shall, forthwith, after filing depositions in his office issue a notice of the filing of such depositions, reciting therein the title of the cause, names of witnesses, and the date of filing such depositions, and serve the same upon the attorneys of the parties in the action therein recited.

Said notice shall be duly served, when the clerk shall have deposited copies of the same in the post-office at the place where such cause is pending for trial, duly directed to the post-office address of the respective attorneys, for the parties in such action, which notice shall be so mailed by the clerk on the day he files such depositions; and if the post-office address of any attorneys of the parties is unknown to the clerk, he shall then deposit said notice, addressed to such attorney or attorneys, at the post-office where such cause is then pending for trial. No exceptions to dispositions other than for incompetency or irrelevancy shall be regarded, unless made by motion filed by the morning of the second day of the first term held after the depositions have been filed by the clerk: *Provided*, such depositions have been filed three days prior thereto.

If the depositions are afterwards received during such term, such motion shall be filed by the morning of the third day after such depositions are filed.

[**Time of filing motion to suppress.**]—All motions to suppress depositions must be filed before the cause is reached for trial.)

A motion to suppress depositions based on any other ground than incompetency or irrelevancy, must be filed by the first morning of the first term after the deposition has been filed with the clerk. That the cross-interrogatories attached by the clerk are not answered, does not constitute incompetency. *The Harris Manufacturing Co. v. Marsh*, 49 Iowa, 11.

A deposition which has been read in evidence without objection on a former trial of an action cannot be objected to on a second trial, on the ground of incompetency of the witness. *McMillan v. The B. & M. R. Co.*, 56 Id., 421.

An objection to testimony in a deposition, on the ground that it was not proper cross-examination, should be made by a proper exception at the time the deposition is taken, or by motion to

suppress, filed within the proper time as prescribed in this section, and cannot be made on the introduction of the deposition. *Bixby v. Carskadden*, 63 Id., 164.

Depositions which have been regularly taken in one cause may be used in another cause between the same parties or their privies; but in such case the parties have the same right to except to them, or to move their suppression, as if they had been taken in that cause; and in order that they may have an opportunity to avail themselves of this right, it is necessary that the depositions be filed in the cause, or leave to use them obtained before the trial is begun. *Searle v. Richardson*, 67 Id., 170.

Where it did not appear that the defendant has been properly made a party to proceedings to take depositions to perpetuate testimony, and it did appear that the depositions were never filed in the trial court; held that it was not necessary to move to suppress the depositions before the cause was reached for trial, but that the objection could not be made when they were offered as evidence. *Accola v. The C. B. & Q. R'y Co.*, 70 Id., 185.

SEC. 3752. [**Hearing.**].—The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions before the commencement of the trial.

SEC. 3753. [**Errors waived.**].—Errors of the court in its decision upon exception to depositions are waived, unless excepted to.

SEC. 3754. [**Costs.**].—In all cases of taking depositions as hereinbefore provided the costs thereof must be paid in the first place by the party at whose instance they are taken, subject like other costs to be taxed against the failing party in the suit.

TITLE XXIII. OF COMPENSATION OF OFFICERS.

CHAPTER 1.

OF STATE AND DISTRICT OFFICERS.

SECTION 3755. [**Governor and secretary.**]-The salary of the governor shall be three thousand dollars per annum; and the salary of the private secretary of the governor [fifteen] hundred dollars per annum.

SEC. 3756. (*As amended by ch. 125, 21st g. a.*) [**Secretary of state and deputy.**]-The salary of the secretary of state shall be twenty-two hundred dollars per annum; and the salary of the deputy secretary of state shall be [fifteen] hundred dollars per annum.

The secretary of state shall collect the following fees:

For each commission to commissioners in other states, three dollars.

For each commission to notaries public, one dollar and twenty-five cents.

For certificate, with seal attached, one dollar.

For a copy of any law or record, upon the request of any private person or corporation, for every hundred words ten cents.

For [filing] articles of incorporation other than those of a public character, [five dollars, and for recording the same, for every hundred words or fraction thereof, fifteen cents; and upon payment of the fees above provided, the secretary of state shall upon request issue a certificate under the seal of his office, setting forth the fact of such filing.]

SEC. 3757. [**Auditor and deputy.**]-The salary of the auditor of state shall be twenty-two hundred dollars per annum; and the salary of the deputy auditor of state shall be [fifteen] hundred dollars per annum; and the auditor shall collect fees as provided in chapters on insurance.

SEC. 3758. [**Treasurer and deputy.**]-The salary of the treasurer of state shall be twenty-two hundred dollars per annum; and the salary of the deputy treasurer of state [fifteen] hundred dollars per annum.

(The office of register of the State Land Office abolished by chapter 206, of the laws of 1880. See post page —.)

SEC. 3760. (*As amended by ch. 118, 21st g. a.*) [**Superintendent of public instruction and deputy.**]-The salary of the superintendent of public instruction shall be twenty-two hundred dollars per annum; and the salary of the deputy superintendent of public instruction, [fifteen] hundred dollars per annum.

SEC. 3761. [**Adjutant general.**]-The salary of the adjutant general shall [be fifteen hundred] dollars per annum.

SEC. 3762. [**State librarian.**]-The salary of the state librarian shall be [one thousand] dollars per annum, nor shall any extra amount be paid for any assistant librarian.

SEC. 3763. [**Superintendent of weights and measures.**]-The salary of the superintendent of weights and measures shall be fifty dollars per annum.

(Sections 3764, 3765, 3766, 3767 and 3768 are repealed by chapter 82, laws of 1888, approved April 7, 1888.)

SUPREME JUDGES—ATTORNEY-GENERAL—CLERK.

SEC. 3769. (*As substituted by ch. 172, 21st g. a.*) [**Judges of supreme court.**]—[The salary of each judge of the supreme court shall be four thousand dollars per annum.]

SEC. 3770. (*As substituted by ch. 172, 21st g. a.*) [**Attorney-general.**]—[The salary of the attorney-general shall be fifteen hundred dollars per annum, and whenever he is required by the duties of his office, or by directions of the governor or general assembly to attend any of the courts of this state, or any federal courts of this or any other state, he shall receive, in addition to his salary, five dollars for each day he attends such courts, and the same mileage in going to and from such courts as is allowed members of the general assembly for attending sessions thereof, to be computed by the nearest practicable route.]

SEC. 3771. (*As amended by ch. 119, 21st g. a.*) [**Salary of clerk and deputy clerk supreme court.**]—The salary of the clerk of the supreme court shall be twenty-two hundred dollars per annum: [and the salary of the deputy clerk of the supreme court shall be [fifteen] hundred dollars per annum.]

[**Shall charge and collect fees.**]—The clerk shall collect the following fees, and account for them as provided in section 3778 of the code, and shall also keep account of and report in like manner all uncollected fees:

Upon filing each appeal, three dollars;

Upon entering judgment when the cause has been tried on its merits, two dollars;

Upon each continuance, one dollar;

Upon issuing each execution, one dollar and twenty-five cents;

Upon entering satisfaction of each judgment, fifty cents;

Upon each writ, rule or order to be served upon any person not in court, twenty-five cents;

For copying an opinion to be transmitted to an inferior court upon reversal of a judgment or an order, to be paid by the party against whom the costs are adjudged, or for a copy of such opinion, or any record made at the request of any person, for each one hundred words, ten cents.]

(CHAPTER 118, LAWS OF 1886.)

RELATING TO SALARIES OF DEPUTY STATE OFFICERS AND CLERKS.

An Act to amend sections 3755, 3756, 3757, 3758, 3760 of the code, and section two (2) of chapter 117, laws of the nineteenth general assembly, relating to salaries of deputy state officers and governor's private secretary, and clerks in state offices.

Be it enacted by the general assembly of the state of Iowa: (Sections 1, 2, 3, 4, 5 and 6 enact amendments to sections 3755, 3756, 3757, 3758 and 3760 of the code, respectively, and to section 2, of chapter 117, laws of 1882, by substituting in each of said sections the word "fifteen" in lieu of the word "twelve," which appears in the amended sections.)

SEC. 7. [**All fees turned into state treasury.**]—The compensation of fifteen hundred dollars per annum shall be in full for all compensation to such deputy state officers, and all fees received by or paid to any deputy state officers by virtue of their official positions shall be turned into the state treasury. They shall receive

no other compensation from the state for any services whatever while acting as such deputy, *provided, further*, that no clerk appointed by the auditor or his deputy, the treasurer or his deputy, the secretary of state or his deputy, or by the executive council or the governor, shall receive, directly or indirectly, a greater sum than fifteen hundred dollars per annum for such services as such clerk.

Approved April 10, 1886.

(Section 3772 repealed by section 2, chapter 74, laws of 1878.)

SEC. 3773. If any of the foregoing fees of the clerk are not paid in advance, execution may issue therefor except where the fees are payable by a county or the state.

DISTRICT OFFICERS.

SEC. 3774. [District judges.]—The salary of each judge of the district and of the circuit court shall be twenty-two hundred dollars per annum.

SEC. 3775. [District attorney.]—The salary of each district attorney shall be six hundred dollars per annum, and they shall receive in addition thereto the following fees, to be audited and paid like other claims against the counties:

For each conviction on a plea of guilty, five dollars;

For each jury trial in cases of misdemeanor, ten dollars;

For each jury trial in cases of felony, twenty dollars;

For each judgment for costs only, five dollars;

For prosecuting an information before a justice of the peace for a violation of the laws in relation to the sale of intoxicating liquors, five dollars;

For all fines and forfeitures actually collected by him, ten per cent upon all sums less than two hundred dollars, and upon all sums exceeding that amount, one per cent.

A district attorney is entitled to the percentage provided in this section of the code upon fines and forfeitures collected through his agency, whether the money actually passes through his hands or not. *Smith v. Linn County*, 55 Iowa, 232.

The district attorney is not entitled to charge a fee for a conviction in addition to the fee allowed him for a jury trial. *Ellis v. Jackson County*, 38 Id., 175; *Bradley v. Marshall County*, Id., 178.

Where defendants are jointly indicted and convicted, a separate judgment must be entered against each, though tried together, and the district attorney is entitled to a conviction fee of five dollars upon each judgment. *The State v. Hunter*, 33 Id., 361.

SEC. 3776. [In case of conviction.]—In cases of conviction, the fees contemplated in the preceding section shall be taxed against the defendant, and when collected paid into the county treasury.

SEC. 3777. (*As substituted by ch. 195, 18th g. a.*) [Compensation.]—[Short-hand reporters shall receive compensation as follows: For each day actually in attendance in court under the order of the judge, such sum as may be fixed by the judge, not exceeding six dollars per day, to be audited and paid by the county upon the certificate of the judge of the court; but the judge shall not order the attendance of said reporter except during that part of the term when, in his judgment, the reporting of the testimony will be required, and he shall discharge said reporter from further attendance at each term as soon as, in his judgment, the reporting of testimony will not be farther required for such term; and for making transcripts of his original notes, for each one hundred words, six cents; but where such transcripts are desired in any civil case, the fees therefor shall be paid by the party desiring the same, and the amount allowed such reporter for reporting testimony in any case shall, in all instances, except where the defendant in a criminal case is acquitted, be taxed as a part of the costs in the case; *provided*, that when the defendant in any criminal cause, who shall have perfected an appeal from a judgment against him, presents to the judge satisfactory proof, by affidavit or other-

wise, that he is unable to pay for such transcript, the court, if in the opinion of the judge justice will be thereby promoted, may order said transcript to be made at the expense of the county, and the original notes of any testimony taken in any case shall be filed in the office of the clerk of the court and become a part of the record in said case; and said notes or any transcript thereof duly certified by the reporter of said court shall be admissible in any case in which the same are material and competent to the issue therein, with same force and effect as depositions and subject to the same objections so far as applicable; and said original notes, or the transcript thereof, or any part thereof, may be referred to in any bill of exceptions, and when duly transcribed and certified, shall be inserted therein on appeal; and upon demand of any person for a duly certified transcript of any designated portion of the original notes of testimony in any case, it shall be the duty of said reporter to transcribe the portion so designated and duly certify the same, upon payment of fees therefor; *provided*, that when the reporter taking the notes in any case in court has ceased to be the official short-hand reporter of that court, any transcript by him made therefrom and duly certified by him under oath as a full, true, and complete transcript of said notes, shall have the same force and effect as though certified in the same manner by the official short-hand reporter of said court.]

The taking of stenographic notes of the oral evidence offered upon the trial of an equitable action, is not a taking down of the evidence in writing in compliance with section 2742 of the code, as amended by chapter 145 of the laws of the seventeenth general assembly. *Godfrey v. McKean*, 54 Iowa, 127.

But where the evidence is so taken down under an order of the court, made on motion of one of the parties, he waives the right to insist that it "be taken down in writing," and is not entitled to an order of court requiring the reporter to make and file a long-hand translation of his notes as a part of the record, without making provision for payment of such service. *Id.*

Where a bill of exceptions referred to the evidence as follows: "The following testimony and rulings were had and reduced to writing by said reporter, being all the testimony on said trial. (Here insert evidence in full)": held a sufficient and unmistakable reference to the testimony taken down by the reporter and by him duly certified and filed in the clerk's office. *Wilson v. First Congregational Church*, 50 Id., 112; *McDonald v. Farrell*, Id., 335.

Where the evidence of misconduct of jurors was taken by the short-hand reporter and neither placed on file, as required by this section, nor preserved by bill of exceptions though incorporated in the transcript, on appeal, will be stricken out on motion. The record must be made up in the court below and cannot be made up in the appellate court. *The State v. Hessian*, 58 Id., 68.

Where the original notes of the reporter were duly filed, and then, instead of being referred to in the bill of exceptions, were incorporated therein, and a long-hand copy, duly certified, was inserted in the transcript, it was held to be a substantial compliance with this section as amended by chapter 195, laws of 1880. *McAnulty v. Seick*, 59 Id., 586.

See *Wilson v. The First Congregational Church*, 60 Id., 112.

The original notes of the short-hand reporter, when filed, become a part of the record, and the clerk may certify whatever is of record. Per SEEVERS, J., in *The Town of Manson v. Ware*, 63 Id., 348.

This section of the code, as amended, making the original notes of the short-hand reporter, or a transcript thereof, admissible in evidence in any case in which the same are material and competent, has reference to the trial of causes in the *nisi prius* courts, and not to the making up of the record for an appeal to the supreme court, and does not dispense with the necessity for bills of exceptions in cases where they were before required. *McCarthy v. Watrous & Co.*, 69 Id., 260.

Under this section, the short-hand reporter's notes of the testimony of a witness cannot be used on the trial of another cause, without first showing, as in the case of the use of a deposition, that the witness himself cannot be produced in court; and evidence that the witness was *reputed* to have left the state was not sufficient for that purpose. *Baldwin v. The St. L., K. & N. W. Ry Co.*, 68 Id., 37.

Evidence taken in short-hand can become the written evidence, for the purpose of an appeal, only when it is translated, and the translation is certified by the reporter. The certificate of the judge who cannot read the short-hand notes, that they show all the evidence offered and received, cannot give them the character of written evidence. *Richards v. Lounesbury*, 65 Id., 587.

Where a witness properly subpoenaed by the plaintiff was out of the state at the time of the trial, without the consent or fault of plaintiff, and three or four days previous to the trial, and in term

time, the plaintiff learned that the witness would be absent, and duly notified defendant that the transcript of the reporters notes of the former testimony of the witness in another trial would be offered in evidence, *held* that such transcript was admissible under section 3777 of the code as amended as above, and that if any notice was necessary in the case, that given was sufficient. *Fleming v. The Town of Shenandoah*, 71 Id., 456.

The record of documentary and oral evidence taken and duly preserved on a former trial is not admissible in a subsequent trial, without any showing of the absence of the witnesses, or of inability to produce the original documents, and without any notice to the adverse party. *Case v. Blood et al.*, 7 Id., 632.

SEC. 3778. [**Certain state officers to pay fees to state treasurer.**]—The secretary of state, auditor of state, and register of the state land office, shall keep an accurate and particular account of all fees received by them, which shall be verified by affidavit, and rendered monthly to the treasurer of state, and they shall pay the amounts thus received to such treasurer at the end of each month.

SEC. 3779. [**Judge's salary not increased.**]—During the term for which any judge may have been elected or appointed, his salary shall not be increased by this chapter, except that any judge elected to fill a vacancy shall receive the salary herein provided.

SEC. 3780. [**Salaries paid monthly.**]—The salaries of all officers mentioned in this chapter shall be paid in monthly installments at the end of each month, and shall be in full compensation for all services, except as otherwise expressly provided in this chapter.

CHAPTER 2.

OF COUNTY AND TOWNSHIP OFFICERS.

SECTION 3781. [**Clerk of district and circuit court.**]—The clerk of the district or circuit court shall be entitled to charge and receive the following fees:

For filing any petition, appeal or writ of error, and docketing the same, one dollar and fifty cents;

For every attachment, fifty cents;

For every cause tried by jury, one dollar and fifty cents;

For every cause tried by the court, seventy-five cents;

For every equity cause, one dollar and fifty cents;

For each injunction, or other extraordinary process or order, one dollar.

For all causes continued on application of a party by affidavit, fifty cents.

For all other continuances, fifteen cents;

For entering any final judgment or decree, seventy-five cents;

For taxing costs, fifty cents;

For issuing execution or other process after judgment or decree, fifty cents;

For filing and properly entering and indorsing each mechanic's lien, the same to be taxed as other costs in case a suit is brought thereon, one dollar;

For certificates and seal, fifty cents;

For filing and docketing transcript of judgment from another county or a justice of the peace, fifty cents;

For entering any rule or order, twenty-five cents;

For issuing writ or order, not including subpoenas, fifty cents;

For issuing commission to take depositions, fifty cents;

For entering sheriff's sale of real estate, fifty cents;

For entering judgment by confession, one dollar;

For entering satisfaction of any judgment, twenty-five cents;

For all copies of records or papers filed in his office, transcripts, and making complete record, ten cents for each hundred words;

For taking and approving a bond and sureties thereon, fifty cents;
 For declaration of intentions by an alien to become a citizen, twenty-five cents;
 For all services on naturalization of aliens, including oaths and certificate, fifty cents;

In criminal cases, and in all cases in which the state or county is a party plaintiff, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant. Where the state fails, the clerk's fees shall be paid by the county;

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

An officer is entitled to charge and receive only such fees as the statute provides as compensation for the services he may perform. *Palo Alto County v. Burlingame et al.*, 71 Iowa, 201; *Estate of Packer v. Corlett*, id., 249.

SEC. 3782. [**Pensions and bounties.**—The clerks of the district court shall certify under the seal of such court, to all applications and other papers requiring the certificate and seal of a court of record to procure pensions, bounties and back pay for soldiers or other persons entitled thereto, whenever requested by the applicant, his agent or attorney, and such clerk shall be entitled to the sum of ten cents only for such service.

SEC. 3783. [**In probate matters.**—There shall be such compensation paid such clerk for his services in probate matters out of the fees collected by him for probate business, as the board of supervisors may allow.

The allowance to be made to the clerk under this section of the code, is not to be in addition to his other legal fees, when they amount in the aggregate to \$2,000 per annum. His entire compensation under the code for all of his official services is limited to \$2,000 per annum. *Washington County v. Jones*, 45 Iowa, 260.

SEC. 3784. (*As substituted by sec. 1, ch. 184, 18th g. a.*) [**Compensation limited.**—The total amount of compensation of such clerk for all official services shall not exceed the sum of eleven hundred dollars per annum in counties having a population not exceeding ten thousand; the sum of thirteen hundred dollars per annum in counties having a population in excess of ten thousand but not exceeding twenty thousand; nor the sum of fifteen hundred dollars per annum in counties having a population in excess of twenty thousand but not exceeding thirty thousand. If the fees collected by the clerk in any county in any one year shall exceed the sums aforesaid, the excess shall be paid into the county treasury for the use of the county fund. In case the aggregate amount of fees so received by the clerk in any one year is less than the limit of his compensation as herein fixed, and such amount is deemed inadequate compensation by the board of supervisors, they may allow such additional amount as they may deem just and proper within the limits herein prescribed. When in the judgment of the board of supervisors it is necessary to the proper discharge of the duties of the office, said board may, upon application of the clerk, authorize said clerk to employ a deputy or clerk, at a salary not exceeding the rate of six hundred dollars per annum for the time actually employed. (*As amended by ch. 36, 22d g. a.*) [*Provided, however, that in all counties having a population of twenty-five thousand, and not over thirty-six thousand, as shown by the last state census, where the board of supervisors find it necessary to have a deputy clerk, deputy treasurer and a deputy auditor, there shall be allowed as compensation to such deputy clerk, deputy treasurer and deputy auditor, for their service a sum equal to not more than two-thirds ($\frac{2}{3}$) the salary or compensation of the county clerk, county treasurer and county auditor of such county, respectively, as the board of supervisors may direct: "Provided, that in counties having a population in excess of forty thousand, the court, upon application of the clerk, may authorize said clerk to appoint, subject to the approval of the board of supervisors, not more than three deputies and one or*

more clerks, and determine in its order the number of deputies and clerks;"] the board of supervisors may allow such compensation to the clerk, deputies and clerks as they may deem just and proper, but that the sum total of such compensation allowed shall not exceed twenty-five hundred dollars, and, *provided further*, that in counties having a population in excess of forty thousand, the board of supervisors may allow such compensation to the said clerk, deputies and clerks as they may deem just and proper, but the total compensation shall not exceed the fees received by such clerk, or the sum of five thousand dollars, if such fees be less than said sum. *Provided further*, that in any county having a population of over thirty and under forty thousand, and which is within the judicial district in which the circuit has been divided, the board of supervisors, if they find it necessary, may employ an additional clerk or deputy, for duties in connection with the probate records, at a compensation not exceeding six hundred dollars per annum. *Provided further*, that in each county having two county seats, the compensation of clerk of courts, including the amount paid his deputies and clerks, shall not exceed three thousand dollars in any one year. Any excess of fees collected to be paid into the county treasury as above provided.

Under the revision of 1860, the total compensation of the clerk of the district and circuit courts, *exclusive* of the amount allowed by the board of supervisors for probate business, was limited to two thousand dollars per annum. *Boone County v. Wilson*, 38 Iowa, 372; *Washington County v. Jones*, 45 Id., 260.

The clerk is entitled under the code in addition to his salary, to such an allowance for the hire of his deputy as may be reasonable, in view to the amount of labor demanded by the duties of his office. *Washington County v. Jones*, *supra*.

SEC. 3785. [**Report to supervisors: fees collected.**—The clerk of the district court as such, and as clerk of the circuit court, shall report to the board of supervisors of his county at each regular session, a full and complete statement of the amount of fees received by him, which shall be verified by the affidavit of such clerk.

SEC. 3786. (*As amended by ch. 151, 19th g. a.*) [**Clerks of courts to pay over unclaimed fees six months in his hands twice a year.**—(The clerk of the district and circuit courts shall, on the first Monday in January and July of each year, pay into the county treasury for the use of the county all fees of whatever kind in his hands at the date of preceding payment, and still unclaimed and at the time of so doing he shall take from the treasurer duplicate receipts thereof [for], giving the title of the cause and style of the court in which the same was pending, with the names of the witnesses, jurors, officers, or other persons, and the amount each one is entitled to receive, one of which receipts he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and on demand by the persons entitled to said fees he shall issue county orders for the amount due each person respectively.)

SEC. 3787. [**For marriage licenses and fees in probate matters.**—There shall be paid the clerk of the circuit court the following fees:

For issuing marriage licenses, one dollar;

For all services performed in the settlement of the estate of any decedent, except where actions are brought by the administrator or against him, or as may be otherwise provided herein, where the value of the estate does not exceed three thousand dollars, three dollars;

Where such value is between three and five thousand dollars, five dollars;

Where such value is between five and seven thousand dollars, eight dollars;

Where the value exceeds eight thousand dollars, ten dollars;

And in addition to the foregoing, for making a complete record in cases where the same is required by law or directed by an order of the court, for every one hundred words, ten cents;

All of which fees shall be paid into the county treasury.

(CHAPTER 94, LAWS OF 1882.)

COMPENSATION OF SHERIFFS.

An Act to repeal chapter 115, laws of the eighteenth general assembly, relating to compensation of sheriffs, and to enact a substitute in lieu thereof.

SECTION 1. [**Repeal of ch. 115, 18th g. a.**].—*Be it enacted by the general assembly of the state of Iowa:* That chapter 115, laws of the eighteenth general assembly, relating to compensation of sheriffs, be and the same is hereby repealed, and the following enacted in lieu thereof:

SEC. 2. [**Per diem for attending court.**].—The sheriff is entitled to charge and receive the following fees:—For attending the supreme court, to be paid out of the amount appropriated for contingent expenses of said court, two dollars per day.

SEC. 3. [**Fee for serving notices.**].—For serving a notice and making a return thereof, for the first person served, fifty cents, and for each additional person, twenty-five cents.

SEC. 4. [**Fee for serving warrant.**].—For each warrant served two dollars and the repayment of any amount actually paid by him as necessary expenses in executing such warrant as sworn to by the sheriff. If service of the warrant cannot be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable.

The sheriff is entitled to this fee of two dollars for serving a warrant for the seizure of intoxicating liquors. *Painter v. Polk County*, 70 Iowa, 596.

SEC. 5. [**Serving subpoena.**].—For serving and returning a subpoena, for each person, twenty cents.

SEC. 6. [**Summoning jury.**].—For summoning a grand or trial jury, for each person served, sixty cents, to be paid out of the county treasury; and such sum shall be in full compensation for such service.

SEC. 7. [**Jury to assess damages for right of way.**].—For summoning a jury to assess the damages to the owners of lands taken for public improvements, and attending to them, five dollars per day. There shall be nothing in this section so construed that will allow any sheriff to make separate charges for different assessments, provided they can be done by the same set of appraisers and completed in one day of ten hours.

SEC. 8. [**Serving execution and attachment.**].—For serving an execution, attachment, or order for the delivery of personal property, injunction, or any order of court and making return thereof, two dollars.

SEC. 9. [**Per centum on collections.**].—For collecting and paying over money: On the first five hundred dollars (\$500) or fraction thereof, two per cent; and on excess over five hundred dollars (\$500) and under five thousand dollars (\$5,000), one per cent; on all over five thousand dollars, (\$5,000) one-half per cent.

SEC. 10. [**Certificate of sale.**].—For making and executing a certificate or deed for lands sold on execution, or a bill of sale for personal property, one dollar.

SEC. 11. [**For making inventory.**].—For the time necessarily employed in making an inventory of personal property attached or levied upon, twenty-five cents per hour.

SEC. 12. [**For copy of paper.**].—For copy of paper required by law, made by him, for each one hundred words, ten cents.

Under this section a sheriff is entitled to receive, for copies of papers required by law to be

made by him for each 100 words, or fraction thereof, ten cents. *Painter v. Polk County*, 70 Id., 596.

SEC. 13. [**Mileage.**]-Mileage in all cases required by law, going and returning, per mile, five cents.

SEC. 14. [**Taking bond.**]-For taking each bond required by law, twenty-five cents.

SEC. 15. [**For commitment.**]-Each commitment to jail, twenty-five cents; discharge from same, twenty-five cents.

SEC. 16. [**Receiving surrender of prisoner.**]-For receiving a prisoner on surrender by bail, fifty cents.

SEC. 17. [**Boarding prisoner.**]-For boarding a prisoner, a compensation to be fixed by the board of supervisors, not less than fifty cents per day.

SEC. 18. [**Washing, etc.**]-For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors.

SEC. 19. [**Attending before judge.**]-For attending before any judge with a prisoner, one dollar per day.

Section nineteen of this chapter does not entitle the sheriff to one dollar for each prisoner brought by him before the court for arraignment, trial or sentence, but only for attending before a Judge when not holding court. *Painter v. Polk Co.*, 70 Id., 596.

SEC. 20. [**Attending sale.**]-For attending sale of property, for each day, one dollar.

SEC. 21. [**For conveying convicts to penitentiary and insane persons to asylum, etc.**]-The sheriff, for conveying one or more convicts to either of the penitentiaries of this state, or any prisoner to any county jail outside of the county in which said sheriff resides, or any insane person or persons to any insane asylum in the state, or person or persons to the reform school in the state, shall be allowed, as full compensation therefor, his necessary traveling expenses, actually paid by him, including board and railroad fare for himself and such convicts, insane, or other prisoners, or any other necessary expenses, and in addition thereto forty cents per hour for the time necessarily employed in going to and returning from said prisons, asylums, or reform schools, to be certified by the oath or affidavit of such sheriff, accompanied by the proper vouchers to the board of supervisors of the county where the convictions took place. Should the sheriff need any assistance in taking prisoners to the penitentiary or insane persons to the asylum, the same shall be furnished at the expense of the county, the compensation to be fixed by the board of supervisors.

A sheriff is not entitled to additional compensation for personal attention to a prisoner, beyond the payment for his board. The fees and salary of the officer include payment for such services. *Grubb v. Louisa County*, 40 Id., 314.

Where the sheriff had for service upon one person seven subpoenas in as many State cases, and made but one trip in serving them all, held that he was entitled to mileage for but the one trip. *Bedford v. Shelby County*, 64 Id., 11.

SEC. 22. [**Dwelling for jailor.**]-The jailor may be furnished a dwelling in connection with the jail, or as convenient thereto as practicable, in the discretion of the board of supervisors.

SEC. 23. [**Salary of sheriff.**]-The sheriff is also entitled, for attending district and circuit courts, and for other service for which no compensation is allowed by law, such annual salary as may be fixed by the board of supervisors, but in no case less than two hundred dollars (\$200) nor more than four hundred dollars (\$400); and the sheriff shall make a full report to the board of supervisors at their January meeting of each year, showing the full amount of fees received by him for the previous year in pursuance of this act.

SEC. 24. [**Repeal.**]-All acts and parts of acts in conflict with this act are hereby repealed.

Under section twelve of this act, the fee provided is chargeable by the sheriff for the service of an execution. *Bell v. Weddington*, 54 Iowa, 561.

Under section twenty-three a sheriff is entitled to mileage for each mile traveled in conveying convicts to the penitentiary and returning therefrom. *Harding v. Montgomery County*, 55 Id., 41.

It is only where persons are found to be insane, under the provisions of chapter 49 title 25 of this code, that a sheriff is entitled to the same mileage for conveying them to the hospital as is allowed for conveying convicts to the penitentiary. *Id.*

The mileage allowed by law to the sheriff for conveying convicts and insane persons to places of confinement is intended to be full compensation for the time spent and expenses incurred in the performance of the services. *Id.*

Where property sold on execution is purchased by the execution plaintiff, and the proceeds are credited on the judgment, the sheriff is entitled under section 9 of the above chapter, 94, laws of 1882, to the same percentage as compensation as if the purchase had been made by a stranger to the execution. *Litchfield v. Ashford et al.* and *Same v. Erickson et al.*, 70 Id., 393.

For conveying a convict to the penitentiary the sheriff is entitled to sixteen cents per mile as his full compensation. *Bringolf v. Polk County*, 41 Id., 554.

The compensation of the sheriff for conveying a prisoner to the penitentiary for safe keeping is five cents a mile. He can demand in addition thereto his railway fare and amount paid for necessary guards. *Id.*

Where the sheriff is directed by the court to produce as a witness a prisoner from the penitentiary, he is entitled to his mileage and all his expenses incurred in the transportation of the prisoner. *Id.*

Where under the same order he thus produces five prisoners, he is entitled to single mileage and expenses for all. *Id.*

When a sheriff produces a prisoner in court from the county jail located in the basement of the court house he is not entitled to charge mileage. *Id.*

For serving a subpoena and delivering a copy of the same, the sheriff is entitled to compensation for the latter at the rate of ten cents for every hundred words. *Id.*

The sheriff is not entitled to ten cents for each jury called by a bailiff, in addition to the per diem paid by the county for the bailiff. *Id.*

The county should reimburse the sheriff for the amount expended by him for the services of bailiffs to the number designated by the court. *Id.*

Where a decree of foreclosure of a mortgage upon a railroad has been rendered at the suit of the mortgage-bond holders, and a sale of the road has taken place thereunder, at which a corporation not a party to the foreclosure was the bidder, and the transfer of such bid being subsequently made to the trustees of the bond holders and approved by the court rendering the decree, it was held, that the sheriff's fees for making the sale should be the same as if the execution plaintiffs had been the immediate purchasers. *Gulman v. The D. V. R. Co.*, 42 Id., 495.

Where a sheriff summoned a jury to assess the damages sustained by the owner of land taken for the right of way of a railroad, and on the same day assessments were made by the same jury of several tracts belonging to different owners, it was held, that directing the jury to proceed from one tract to another did not constitute a distinct summons, and that the sheriff was only entitled to compensation for summoning the jury to assess the damages on a single tract. *Robb v. The A., K. & D. M. R. Co.*, 44 Id., 440.

Section 3788 of the code providing that the mileage of an officer for conveying a convict to the penitentiary shall be computed by the "most direct route of travel," is to be construed as intending the route by which the journey can be most speedily performed. *Maynard v. Cedar County*, 51 Id., 430.

The salary provided by this section to be paid to the sheriff is intended as a full compensation for all services for which payment is not otherwise provided, and he cannot recover for services he may render as jailor. *McDonald v. Woodbury & Co.*, 48 Id., 404; *Grubb v. Louisa Co.*, 40 Id., 314.

The board of supervisors of a county may properly fix the salary of a sheriff at the beginning of his term, and when this is done the action of the board and the rendering of services by the sheriff upon the faith of such action, constitutes a binding contract upon the county. *Holmes v. Lucas County*, 53 Id., 211.

The compensation of a sheriff is limited to the amount fixed by the statute, and he cannot recover a *quantum meruit* for his services. *Wapello County v. Monroe County*, 39 Id., 349.

(Sections 3788 and 3789 of the code were repealed by chapter 115 of the acts of the 18th general assembly, and that chapter is repealed and substituted by the foregoing chapter 94 of acts of the 19th general assembly.)

SEC. 3790. [In criminal cases.]—In all criminal cases where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice as far as their knowledge extends,

and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury.

A county is not liable for the cost of printing the abstract and argument of a defendant convicted of crime, on his appeal to the supreme court. This section has reference only to sheriff's fees. *Red v. Polk County*, 56 Iowa, 98.

Proceedings under the statute, brought by the mother of a bastard child against the putative father, to charge him with the support of the child, are not criminal in their nature, though brought in the name of the state, and the county is not liable for the costs in such case under section 3790 of the code. *McAndrew v. Madison County*, 67 Id., 54.

COUNTY SUPERVISORS.

SEC. 3791. (*As amended by ch. 15, 21st g. a.*) [**Per diem: in session: on committee: mileage.**].—[The members of the board of supervisors shall each receive four dollars for each day actually in session, and two dollars and fifty cents per day, exclusive of mileage, when not in session but employed on committee service, and six cents per mile for every mile traveled in going to and from the regular and adjourned sessions of the board and in going to and from the place of performing committee service: *Provided*, that in counties having a population, as shown by the last preceding census, of ten thousand or less, they shall not receive compensation for session service for more than twenty days in one year; and in counties having a population of more than ten thousand but less than twenty-three thousand, for more than thirty-five days of such service in one year; and in counties having a population of twenty-three thousand or over, for more than forty days of such service in one year]; [and in counties having a population of forty thousand or over, not more than fifty days in one year.]

RECORDER—TREASURER.

SEC. 3792. **The recorder** shall be entitled to charge and receive the following fees:

For recording each instrument containing four hundred words, fifty cents;

For every additional hundred words, or fraction thereof, ten cents.

SEC. 3793. (*As substituted by § 11, ch. 184, 18th g. a.*) **Each county treasurer** shall receive for his services the following compensation:

1. Three-fourths of one per cent of all money collected by him as taxes due any incorporated city or town, to be paid out of the same.

2. Three per cent of all taxes collected by him for all other tax funds, to be paid out of the county treasury.

3. For each certificate of purchase issued for land sold for non-payment of taxes, twenty cents.

4. For paying money into the state treasury when required by law, or the auditor of state, such compensation as the board of supervisors shall allow, not exceeding one-fourth of one per cent on the amount so paid, which allowance shall be paid by the county.

5. When the aggregate amount of compensation allowed by this and the next section exceeds twelve hundred dollars in any one year in counties where taxes are collected by township collectors, or fifteen hundred dollars in counties having no township collectors, the excess shall be paid into the county treasury; but when in the judgment of the board of supervisors it is necessary for the proper discharge of the duties of the office, said board may, upon application of the treasurer, authorize said treasurer to employ a deputy, or clerk, at a salary not exceeding the rate of six hundred dollars per annum for the time actually employed; *provided*, that in counties where population does not exceed ten thousand, the salary shall not exceed thirteen hundred dollars in any case, and the board shall not allow it to

exceed three hundred dollars clerk hire in such counties; and *provided*, that in counties having more than thirty thousand population, the board of supervisors may grant such additional compensation for treasurer, deputy, or clerk hire as they may deem just and proper.]

Where the board of supervisors allowed the treasurer compensation in addition to the percentage allowed by this section a sum which made his total compensation exceed \$1,500 per annum, such allowance was wholly void, and thereunder no additional allowance whatever is recoverable in excess of such percentage. (See subdivision 5 of said section.) *Griffin v. Clay County*, 63 Iowa, 413.

SEC. 3794. [To give information of amount of taxes due from any person.]—The county treasurer shall, if applied to by letter enclosing thirty cents' value in postage stamps, asking for information of the amount of taxes upon any specified parcel or parcels of land in his county, answer the same correctly by mail, giving direct answers to all the inquiries in such letter respecting the amount and interest of the unpaid taxes as the same appears from the tax books in his office. If the total of such land specified in any one letter exceeds three hundred and twenty acres, then such treasurer is not bound to answer such letter unless it contains, besides the thirty cents above provided, ten cents in addition for every one hundred and sixty acres when the total acres specified in such letter exceed the said three hundred and twenty acres; but the aggregate fees thus charged shall in no case exceed the sum of fifty cents; and upon the return to such treasurer of the letter or a copy thereof so sent to him, with the amount due as shown by such letter, such treasurer shall pay such taxes and return a receipt therefor by mail.

SEC. 3795. [Penalty for failure.]—Any treasurer who shall neglect for twenty days after the receipt of any such letter, with money inclosed as aforesaid, to answer the same fully as required in the preceding section, or who shall directly or indirectly receive or be concerned in receiving any greater compensation for the service mentioned in the preceding section than is therein provided, shall forfeit to the person aggrieved, for each offense the sum of fifty dollars, which may be recovered in a civil action in any court having jurisdiction.

SEC. 3796. [Render account of money received as compensation to supervisors.]—The county treasurer shall enter in a book kept for that purpose, all moneys received by him for services rendered, designating for what the same was received, and shall render an account verified by affidavit to the board of supervisors at each session thereof, stating fully all money so received and from what source derived, and any excess to which he would be entitled under the preceding section over and above the sum therein limited, shall be paid into the county treasury.

AUDITOR.

SEC. 3797. [County auditor.]—The county auditor shall be entitled to charge and receive the following fees:

- For recording each bond required to be by him recorded, fifty cents;
- For transfers made in the transfer books, for each deed, twenty-five cents;
- For issuing certificate of redemption of land sold for taxes, twenty-five cents;
- For each certificate issued by the treasurer for lands sold for non-payment of taxes, fifteen cents.

SEC. 3798. (*As substituted by ch. 184, sec. 3, 18th g. a.*) [Compensation of auditor limited.]—[The total compensation of the auditor in any one year shall not exceed the sum of twelve hundred dollars, inclusive of fees; but when, in the judgment of the board of supervisors, it is necessary for the proper discharge of the duties of the office, said board may, upon application of the auditor, authorize said auditor to employ a deputy or clerk at a salary not exceeding the rate of six hundred dollars per annum; *provided*, That in counties of more than twenty-five

thousand population, the board of supervisors may grant such additional compensation to the auditor, deputy, or clerks as they deem it just and proper.

[**Last census to determine population.**]—It shall be the duty of the board of supervisors, in fixing the compensation of the officers as provided in this act to take the latest state or national official census, as their guide in so doing.

[**Each officer keep record of fees and report to board of supervisors.**] It is hereby made the duty of the county auditor, the county treasurer and the clerk of the district and circuit courts, in each county of the state to keep a complete and accurate account of all the fees charged and collected by them as now provided by law; which account shall be made and kept as a permanent record of the office; and it is hereby made the further duty of each of the officers therein specified, to make a report of such fees to the board of supervisors, at each regular session of said board, verified by oath or affirmation, a summary of which shall be spread upon the minutes of said board and made a part of the record. If any officer shall neglect or refuse to make such report, as required by this section, it shall be the duty of the board to employ an expert to examine the books, papers and accounts of such officer, and to make such report, the expense therefor being charged to the delinquent officer, and collectible upon his official bond.]

A county is under no legal obligation to reimburse an auditor for money paid by him for services of a deputy. *Benton v. Decatur County*, 36 Iowa, 504.

SEC. 3799. **The coroner is entitled to charge** and receive the following fees:

For a view of each body and taking and returning an inquest on same, five dollars;

For a view of each body and examination without inquest, three dollars;

For issuing subpoena, warrant, or order for a jury, twenty-five cents;

For each mile traveled to and returning from an examination or inquest, ten cents;

Which fees shall be paid out of the county treasury when they cannot be obtained from the estate of the deceased;

For all other services, the same fees as are allowed sheriffs in similar cases, to be paid in like manner.

SEC. 3800. (*Amended by ch. 25, 16th g. a.*) **The county surveyor is entitled to charge** and receive the following fees:

For each day's service actually performed in travelling to and from the place where any survey is to be made, and for making the same and return thereof, [four] dollars;

For certified copy of the plat or field-notes, fifty cents.

NOTARIES PUBLIC.

SEC. 3801. **Notaries public shall be entitled to charge** and receive the following fees:

For every protest of a bill or note, seventy-five cents;

For registering any protest, fifty cents;

For being present at a demand, tender, or deposit, and noting the same, fifty cents;

For administering an oath, five cents;

For certifying to the same under his official seal, twenty-five cents;

For certificate under seal, twenty-five cents;

For other services, the same fees as are allowed justices of the peace for similar services.

SEALER.

SEC. 3802. Each sealer of weights and measures shall receive the following fees:

- For sealing and marking every baem, ten cents;
- For sealing and marking measures of extension at the rate of ten cents per yard, not to exceed fifty cents for any one measure;
- For sealing and marking every weight, five cents;
- For sealing and marking liquid and dry measure, five cents for each measure;
- He shall also be entitled to a reasonable compensation for making weights and measures conform to the standard in his possession.

SEC. 3803. The inspector of lumber and shingles shall receive:

- For inspecting and measuring lumber, for each one thousand feet, board measure, fifteen cents;
- For inspecting shingles for each thousand, fifteen cents.

JUSTICES OF THE PEACE.

SEC. 3804. Justices of the peace shall be entitled to charge and receive the following fees:

For docketing each case in any action, except in garnishment proceedings, fifty cents:

- For issuing each original notice, fifty cents;
- For issuing attachment or order for the delivery of property, twenty-five cents;
- For drawing and approving bond when required in any case, fifty cents;
- For entering judgment by confession after the suit brought, fifty cents;
- For entering judgment by confession not on suit brought, one dollar;
- For entering judgment by default, or on a plea of guilty, fifty cents;
- For entering judgment when contested, fifty cents;
- For additional when a jury is called, one dollar;
- For issuing venire for jury, twenty-five cents;
- For each subpoena in civil cause, when demanded, twenty-five cents;
- For each oath or affirmation, except in proceedings connected with suits before him, five cents;
- For each continuance at the request of either party, fifty cents;
- For setting aside each judgment by default, fifty cents;
- For each information and affidavit, fifty cents;
- For each execution, renewal of execution, or warrant of any kind, fifty cents;
- For each bond or recognition, fifty cents;
- For each mittimus or order of discharge, fifty cents;
- For each official certificate or acknowledgment, twenty-five cents;
- For making and certifying transcript, fifty cents;
- For trial of all causes, civil or criminal, for each six hours or fraction thereof, one dollar;

For all money collected and paid over without suit, five per cent; and for all money collected and paid over after suit brought without judgment, two per cent, which shall be added to the costs.

A justice of the peace is entitled to fifty cents for drawing and approving an appeal bond when required in any case, but he is not entitled to any fee for approving an appeal bond prepared by the attorney of the appellant, nor can he demand from the appellant the payment to him of the clerk's fee for docketing the case in the circuit court, before allowing the appeal. He may, however, demand the payment of his own fee for making and certifying the transcript, before allowing the same to go out of his possession. *McKay v. Maloy*, 53 Iowa, 33.

This section provides for costs in an action and not for services. A justice cannot recover from

the debtor his *fees* for the collection of a claim which he has collected without suit. *Pennington v. Beedy*, 50 Id., 85.

CONSTABLES.

SEC. 3805. **Constables shall be entitled to charge** and receive the following fees:

- For serving any notice or civil process on each person named therein, fifty cents;
 - For copy thereof when required, ten cents;
 - For serving attachment or order for the delivery of property, fifty cents;
 - For traveling fees, going and returning, per mile, five cents;
 - For summoning a jury, including mileage, one dollar;
 - For attending the same on trial, for each calendar day, one dollar;
 - For serving execution, besides mileage fifty cents;
 - For advertising and selling property, seventy-five cents;
 - For advertising without selling, twenty-five cents;
 - For return of execution when no levy is made, ten cents;
 - For serving each subpoena, besides mileage, fifteen cents;
 - For posting up each notice required by law, fifteen cents;
 - For serving each warrant of any kind, seventy-five cents;
 - For attending each trial in a criminal case, for each calendar day, one dollar;
 - For serving each mittimus or order of release, besides mileage thirty cents;
 - For all money collected on execution and paid over except costs, five per cent,
- which shall constitute part of the costs.

The original notice in an action in the circuit court may be served by a constable, and he is entitled to receive therefor fifty cents for service, and mileage at the rate of five cents per mile. *Du Boise & Bro. v. Babcock et al.*, 42 Iowa, 233.

SEC. 3806. [**In criminal cases.**]—The fees contemplated in the two preceding sections, in criminal cases shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit.

The mayor of a city is not entitled under this section to fees from the county for services rendered as a magistrate in state cases. *Upton v. The County of Clinton*, 52 Iowa, 311.

SEC. 3807. [**Officers seizing intoxicating liquors.**]—A constable or other officer who serves any warrant for the seizure of intoxicating liquors shall be allowed:

- For such service, one dollar;
- For the removal and custody of such liquor, his reasonable expenses;
- For the destruction of such liquor under the order of the court, his reasonable expenses and one dollar.

For posting and leaving notices in such cases, one dollar.

This section is repealed as to sheriffs, but remains in force as to constables. *Painter v. Polk County*, 70 Iowa, 596.

TOWNSHIP TRUSTEES.

SEC. 3808. **The township trustees shall receive:**

For each day's service of eight hours necessarily engaged in official business, to be paid out of the county treasury, to each trustee, two dollars;

For each day engaged in assessing damages done by trespassing animals, one dollar per day, each, to be paid as are other costs in such cases;

But when acting as fence viewers, or viewing or locating any ditch or drain, or in any other case where provision is made for their payment otherwise, they shall not be paid out of such treasury.

(*As amended by ch. 35, 16th g. a.*) [When acting as fence viewers, or in locating any ditch or drain, or in any other place where provision is not made for their payment out of the county treasury, their fees shall be 2 [two] dollars per day each, and in the first instance be paid by the party requiring their services, and they shall append to their report of the proceedings a statement thereof, and therein shall direct who shall pay said fees, and in what sums respectively, and the party having so advanced any such fees may have his action therefor against the party so awarded to pay the same, unless within ten days after demand by the party entitled, the same shall be reimbursed to him.]

The necessary expense incurred by the township trustees in providing and furnishing a place in which to hold the general state election is not a lawful claim against the county. *Turner & Co. v. Woodbury County*, 57 Iowa, 440.

TOWNSHIP CLERK—ASSESSOR.

SEC. 3809. (*As amended by ch. 61, 16th g. a.*) **The township clerk shall receive:**

For each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid from the county treasury, two dollars;

For all money coming into his hands by virtue of his office [aside from money received from his predecessor in office], five per cent;

For filing each application for a drain or ditch, fifty cents;

For recording each person's mark or brand for animals, twenty-five cents;

For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation in such cases as the board of supervisors may deem reasonable and allow.

SEC. 3810. **Each township assessor shall receive** for each day of eight hours necessarily engaged in the discharge of his official duties, to be paid out of the county treasury, two dollars.

CHAPTER 3.

OF WITNESSES, JURORS, AND SPECIAL CASES.

SECTION 3811. **Jurors shall receive the following fees:**

For each day's service or attendance in courts of record, two dollars, and for each mile traveled from his residence to the place of trial, the sum of ten cents;

For each day's service before a justice of the peace, one dollar;

No mileage shall be allowed jurors before justices, nor to talesmen;

Jurors' fees in justice's courts shall be taxed as part of the costs;

Immediately after the adjournment of each term of a court of record, the clerk thereof shall certify to the county auditor a list of the jurors with the number of days' attendance and mileage to which each one is entitled.

SEC. 3812. (*As re-enacted by ch. 39, 16th g. a.*) [**Fees taxed as part of costs.**]—For every case tried in a court of record by jury, there shall be taxed as a part of the costs as a jury fee the sum of six dollars, which shall be collected as other costs and paid into the county treasury by the clerk, who shall report the same to the board of supervisors at each regular session thereof, who shall cause the same to be charged to the treasurer.

Section 3812 of the code was repealed and substituted by chapter 32 of the laws of 1874; and by chapter 39 of the laws of 1876, that act was repealed and the original section as it stood in the

code was, by the latter act, restored. It was held under the repealed statute that it was not in conflict with the constitution in authorizing jury fees to be taxed as a part of the costs of the case. *Steele v. The Cent. R. Co.*, 43 Iowa, 109. Following *Adae & Co. v. Zangs*, 41 Id., 536.

This section of the statute in providing for the taxation of a jury fee as part of the costs in an action tried by jury in courts of record, is not in conflict with the constitution of the state. *Little v. McGuire*, 43 Id., 447; *Adae & Co. v. Zangs*, 41 Id., 536; *Steele v. The Central Railroad of Iowa*, 43 Id., 109.

The entire jury fee fixed by the statute is properly chargeable as part of the costs, even if the case does not consume the whole of a day when no other case is tried upon the same day. *The State v. Verwayne*, 44 Id., 621.

SEC. 3813. **Every appraiser or commissioner** appointed or selected to appraise the damages caused by taking private property for public use, shall receive the same compensation as jurors in courts of record, but when called to appraise property taken on judicial process, they shall receive twenty-five cents per hour.

SEC. 3814. (*As amended by ch. 62, 16 g. a.*) **Witnesses in any court of record** [except in the police courts], shall receive for each day's attendance, one dollar and twenty-five cents; [in the police courts, witnesses shall receive for each day's attendance, the same fees and mileage as are allowed before justices of the peace.]

Before a justice of the peace, fifty cents for each day;

Mileage for actual travel per mile each way, five cents;

An attorney, juror, or officer, who is in habitual attendance on the court for the term at which he is examined as a witness, shall be entitled to but one day's attendance.

(*As amended by ch. 62, 16th g. a.*) [**Experts.**].—Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court with reference to the value of the time employed and the degree of learning or skill required; [provided that such additional compensation so fixed shall not exceed four dollars per day while so employed.]

[**Criminal cases.**].—For attending before the grand or trial jury, or court, in criminal cases where the defendant is adjudged not guilty, the fees above provided for attending the district or justice's court shall be paid by the county, upon a certificate of the clerk or justice showing the amount of service to which they are entitled.

Physicians or other professional men who may have been subpoenaed as witnesses are not entitled to extra compensation under this section unless called to testify as experts and give an opinion based upon their special study and experience. *Snyder v. Iowa City*, 40 Iowa, 646.

A justice of the peace may legally tax the costs in a criminal prosecution, dismissed by him before final trial, because of the failure of the prosecuting witness to appear and prosecute, to the state to be paid by the county. *Cassidy v. Palo Alto County*, 58 Id., 125.

A witness who is confined in the county jail by order of a magistrate for a failure to give security for his appearance to testify on behalf of the state in a criminal trial, cannot recover from the county his per diem as a witness for the time he has been thus imprisoned. *Markwell v. Warren County*, 53 Iowa, 422.

A witness who is subpoenaed to attend court upon the same day in several different cases, is entitled only to fees for attendance and mileage for each separate day of his attendance, and his daily compensation is not increased by the fact that he has been subpoenaed in more than one case. Constructive compensation is not allowed. *Hardin v. Polk County*, 39 Id., 661; *Muffert v. The D., B. & M. R. R. Co.*, 34 Id., 430.

SEC. 3815. (*As amended by ch. 151, 19th g. a.*) [**Justice of the peace to pay money received for fees into county treasury.**].—[Each justice of the peace shall, on the first Monday in January and July, each year, pay into the county treasury for the use of the county all fees of whatsoever kind in his hands at the date of *proceeding* [preceding] payment and still unclaimed, and at the time of so doing he shall take from the treasurer duplicate receipts therefor, giving the

title of the cause, with the names of the witnesses, jurors, officers or other persons, and the amount each one is entitled to receive, one of which receipts he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and on demand by the persons entitled to said fees he shall issue county orders for the amount due each person respectively.]

SEC. 3816. [**Penalty for failure.**—Any failure to pay over to the county treasurer witness fees as contemplated by this title, is a misdemeanor, and shall be prosecuted as provided by law.]

SEC. 3817. [**When witness fees are paid by party or county.**—When the county or any party has paid the fees of any witness, and the same is afterward collected from the adverse party, the person or county so paying the same shall, upon the production of the receipt of such witness or other satisfactory evidence, be entitled to such fee, whether it be in the hands of the justice or clerk, or has been paid into the county treasury.]

SEC. 3818. (*As substituted by ch. 207, 18th g. a.*) [**Witnesses subpoenaed at expense of the county only on order of the court.**—In no criminal case shall witnesses for the defense be subpoenaed at the expense of the county, except upon the order of the court or judge before whom the case is pending; then only upon a satisfactory showing that the witnesses are material and necessary for the defense, and the board of supervisors shall in no case audit or allow any claim for witness fees, for the defendant in criminal cases, except upon order or judgment of court or judge thereof. And such order may be made at the time of trial or other disposition of the case, and upon such showing as the court may require.]

Section 3818, of the code, as amended by chapter 207 laws of 1880, being a later expression of the legislative will than section 3814, the latter must now be construed as being limited to the payment of witnesses by the county, to such of defendant's witnesses as have been subpoenaed after the proper order has been made by the justice. *Kennedy v. Delaware County*, 59 Iowa, 123.

A motion for an order to subpoena witnesses for defendant in a criminal case under this section held properly overruled, where the affidavit in support of the motion did not state with precision the facts which the defendant expected to prove by the witnesses, and the facts, if proved, did not seem to be material or necessary to the defense. *State v. Benge*, 61 Id., 658.

It is not necessary that the order of the court or judge for the payment of fees of witnesses for the defense, required by this section, be made upon the application of the accused, nor that it be made during the progress of the trial or at its conclusion. It may be made "at the time of the trial or other disposition of the case," and in the absence of a counter-showing it will be presumed to have been made at some stage of the disposition of the case. *Jones County v. Linn County*, 68 Id., 63.

SEC. 3819. [**Where no other fees are fixed.**—Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:

For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents;

For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents;

For making out a transcript of any public papers or records under his control, for the use of a private person or corporation, or recording articles of incorporation, for every one hundred words, ten cents.

SEC. 3820. [**For committing persons to jail: carriage hire.**—Every officer or person who shall arrest any person with a warrant or order issued by any court or officer, or who shall be required to convey a prisoner from a place distant from the county jail to such jail on an order of commitment, shall be allowed to charge as fees, which shall be collectible the same as other fees in criminal cases, besides the fees allowed by law, whatever sums such officer or person shall actually and necessarily pay for carriage hire in so conveying such person to jail.]

SEC. 3821. [**For taking up estrays.**]—Any person taking up an estray horse, mule, jack or jenny, fifty cents;

For every head of neat cattle, twenty-five cents;

For all other kinds of animals, fifteen cents;

For appointing the appraisers, making the necessary entry, certificate and return, the justice shall receive fifty cents.

SEC. 3822. [**Trespassing animals.**]—In all cases where services shall be performed by any officer or person in respect to estrays or trespassing animals, the following fees or compensation shall be allowed: to the justice of the peace for administering the oath to the taker-up or finder, making an entry thereof, with the report of the appraisers, and making and transmitting a certificate thereof to the clerk of the district court, fifty cents; to the clerk for taking proof of the ownership of the property and granting certificate of the same, twenty-five cents; for registering each certificate transmitted to him by the justice as aforesaid, ten cents; for advertisements, including the newspaper publication, fifty cents; to the sheriff on account of sales made by him in pursuance of chapter three, of title eleven, four per cent on the amount; to the constable, for each warrant served on appraisers, twenty-five cents; to each appraiser, twenty-five cents; all which said cost and charges, with the exception of the justice's for granting a certificate of ownership, and the sheriff's commission, shall be paid by the taker-up to the person entitled thereto, whenever the service shall be performed; the printer of the county paper for publishing the notice shall receive the price of his published or ordinary advertising rates; in all cases where it shall be necessary to make publication in a newspaper, the taker-up or finder, as the case may be, shall be required to deposit with the clerk of the district court, a sum of money sufficient to pay the same, previous to the publication thereof; all which costs and charges shall be reimbursed to the taker-up or finder in all cases where restitution of the property shall be made to the owner, or the same shall be delivered to the sheriff to be sold, or where money or bank notes shall be paid into the county treasury, in addition to the reward to which such person may be entitled for such taking up or finding as aforesaid.

SEC. 3823. [**Public printer for publishing estray notices.**]—The public printer shall receive for each estray notice published, a sum agreed upon by the secretary of state, not, however, exceeding thirty cents for each insertion; and when the appraised value of the estray exceeds fifteen dollars, the finder shall pay the justice a sum sufficient to pay the clerk's fee, postage, and the cost of publishing such notice. If more than one animal is taken up at the same time, they shall be included in one entry and advertisement, and no additional fees shall be required or allowed in such case, and said clerk shall subscribe for one copy of such paper, to be paid for out of the county treasury, which paper shall be filed and preserved in the office of said clerk.

SEC. 3824. [**For laying out public highways.**]—The following fees shall be paid persons engaged in laying out and changing highways:

Commissioners for each day, two dollars;

Surveyor for each day, four dollars;

Chain carriers, markers, and other assistants, for each day, one dollar and fifty cents. If the highway extends into more than one county, such expenses when so adjudged shall be paid by the several counties in proportion to the length of time occupied on the highway in each county.

SEC. 3825. [**Commissioners of insanity.**]—The commissioners of insanity shall be allowed at the rate of three dollars per day each, for all the time actually employed in the duties of their office. They shall also be allowed their necessary and actual expenses, not including charges for board. The clerk, in addition to what he is entitled to as commissioner, shall be allowed one-half as much more for

making the required record entries in all cases of inquest and of meetings of the board for any purpose, and for the filing of any papers required to be filed. He shall also be allowed twenty-five cents for each notice or process given or issued under seal as herein required. The examining physician shall be entitled to the same compensation as a commissioner, and to mileage at the rate of five cents per mile each way. The sheriff shall be allowed for his personal services in conveying a patient to the hospital and returning therefrom, at the rate of three dollars per day for the time necessary and actually employed, and mileage the same as is allowed him in other cases, and for other services the same fees as for like services in other cases. Witnesses shall be entitled to the same fees as witnesses in the circuit court. The compensation and expenses provided for above, shall be allowed and paid out of the county treasury in the usual manner. Whenever the commissioners issue their warrant for the admission of a person to the hospital, and funds to pay the expenses thereof are needed in advance, they shall estimate the probable expense of conveying such person to the hospital, including the necessary assistance, and not including the compensation allowed the sheriff, and on such estimate, certified by the clerk, the auditor of the county shall issue an order on the county treasurer for the amount as estimated in favor of the sheriff or other person intrusted with the execution of such warrant; the sheriff or other person executing such warrant, shall accompany his return with a statement of the expenses incurred, and the excess or deficiency may be deducted from or added to his compensation, as the case may be. If funds are not so advanced, such expenses shall be certified and paid in the manner above prescribed on the return of the warrant. When the commissioners order the return of a patent, compensation and expenses shall be in like manner allowed.

(CHAPTER 151, LAWS OF 1882.)

PAYMENT OF UNCLAIMED FEES INTO THE COUNTY TREASURY.

An Act to repeal sections 3786 and 3815 of the code of Iowa, relating to the payment of fees into the county treasury and to enact a substitute therefor.

(Section 1 enacts substitutes for sections 3786 and 3815 of the code, which see.)

SEC. 2. [**Treasurer to file statement with county auditor.**—Each county treasurer shall make a certified statement of all unclaimed fees in his hands at the time of the taking effect of this act, showing the title of the cause, style of the court, name of the individual, and the amount to which each one is entitled, and file the same with the county auditor, who shall charge the treasurer in the county fund with the aggregate amount so certified, and place the same on the proper record as a claim allowed, and issue county orders therefor, upon demand by the parties entitled thereto.

(CHAPTER 77, LAWS OF 1888.)

An Act to amend chapter 92, laws of the seventeenth general assembly, and fix the per diem and expenses of trustees of state institutions, members of visiting committees to the hospitals for the insane, and regents of the state university.

SECTION 1. [**Repeal.**—*Be it enacted by the general assembly of the state of Iowa:* That section 1, chapter 92, laws of the seventeenth general assembly, be and is hereby repealed.

SEC. 2. [**Compensation.**]-That the trustees of state institutions, members of visiting committees to the hospitals for the insane, and regents of the state university shall receive as their compensation four (\$4) dollars per day for each and every day actually employed in the discharge of their duties, and the actual and necessary expense incurred while so engaged; but in no case shall the amount allowed for expenses exceed five (5) cents per mile by the nearest traveled route necessarily traveled in such business.

Approved April 11, 1888.

(CHAPTER 92, LAWS OF 1878.)

COMPENSATION OF OFFICERS OF HOSPITALS, ETC.

(Section 1 repealed by the foregoing chapter 77, laws of 1888.)

SEC. 2. [**Construction.**]-This act shall not be construed to allow trustees to receive compensation for a longer time than is now permitted by law.

SEC. 3. [**Repeal.**]-All acts and parts of acts inconsistent with this act are hereby repealed.

SEC. 3826. (*As amended by ch. 92, 17th g. a.*) [**Visiting committee to hospital for the insane.**]-The visiting committee shall be allowed [four] dollars per day for the time taken in visiting the hospital for the insane, and mileage at the rate of five cents per mile each way. The disbursing officer of each hospital for the insane shall pay the per diem and mileage allowed such visiting committee, and each member of such visiting committee shall certify under oath to such disbursing officer the number of days he has served and the number of miles traveled.

SEC. 3827. [**Messengers sent for election returns.**]-Messengers sent for the returns of elections shall be paid ten cents a mile going and returning, to be audited and paid from the state or county treasury, as the case may be.

SEC. 3828. [**Marriages: solemnization.**]-Any person authorized to solemnize marriage is entitled to charge two dollars for officiating in each case, and making return thereof.

SEC. 3829. (*As amended by ch. 91, 17 g. a.*) [**Attorney appointed to defend criminals.**]-An attorney appointed by a court to defend a person indicted for any offense, is entitled to receive from the county treasury the following fees:

For cause of murder [twenty-five dollars];

For felony [ten dollars];

For misdemeanor, five dollars;

Any attorney selected by a peace officer, for appearing and prosecuting before a justice of the peace a prosecution for selling intoxicating liquors, five dollars.

The provisions of the statute which establishes the maximum of attorneys' fees for the defense of criminals, appointed by the court, is not unconstitutional. *Samuels v. Dubuque County*, 13 Iowa, 536.

The district attorney cannot render the county liable for the services of an attorney requested by him to conduct a criminal prosecution. *Foster & Foster v. The County of Clinton*, 51 Id., 541.

An attorney at law who has defended a pauper criminal, under appointment by the court, is not entitled to the compensation provided by sections 3829 and 3830 of the code, "until he has filed his affidavit that he has not directly or indirectly received any compensation for such services from any source. An affidavit annexed to the account, as presented to the board of supervisors, that it is just and true, and wholly unpaid, is not sufficient. *Ryce v. Mitchell County*, 65 Iowa, 447.

An attorney selected by a peace officer to prosecute a person charged with keeping intoxicating liquors for unlawful sale, is entitled to the fee provided for in this section of the code to be paid by the county. *Work v. Wapello County*, 35 N. W. R., 452.

But where there is a conviction upon several separate counts for unlawful sale of intoxicating

liquors, under section 1540 of the code, the attorney is not entitled to a separate fee upon each count upon which conviction is had. *Schoulb v. Keokuk County*, 37 Id., 376.

SEC. 3830. **An attorney cannot** in such case be compelled to follow a case to another county or into the supreme court, and if he does so, may recover an enlarged compensation, to be graduated on a scale corresponding to the price above allowed.

An attorney appointed by the district court to defend a person indicted therein, may, in his discretion, present the case on appeal to the supreme court, and recover from the county therefor an enlarged compensation, graduated on a scale corresponding to that fixed for his services in the district court. *Baylies v. Polk County*, 58 Iowa, 357.

SEC. 3831. [**Only one attorney.**—] Only one attorney in any one case shall receive the compensation above contemplated, nor is he entitled to this compensation until he files his affidavit, that he has not, directly or indirectly, received any compensation for such service from any source.

SEC. 3832. [**For publication of legal notices.**—] In all cases where publication of legal notices of any kind are required or allowed by law, the person or officer desiring such publication shall not be required to pay more than one dollar per square of ten lines of briefer type, or its equivalent, for the first insertion, and fifty cents per square for each subsequent insertion; and any person desiring such publication, who shall have tendered such notice to the editor, proprietor or person conducting some newspaper published weekly or oftener in such county, having the largest circulation, and has offered to pay for the publication of the same at the rate herein named, and in case the publication of such notice is refused at the price above fixed, then the officer or person desiring such publication shall procure the insertion of such notice in the newspaper nearest the county seat of such county having a general circulation that will publish such notice at the rate herein provided; which publication shall in all respects have the same effect in law and equity as if such notice had been published in the county where such action was commenced or sale is to take place. And in all cases of publication of notices in connection with commencement of actions in court, or sales upon execution, the plaintiff may designate the newspaper published within the county in which such notice shall be published.

The judgment creditor has the right to select the newspaper in which the notice of sheriff's sale on execution shall be published, and the sheriff is required by this section to follow the direction of the plaintiff in this respect. *Herriman v. Moore*, 49 Iowa, 171.

The judge, in vacation, may direct the sheriff to publish notice of sale in the manner prescribed by law. *Id.*

SEC. 3833. [**For printing delinquent tax list.**—] The compensation for printing the delinquent tax list, shall be at a rate not exceeding twenty cents for each tract of real property advertised for sale; and in case there is no newspaper published in the county where such lands lie, then the treasurer shall cause the publication to be made in the nearest newspaper having a circulation in such county, provided that no newspaper shall be considered as one of general circulation unless it has two hundred regular weekly subscribers.

SEC. 3834. [**Arbitrators.**—] The compensation of arbitrators shall be, for each day actually and necessarily spent in the discharge of their duty, two dollars, or such other sum as may be agreed upon by the parties in interest. The fees of referees acting under a submission made by or agreed to by the parties in a case pending in a court of record, shall be fixed by the court or judge and taxed as a part of the costs in the case.

SEC. 3835. [**Depositions.**—] Any officer or person taking depositions is authorized to charge therefor at the rate of ten cents per hundred words, exclusive of the certificate.

SEC. 3836. [**Receipt for fees paid.**—] Every person charging fees shall, if required by the person paying them, give him a receipt therefor, setting forth the items and the date of each.

SEC. 3837. [**Bill of particulars.**]—When no other provision is made on the subject, the party requiring any service shall pay the fees therefor upon the same being rendered, and a bill of particulars being presented if required.

Where an attorney requires the performance of service by the sheriff who has knowledge that the attorney is therein acting for his client, the attorney will not be personally liable to pay for such services. *Doughty v. Paige*, 48 Iowa, 483, 485.

The custom of the attorneys of a county to hold themselves responsible for sheriff's fees in cases wherein they are employed, will not subject an attorney to liability therefor, in the absence of an agreement or of proof that the attorneys were accustomed to pay for such services regardless of the responsibility of their clients. *Id.*

SEC. 3838. [**Putting up advertisements.**]—In all cases where an officer in the discharge of his duty is required to set up an advertisement, he shall, when not otherwise provided, be allowed twenty-five cents, and if an advertisement is required to be published in a newspaper, the money therefor shall be paid by the party and may be taxed in the bill of costs.

SEC. 3839. [**Officers to keep list of fees posted up.**]—Every officer entitled to fees, shall keep posted up in his office a fair table thereof on pain of forfeiture of two dollars per day, for the benefit of the county, for each day he fails to keep such table of fees thus posted up.

SEC. 3840. [**Penalty for taking more than allowed.**]—Any officer who willfully takes higher or other fees than are allowed by law, is guilty of a misdemeanor, and may be fined therefor a sum not less than ten nor more than fifty dollars.

A contract entered into by a sheriff to perform certain official services for a gross sum, in lieu of the fees provided by law, where it does not appear whether such sum will be greater or less than the legal fees, is void because against public policy and in violation of section 3840 of the code. *Gilman et al. v. The D. V. R. Co. et al.*, 40 Iowa, 200.

A sheriff is not entitled to additional compensation for personal attention rendered to prisoners, beyond the payment for their board. *Grubb v. Louisa Co.*, Id., 314.

SEC. 3841. [**When paid by a county.**]—Where costs are paid by a county other than the one where the offense was committed, the amount of such costs shall be deemed a charge in favor of such county and against the one in which the offense was committed, and may be recovered by an action in any court having jurisdiction.

Where the district court of a county takes jurisdiction of a public offense committed in another county, within five hundred yards of its boundary, and incurs an expenditure of money in prosecuting the offender, it is not entitled to recover the money thus expended from the county within which the offense was committed. This section of the code does not apply to such cases, but is limited to those where the jurisdiction is thrust upon the county without any act of its own, as by change of venue or otherwise. *The County of Floyd v. Cerro Gordo County*, 47 Iowa, 186.

SEC. 3842. [**When fees must be paid in advance.**]—No officer or other person mentioned in this title, is entitled to any of the fees mentioned herein in advance, where the same grows out of any criminal prosecution. But in all other cases, except where the fees or compensation is payable by the state or county, or when the orders, judgments or decrees of courts or justices of the peace are to be entered or performed, or their writs executed, the officer performing any of the services named in this chapter, is entitled to his fees in advance if he demand them. After the expiration of sixty days from the rendition of a final judgment not appealed, removed or reversed, the clerk of the court or a justice of the peace in whose office the judgment is entered, may, and on demand of any party entitled to any part thereof shall, issue a fee bill for all costs of such judgment, which shall have the same force and effect as an execution issued by such officer, and shall be served and executed in the same manner.

The circuit court has power to prescribe and enforce a rule to the effect that, in cases of appeal from justices of the peace, if the appellant fails to have filed a transcript from the justice by the second day of the term, and pay the docket fee, that then the appellee may file such transcript and the appeal bond, and have the judgment of the justice affirmed against the appellant and his sureties in the bond. *Pinders v. Yager*, 29 Iowa, 486; *McManus v. Humes*, 6 Id., 159; *The State v. Glass*, 8 Id., 325.

A party against whom a judgment is rendered is primarily liable for all the costs to the persons entitled thereto, who may have a fee-bill issued for the same, and failing in that, they may by motion, require the successful party to pay the costs accrued at his instance. *McConkey v. Chapman*, 58 Id., 281.

SEC. 3843. [When fees are payable by state or county.]—In all cases where fees or compensation as distinguished from a certain and fixed salary, are, by the provisions of this title to be paid any officer or other person out of the county or state treasury, no part of the same shall be audited or paid, until a particular account has been filed in the auditor's office of the county or state, verified by affidavit and showing clearly for what services such fees or compensation are claimed and when the same was rendered.

That a claim against a county is not as definite and certain as directed by the provisions of section 3843, will not, if the claims allowed by the board of supervisors, affect the validity of the warrant drawn on the county therefor. *Griggs v. Kimball*, 42 Iowa, 572, 575.

SEC. 3844. [Supervisors to furnish officers with office, fuel and stationery.]—The board of supervisors shall furnish the clerk of the district and circuit court, sheriff, recorder, treasurer, auditor and county superintendent, with offices at the county seat, together with fuel, lights, blanks, books and stationery necessary and proper to enable them to discharge the duties of their respective offices; but in no case shall any of such officers be permitted to occupy an office also occupied by a practicing attorney.

(CHAPTER 185, LAWS OF 1880.)

IN RELATION TO ATTORNEY'S FEES.

An Act to regulate and limit the amount of attorney's fees that may be taxed in suits on written contracts stipulating for attorney's fees in certain cases.

SECTION 1. [No greater fee than prescribed by this act shall be collected.]—*Be it enacted by the general assembly of the state of Iowa:* That in any action upon a written contract for the payment of money, made after the taking effect of this act, in which it is an agreement to pay to an attorney's or collection fee, no greater recovery for attorney's fee shall be had against the maker of such contract than is provided for in section two hereof, anything in said contract contained to the contrary notwithstanding.

SEC. 2. [Limiting fees on contract.]—When judgment is recovered on a written contract, made after the taking effect of this act, containing an agreement to pay an attorney's fee, there shall be an attorney's fee allowed by the court and taxed as a part of the costs, except as provided in sections three and four hereof; but in no case shall the amount allowed to be greater than the following, to-wit:

For the first two hundred dollars, or fraction thereof, ten per cent of the amount found due;

For the excess of two hundred dollars, up to five hundred dollars, five per cent;

For the excess of five hundred dollars, up to one thousand dollars, three per cent;

For all in excess of one thousand dollars, one per cent.

Provided, that the plaintiff shall be entitled to recover not to exceed one-half the above collection fee in case payment is made after commencement of suit and before return day. And in case of payment before judgment, and after return day, the plaintiff may recover not to exceed three-fourths of the said amounts, and have judgment therefor, and no fee shall be allowed if suit has not been commenced or expense incurred.

SEC. 3. [Court to be satisfied by affidavit.]—Before any allowance of attorney's fee shall be made by the court, the court shall be fully satisfied by affi-

davit of the attorney engaged in the cause, which affidavit shall be filed with the original papers, that there has been and there is no agreement, expressed or implied, between the attorney and his client, or between the attorney and any other person, except a practicing attorney engaged with him as attorney in the cause, for any division or sharing of the fee to be taxed; and no fee shall be taxed except in favor of a regular attorney, and in compensation for services actually rendered in the cause.

SEC. 4. [**Court shall be satisfied.**—Before any attorney's fee shall be allowed by the court, the court shall be fully satisfied that the defendant, if he be a resident of the county, and the suit is not aided by an attachment, had information of the whereabouts of the contract, and had a reasonable opportunity to pay the same before suit was brought. But this provision shall not apply when the contract is by its terms payable at a particular place, and the maker of the contract has not tendered the money due at the place named in the contract.

Approved March 27, 1880.

In order to recover an attorney's fee on a note or contract providing therefor, the affidavit required by section 3, chapter 185 of the laws of 1880, must be filed when the original petition in the action is filed. *Wilkins v. Troutner*, 66 Iowa, 557.

Where the affidavit for an attorney's fee, required by section three of this chapter, has not been filed with the original papers within the meaning of the statute the fee cannot properly be allowed, and must be disallowed on a trial *de novo* in the supreme court, even though the precise question was not brought to the attention of the court below. *Sweeney v. Davidson*, 68 Id., 336.

This chapter regulating the amount of attorney's fees that may be taxed on written contracts stipulating for such fees, applies wholly to contracts made after the passage of the act, and the filing of the affidavit provided in section three is not necessary in order to recover attorney's fees on a contract antedating the statute. *Eikenberry v. Edwards*, 71 Id., 82.

(CHAPTER 97, LAWS OF 1888.)

DRAINS AND DITCHES.

An Act to amend section 3 of chapter 186 of the twentieth general assembly in relation to drains, ditches, etc.

SECTION 1. (*Chapter 186, acts 20th general assembly amended.*) *Be it enacted by the general assembly of the state of Iowa:* That section 3 of chapter 186 of the acts of the twentieth general assembly be and the same is hereby amended by adding to said section the following: *Provided*, that each bond so issued shall express on its face, that the same shall only be paid by taxes assessed, levied and collected on the lands within the district so designated and numbered and for the benefit of which district such bond was issued; and *provided, further*, that in no case shall any tax be levied or collected for the payment of such bond or bonds, or the interest thereon, on any property outside of the district so numbered, designated and benefited.

Approved April 25, 1888.

(CHAPTER 77, LAWS OF 1888.)

EXPENSES OF CERTAIN TRUSTEES, VISITORS AND REGENTS.

An Act to amend chapter 92, laws of the seventeenth general assembly and fix the per diem and expenses of trustees of state institutions, members of visiting committees to the hospitals for the insane and regents of the state university.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* That

section 1, chapter 92, laws of the seventeenth general assembly be and is hereby repealed.

SEC. 2. [**Expenses trustees and visiting committees.**—That the trustees of state institutions, members of visiting committees to the hospitals for the insane and regents of the state university shall receive as their compensation four (\$4) dollars per day for each and every day actually employed in the discharge of their duties, and the actual and necessary expenses incurred while so engaged; but in no case shall the amount allowed for expenses exceed five (5) cents per mile by the nearest traveled route necessarily traveled in such business.

Approved April 11, 1888.

PART FOURTH.

CODE OF CRIMINAL PROCEDURE.

TITLE XXIV.

OF CRIMES AND PUNISHMENTS.

CHAPTER 1.

OF OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

SECTION 3845. [**Treason.**—Whoever is guilty of treason, by levying war against the state, or adhering to its enemies, giving them aid and comfort, shall be punished by imprisonment for life at hard labor in the state penitentiary. Treason is not a bailable offense.

SEC. 3846. [**Misprison of treason.**—If any person have knowledge of the commission of the crime of treason against the state and conceal the same, and not as soon as may be disclose such offense to the governor or some judge within the state, he is guilty of misprison of treason, and shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not exceeding three years nor less than one year.

SEC. 3847. [**Evidence.**—No person can be convicted of the crime of treason unless on the evidence of two witnesses to the same overt act, or on confession in open court.

CHAPTER 2.

OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.

SEC. 3848. [**Murder.**—Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder.

If the unlawful act be trespass only, to make all guilty of murder, the death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a bare trespass, it will be murder in all, although the death happened collaterally or beyond the original design. *The State v. Nash*, 7 Iowa, 347.

While an indictment for murder must charge that the killing was done with "malice aforethought," it is not essential that these identical words be used, but words of the same import may be used instead; so, where an indictment charged that drugs were administered, and an instrument thrust into the body of the deceased, with the specific intent to produce abortion, held, that the language sufficiently charged malice aforethought. *The State v. Thurman*, 66 Id., 693.

On the trial of one indicted for murder in the first degree, all the degrees of criminal homicide should be explained and submitted to the jury in the court's instructions. *The State v. Clemons*, 51 Id., 274; *The State v. Glynden*, Id., 463.

A party indicted for murder may be found guilty of manslaughter if the evidence proves the latter offense, and not the former, to have been committed. *Gordon v. The State*, 3 Id., 410.

Section 3848 defines murder to be the killing of a human being with malice aforethought, and to constitute the crime of murder in the first degree it is essential that the killing be done with malice aforethought, and, as required in section 3849, that it be done *willfully*, and also that it be done *deliberately* and *premeditatedly*. *The State v. Shelton*, 64 Id., 333.

An instruction given on the trial of an indictment for murder in the first degree which omits the element of premeditation in defining the crime, is erroneous. *The State v. Johnson*, 8 Id., 525.

When the defendant, as shown on a trial for murder, sought the deceased with a loaded gun, with the view of provoking a difficulty, or with the intent of having an affray, and a difficulty did ensue, he cannot, without some proof of a change of conduct or action, excuse the homicide on the ground that the deceased fired the first shot. *The State v. Neeley*, 20 Id., 108.

The defendant and others were jointly indicted for the murder of W. The court properly charged the jury, "that if the defendant and others, formed the design of taking the life of said W., whether by hanging or otherwise; that if in pursuance of such design they went in a body to his house, armed and resolved and prepared to resist all opposition; that they by force obtained possession of W., and bound his arms, so as to render him helpless; that after they had so obtained possession of him, the defendant and those engaged with him, or any one of them, in the presence and hearing of said W., avowed their purpose to take his life, by hanging or otherwise; that they forced him into a hack while thus bound and started to the timber with him; that while on the road, and when on the bank of the river, they cast said W. into the river, from the said hack, or compelled him, by threats or otherwise to jump from the hack into the river, and they then and there permitted him to drown while standing by, and made no effort to rescue him, if by reasonable efforts they might have done so, then the said defendant is guilty of murder in the first degree." *The State v. Shelledy*, 8 Id., 477.

When death ensues in consequence of the unlawful act of another, it is not necessary that the fatal result sprung from an act of commission; but if the defendant omitted any act incumbent on him, from which death resulted, if there was no malice it was manslaughter, if there was malice it was murder. *Id.*

Malice aforethought is essential to the crime of murder. It is not necessary that it existed for any particular length of time. *The State v. Decklots*, 19 Id., 447. *The State v. Gillick*, 7 Id., 287; *The State v. Johnson*, 8 Id., 525.

To constitute murder in the first degree, where it is not committed in the perpetration, or attempt to perpetrate, arson, rape, robbery, mayhem or burglary, the killing must not only be deliberate, and premeditated but willful. But it is not necessary to charge the crime in the precise language of the statute; and to charge in the indictment that the homicide was committed "with a specific intent to kill and murder" was in the case at bar equivalent to alleging that it was willful. *The State v. Townsend*, 66 Id., 741.

Where it was distinctly charged in an indictment for murder that the killing was committed willfully, deliberately, premeditatedly and with malice aforethought, every element of murder in the first degree was charged, and the defendant was properly put on trial for that offense. *The State v. Perigo*, 70 Id., 657.

Section 3848 defines murder to be the killing of a human being with malice aforethought, and to constitute the crime of murder in the first degree it is essential that the killing be done with malice aforethought, and that it be done *willfully*, and also that it be done *deliberately* and *premeditatedly*. *The State v. Shelton*, 64 Id., 333.

To constitute a good indictment for murder in the first degree, the facts constituting the offense and the degree must be alleged. Naming the offense murder in the first degree, in the introductory and concluding parts of the indictment, is not sufficient unless the facts charged make it such. *The State v. McCormick*, 27 Id., 402.

An infant is not the subject of murder until an independent circulation is established; prior to that time the life of the child, even after it is born, is substantially *fœtal* life, which the law distinguishes from independent life. *The State v. Winthrop*, 43 Id., 519.

When a person assaults another with a deadly weapon, or an instrument likely to produce death in a certain manner, the law will presume malice, but the fact of the use of a deadly weapon under the particular circumstances is a question for the jury. *The State v. Seibert*, 40 Id., 169.

Where an indictment charged the crime of murder committed in the perpetration of robbery and burglary, and the jury returned a verdict of "guilty as charged in the indictment," it was held that the verdict was sufficient, and found the defendant guilty of murder in the first degree, the indictment charging the highest degree of the crime under the statute, and in language that cannot be applied to any lower degree. (The case of *The State v. Moran*, 7 Iowa, 236, considered and distinguished.) *The State v. Weese*, 53 Id., 92.

SEC. 3849. (*As repealed and substituted by ch. 165, 17th g. a. As amended by sec. 1, ch. 2, 18th g. a.*) [**Murder in first degree.**]*—*All murder which is perpetrated by means of poison or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree and shall be punished with death "or imprisonment for life at hard labor, in the state penitentiary, as determined by the jury," [or by the court if the defendant pleads guilty.]

An indictment for murder in the first degree, where the killing was not done in the perpetration or attempt to perpetrate any of the felonies mentioned in section 3849 of the code, must charge that the killing was willful, deliberate and premeditated, and that the blow which caused death was given willfully, deliberately and premeditatedly. It should be alleged that the blow was thus given with intent to kill, and that the killing was willful, deliberate and premeditated. The specific intent to kill must be alleged. *The State v. McCormick*, 27 Id., 402; *The State v. Watkins*, Id., 415; *The State v. Stanley*, 33 Id., 526; *The State v. Boyle*, 28 Id., 522; *The State v. Knouse*, 29 Id., 118; *The State v. Thompson*, 31 Id., 393.

An indictment for murder which would be good at common law, is not necessarily so for murder in the first degree under the statute. *Id.*

SEC. 2. (*As amended by ch. 2, 18th g. a.*) [**Verdict must designate punishment.**]*—*Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor in the penitentiary. [But if such defendant be convicted upon a plea of guilty, the court shall designate whether he shall be punished by death or imprisonment for life at hard labor in the penitentiary.]

This section, as amended by chapter 2 of the laws of 1880, authorizing the jury to designate in their verdict of guilty whether the defendant shall be punished by death or imprisonment for life at hard labor in the penitentiary, is not unconstitutional on the ground that all judicial power is vested in the courts, and that they, and not the jury, must declare the law. *State v. Hockett*, 70 Iowa, 442.

SEC. 3. (*As amended by ch. 2, 18th g. a.*) [**Judgment and execution.**]*—*[Whenever the court or jury shall designate that a defendant shall be punished by death.] the court pronouncing judgment shall fix the day of the execution thereof, which shall not be less than one year after the day on which the judgment is rendered, and not longer than fifteen months, during which time the defendant, against whom judgment of death has been pronounced, shall be imprisoned in the penitentiary of the state.

SEC. 4. [**After judgment, copy of papers shall be sent the governor.**]*—*Immediately after the entry of the judgment of death, the court rendering such

judgment must transmit by mail to the governor of the state a copy of the indictment, plea, verdict, judgment, and of the testimony in the case.

SEC. 5. [**Warrant of execution.**]—When a judgment of death is pronounced, a certified copy of the entry thereof in the record book must be furnished to the officer whose duty it is to execute the same, who shall proceed and execute accordingly, and no other warrant or authority is necessary to require or justify the execution.

SEC. 6. [**Reprieve: who may.**]—The only officer[s] who shall have power to reprieve or suspend the execution of a judgment of death are the governor and the sheriff, as provided in the next section, unless in case of an appeal to the supreme court, as provided in section 18 of this act.

SEC. 7. [**Insanity or pregnancy, shall suspend sentence.**]—When the sheriff is satisfied that there are reasonable grounds for believing that the defendant is insane or pregnant, he may summon a jury of twelve persons on the jury list, to be drawn by the clerk, who shall be sworn by the sheriff well and truly to inquire into the insanity of [or] pregnancy of the defendant and a true inquisition return, and they shall examine the defendant and hear any evidence that may be presented, and by written inquisition, signed by each of them, find as to the insanity or pregnancy, and unless the inquisition find the defendant insane or pregnant, the sheriff shall not suspend the execution. But if the inquisition find the defendant insane or pregnant, he shall suspend the execution and immediately transmit the inquisition to the governor.

SEC. 8. [**In case execution is delayed or suspended.**]—Whenever a judgment of death has not been executed on the day appointed by the court therefor, from any cause whatever, the governor, by a warrant under his hand and the seal of the state, shall fix the day of execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution.

SEC. 9. [**Time and manner of execution.**]—A judgment of death must be executed by the sheriff on the day fixed in the judgment, between sunrise and sunset, by hanging the defendant by the neck until he is dead.

SEC. 10. [**Place of execution.**]—A judgment of death must be executed within the walls of the jail of the county in which the judgment was rendered, or within a yard or enclosure adjoining thereto, unless as provided in the next two sections.

SEC. 11. [**Same.**]—If there be no jail in the county in which the judgment was rendered, or if it becomes unfit or unsafe for the confinement of prisoners, or be destroyed by fire or otherwise, and the jail of any other county has been legally designated for the imprisonment of the defendant until the day fixed for his execution, the judgment must be executed within the walls of the jail of the county so designated, or within a yard or enclosure adjoining the same, and by the sheriff of such county.

SEC. 12. [**Same.**]—If there be two or more jails or prisons in the same county, a judgment of death shall be executed within the walls of either of such jails or prisons, or within an enclosure adjoining thereto, as the court rendering such judgment shall therein direct.

SEC. 13. [**Witnesses at execution.**]—The sheriff executing a judgment of death must, at least three clear days before inflicting the punishment of death, notify the judge of the district court of his county, the district attorney, the clerk of the district court, together with two physicians and twelve respectable citizens of his county, to be selected by him, and the sheriff of the county in which the trial was had and the offense committed (if it be in a different county), to be present as witnesses of such execution. He must also, at the request of the defendant, permit one or more ministers of the gospel, whom the defendant shall name, and any of his relations, to attend the execution, and also such magistrates, peace officers, and

guards as the sheriff shall deem proper, but no person other than those mentioned in this section can be present at the execution, nor shall any person under age be permitted to witness the same.

SEC. 14. [**Certificate of sheriff and judges.**—The sheriff or his deputy executing the judgment of death, and the judges attending the execution, must prepare and sign with their name of office, a certificate, setting forth the time and place of the execution, and that judgment was executed upon the defendant according to the foregoing provisions, and must cause the certificate to be signed by the public officers, and at least twelve (12) persons not relations of the defendant who witnessed the execution.

SEC. 15. [**Must be filed and published.**—The sheriff or his deputy executing such judgment of death, must cause the certificate to be filed in the office of the clerk of the district court of the county in which the judgment was rendered, and a copy thereof to be published in a newspaper printed at the capital of the state, and in one, if any, published in his county.

SEC. 16. [**Appeal shall stay execution.**—An appeal by the defendant to the supreme court from a judgment of death shall stay the infliction of that punishment, but the defendant is to be retained in custody to abide the judgment on the appeal.

SEC. 17. [**Appeal: proceedings in case of.**—When an appeal is taken from a judgment of death it shall be the duty of the clerk of the district court in which the judgment was rendered to give forthwith to the defendant, his agent, or attorney, a certificate under his hand and the seal of the county, stating that an appeal has been taken in the case, and the sheriff or other officer having the custody of the defendant, must upon the delivery of such certificate to him refrain from the infliction of the punishment of death upon the defendant, and retain him in custody to abide the judgment of the appeal.

SEC. 18. [**Appeal: proceedings in case judgment is affirmed by supreme court.**—When a judgment of death has been affirmed, the supreme court must cause a copy of the entry of judgment to be remitted to the governor, to the end that a warrant of the execution may be issued by the governor. The governor shall send his warrant of execution by a special messenger, or by mail, to the proper officer, and shall name therein the day and time of execution, but shall not appoint an earlier day than that fixed by the judgment of the district court. The officer receiving the same shall execute the warrant of the governor as therein directed and shall report his action both to the governor and the district court which rendered the original judgment. If for any cause the execution does not take place on the day appointed by the governor, the governor may from time to time appoint another day for the execution until the judgment is carried into effect.

SEC. 19. [**Indictments pending shall be prosecuted to judgment under code, § 3849.**—All indictments pending in any court of this state for any crime committed in violation of said section 3849 of the code shall be prosecuted to final judgment, and all crimes that have been committed in violation of said section shall be subject to indictment, trial and punishment in the same manner as they would have been had said section not been repealed.

SEC. 20. [**Repealing clause.**—All acts and parts of acts inconsistent with this act are hereby repealed.]

SEC. 3850. [**Murder in the second degree.**—Whoever commits murder otherwise than is set forth in the preceding section, is guilty of murder in the second degree, and shall be punished by imprisonment in the penitentiary for life, or for any term not less than ten years.

An intent to kill is not necessary to constitute murder in the second degree under our statute. If there was no necessity, either real or apparent, for the killing, the perpetrator would be guilty

of murder in the second degree, although he entered the combat without the intent to kill; this would be especially true if there were undue advantage taken by the slayer, and the use by him of a deadly weapon. *The State v. Morphy*, 33 Iowa, 270. To the same effect are *The State v. Decklots*, 19 Id., 447; *The State v. Mewherter*, 46 Id., 88.

On an indictment for murder in the first degree the defendant may be convicted of murder in the second degree, where the killing was not intended. *Id.*

A specific intention to kill is not essential at common law to constitute murder, nor is it necessary under our statute to constitute murder in the second degree, although it is essential to murder in the first degree. *The State v. Decklots*, Id., 447.

Where death ensues from a wound given in malice but not in its nature mortal, but from which, being neglected or mismanaged the party dies, the prisoner will not be thereby excused, but will be held guilty of murder, unless he can make it clearly to appear that the maltreatment of the wound, or the medicine given to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death. *The State v. Morphy*, 33 Id., 270.

The state has the burden of proof to establish beyond a reasonable doubt the guilt of the accused; hence, any negative matter, such as the absence of self defense, the want of provocation, etc., must be shown by the prosecution; but when the matter of defense is wholly disconnected from the body of the crime charged, and is distinctly affirmative matter, the burden of proof thereof is on the defendant. *Id.*

Where an indictment for murder charged that the offense was committed "with intent in so doing, then and there, felonously, intentionally, willfully, maliciously and deliberately to kill and murder," it was held that the charge necessarily implied, to the common understanding, "malice aforethought," and that under the statute the crime of murder in the second degree was sufficiently charged. *The State v. Nealey*, 20 Id., 108.

The presence of malice is necessary to constitute a homicide murder in the second degree. *The State v. Spangler*, 40 Id., 365.

SEC. 3851. [Degree, how determined.]—Upon the trial of an indictment for murder, the jury, if they find the defendant guilty, must inquire, and by their verdict ascertain, whether he be guilty of murder of the first or second degree; but if such defendant be convicted upon his own confession in open court, the court must proceed by the examination of witnesses to determine the degree of murder, and award sentence accordingly.

SEC. 3852. [Dueling.]—Whoever fights a duel with deadly weapons, and inflicts a mortal wound on his antagonist, whereof death ensues, is guilty of murder in the first degree, and shall be punished accordingly.

SEC. 3853. [Same: aiding and abetting.]—Any person who fights a duel with deadly weapons, or is present at the fighting of such duel as aid, second, or surgeon, or advises, encourages, or promotes such duel, although no homicide ensue; and any person who challenges another to fight a duel, or sends or delivers any verbal or written message purporting or intended to be such challenge, although no duel ensue, shall be fined in a sum not exceeding one thousand dollars nor less than four hundred dollars, and imprisoned in the penitentiary not more than three years nor less than one year.

SEC. 3854. [Accepting challenge.]—Any person who accepts such challenge, or who consents to act as a second, aid or surgeon on such acceptance, or who advisers, encourages or promotes the same, although no duel ensue, shall be punished as prescribed in the preceding section.

SEC. 3855. [Posting for not accepting challenge.]—If any person post another, or in writing or print use any reproachful or contemptuous language to or concerning another for not fighting a duel, or for not sending or accepting a challenge, he shall be fined not exceeding three hundred dollars nor less than one hundred dollars, and shall be imprisoned in the county jail not more than six months nor less than two months.

SEC. 3856. [Manslaughter.]—Any person guilty of the crime of manslaughter, shall be imprisoned in the penitentiary not exceeding eight years, and by fine not exceeding one thousand dollars.

The crime of manslaughter is essentially the same under our statute as at common law, and will be so regarded in respect to what constitutes the offense. *The State v. Moore*, 25 Iowa, 128.

The common law definition of manslaughter has not been changed by this section of the statute. *The State v. Shelledy*, 8 Id., 477.

If one fires a gun recklessly or heedlessly, and death is caused thereby, the offense will be at least manslaughter, notwithstanding the gun was pointed in the range of the deceased by accident, with no desire or intention to kill or wound. Where the act is done with deliberation, or is attended with probable mortally dangerous consequences to the deceased, or to persons generally, the grade of the offense is to be determined by the degree of deliberation. *State v. Vance*, 17 Id., 138.

Manslaughter is the unlawful and felonious killing of another, without malice, either express or implied. *The State v. Shelledy*, 8 Id., 477.

A provocation which does not place the party in a position where self defense is necessary, may reduce a homicide to manslaughter, but can never render it excusable. *The State v. Vance*, 17 Id., 138; *The State v. Shelledy*, 8 d., 477.

The general rule is, that when death ensues from sudden transport of passion or heat of blood upon sudden provocation, without malice, the offense is manslaughter and not murder. *The State v. Shelledy*, *supra*; *Cokely v. The State*, 4 Id., 477; *The State v. Decklotts*, 19 Id., 447; *The State v. Spangler*, 40 Id., 365.

Where a man doing an unlawful act not amounting to felony, by accident kill another, or where a man kills another without malice, either express or implied, either unlawfully upon a sudden quarrel, or unintentionally while the slayer is in the unlawful commission of some act not amounting to a felony, it is manslaughter in either case. *The State v. Abarr*, 39 Id., 185.

When death ensues in consequence of the unlawful act of another, it is not necessary that the fatal result should have sprung from an act of commission; but if the defendant omitted an act incumbent on him from which death resulted to the deceased, if there was not malice it is manslaughter; if there was malice it is murder. *The State v. Shelledy*, 8 Id., 477.

The crime of murder is essentially the same under our statute as at the common law, and whatever would be regarded as murder or manslaughter in a common law tribunal will be so regarded here. *The State v. Moore*, 25 Id., 128.

An assault with intent to commit manslaughter is included in an assault with intent to commit murder, and under an indictment for the latter offense the defendant may be convicted of the former. *The State v. White*, 45 Id., 325.

A homicide committed in sudden passion, without deliberation or premeditation, would be manslaughter. The presence of malice is necessary to constitute the crime of murder in the second degree. *The State v. Spangler*, 40 Id., 365.

The crime of manslaughter is properly defined to be the unlawful and felonious killing of another, without any malice express or implied. *The State v. Eber*, 39 Id., 185.

The accidental killing of another, when done in the prosecution of an unlawful act, is not excusable homicide, but manslaughter, but if one engaged in doing a lawful act, and using proper precaution to prevent danger, accidentally kills another the law excuses the homicide. *The State v. Benham*, 23 Id., 154.

SEC. 3857. [Mayhem].—If any person, with intent to maim or disfigure, cut or maim the tongue; cut out or destroy an eye; cut, slit, or tear off an ear; cut, bite, slit, or mutilate the nose or lip; cut off or disable a limb or any member of another person, he shall be punished by imprisonment in the penitentiary not more than five years, and by fine not exceeding one thousand dollars nor less than one hundred dollars.

On an indictment for mayhem a specific intent to disfigure is an essential element of the crime, but such intent may be inferred or presumed, if the act be done deliberately, and the injury the reasonable and probable effect thereof, considering all the circumstances of the transaction. *State v. Jones*, 70 Iowa, 505.

SEC. 3858. [Robbery].—If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense as is provided in the following two sections.

The sudden snatching of a purse or other property from the hand of another involves the force and violence sufficient under the statute to constitute robbery. *The State v. Carr et al.*, 43 Iowa, 418.

An instruction that "robbery may be committed by force or violence, or putting in fear * * * and it is not necessary that the means used to put a party in fear should be such as to put in fear a man used to the ways of the world," was held to be correct. *Id.*

It is not essential to the validity of an indictment for robbery under the statute that it should in express terms charge an assault. *The State v. Brewer*, 53 Id., 735.

To constitute the crime of robbery the taking must be *animo furandi*, and evidence tending to rebut a felonious intent is admissible. *The State v. Hollyway*, 41 Id., 200.

It is not robbery at common law to compel the payment of money by threats of violence, yet our statute makes it an offense, (see section 3871 of the code). *Id.*

A charge in an indictment for robbery that the defendants did with force, etc., steal, take and carry away from another certain described property, is not equivalent to charging that it was taken from the person, and is not sufficient to charge the crime of robbery. *The State v. Leighton*, 56 Id., 595.

The crime of robbery includes the crime of larceny from the person. So, an indictment for larceny from the person is sustained by evidence which establishes the crime of robbery. *The State v. Graff*, 66 Id., 482.

To constitute the crime of robbery under the code it is necessary that the articles be upon, or attached to, or in the immediate presence of, the person from whom they are taken. It is sufficient if they were taken while in his possession or under his control, and they may be in another room of the house than that wherein the force or violence or putting in fear is used. *State v. Calhoun*, 34 N. W. R., 194.

SEC. 3859. [Same.]—If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if being so armed he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery present and so armed, he shall be punished by imprisonment in the penitentiary for a term not exceeding twenty years nor less than ten years.

SEC. 3860. [Same.]—If such offender commit the robbery otherwise than is mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding ten years nor less than two years.

SEC. 3861. (*As amended by ch. 114, 21st g. a.*) [Rape.]—If any person ravish and carnally know any female of the age of [thirteen] years or more, by force and against her will, or carnally know and abuse any female child under the age of [thirteen] years, he shall be punished by imprisonment in the penitentiary for life or any term of years.

On the prosecution for rape, it is not necessary to establish the non-consent or force by proof of outcries of the female, nor, by her or any one else, the fact of an actual struggle; nor is the state bound to show actual penetration by the prosecutrix herself; but the jury, taking all the facts and circumstances into consideration, may say from them whether the requisite facts are proved beyond such reasonable doubt as to warrant a conviction. *The State v. Tarr*, 28 Iowa, 397.

So, too, if the female ravished was idiotic and unable to talk intelligibly, the jury might infer that the prisoner could and did know her condition upon meeting and talking with her a while before making the assault. *Id.*

In a prosecution for rape, it may be properly held without resistance on the part of the female being shown, that the force used by the prisoner to effect his purpose was against her will, when it is shown that she was idiotic or of imbecile mind, and there is nothing to indicate that she desired or consented to the sexual intercourse. *Id.*

Carnal knowledge of a female child under the age of ten years constitutes the crime of rape under this section of the statute. *The State v. Newton*, 44 Id., 45, 47.

In a prosecution for rape, the fact that the prosecutrix made complaint of the injury soon after the occurrence, is admissible on the part of the state; but the particulars of such complaint, or what she said in respect thereto, are not admissible. *The State v. Richards*, 33 Id., 420.

A person charged with the commission of a rape may be convicted of an assault with intent to commit a rape, upon evidence showing that the offense was consummated under circumstances which satisfy the jury that the assault was made without the consent of the female, although there was not sufficient want of consent at the time of the consummation as to constitute the higher crime. *The State v. Cross*, 12 Id., 66.

The failure of the woman to make any outcry when the violation of her person was attempted, and the fact that her garments were uninjured by the struggle with her assailant, tend strongly to show consent, but are not conclusive; and should always be considered in connection with her age and intelligence. *Id.*

Upon the trial of one indicted for rape, an instruction directing the jury that they might find the defendant guilty if the woman failed to resist because she was imbecile, was held, properly given, although the record contained no evidence tending to show imbecility. *The State v. Atherton*, 50 Id., 189.

On a trial for rape a conviction for that offense may fail by reason of evidence of the woman's consent, yet if before such consent was given it appears that the defendant used such force as to evince intention to commit rape, the defendant may be convicted of an assault with intent to commit rape. *Id.*

The crimes of rape and incest cannot be both committed by the same act, and cannot be charged in an indictment as a compound offense. *The State v. Thomas*, 53 Id., 214.

Where one indicted for rape was shown to have stated, before the offense became publicly

known, that he could under certain circumstances "get clear," this was held to be a sufficient corroboration of the statements of the prosecuting witness. *The State v. Comstock*, 46 Id., 265.

Where, upon the trial of an indictment for rape, the court instructed the jury that if there was a reasonable doubt of the defendant being guilty of the crime of rape or of an assault with intent to commit a rape, they should find the defendant not guilty, it was held that the instruction was erroneous in not instructing the jury that they might find the defendant guilty of a simple assault if the evidence justified it. *The State v. Vinsant*, 49 Id., 241.

For a discussion of the weight of evidence offered to sustain an indictment for rape, see *The State v. Tomlinson*, 11 Id., 401.

A person may be indicted for the crime of rape, and conviction for that offense fail by reason of evidence of the woman's consent, yet if, before the consent was given, it appears that the defendant used such force as to evince an intention to commit rape, the defendant may be convicted of an assault with intent to commit rape. *The State v. Atherton*, 50 Id., 189; *The State v. Cross*, 12 Id., 66.

On the trial of one indicted for rape, an instruction to the effect that the defendant might be convicted if the woman failed to resist because she was imbecile, was held, properly given. *The State v. Atherton*, 50 Id., 189.

To justify a conviction for rape, the jury must be satisfied that the defendant not only used force, but that he used it with the intention of gratifying his passions on the person of the prosecutrix at all events, and notwithstanding any resistance on her part. *The State v. Hagerman*, 47 Id., 151.

An indictment for rape includes the crime of assault with intent to commit rape, and that of simple assault, and an instruction precluding the jury from convicting for the latter offense under such an indictment is erroneous. *The State v. Peters*, 56 Id., 263.

Where the prosecutrix was a child over ten years of age the statute presumes that she is capable of consenting to sexual intercourse. But where the evidence was conflicting as to whether she did consent, and as to whether, if she did consent, she did not withdraw her consent before penetration was effected, the evidence showed an entire lack of puberal development on her part, held that the jury might consider her want of development, not to establish her inability to consent, but, in connection with other evidence, to aid in determining whether or not she did in fact consent. *The State v. McCaffey*, 63 Id., 480.

A man may make an assault upon a woman with the intention of having sexual intercourse with her, and yet not be guilty of an assault with intent to commit a rape. There must be added to the assault the intent to use whatever force is necessary to overcome the woman's resistance and to accomplish the purpose. *The State v. Canada*, 68 Id., 397.

SEC. 3862. [**Compelling to marry.**—If any person take any woman unlawfully and against her will, and by force, menace or duress, compel her to marry him or any other person, or to be defiled, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding ten years.

This section of the statute was intended to cover those cases of defilement in which there was no force except that which is constructive, and in which the act is accomplished principally by menace or duress, acting to subdue the will. *Pollard v. The State*, 2 Iowa, 567.

SEC. 3863. [**Carnal knowledge.**—If any person unlawfully have carnal knowledge of any female by administering to her any substance, or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall, upon conviction, be punished as provided in the section relating to ravishment.

SEC. 3864. (*As amended by ch. 19, 19 g. a.*) [**Producing miscarriage of pregnant woman.**—If any person, with intent to produce the miscarriage of any pregnant woman, willfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the state prison for a term not exceeding [five years,] and be fined in a sum not exceeding one thousand dollars.

The procuring of an abortion by a married woman upon herself was held not to be a crime under the code of 1851, nor under section 4221 of the revision. *Hatfield et ux. v. Gano*, 15 Iowa, 177; *Abrams v. Forshee et ux.*, 3 Id., 274.

To cause death by procuring an abortion was, at the common law, and is, therefore, in this state, murder independent of, as well as under the statute, although there was no intent to cause the death of the woman. *The State v. Moore*, 25 Id., 128.

In a prosecution for abortion, the jurisdiction is with the county in which the medicine intended to produce the miscarriage was administered, and not in that where the miscarriage took place. *The State v. Hollenbeck*, 36 Id., 112.

The crime of attempting to produce the miscarriage of a pregnant woman is complete, if the attempt is made at any time during pregnancy. *The State v. Fitzgerald*, 49 Id., 260.

The fact that the accused used a substance which would not have the effect to bring about a miscarriage, would constitute no defense if he employed it with a criminal intent. *Id.*

SEC. 3865. (As amended by ch. 114 21st g. a.) [**Enticing female child under eighteen years.**]
—If any person take or entice away any unmarried female under the age of [eighteen] years from her father, mother, guardian or other person having the legal charge of her person for the purpose of prostitution, he shall, upon conviction, be punished by imprisonment in the penitentiary for not more than three years, or by fine of not more than one thousand dollars and imprisonment in the county jail not more than one year.

Under an indictment for enticing away an unmarried female, under the age of fifteen years, from her father and mother, without their consent, for the purpose of prostitution, the accused cannot show that the female, before being so enticed, told him that she was over fifteen years of age. *The State v. Ruhl*, 8 Iowa, 447.

The words "or other persons having legal charge of her person," in this section do not mean that such person shall have all the power and authority over the child possessed by the parent, or legally appointed guardian, nor do they mean the person who has the temporary charge for a particular purpose—as a school mistress or governess. If otherwise made out, the crime will be complete, if the enticing away was without the permission of the parents if living or of the person who was entrusted with the care, custody, charge or control of the child, as an actual member of the family. *Id.*

SEC. 3866. (As amended by ch. 114, 21st g. a.) [**When under twelve years of age.**]
—If any person maliciously, forcibly or fraudulently lead, take, decoy or entice away any child under the age of [fourteen] years, with the intent to detain or conceal such child from its parent, guardian, or any other person having the lawful charge of such child, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.

SEC. 3867. [**Seduction.**]
—If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

The act of sexual intercourse alone does not constitute seduction. It must be accomplished by false promises, artifices or deception, to constitute the crime. *Smith v. Milburn*, 17 Iowa, 30; *Brown v. Kingsley*, 38 Id., 220; *Delvee v. Boardman*, 20 Id., 446.

A threat made by the defendant to dismiss the plaintiff from his service if she refused to yield to him, is proper to be considered by the jury in determining whether he accomplished his purpose by artifice or not. *Brown v. Kingsley*, 38 Id., 220.

In a criminal trial for seduction, a fact testified to alone by the person injured is not admissible to corroborate her. *The State v. Kingsley*, 39 Id., 439; *Andre v. The State*, 5 Id., 389.

If the injured female was not enticed from her previous chastity, but the defendant had sexual intercourse with her by force or without her consent, the offense is not seduction. *The State v. Kingsley*, 39 Id., 439.

It will be presumed that, on a trial for seduction, the testimony of the prosecutrix will be given, as far as possible, to shield herself, and her language, therefore, should not receive a strained construction in order to sustain a verdict of guilty. *The State v. Haven*, 43 Id., 181.

"The crime of seduction under our statute is a felony." Per SEEVERS, J., in *The State v. Savoye*, 48 Id., 562, 565.

It is not necessary that an indictment for a conspiracy to accomplish a woman's seduction should in terms charge that the woman was unmarried and of previously chaste character. *Id.*

The term character as employed in section 3867 of the code, refers to moral qualities, and not to reputation; and evidence of reputation, in an action for seduction, is not admissible upon the issue involving the woman's character, but only to discredit or support her testimony tending to establish particular acts of lewdness. *The State v. Prizer* 49 Id., 531.

In an action by a husband for damages for seducing and debauching his wife, whereby her affections have been alienated from him, the gravamen of the action is the alleged criminal conversation, and he cannot, if he fails to prove this, recover for the loss of her society, even though caused by the defendant. *Wood v. Mathews*, 47 Id., 409.

The previously chaste character of the prosecutrix in a criminal prosecution for seduction is presumed, and the burden is upon the defendant to show the contrary. *The State v. Higdon*, 32 Id., 262; *Andre v. The State*, 5 Id., 396; *The State v. Wells*, 48 Id., 671.

In a trial for seduction inquiry into the previous chaste character of the female must be strictly confined to the time prior to the alleged seduction. *The State v. Deitrick*, 51 Id., 467.

The crime of seduction can be perpetrated only against an unmarried woman of previously chaste character, hence unchaste conduct of the woman with another man prior to the alleged seduction will entitle the defendant to an acquittal. *The State v. Carr*, 60 Id., 453.

An indictment for seduction is sufficient which charges the offense in the language of the statute. *The State v. Curran*, 51 Id., 112.

Evidence of a general moral character is not admissible in a prosecution for seduction, but the evidence must be limited to the woman's character for virtue. *Id.*

It is not competent to show, in order to establish the unchastity of the prosecuting witness, that she had on a particular occasion acted in such a manner as to be reproved by her mother. *Id.*

The fact that the defendant was the suitor of the witness, proven by other testimony than hers, tends to corroborate her testimony that her seduction was accomplished by him. *Id.*

It is proper to charge the jury that every woman is presumed to be of chaste character until it is shown to the contrary, and the burden of overcoming this presumption is upon the defendant. *Id.*

It is competent for the jury to consider the conduct of the defendant toward the prosecutrix subsequent, as well as prior to and at the time of the alleged seduction. *Id.*

In a prosecution for seduction the law presumes the previous chastity of the prosecutrix without proof; she may, therefore, when introduced and examined by the state for the purpose of proving the fact of her seduction, be asked on cross-examination, in respect to matters showing her want of chastity, for the purpose of contradicting this presumption of law. *The State v. Sutherland*, 30 Id., 570.

An unmarried female, who has become unchaste by sexual intercourse, may reform and gain a character for chastity, within the meaning of the statute defining the crime of seduction. *The State v. Carron*, 18 Id., 372.

On the trial of an indictment for seduction, the question as to the previously chaste character of the prosecutrix is one of fact for the jury. *Id.*

The kind and extent of seductive arts necessary to be shown in order to establish the offense of seduction depend upon the particular circumstances of each case, together with the condition of life, advantages, age and intelligence of the parties. *The State v. Hegdon*, 32 Id., 262.

A defendant cannot be convicted of seduction upon the testimony of the prosecutrix, unless she be corroborated by other evidence tending to connect him with the commission of the offense. Circumstances which were held to be corroborative. *The State v. Wells*, 48 Id., 671.

SEC. 3868. [**Marriage a bar.**]

—If before judgment upon an indictment, the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense.

Marriages celebrated after the commencement of a prosecution for seduction, between the parties to the action, are encouraged by the law, and contracts which promote them will receive favorable interpretation. *Armstrong v. Lester et al.*, 43 Iowa, 159.

Where, on a trial for seduction, the prosecuting witness testified that the defendant overpowered her, it was held that the court below should have instructed the jury that, if the defendant accomplished his purpose by force, he should be acquitted. The crime would be rape and not seduction. *The State v. Lewis*, 48 Id., 578.

The precise time at which the crime of seduction was accomplished need not be alleged in an indictment, time not being a material ingredient of the offense. *The State v. Deitrick*, 51 Id., 467.

SEC. 3869. [**Kidnapping.**]

—If any person willfully and without lawful authority, forcibly or secretly confine or imprison any other person within this state against his will or forcibly carry or send such person out of the state, or forcibly seize and confine or inveigle or kidnap any other person with the intent either to cause such person to be secretly confined or imprisoned in this state against his will, or to cause such person to be sent out of this state against his will, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine and imprisonment at the discretion of the court.

SEC. 3870. [**Exposing child.**]

—If the father and mother of any child under the age of six years, or any person to whom such child has been entrusted or confided, expose such child in any highway, street, field, house or out-house, or in any other

place with intent wholly to abandon it, he or she, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding five years.

The word "and" in the first line of section 3870 of the code may be construed to mean "or," and the offense defined therein may be committed by either "father or mother." *The State v. Smith*, 46 Iowa, 670.

SEC. 3871. [Malicious threats to extort.]—If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent thereby to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be punished by imprisonment in the penitentiary not more than two years or by a fine not exceeding five hundred dollars.

Extortion and pecuniary advantage are not necessary ingredients in the offense of maliciously threatening to injure another, with intent, thereby to compel the person threatened to do an act against his will, under section 3871 of the code. *The State v. Young*, 26 Iowa, 122.

It is not robbery to compel the payment of money by threats of violence, yet it is an offense under this section of the code. *The State v. Hollyway*, 41 Id., 200.

An indictment charging the defendant with "willfully and maliciously verbally threatening to kill and murder" another, is sufficient under this section notwithstanding it does not set out the words used. *The State v. O'Mally*, 43 Id., 501.

SEC. 3872. [Assault with intent to murder.]—If any person assault another with intent to commit murder, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

In an indictment for an assault with intent to commit an offense, it is not necessary to make all the averments required in an indictment for the commission of the offense. *The State v. Newberry*, 26 Id., 469.

It was therefore held, that in an indictment for an assault with intent to commit murder, it need not be averred that the assault was made with malice aforethought. *Id.*

An assault with intent to commit manslaughter is included in an assault with intent to commit murder, and on an indictment for the latter offense the defendant may be convicted of the former. *The State v. White*, 45 Id., 325.

The crime of assault with intent to inflict a great bodily injury is included in an indictment for an assault with intent to commit murder. *The State v. Schele*, 52 Id., 608. And the defendant indicted for an assault with intent to kill may be convicted of an assault of a minor degree. *The State v. Sheppard*, 10 Id., 126.

An assault with intent to commit murder does not admit of degrees, the intent being the gist of the offense. *The State v. Jarvis*, 21 Id., 44, 46; *The State v. White*, 41 Id., 316.

The subsequent declarations of the party injured are not admissible as evidence for the defendant on the trial of an indictment for an assault with intent to commit rape. If offered for the purpose of contradicting the prosecutrix, the proper foundation must be laid by first calling her attention to the alleged declarations. *The State v. Emeigh*, 18 Id., 122.

An indictment under this section which alleged that "the said K. did then and there unlawfully, deliberately, feloniously, and with malice aforethought, make an assault * * * upon R., and did * * * feloniously shoot off and discharge the contents of said pistol * * * through the arm of R. with a felonious intent * * * to kill and murder the said R., contrary," etc; contained all the elements of the crime charged, without an additional averment that the assault and shooting were willful and deliberate. *State v. Keasling*, 38 N. W. R. 397.

SEC. 3873. [Assault with intent to commit rape.]—If any person assault a female with intent to commit a rape, he shall be punished by imprisonment in the penitentiary not exceeding twenty years.

An assault upon a female child under ten years of age with intent to have carnal knowledge of her person is an offense and indictable under section 3873 of the code. *The State v. Newton*, 44 Iowa, 45.

To constitute the offense, in such cases, it is not necessary that the defendant should know that the child is under ten years of age, it is sufficient in this respect if such is the fact. *Id.*

Evidence of previous assaults by the defendant upon the prosecutrix are admissible to show the intent with which the assault charged was committed. *The State v. Walters*, 45 Id., 389.

SEC. 3874. [Assault with intent to maim, etc.]—If any person assault another with intent to maim, rob, steal, or commit arson or burglary, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollars, or by both fine and imprisonment, at the discretion of the court.

The court should instruct the jury that if they have a reasonable doubt of the degree or character of the assault charged, they should only convict of a lower degree of crime included in that charge in the indictment. *The State v. Walters*, 45 Iowa, 389.

SEC. 3875. [**Great bodily injury.**—If any person assault another with intent to inflict a great bodily injury, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars.

An information filed before a justice of the peace, charging that the defendant did "willfully and maliciously strike and beat C. D. with intent of doing her great bodily injury," charges an indictable offense and one of which a justice has no jurisdiction to try. Nor would an appeal from a judgment of conviction rendered by a justice in such case, confer jurisdiction on the district court. *The State v. Carpenter*, 23 Iowa, 506.

SEC. 3876. [**With intent to commit any felony.**—If any person assault another with intent to commit any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

A battery is only an aggravated assault; when the assault is charged to have been made with a dangerous weapon, it is still further aggravation, and where it is charged to have been made with intent to commit a great bodily injury, it is only an offense in a different degree. The assault is the original offense, and the means, the intent, and the extent to which it is carried, qualify only the aggravation of this original offense, to which the statute affixed additional punishment. *Cokely v. The State*, 4 Iowa, 477.

SEC. 3877. [**Mingle poison with food, etc.**—If any person mingle poison with any food, drink, or medicine, with intent to kill or injure any human being, or willfully poison any spring, well, cistern, or reservoir of water, he shall be punished by imprisonment in the penitentiary not exceeding ten years, and by fine not exceeding one thousand dollars.

SEC. 3878. [**Assault and battery.**—Whoever is convicted of an assault, or an assault and battery, where no other punishment is prescribed, shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars.

An assault may be committed without inflicting any personal injury. *The State v. Meyers*, 19 Iowa, 517.

Pointing an unloaded gun may be an assault. *The State v. Shepard*, 10 Id., 126.

As every battery includes an assault, so does every intentional maiming include a battery as well as an assault. *Benham v. The State* 1 Id., 542.

Any person aiding or abetting in the commission of an assault and battery is as guilty as the others, although he did not strike himself. *The State v. McClintick*, 8 Id., 203.

The offense of assault and battery is triable before a justice of the peace or other officer authorized by law, on information under oath without indictment or the intervention of a grand jury, and not otherwise. *The State v. Lee*, 37 Id., 402.

The offenses of an assault and an assault and battery are made punishable by the statute; but in order to ascertain what would amount to an assault, or an assault and battery, we are left to the common law definition. *The State v. Twogood*, 7 Id., 252; see *The State v. Abrams*, 6 Id., 117.

An information charging a defendant with inhumanly whipping and beating his own child, is sufficient as an information charging an assault and battery, but it should set out the name of the child beaten. *The State v. Bitman*, 13 Id., 485.

SEC. 3879. [**Carrying concealed weapons.**—If any person carry upon his person any concealed weapon, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days; *provided*, that this section shall not apply to police officers and other persons whose duty it is to execute process or warrants, or make arrests.

It is a good defense to an indictment for carrying a concealed weapon to show that it was carried through restraint or in ignorance of its real character, or for any innocent or lawful purpose, but such defenses need not be anticipated and negatived by allegations and proofs by the state. *The State v. Williams*, 70 Iowa, 52.

CHAPTER 3.

OFFENSES AGAINST PROPERTY.

SECTION 3880. [**Burning inhabited dwellings in night time.**]-If any person willfully or maliciously burn in the night time, the inhabited building, boat or vessel of another, or willfully and maliciously set fire to any other building, boat or vessel owned by himself or another, by the burning whereof such inhabited building, boat or vessel is burnt in the night time, he shall be punished by imprisonment in the penitentiary for life or any term of years.

SEC. 3881. [**In day time.**]-If any person willfully or maliciously burn in the day time the inhabited building, boat or vessel of another, or any building, boat or vessel adjoining thereto; or willfully and maliciously set fire to any building, boat or vessel owned by himself or another, by the burning whereof such inhabited building, boat or vessel is burnt in the day time; or in the day time willfully and maliciously set fire to any building, boat or vessel owned by himself or another, by the burning of which any such inhabited building, boat or vessel is burnt in the night time, he shall be punished by imprisonment in the penitentiary for a term not exceeding thirty years.

SEC. 3882. [**Burning uninhabited dwellings etc., in night time.**]-If any person willfully and maliciously burn in the night time any uninhabited dwelling-house, boat or vessel belonging to another, or any court house, jail, college, church, or any building erected for public use; or any other building boat or vessel, by the burning whereof any building, boat or vessel mentioned in this section is burnt in the night time, he shall be punished by imprisonment in the penitentiary not exceeding twenty years.

SEC. 3883. [**In the day time.**]-If any person willfully and maliciously burn in the day time any building, boat or vessel mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years.

SEC. 3884. [**Burning mills, locks, dams, depots, etc.**]-If any person willfully and maliciously burn, either in the night or day time, any warehouse, store, manufactory, mill, railroad depot, barn, stable, shop, office, out-house, or any building whatsoever of another, other than is mentioned in the preceding sections of this chapter, or any bridge, lock, dam or flume, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

It seems, that to constitute a barn within the meaning of the statute against arson, it is not necessary that it should be designated or used, in whole or in part, for the storage of hay, corn or produce of any kind. *The State v. Smith*, 28 Iowa, 565.

SEC. 3885. [**Setting fire with intent to burn.**]-If any person set fire to any building, boat or vessel mentioned in the preceding sections of this chapter, or to any material with intent to cause any such building, boat or vessel to be burnt, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

An indictment charging that the defendant, etc., feloniously, etc., intending to set fire to and cause to be burned a certain barn, etc., did feloniously, etc., cause and procure and place a certain lighted candle in and among a certain quantity of hay and grain then and there being in said barn, feloniously, etc., intending, by so causing, procuring, and placing the said lighted candle aforesaid, to set fire to said hay and grain, and as aforesaid, feloniously, etc., cause the said barn to be burned, etc., was held to charge a crime under this section of the statute. *The State v. Johnson*, 19 Iowa, 230.

SEC. 3886. [**Burning or destroying lumber, fences, grain, etc.**]-If any person willfully and maliciously, burn, or otherwise destroy or injure any pile or parcel of wood, boards, timber, or lumber, or any fence, bars, or gate, or any grain, hay

or other vegetable product severed from the soil, or any standing tree, grain, grass, or other standing product of the soil the property of another, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 3887. [**Married woman: liability of.**—The preceding sections of this chapter, severally, extend to a married woman who commits either of those offenses therein described, though the property burnt or set fire to may belong partly or wholly to her husband.

SEC. 3888. [**Burning to injure insurers.**—If any person willfully burn any building, goods, wares, merchandise, or other chattels which are insured against loss or damage by fire, or willfully cause or procure the same to be burned, with intent to injure the insurer, whether such person be the owner of such property or not, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

SEC. 3889. (*As substituted by ch. 55, 17 g. a.*) [**Penalty for setting out fire by which property of another is injured.**—(If any person willfully, or without using proper caution, set fire to and burn, or cause to be burned, any prairie or timbered land, or any enclosed or cultivated field, or any highway, by which the property of another is injured or destroyed, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment, in the discretion of the court.)

Under this section as it stood prior to its amendment, it was properly held that a party would be liable only where he set out the fire willfully or *without using proper caution*—negligently. *Conn v. May*, 36 Iowa, 241; *De France v. Spencer*, 2 G. Greene, 462; *Hanlon v. Ingram*, 3 Iowa, 81; *Jacobs v. Andrews*, 4 Id., 506.

So also prior to the amendment it was *held*, that the kindling of a fire in a cultivated field did not render the person charged therewith liable for resulting damages, regardless of the question of care or negligence. *Brunell v. Hopkins*, 42 Id., 429.

But under chapter 53, laws of 1862, a person setting out fire between the 1st day of September and the 1st day of May, was held absolutely liable for damages caused by its escape on the premises of another, regardless of the question of diligence. *Conn v. May*, 36 Id., 241. No question was made in that case as to where the fire was set, whether in a cultivated field, or in timber or prairie land.

SEC. 3890. [**Same.**—If any person set fire to and burn, or cause to be burned, any prairie or timber land, and allow such fire to escape from his control, between the first day of September in any year and the first day of May following, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

Under this section a person is not liable absolutely where the fire is set by him in a cultivated field. *Brunell v. Hopkins*, 42 Iowa, 429.

Under this section of the code a person setting out fire and burning, or causing to be burned, any timber or prairie land between the dates mentioned in the statute, is *absolutely* liable for damages caused by its escape to and on the premises of another, regardless of the question of diligence. *Conn v. May*, 36 Id., 241.

SEC. 3891. [**Burglary.**—If any person break and enter any dwelling-house in the night time, with intent to commit any public offense; or, after having entered with such intent, break any such dwelling-house in the night time, he shall be deemed guilty of burglary, and shall be punished according to the aggregation of the offense as is provided in the next two sections.

An indictment for burglary which charges the breaking and entering with an intent to commit a public offense is sufficient; it is not necessary to charge that such breaking and entering were "burglarious." *The State v. Short*, 54 Iowa, 392.

Where the legal title to a homestead is in the wife but occupied jointly by her and her husband, the ownership may be laid in the latter in an indictment for burglary. *Id.*

An indictment for burglary is sufficient which charges that the breaking and entering was done with intent to commit larceny, without also averring that there was an intent to take, steal and carry away any property of greater value than twenty dollars. *The State v. Jones*, 10 Id., 206.

An indictment for burglary under section 3891 would differ but little from an indictment under section 3894, without the use of some of the qualifying words used in the latter section; the indictment in the case at bar was made certain by describing the house burglarized as one "in which goods were kept for use, sale and deposit," words peculiar to section 3894. *State v. Franks*, 64 Id., 39.

In an indictment for breaking and entering a dwelling-house *from the outside*, in the night time, it is not necessary to allege that any person was in the house at the time of the alleged breaking. *The State v. Ried*, 20 Id., 413.

The pushing open of a closed door, with the intent expressed in the statute, is a sufficient breaking within the meaning of the law to constitute burglary. *Id.*

While the criminal intent of breaking and entering a dwelling-house in the night time, with intent to commit a larceny, might sufficiently exist in the mind of a drunken person, and while, in such case, his intoxication would be no excuse, yet if it was such that under the influence thereof he entered the house with no intent to commit crime, then he would not be guilty of burglary. *The State v. Bell*, 29 Id., 316.

The law does not necessarily imply the criminal intent from the mere fact of breaking and entering; but whether such intent existed or whether the defendant was capable, in his intoxicated condition, of forming an intent is a question for the jury. *Id.*

SEC. 3892. [Being armed or assaulting a person.]—If such offender, at the time of committing such burglary, is armed with a dangerous weapon, or so armed himself after having entered such dwelling-house, or actually assault any person being lawfully therein, or has any confederate present aiding and abetting in such burglary, he shall be punished by imprisonment in the penitentiary for life or any term of years.

SEC. 3893. [When not armed.]—If such offender commit such burglary otherwise than is mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding twenty years.

SEC. 3894. [Breaking in day time into railway cars, etc., to commit a public offense.]—If any person with intent to commit any public offense in the day time break and enter, or in the night time enter without breaking, any dwelling-house; or at any time break and enter any office, shop, store, warehouse, railroad car, boat, or vessel, or any buildings in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one hundred dollars and imprisonment in the county jail not more than one year.

In an indictment for breaking and entering a building in which valuable things are kept, with intent to commit a felony, the name of the building should be averred and set out, if known, and, if not known, then it should be so stated. *The State v. Morrissey*, 22 Iowa, 158.

An indictment charging the defendant with feloniously and burglariously breaking and entering a store with intent to commit larceny, and with stealing and carrying away certain property therein contained, was *held*, not vulnerable, to the objection that it charged two distinct offenses. *The State v. Hayden*, 45 Id., 11.

Under this section the unlawful breaking and entering must be "with an intent to commit a public offense." *The State v. Ridley et al.*, 48 Id., 370, 373.

An indictment for burglary includes the offense of entering a dwelling-house in the night time without breaking, and will sustain a conviction for the latter offense. *The State v. Maxwell*, 42 Id., 208.

An indictment for breaking and entering a dwelling-house was held not fatally defective because instead of alleging that the house was the dwelling house of those who dwelt therein, it alleged that the house belonged to one R. and that his surviving widow and children, being his heirs at law, kept goods and valuable things therein, and that the intent of the defendant was to steal and carry away said goods and valuable things, there being no prejudicial inaccuracy therein. *State v. Franks*, 64 Iowa, 39.

SEC. 3895. [Selling or concealing mortgaged property.]—If any mortgagor of personal property, while his mortgage of it remains unsatisfied, willfully destroy, conceal, sell, or in any manner dispose of the property covered by such mortgage without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny and be punished accordingly.

In order to recover in a civil action for the driving away cattle or stock by drovers, the plaintiff must allege and prove that the defendant had knowledge at the time of the injury

done, that the domestic animal of another had entered his drove, or was being driven away. *Chamberlain v. Gage et al.*, 20 Iowa, 303.

A second mortgage upon chattels, though made without the consent of the first mortgagee, is not rendered void by this section, which makes the mortgagor guilty of larceny for disposing of such property without the consent of the mortgagee. *Tootle, Hosea & Co. v. Taylor et al., garnishees*, 64 Id., 629.

By this section, it is a criminal act for the mortgagor to dispose of mortgaged chattels, but it does not make the act of the purchaser criminal. *McDonald v. Norton*, 72 Id., 625.

SEC. 3896. [**Driving stock from home or pasture.**—If any person knowingly or willfully drive off, or suffer to be driven off, any horned or other stock of another to a distance exceeding three miles from the residence of the owner, or of his agent having charge of such stock, or the range in which such stock is usually in the habit of running, without the consent of such owner or agent, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days; and any justice of the peace in any county through which the stock thus driven off should pass, or in which it may be found, shall have jurisdiction of the offense.

An indictment for larceny growing out of the sale of mortgaged chattels, must aver that the mortgage was unsatisfied at the time of the offense charged. *The State v. Gustafson*, 50 Id., 194.

Where the mortgage of personal chattels provided that if the mortgagor removed it from the county, the mortgagee might take possession of and sell it, it was held that a removal and sale in another state, under the circumstances stated did not constitute an offense indictable in the county where the mortgage was executed. *The State v. Julien*, 43 Id., 445.

SEC. 3897. [**Stealing, injuring, or disfiguring fruit in day time.**—If any person maliciously or mischievously enter the enclosure of another, with intent to knock off, pick, destroy, or carry away; or having lawfully entered, do afterwards wrongfully knock off, pick, destroy, or carry away any apples, peaches, pears, plums, grapes, or any other fruit or flower of any tree, shrub, bush, or vine, he shall be punished, for the first offense, by a fine not less than five dollars, nor exceeding one hundred dollars, with the costs of conviction, or by imprisonment in the county jail not exceeding thirty days; and should any person be found guilty of a second violation hereof, he shall be fined not less than ten dollars and costs of conviction, or imprisonment as above provided.

SEC. 3898. [**Same in the night time.**—If any person maliciously or mischievously enter the enclosure of another in the night time, and knock off, pick, destroy, or carry away any apples, peaches, pears, plums, grapes, or other fruit or flower of any tree, shrub, bush, or vine; or, if any person having entered the enclosure of another in the night time, with the intent to knock off, pick, destroy, or carry away any fruit or flower as aforesaid, be actually found therein, he shall, on conviction thereof, be punished by a fine not less than twenty-five nor to exceed one hundred dollars and costs of conviction, or by imprisonment in the county jail not exceeding thirty days.

The offense defined in this section is a misdemeanor. *Hooker v. Miller*, 37 Iowa, 613, 614.

SEC. 3899. [**Destroying or injuring fruit trees.**—If any person maliciously or mischievously bruise, break, pull up, cut down, carry away, destroy, or in anywise injure any fruit or ornamental tree, shrub, or vine, growing, or standing on the land of another, he shall be punished by a fine not less than ten nor exceeding one hundred dollars and costs of conviction, or by imprisonment in the county jail not exceeding thirty days.

SEC. 3900. [**Discharging fire arms near where stock is being fed.**—Any person who knowingly discharges fire arms of any description within, or in the immediate vicinity of, any enclosure where cattle, hogs, or sheep are being fed for the purpose of fattening the same; or any person who enters such enclosure with fire arms, or dog, unless such person shall be the owner of said stock, or have the control of the same, or shall have permission from such owner

or the person having control thereof to enter said premises, shall be guilty of a misdemeanor.

(Section 3901 repealed by chapter 185, laws of 1884.)

(CHAPTER 13, LAWS OF 1874.)

BURGLAR TOOLS OR IMPLEMENTS.

An Act for the punishment of persons having in their possession burglar tools or implements with intent to commit the crime of burglary. [Additional to chapter 3, title XXIV, code, concerning "Offenses against property."]

SECTION 1. [Possession of burglar tools or implements a misdemeanor.]—*Be it enacted by the general assembly of the State of Iowa*, That if any person shall be found, having in his possession at any time any burglar tools or implements, with intent to commit the crime of burglary, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days, and it shall be the duty of the court before whom such conviction is had to retain possession of such burglar tools or implements, to be used in evidence in any court in which said person is tried.

Approved, March 10, 1874.

(CHAPTER 11, LAWS OF 1880.)

BREAKING AND ENTERING BUILDINGS.

An Act for the punishment of persons for attempting to break and enter buildings with intent to commit a public offense. [Additional to chapter 3, title XXIV, code, concerning "Offenses against property."]

SECTION 1. [Breaking and entering dwellings at any time or entering a dwelling in night, or to break and enter any office, etc., punished by fine and imprisonment.]—*Be it enacted by the general assembly of the state of Iowa*: That if any person, with intent to commit any public offense, shall attempt to break and enter any dwelling-house, at any time, or to enter any dwelling-house in the night time without breaking, or at any time to break and enter any office, shop, store, warehouse, railroad car, boat, vessel, or any building in which any goods, merchandise, or valuable things are kept for use, sale or deposit, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not more than one year.

Approved, February 27, 1880.

(CHAPTER 78, LAWS OF 1884.)

RELATING TO SALE OF FIRE ARMS TO MINORS.

An Act to prohibit the selling or giving of fire arms to minors.

SECTION 1. [Unlawful to sell or give to minors fire arms or toy pistols.]—*Be it enacted by the general assembly of the state of Iowa*: That it shall be unlawful for any person to knowingly sell, present or give any pistol, revolver or toy pistol to any minor.

SEC. 2. [**Fine or imprisonment.**]⁹⁴—Any violation of this act shall be punishable by a fine of not less than twenty-five nor more than one hundred dollars or by imprisonment in the county jail of not less than ten nor more than thirty days.

Approved, March 29, 1884.

Where defendant in violation of this chapter, sold a revolver to plaintiff's minor son, fifteen years old wherewith he, by accident, shot himself through the hand, *held* that in an action by the father for damages for loss of services and for curing his son, in the absence of a showing that there was something in the boy's disposition or want of experience, from which the defendant might reasonably have anticipated such an accident, plaintiff could not recover. *Poland v. Earhart*, 70 Iowa, 285.

CHAPTER 4.

LARCENY AND RECEIVING STOLEN GOODS.

SECTION 3902. [**Larceny.**]⁹⁵—If any person steal, take, and carry away of the property of another, any money, goods, or chattels; any writ, process, or public record; any bond, bank note, promissory note, bill of exchange, or other bill, order, or certificate; or any book of accounts respecting money, goods, or other things, or any deed or writing containing a conveyance of real estate; or any contract in force; or any receipt, release, or defeasance; or any instrument or writing whereby any demand, right, or obligation is created, increased, extinguished or diminished, he is guilty of larceny, and shall be punished, when the value of the property stolen exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years; and when the value of the property stolen does not exceed the sum of twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

A verdict of guilty on the trial of an indictment for grand larceny, must fix the value of the property stolen, that the court may know with certainty the grade of the crime of which the defendant has been convicted. *The State v. Redman*, 17 Iowa, 329.

Under our statute, which changes the common law rule, a draft, promissory note or other evidence of debt, is the subject of larceny, and also of embezzlement, which is but a similar statutory crime. *The State v. Orwig*, 24 Id., 102.

Money may be the subject of larceny, and an allegation that money was feloniously taken, is sustained by proof that the crime was the taking of money "called greenbacks." *The State v. Carr et al.*, 43 Id., 418.

The stealing of "bank notes" or "bank bills" is larceny, and these terms mean the same thing under our statute. *Munson v. The State*, 4 G. Greene, 483; *The State v. Bond*, 8 Id., 540.

In an action for the larceny of a bank note, it is sufficient to describe it as a promissory note for the payment of money, commonly called a bank note, purporting to be issued by a bank for the payment of a certain sum of money, still due and unpaid, and of a certain value. *Id.*

An indictment charging the larceny of "\$180 in bank notes, usually known and described as greenbacks," was *held*, sufficiently certain in respect to the subject of the larceny. *The State v. Hockenberry*, 30 Id., 504.

The jurisdiction of the district court is determined by the value of the property stolen as found in the indictment of the grand jury, and not by the value as ascertained by the verdict of the trial jury. *The State v. Stingley et al.*, 10 Id., 488.

To constitute larceny, possession of the property must have been acquired with an intent to steal it, and, if the original possession was innocent, the defendant is not guilty, even though he may have subsequently conceived the purpose of appropriating it. *The State v. Wood*, 46 Id., 116.

Where stolen property is brought into this state, the crime of larceny is committed in any county in this state into which the property is brought by the thief, and he may be therein indicted and convicted. *The State v. Bennett*, 14 Id., 479.

If one holds possession of or disposes of the property of another, under a well founded belief that he is entrusted with the property by the latter for that purpose, he is not guilty of larceny. *The State v. Barrackmore*, 47 Id., 684.

To sustain an indictment for larceny of money, it is not necessary to show that it was taken from the person of the owner. If it was dropped from the pocket of the owner and picked up by

the defendant and converted to his own use, without the knowledge of the owner, the facts would sustain an indictment for the general offense of larceny. *The State v. Pratt*, 20 Id., 267.

Where personal property was pledged as security for a debt, the pledgor afterwards obtained possession of the pledged property for a special purpose, with the consent of the pledgee, and thereupon took the property out of the county, and there was evidence tending to show that the pledgor obtained possession of the pledge with a felonious intent to deprive the pledgee of his security, it was held: 1, that the pledgee had a special property in the pledge; 2, that if the pledgor obtained possession of the pledge by deception and false pretense, the pledgee would not be deemed to have released his lien or special property therein; 3, that where the taking of possession was with the felonious intent to deprive the pledgee of his security, the pledgor would be guilty of larceny. *Bruley v. Rose*, 57 Id., 651.

When property recently stolen is found in the possession of any person, the burden of proof is upon such person to show how he came into the possession thereof; and unless he shows that he came honestly into possession of the property the law will presume that he stole the same. *The State v. Hessians*, 50 Id., 135; *The State v. Taylor*, 25 Id., 273; *The State v. Golden*, 49 Id., 48; *The State v. Brady*, 27 Id., 126; *Warren v. The State*, 1 G. Greene, 106; *The State v. Stanley*, 48 Id., 221, 222.

On the trial of an indictment for larceny, where the value of the property alleged to have been stolen is in issue, the jury should be instructed to find, as the value of the property, what it would realize in the ordinary course of trade, and not merely what it is worth to the owner. *The State v. Smith*, 48 Id., 595.

On the trial of an indictment for larceny, the value of the property stolen must be established beyond a reasonable doubt, mere preponderance of evidence that it exceeds twenty dollars not being sufficient to justify a conviction for the higher offense. *State v. Wood*, 46 Id., 116.

SEC. 3903. (As substituted by sec. 1, ch. 11, 15th g. a.) [In night time in houses, stores, boat, etc.]—[If any person in the night time commit larceny in any dwelling-house, store or any public or private building, or in any boat, vessel or water craft, when the value of the property stolen exceeds the sum of twenty dollars, he shall be imprisoned in the penitentiary not exceeding ten years; and when the value of the property stolen, [does not exceed] twenty dollars, by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

Where defendant was charged with robbery under section 3858 of the code, committed by taking money from a dwelling-house, a formal acquittal on an indictment for larceny of the same money, under this section, held, a bar to the prosecution for robbery, because the crime of robbery as charged, could not have been committed without the commission of the larceny, as an included, but inferior, offense. *The State v. Mikesell*, 70 Iowa, 176.

An indictment which in one count charges larceny from a dwelling house in the night time, and in another count charges the same larceny in the day time is not bad for duplicity. *The State v. Elsham*, 79 Id., 531.

Under this section embezzlement from a corporation may be committed by an agent, though he be under sixteen years of age; and an allegation in an indictment that he was over that age was superfluous, and proof of it was not necessary to conviction. *The State v. Goode*, 68 Id., 593.

Under this section a person is guilty of larceny, if he has embezzled his employer's money, coming into his hands by virtue of his employment, by actual conversion, or by secreting the same with intent to convert. *Id.*

The using by a clerk of money belonging to his employer to replace other sums previously appropriated by him to his own use constitutes embezzlement, for which he is liable to his employer in a civil action. *Bowman v. Brown*, 52 Id., 437.

SEC. 3904. (As substituted by sec. 2, ch. 11, 15 g. a.) [Same in day time.]—[If any person in the day time commit larceny as specified in the preceding section, and the value of the property stolen exceeds twenty dollars, he shall be punished by imprisonment in the penitentiary not more than five years; and when the value of the property stolen does not exceed twenty dollars, by fine not exceeding two hundred dollars and imprisonment in the county jail not exceeding one year.]

Where the prisoner was convicted of stealing personal property of less than twenty dollars in value, in a dwelling-house in the day time, it was held, that the district court had jurisdiction of the offense, and that a justice of the peace did not. *The State v. Dawson*, 17 Iowa, 584.

SEC. 3905. [From building on fire.]—If any person commit the crime of larceny by stealing from any building on fire; or by stealing any property removed in consequence of an alarm caused by fire; or by stealing from the person of

another, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years.

The crime of robbery includes the crime of larceny from the person, and under an indictment for larceny from the person, proof of the crime of robbery will warrant a conviction. *State v. Grabb*, 66 Id., 482.

SEC. 3906. [Falsely personating another to receive money, etc.]—If any person falsely personate or represent another, and in such assumed character receive any money or property intended to be delivered to the person so personated, with intent to convert the same to his own use, he is guilty of larceny, and shall be punished accordingly.

A person who falsely personates another, and in such assumed character receives property intended to be delivered to the party so personated, with intent to convert the same to his own use, is guilty of larceny under section 3906 of the code. *The State v. Brown*, 25 Iowa, 561.

SEC. 3907. [Finding and appropriating property.]—If any person come, by finding, to the possession of any personal property of which he knows the owner, and unlawfully appropriate the same or any part thereof to his own use, he is guilty of larceny, and shall be punished accordingly.

To constitute the finding and conversion of lost property larceny under section 3907, such finding and conversion must have been by one *knowing* the owner of the property. The offense is not complete in the absence of this knowledge. *The State v. Taylor*, 25 Iowa, 273; *The State v. Dean*, 49 Id., 73.

The finder of lost goods which have no marks by which the owner could be identified, and does not know to whom they belong, is not guilty of larceny, even if he does not exercise diligence to discover the owner of the goods. *The State v. Dean*, 49 Id., 73.

Where the evidence warranted the jury in finding that the defendant either stole a pocket-book from the owner, or else that he found it, and knew whose it was, but appropriated it to his own use, a verdict of guilty was properly rendered. *The State v. Bolander*, 71 Id., 706.

SEC. 3908. [Embezzlement of public money by officer.]—If any state, county, township, school, or municipal officer, or officer of any state institution, or other public officer within the state charged with the collection, safe keeping, transfer, or disbursement of public money, fails or refuses to keep in any place of deposit that may be provided by law for keeping such money, until the same is withdrawn therefrom upon warrants, issued by the proper officer, or deposits such money in any other place than in such safe, or unlawfully converts to his own use in any way whatever, or use by way of investment in any kind of property, or loan without the authority of law any portion of the public money entrusted to him for collection, safe keeping, transfer, or disbursement, or convert to his own use any money that may come into his hands by virtue of his office, shall be guilty of embezzlement to the amount of so much of said money as is thus taken, converted, invested used, loaned, or unaccounted for, and upon conviction thereof, he shall be imprisoned in the penitentiary not exceeding five years and fined in a sum equal to the amount of money embezzled; and, moreover, is forever after disqualified from holding any office under the laws or constitution of this state.

Conversion may be established either by direct proof of the fact or by proof of demand and refusal; but evidence of demand and refusal will not establish the conversion where the failure to comply with the demand can be sufficiently explained by the existing or other circumstances. *The State v. Bryan*, 40 Iowa, 379.

Under section 4243 of the revision (section 3908, code), it was held that the crime of embezzlement, as defined therein, consisted only in the converting, using or loaning of *so much* of the public money entrusted for safe keeping to the person charged, as was taken and *unaccounted for*. *The State v. Brandt*, 41 Id., 593.

Where the board of directors, in violation of this section, loaned the funds of a school district to one Calvin, who gave his promissory note, with three others as sureties therefor, payable to the district township, in an action on the note the plaintiff was *held* entitled to recover, the illegal act of loaning the money not being the act of plaintiff, but that of the directors. *District Tp. of Pleasant Valley v. Calvin*, 59 Id., 189.

The crime of embezzlement of public funds by a custodian thereof, consists, under the statute, of the conversion of the public money in his hands and a failure to account for the same; and an

indictment for the offense must charge not only the conversion, but also the failure to account. *The State v. Parsons*, 54 Id., 405. Following *The State v. Brandt*, 41 Id., 600.

Under an indictment for embezzlement by a public officer, conversion may be established by direct proof of the fact or proof of demand and refusal; but where the fact of conversion is sought to be proved by evidence of demand and refusal, it may be met and neutralized by evidence showing an excuse for the refusal. *The State v. Bryan*, 40 Id., 379.

SEC. 3909. (As amended by ch. 30, 21st g. a.) [All persons over 16 years of age who embezzles money or goods guilty of larceny.]—(If any officer, agent, clerk or servant of any incorporated company, or voluntary association, or if any clerk, agent or servant of any private person, or of any co-partnership except persons under the age of sixteen years, or if any attorney at law, collector or other person, who in any manner receives or collects money or any other property for the use of and belonging to another, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use without the consent of his employer, master, or the owner of the money or goods collected, or received any money or property of another, or which is partly the property of another and partly the property of such officer, agent, clerk, servant, attorney at law, collector, or other person which has come to his possession or under his care in any manner whatsoever, he shall be deemed guilty of larceny and punished accordingly. And in a prosecution for such crime it shall be no defense that such officer, agent, clerk, servant, collector, attorney at law, or other person was entitled to a commission or compensation out of such money or property as compensation or commission for collecting or receiving the same, for or on behalf of the owner thereof. *Provided*, it shall be no embezzlement on the part of such agent, clerk, servant, attorney at law, collector, or other person to retain his reasonable compensation or collection fee, for collecting or receiving the same; but this proviso shall not authorize or warrant an attorney at law to retain any money or property as compensation, or as money and property on which he has an attorney's lien after the filing of a bond as provided for in section 216 of the code. No offense committed before the taking effect of this act shall be affected by the repeal of section 3909 of the code.

Where an indictment charged that the defendant, as private secretary of the governor, received in his possession and care a treasury draft of the United States, drawn in favor of the state and payable to the order of the governor, which the defendant feloniously converted to his own use and embezzled, it was held that the indictment was good. *The State v. Orwig*, 24 Iowa, 102.

Where the defendant, by virtue of an agreement between him and the prosecutor, received from the latter a watch which he was to trade for a wagon, and was to receive five dollars as compensation for his services, it was held, that this constituted such an employment as rendered the defendant guilty of embezzlement for converting the watch to his own use. *The State v. Foster*, 37 Id., 404.

The unlawful appropriation of money by an agent or employe not authorized to receive it, is not within the provisions of this section (3909), making the offense therein defined punishable as larceny, although the party paying it to the agent or employe supposes him to be authorized to receive it. *The State v. Johnson*, 49 Id., 141.

This section as it read prior to amendment by chapter 30, of the laws of 1886, providing that if "any person over the age of sixteen years embezzle," etc., "without the consent of his employer * * * any money of another which has come into his possession by virtue of such employment, he is guilty of larceny," etc., the indictment need not allege the particular nature of the employment by virtue of which the money came into defendant's possession; and if the same has already set forth, an averment that the money came into defendant's possession, "by virtue of such employment," is sufficient. *State v. Jamison*, 38 N. W. Rep., 508.

An indictment which charged that the defendant "did * * * fraudulently embezzle and convert" etc., sufficiently followed the statute. *Id.*

SEC. 3910. [Same by carriers and others.]—If any carrier or other person to whom any money, goods or other property, which may be the subject of larceny, has been delivered to be carried for hire, or if any other person entrusted with such property, embezzle or fraudulently convert to his own use any such money, goods, or other property, either in the mass as the same were delivered or otherwise and before the same were delivered at the place or to the person where

and to whom they were to be delivered, he is guilty of larceny and shall be punished accordingly.

The crime defined in this section is limited to property which has been delivered *to be carried for hire*; it was accordingly held, that where a quantity of wheat had simply been stored with the defendant, which he converted to his own use, he was not liable to an indictment for embezzlement. *State v. Stoller*, 33 Iowa, 321.

SEC. 3911. [Receiving stolen goods.]—If any person buy, receive, or aid in concealing any stolen goods, or any property, the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, he shall be punished, when the value of the property so bought, received, or concealed by him exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year; and when the value of the property so bought, received, or concealed by him does not exceed the sum of twenty dollars, by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

Where on the trial of an indictment charging the defendant with "concealing" and with "receiving" and "aiding in the concealment" of stolen property, the jury rendered a verdict as follows: "We, the jury, find the defendant guilty of aiding in concealing the stolen property mentioned in the indictment, as charged therein, and assess the value of the same at one thousand dollars," it was held to be equivalent to a general verdict of guilty. *The State v. Turner*, 49 Iowa, 144.

In order to convict a defendant indicted with aiding to conceal stolen property under this section of the code, the evidence must show that he assisted to *hide* the property, in order to elude pursuit, or avoid discovery. *Upton v. The State*, 5 Id., 465.

The crime of receiving stolen goods may be committed by receiving stolen property, knowing it to be stolen, or by knowingly receiving property which has been obtained by burglary or robbery. In this view the indictment in the case held sufficient. *The State v. Lane*, 68 Id., 384.

SEC. 3912. [Same on second conviction.]—If any person after having been convicted of the offense of buying, receiving, or aiding in the concealment of stolen money, goods, or any property, the stealing of which is larceny, or property obtained by robbery or burglary, be again convicted of the like offense; or if any person at the same term of court is convicted of three distinct acts of buying, receiving, or aiding in the concealment of stolen property or property obtained by robbery or burglary, knowing the same was so obtained, he shall be punished as provided in the preceding section.

SEC. 3913. [Receiver convicted without proof that principal has been.]—In any prosecution for the offense of buying, receiving, or aiding in the concealment of stolen property or property obtained by robbery or burglary, knowing the same was so obtained, it shall not be necessary to aver nor to prove on the trial thereof that the person who stole, robbed, or took the property has been convicted.

SEC. 3914. [Measure of value of stolen goods.]—If the property stolen consist of any bank-note, bond, bill, covenant, bill of exchange, draft, order or receipt, or any evidence of debt whatever; or any public security, or any instrument whereby any demand, right, or obligation may be assigned, transferred, created increased, released, extinguished, or diminished, the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or affected, as the case may be, shall be adjudged the value of the thing stolen.

In an indictment for larceny of a bank check, it is sufficient allegation of value to say that it was "of the value of \$20.97," that being equivalent to saying that the instrument called for at least that sum of money. *State v. Pierson*, 59 Iowa, 271.

SEC. 3915. [Removal of goods from custody of an officer.]—If any person knowingly and without authority of law, take, carry away, secrete, or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable, or other officer, and rightfully held by such

officer by virtue of execution, writ of attachment, or other legal process issued under the laws of Iowa, he shall be deemed guilty of larceny, and shall be punished, when the value of the property so taken, carried away, secreted, or destroyed, exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than one year; and when the value of the same does not exceed twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not more than thirty days.

A receiver is not an officer under this section. *State v. Rivers*, 60 Iowa, 381.

Intoxicating liquors seized under an information for their forfeiture are not the subject of replevin, and to take them from an officer by such process would be an illegal act. *The State v. Harris et al.*, 38 Iowa, 242.

SEC. 3916. [When left by an officer with another for safe keeping.]—The possession or custody of goods and chattels by any person with whom the same have been left or deposited for safe keeping to be returned for the purpose of being disposed of on legal process, shall be deemed to be the possession and custody of the officer having or depositing the same, and entitled to the custody thereof, and in a prosecution under the preceding section, the property taken, carried away, secreted, or destroyed, as therein mentioned, may be laid in the officer entitled to the custody thereof at the time of the commission of the offense.

An instruction as follows was held to be correct: "When property recently stolen is found in the possession of any person the burden of proof is upon such person to show how he came into the possession thereof; and unless he shows that he came honestly into possession of said property, the law will presume that he stole the same." *The State v. Hessians*, 50 Iowa, 135.

CHAPTER 5.

FORGERY AND COUNTERFEITING.

SECTION 3917. [Forgery of records and instruments in writing.]—If any person with intent to defraud, falsely make, alter, forge or counterfeit any public record, or any process issued or purporting to be issued by any competent court, magistrate, or officer, or any pleading or proceeding filed or entered in any court of law or equity; or any attestation or certificate of any public officer, or other person, in relation to any matter wherein such attestation or certificate is required by law, or may be received or taken as legal proof; or any charter, deed, will, testament, bond, writing obligatory, power of attorney, letter of credit, policy of insurance, bill of lading, bill of exchange, promissory note; or any order, acquittance, discharge, or accountable receipt for money, or other valuable thing; or any acceptance of any bill of exchange, or order or any indorsement or assignment of any bill of exchange, promissory note, or order, or of any debt or contract; or any instrument in writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property, whatever, is, or, purports to be created, increased, transferred, conveyed, discharged or diminished, he shall be punished by imprisonment in the penitentiary not more than ten years.

The false making or material alteration with intent to defraud, of any writing which if genuine, might apparently be of legal efficacy or the foundation of a legal liability, is forgery. *The State v. Johnson*, 26 Iowa, 407.

A material alteration of a promissory note is forgery, both at common law and under our statutes. *Snyder v. Reno*, 38 Id., 329, 333.

While there can be no forgery of a written instrument invalid on its face, yet it is not necessary that it should show actual legal efficacy, and it is sufficient that if genuine it might have such apparent efficacy. *Id.*

The detachment from a written instrument of a condition thereto, written on the same paper and at the same time, whereby the writing is changed from a non-negotiable instrument to a

negotiable promissory note, is forgery, and punishable as such. *The State v. Stratton*, 27 Id., 420

Where a person writes his name on a blank piece of paper, to be used for the purpose of identifying his signature, and the person to whom it is given, without the knowledge of the other, writes over such signature a promissory note, it will be held that the instrument is a forgery, and invalid, even in the hands of an innocent holder to whom it was negotiated before maturity. *Caulkins v. Whisler*, 29 Id., 455.

Under an indictment charging the forgery of the signature, the writing is admissible in evidence, and the jury must determine whether or not the act of the defendant is an attempt to imitate the signature as charged. *The State v. Nichols*, 38 Id., 110.

An indictment for forgery is supported by proof of a material alteration of a written instrument whereby another is defrauded. *The State v. Maxwell*, 47 Id., 454.

Where a promissory note for ten dollars contained blank space in which the words "one hundred and" and the figure "1" after the dollar mark at the top of the note, thus altering it from a note for ten dollars to one for one hundred and ten dollars, and nothing on the face of the note tended to show such alterations, it was held to be a forgery which viciated the note in the hands of a *bona fide* holder. *The Knoxville Bank v. Clark*, 13 West. Jur., 310. (July 1879.)

In *Rainbolt v. Eddy*, 34 Iowa, 440, it was held, that the alteration of a promissory note by filling a blank left therein for the rate of interest, so as to make it draw ten per cent, did not affect its validity in the hands of a *bona fide* indorsee, for value before maturity.

Under an indictment charging the forgery of the signature to a written instrument, the instrument is admissible in evidence, and the jury must determine whether or not the act of the defendant was an attempt to imitate the signature as charged. *The State v. Nichols*, 38 Id., 110.

A material alteration of the terms or conditions of a note or other commercial paper made by the holder with a fraudulent intent, will defeat recovery thereon. *Robinson v. Reed*, 46 Id., 219. For other cases holding alterations of notes, etc., fatal to recovery, see *Hammond v. Hooper*, 46 Id., 515; *Dickerman v. Miner*, 43 Id., 508; *Cutler v. Rose et ux.*, 35 Id., 456.

SEC. 3918. [Uttering same.]—If any person utter and publish as true any record, process, certificate, deed, will, or any other instrument of writing, mentioned in the preceding section, knowing the same to be false, altered, forged or counterfeited, with intent to defraud, he shall be punished by imprisonment in the penitentiary not more than fifteen years and fined not exceeding one thousand dollars.

SEC. 3919. [Forgery of public securities.]—If any person with intent to defraud, falsely make, utter forge, or counterfeit any note, certificate, state bond, warrant, or other instrument, being public security for money or other property issued or purporting to be issued by authority of this state, or any other of the United States; or any indorsement or other writing purporting to transfer the right or interest of any holder of such public security, he shall be punished by imprisonment in the penitentiary not more than twenty years, nor less than five years.

SEC. 3920. [Counterfeiting bank notes, etc.]—If any person make, alter, forge or counterfeit any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized for that purpose by any state of the United States, or any other government or country, with intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 3921. [Having same in possession to defraud.]—If any person has in his possession any forged, counterfeited or altered bank bill, promissory note, draft or other evidence of debt issued or purporting to be issued as is mentioned in the preceding section, with intent to defraud, knowing them to be so forged, counterfeited or altered, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding two hundred dollars and imprisonment in the county jail not exceeding one year.

In an indictment for having in possession forged and counterfeit bank bills, with intent to defraud, etc., it is not necessary to allege an intent to defraud any particular person or corporation, nor is it necessary to aver a felonious or willful intent to defraud, but a copy of the bills

should be set out in the indictment, or a reason given for not doing so. *The State v. Callendine*, 8 Iowa, 288.

SEC. 3922. [**Uttering counterfeit securities.**]—If any person utter or pass, or tender in payment as true, any false, altered, forged or counterfeited note, certificate, state bond, warrant or other instrument of public security, or any bank bill, promissory note, draft or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized as heretofore mentioned, knowing the same to be false, altered, forged or counterfeited, with the intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

The name of the person, to whom counterfeit money is passed should be stated with certainty in the indictment unless the name is unknown, and if so, that fact should be stated. *Buckley v. The State*, 2 G. Greene, 162.

An indictment for uttering as true a counterfeit bill, need not allege an intent to defraud any particular person. *The State v. Barrett*, 8 Iowa, 536; *The State v. Callendine*, Id., 288; *The State v. Pierce*, Id., 231.

An indictment which charges the defendant with uttering, passing and tendering in payment a counterfeit bank bill with intent to defraud, etc., does not charge more than one public offense. *Id.*

SEC. 3923. [**Second conviction.**]—If any person, having been convicted of the offenses described in the preceding section, afterward be convicted of a like offense; or if any person at the same term of the court is convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary not less than two years, nor more than ten years.

SEC. 3924. [**Making tools, etc., adapted for counterfeiting.**]—If any person engrave, make or mend, or begin to engrave, make or mend any plate, block, press or other tool, instrument or implement; or make or provide any paper or other materials adapted and designed for the forging or making any false and counterfeit note, certificate, state bond, warrant or other instrument of public security for money or other property of this state, or any other of the United States; or any bank bill, promissory note, draft or other evidence of debt issued or purporting to be issued by any corporation or company; and every person who has in his possession any such plate or block engraved in any part, or any press or other tool, instrument, or implement, paper or other material adapted and designated as aforesaid, with intent to use the same, or to cause or permit the same to be used in forging or making any such false and forged certificates, notes, bonds, warrants, public securities or evidences of debt, shall be punished by imprisonment in the penitentiary for not more than five years nor less than two years.

SEC. 3925. [**Counterfeiting coin.**]—If any person forge or counterfeit any gold or silver coin current by law or useage within this state, and if any person have in his possession at the same time five or more pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, he shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year.

An indictment under this section for having in possession false money or coin counterfeited in the similitude of coin current in the state of Iowa, need not allege that the coin was counterfeited in the similitude of the current coin of the United States; nor is it necessary to aver that the counterfeit coin was of any value. *The State v. Williams*, 8 Iowa, 533.

The conjunction in this section, though copulative in form, will be construed as disjunctive in sense. *The State v. Myers*, 10 Id., 448.

The evidence to sustain an indictment, charging a defendant with having five or more pieces of counterfeit coin in possession should show the number of pieces in possession of the accused. *State of Iowa v. Pepper*, 11 Id., 347.

SEC. 3926. [**Uttering counterfeit coin and having possession thereof.**]
—Any person who has in his possession any number of pieces less than five of the

counterfeit coin mentioned in the preceding section, knowing the same to be false or counterfeit, with intent to utter or pass the same as true; and any person who utters, passes or tenders in payment any false and counterfeit coin, knowing the same to be false and counterfeit, shall be punished by imprisonment in the penitentiary not exceeding eight years, or fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year.

The possession of counterfeit coin, as contemplated in this section, may consist in having it deposited in a secret place within the knowledge and control of the accused. *The State v. Washburn*, 11 Iowa, 245.

The evidence to sustain an indictment under this section should show the number of pieces of counterfeit coin in the possession of the defendant. *The State v. Pepper*, Id., 347.

The indictment charging the defendant with counterfeiting coin, and also with having coin in his possession with intent to pass the same as true, is bad for duplicity. *The State v. McPherson*, 9 Id., 53.

SEC. 3927. [Counterfeiting parts of bank notes and instruments.]—If any person fraudulently connect together different parts of several genuine bank bills, notes, or other instruments in writing, so as to produce one instrument; or alter any note or instrument in writing in a matter that is material with intent to defraud, the same shall be deemed forgery in like manner as if such bill or note or other instrument had been forged and counterfeited, and the offender shall be punished accordingly.

SEC. 3928. [Affixing fictitious signatures.]—If any fictitious or pretended signature of an officer or agent of any corporation be fraudulently affixed to any instrument of writing, purporting to be a note, draft, or other evidence of debt issued by such corporation, with intent to utter or pass the same as true, it is a forgery, though no such person may ever have been an officer or agent of such corporation, nor such corporation have ever existed. Every person guilty of this offense shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding three hundred dollars, and imprisonment in the county jail not more than one year.

SEC. 3929. [Fraudulent obliteration of instruments.]—The total or partial erasure or obliteration of any record, process, certificate, deed, will or any other instrument in writing mentioned in this chapter with the intent to defraud, shall be deemed forgery, and the offender shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year.

SEC. 3930. [Second and third convictions.]—If any person having been convicted of either of the offenses mentioned in the preceding section be afterwards convicted of a like offense; or if any person at the same term of court, be convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary not more than ten years, nor less than three years.

SEC. 3931. [Having instruments for counterfeiting.]—If any person cast, stamp, engrave, make, or mend, or have in his possession any mould, die, press or other instrument or tool adapted and designed for the forging and counterfeiting of any coin before mentioned with intent to use the same, or permit the same to be used for that purpose, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

SEC. 3932. [Counterfeiting foreign coin.]—If any person forge or counterfeit any gold or silver coin of any foreign government or country, with intent to export the same to injure or defraud any such government or the citizens thereof, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

SEC. 3933. [Forging or counterfeiting seals.]—Every person who is convicted of having forged, counterfeited, or falsely altered the great seal of this state; or the seal of any public office authorized by law; or the seal of any court, corpora-

tion, city or county; or who falsely makes, forges, or counterfeits any impression purporting to be the impression of any such seal with intent to defraud, shall be punished by imprisonment in the penitentiary not exceeding ten years.

SEC. 3934. [**Existence of corporation proved by reputation.**—On the trial of any person for forging or counterfeiting any bill, note, or any other evidence of debt purporting to be issued by any incorporated company; or for uttering, passing or attempting to pass; or having in possession the same with intent to utter or pass such bill, note, or evidence of debt, it is not necessary to prove the incorporation by the charter or act thereof; but the same may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill, note, or evidence of debt is forged or counterfeit.

Where an indictment for passing counterfeit bank bills, alleged that the bank is a corporation, duly authorized to issue bills, by a certain state named, it is incumbent upon the prosecution to prove the fact alleged. *The State v. Newland*, 7 Iowa, 242.

Where a party is indicted for forging an indorsement on the back of an order purporting to have been drawn by one bank upon another, proof of the existence of the bank is not necessary, nor is it necessary to aver the genuineness of the instrument indorsed. *The State v. Pierce*, 8 Id., 231.

SEC. 3935. [**Counterfeiting brands or stamps.**—If any person with intent to defraud, falsely make, forge or counterfeit any stamp or brand authorized by law to be affixed to any substance or thing whatever; or, knowing such stamp or brand to be counterfeit, use the same as genuine with intent to defraud, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

CHAPTER 6.

OFFENSES AGAINST PUBLIC JUSTICE.

SECTION 3936. [**Perjury.**—If any person on oath or affirmation, lawfully administered, willfully and corruptly swear or affirm falsely to any material matter in any proceeding in any court of justice, or before any officer thereof; or before any tribunal or officer created by law; or in any proceeding in regard to any matter or thing in or respecting which an oath or affirmation is or may be required or authorized by law, he is guilty of perjury, and shall be punished, if the perjury was committed on the trial of a capital crime, by imprisonment in the penitentiary for life or any term not less than ten years; and if committed in any other case, by imprisonment in the penitentiary not more than ten years nor less than two years.

Perjury may be committed by willfully giving false testimony in a material matter before a grand jury. *The State v. Schill*, 27 Iowa, 263.

In order to convict on an indictment for perjury, it must be shown that the defendant willfully and corruptly swore falsely respecting a material matter. The materiality must be established by evidence, and cannot be left to presumption or inference. *The State v. Aikens*, 32 Id., 403.

It is not essential to constitute the crime of perjury that the fact sworn to shall be material to the main issue in the case. It is sufficient if it be material to a collateral issue before the court. *The State v. Shupe*, 16 Id., 36.

In an indictment for perjury it is not necessary to charge that the defendant *knew* of the falsity of the matter testified to by him, except in cases where the assignment of perjury is upon the statement by the accused of his *belief* or denial of his *belief* of the alleged false matter. *The State v. Raymond*, 20 Id., 533.

Where an indictment for perjury charged that the defendant testified on a certain trial to certain matters, whereas he "did know" they were false, it was *held* that the averment of knowledge of the falsity of his evidence at the time he gave it was sufficient. *The State v. Woods*, 17 Id., 18.

Where a defendant in a civil action, in which he pleaded the statute of limitations, was called as a witness by the plaintiff under section 2742 of the revision, in order to remove the bar of the

statute, and he swore that the claim sued on had no existence, it was held competent to show, on an indictment for perjury that the defendant swore falsely in the civil action. *The State v. Vogt*, 27 Id., 117.

SEC. 3937. [Subornation of.]—If any person procure another to commit perjury, he is guilty of subornation of perjury, and shall be punished as provided in the preceding section.

SEC. 3938. [Attempt to suborn.]—If any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

SEC. 3939. [Bribery of public officers.]—If any person give, offer or promise to any executive or judicial officer or member of the general assembly after his election or appointment, and either before or after he has been qualified or has taken his seat, any valuable consideration, gratuity, service, or benefit whatever, with intent to influence his act, vote, opinion or judgment in any matter, question, cause or proceeding which may be pending or which may legally come or be brought before him in his official capacity, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not more than one thousand dollars and imprisonment in the county jail not more than one year.

The giving of facilities for the public convenience of the whole county, as an inducement to remove the county seat, or the offering of a public advantage to an entire community as an inducement to the members of such community to vote for such removal, does not constitute bribery within the meaning of sections 2647, 2657 of the code of 1851. (Sections 3939, 3949, code of 1873.) *Dishorn v. Smith*, 10 Iowa, 212.

SEC. 3940. [Acceptance of bribes by such officers.]—If any executive or judicial officer, or member of the general assembly, accept any valuable consideration, gratuity, service or benefit whatever, or any promise to make the same or to do any act beneficial to such officer or member under the agreement or with the understanding that his vote, opinion, decision or judgment shall be given in any particular manner or upon any particular side of any question, cause or other proceeding which is, or may by law be, brought before him in his official capacity, or that in such capacity he will make any particular nomination or appointment, he shall be imprisoned in the penitentiary not more than ten years, or be fined not more than two thousand dollars and imprisoned in the county jail not more than one year.

SEC. 3941. [Same.]—Every person who is convicted under either of the two preceding sections of this chapter, shall forever afterward be disqualified from holding any office under the laws or constitution of this state.

SEC. 3942. [Corrupt solicitation of places of trust.]—If any person directly or indirectly, give, offer or promise any valuable consideration or gratuity to any other person not being such officer as is mentioned in the preceding section, with intent to induce such other person to procure for him by his interest, influence or any other means whatever any place of trust within this state, he shall be punished by fine not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year.

SEC. 3943. [Acceptance of such rewards.]—If any person, not being such officer as is referred to in the preceding sections of this chapter, accept and receive of another any valuable consideration or gratuity whatever as a reward for procuring, or attempting to procure, any office or place of trust within this state for any person, he shall be punished by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 3944. [Bribery of jurors, referees, etc.]—If any person give, offer or promise any valuable consideration or gratuity whatever, to any one summoned, appointed, or sworn as a juror; or appointed or chosen arbitrator, or umpire, or

referee; or to any master in chancery; or appraiser of real or personal estate; or auditor, with intent to influence the opinion or decision of any such person in any matter, inquest or cause which may be pending or can legally come before him, or which he may be called on to decide in either of said capacities, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

SEC. 3945. [**Acceptance of bribes by such persons.**—If any person summoned, appointed or sworn as a juror; or appointed arbitrator, umpire or referee; or master in chancery; or auditor; or appraiser as aforesaid, take or receive any valuable consideration, or gratuity whatever, to give his verdict, award or report in favor of any particular party in a matter for the hearing or decision of which such person has been summoned, appointed or chosen as aforesaid, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

SEC. 3946. [**Attempt to corrupt such persons.**—If any person attempt to improperly influence any juror in any civil or criminal cause, or any one drawn or summoned, or appointed, or sworn as such juror, or any arbitrator or referee, in relation to any cause or matter pending in, or to be brought before the court for which such juror has been drawn, summoned, appointed or sworn; or for the hearing and decision of which such arbitrator or referee has been chosen or appointed, he shall be punished by a fine not exceeding five hundred dollars, and by imprisonment in the county jail not more than six months.

Under the charge of compounding a felony, the mere fact that the defendant was an officer, was no reason why he should not be indicted under sections 3951 and 3952 instead of under this section. *The State v. Ruthven*, 58 Iowa, 121.

SEC. 3947. [**Jurors acting corruptly.**—If any person drawn, summoned or sworn as a juror, make any promise or agreement to give a verdict for or against any person in any civil or criminal case, or corruptly receive any paper, evidence or information from any one in relation to any matter or cause for the trial of which he is sworn, without the authority of the court or officer before whom such cause or matter is then pending, he shall be punished by a fine not exceeding two hundred dollars, or imprisonment in the county jail not exceeding three months.

SEC. 3948. (*As amended by ch. 123, 20 g. a.*) [**Sheriff and other officers receiving bribes.**—If any sheriff, constable, [marshal, deputy marshal, policeman, or any police officer of any city or town,] or coroner receive from a defendant, or any other person, any money or other valuable thing as a consideration or inducement for omitting or delaying to arrest any defendant, or to carry him before a magistrate or to prison; or for postponing, delaying or neglecting the sale of property on execution; or for omitting or delaying to perform any other duty pertaining to his office, he shall be punished by fine not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or by both fine and imprisonment at the discretion of the court.

SEC. 3949. [**Refusing to execute process in criminal cases.**—If any officer authorized to serve process willfully refuse to execute any lawful process to him directed, requiring him to apprehend or confine any person charged with, or convicted of, any public offense; or willfully delay or omit to execute such process, whereby such person escape, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both fine and imprisonment at the discretion of the court.

SEC. 3950. [**Extortion.**—If any person corruptly and willfully demand and receive of another, for performing any service or official duty for which the fee or

compensation is established by law, any greater fee or compensation than is allowed or provided for the same; or if any witness falsely and corruptly certify that as such he has traveled more miles, or attended more days than he has actually traveled or attended, he shall be punished by fine not exceeding one hundred dollars for each offense, or imprisoned in the county jail not exceeding six months.

SEC. 3951. [**Compounding felonies.**]—If any person having knowledge of the commission of any offense punishable with imprisonment in the penitentiary for life, take any money, or valuable consideration, or gratuity, or any promise therefor, upon an agreement or understanding, expressed or implied, to compound or conceal such offense, or not to prosecute the same, or not to give evidence thereof, he shall be punished by imprisonment in the penitentiary not more than six years, or by fine not exceeding one thousand dollars.

A contract for the compromise or compounding of a felony is illegal, and the parties thereto being in *pari delictu*, the law will not afford affirmative relief to either, but will leave them as it found them. *Allison v. Hess*, 28 Iowa, 388, and cases cited on page 390.

Where a mortgage was executed in consideration that the son of the mortgagor, who was under arrest, charged with the crime of embezzlement, should not be prosecuted, it was held, that the mortgage was based upon an illegal consideration, and, therefore, void. *Peed v. McKee et al.*, 42 Id., 689.

SEC. 3952. [**Same.**]—If any person having knowledge of the commission of any offense punishable by imprisonment in the penitentiary for a limited term of years is guilty of the offense described in the preceding section, he shall be punished by imprisonment in the county jail not more than one year, and by fine not exceeding four hundred dollars.

SEC. 3953. [**Suffering prisoner to escape.**]—If any jailor or other officer voluntarily suffer any prisoner in his custody, upon a charge or conviction of a felony punishable by imprisonment for life to escape, he shall be punished by imprisonment in the penitentiary not more than ten years, nor less than one year.

SEC. 3954. [**Same.**]—If any jailor or other officer voluntarily suffer any prisoner in his custody upon charge or conviction of any other felony to escape, he shall be punished by imprisonment in the penitentiary not more than eight years, or by fine not more than one thousand dollars.

SEC. 3955. [**Same.**]—If any jailor or other officer suffer any prisoner in his custody upon a charge or conviction of any public offense to escape, he shall be punished by fine not exceeding one thousand dollars and by imprisonment in the penitentiary not exceeding five years.

SEC. 3956. [**Assisting prisoner to escape.**]—If any person by any means whatever aid or assist any prisoner lawfully detained in the penitentiary, or in any jail or place of confinement for any felony in an attempt to escape, whether such escape be effected or not, or forcibly rescue any person held in legal custody upon any criminal charge, he shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 3957. [**Same.**]—Every person who by any means whatever aids or assists any prisoner lawfully committed to any jail or place of confinement charged with or convicted of any criminal offense other than a felony in an attempt to escape, whether such escape be effected or not; or who conveys into such jail or place of confinement any disguise, instrument, arms, or other things proper or useful to facilitate the escape of any prisoner so committed, whether such escape be effected or attempted or not, shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding five hundred dollars, or by both such fine and imprisonment at the discretion of the court.

SEC. 3958. [**Same from officer.**]—Every person who aids or assists any prisoner in escaping, or attempting to escape, from the custody of any sheriff, deputy sheriff, marshal, constable, or other officer or person who has the lawful charge of

such prisoner upon any criminal charge, shall be punished by fine not exceeding one thousand dollars and imprisonment in the penitentiary not exceeding five years.

To assist a prisoner to escape from the custody of an officer when held under warrant issued by a magistrate for having *threatened* to commit a public offense, is as much a violation of the statute (§ 3958) as if the prisoner stood charged with its actual commission. *The State v. Bates*, 23 Iowa, 96.

In a prosecution for assisting a prisoner to escape, when held upon a warrant charging him with *threatening* to commit a public offense, the defendant cannot avoid a conviction by proving that he was not, in fact, guilty of the charge: all evidence for that purpose is incompetent. *Id.*

It is equally a crime to assist a prisoner to escape from an officer *de facto* only, as though he were an officer *de jure*. *Id.*

On the trial of an indictment for assisting a prisoner to escape, it is no defense to show that the prisoner was, in fact, not guilty of the crime with which he was charged, and all evidence for that purpose is incompetent. *Id.*

It is equally an offense to assist a prisoner to escape from an officer *de facto* as if he were an officer *de jure*. *Id.*

Sec. 3959. [Prisoner escaping from county jail.]—If any person confined in a county jail upon any conviction for a criminal offense, break such jail and escape therefrom, he shall be imprisoned in such prison not exceeding one year, to commence from and after the expiration of the former sentence, and fined not exceeding three hundred dollars.

Sec. 3960. [Resisting execution of process.]—If any person knowingly and willfully resist or oppose any officer of this state, or any person authorized by law, in serving or attempting to execute any legal writ, rule, order or any process whatsoever, or shall knowingly and willfully resist any such officer in the discharge of his duties without such writ, rule, order, or process, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars nor less than fifty dollars, or by both fine and imprisonment at the discretion of the court.

A road supervisor is not such an officer as is referred to in this statute providing a punishment for resisting an officer in the service of process or in the discharge of his duties. The statute contemplates only such officers as are authorized to execute legal process. *The State v. Putnam*, 35 Iowa, 561.

That a writ of attachment was issued upon an insufficient affidavit, does not constitute a valid defense to an indictment for resisting an officer in the execution of it, when it is not shown that the justice who issued the writ had no jurisdiction of the main action to which it was auxiliary. *The State v. Foster*, 10 Id., 435.

In an indictment charging the defendant with knowingly and willfully resisting an officer, in attempting to execute legal process, it is not necessary to aver that the officer, at the time, informed the defendant that he acted under the authority of a warrant; nor need the indictment set forth at length, the acts of the officer, or show that in making the arrest, he complied in all respects, with the requisites of the statute. *The State v. Freeman*, 8 Id., 428.

An indictment for resisting an officer in the execution of process charges a misdemeanor. In such case the defendant may appear by counsel and demand a trial, and it is error for the court to refuse a trial and order a forfeiture of the bond. *The State v. Connehan*, 57 Id., 351.

Since it is a criminal offense to resist an officer in executing a legal order, he may oppose such resistance with all the means at his command, and he may call on the sheriff, and through him may have the power of the county, to prevent the commission of the offense, and thus enable him to execute the order. *The State v. Rivers et al.*, 66 Id., 653.

One who resists a receiver in the execution of an order of the court is indictable under section 3960 of the code as held in *State v. Rivers*, 64 Id., 729 and re-affirmed in 66 Id., 653.

Because one charged with the execution of a legal order has no authority for aid in so doing, it does not follow that one who resists him is not guilty of a crime under this section of the code. *Id.*

A receiver who is required by order of a court of competent jurisdiction to take possession of property, who has in his possession, as evidence of his authority, a properly certified copy of the order, is a person authorized by law to execute a legal order, within the meaning of this section, so that any person knowingly and willfully resisting or opposing him in the execution of such order is guilty of the crime defined in this section. *The State v. Rivers et al.*, 64 Id., 729.

A person who resists an officer in making an arrest cannot justify his resistance on the ground

that the party arrested is not guilty of the charge upon which he is arrested. *Montgomery v. Sutton*, 67 Id., 497.

An indictment for resisting an officer in the execution of process charges a misdemeanor. In such case the defendant may appear by counsel and demand a trial, and it is error for the court to refuse a trial and order a forfeiture of the bond. *The State v. Connehan*, 57 Id., 351.

SEC. 3961. [**Refusing to assist officer.**—If any person, being lawfully required by any sheriff, deputy sheriff, coroner, constable, or other officer, willfully neglect or refuse to assist him in the execution of his office in any criminal case, or in any case of escape or rescue, he shall be punished by imprisonment in the county jail not more than six months, or by fine not more than one hundred dollars.

SEC. 3962. [**Falsely assuming to be judge, etc.**—If any person falsely assume to be a judge, justice of the peace, magistrate, sheriff, deputy sheriff, coroner, or constable, and take upon himself to act as such or to require any one to aid or assist him in any matter pertaining to the duty of such officer, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding three hundred dollars.

An indictment for oppression in office in substantially the following form: "For that the defendant did, by color of his office as constable of, etc., willfully and corruptly oppress one Josephine Snider, by extorting large sums of money from her under pretense of having an order of court to obtain the said money, when in truth and in fact the said defendant had no order of court nor authority, but did willfully and corruptly obtain said money by false and fraudulent representations of his authority and character as an officer, contrary to the statutes," etc., was held to sufficiently charge the offense. *The State v. Bevans*, 37 Iowa, 178.

A constable may, under this section be guilty of oppression in office. *Id.*

SEC. 3963. [**Exercising office without authority, and officers exceeding authority.**—If any person take upon himself to exercise or officiate in any office or place of authority in this state, without being legally authorized; or if any person by color of his office, willfully and corruptly oppress any person under pretense of acting in his official capacity, he shall be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail not more than one year; or by both fine and imprisonment.

SEC. 3964. [**Stirring up quarrels.**—If any judge, justice of the peace, clerk of any court, sheriff, coroner, constable, attorney or counselor at law, encourage, excite, or stir up any suit, quarrel, or controversy between two or more persons, with intent to injure such person or persons, he shall be punished by fine not exceeding five hundred dollars, and he shall be answerable to the party injured in treble damages.

SEC. 3965. [**Neglect of duty by public officers.**—When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency, is a misdemeanor.

SEC. 3966. [**Misdemeanors.**—When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor.

An indictment against the directors of a school district for misconduct in the issuance of school orders, in violation of section 21 of the school laws of Iowa of 1872, should state that the claims for which the orders were alleged to be drawn had not been audited and allowed. *The State v. Stiles*, 40 Iowa, 148.

Where the county auditor gave a false certificate of the receipt by the treasurer of a certain sum in payment of interest upon a loan of the school fund, it was held that such act constituted a crime under this section of the code, although the auditor is authorized to issue in case of such payment a receipt and not a certificate. *The State v. Morse*, 52 Id., 509.

SEC. 3967. [**Punishment of, when none other prescribed.**—Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the

county jail not more than one year, or by fine not exceeding five hundred dollars, or by both fine and imprisonment.

SEC. 3968. [**Public officers making false entries and returns.**—If any public officer fraudulently make or give false entries, or false returns, or false certificates or receipts in cases where entries, returns, certificates, or receipts are authorized by law, he shall be fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding one year, or both, at the discretion of the court.

Where the county auditor gave a false certificate of the receipt by the treasurer of a certain sum in payment of interest upon a loan of the school fund, it was *held* that such act constituted a crime under this section of the code, although the auditor is authorized to issue in case of such payment a receipt and not a certificate. *The State v. Morse*, 52 Iowa, 509.

SEC. 3969. [**Oppression by officers.**—If any judge or other officer by color of his office, willfully and maliciously oppress any person under pretense of acting in his official capacity, he shall be punished by a fine not exceeding three hundred dollars and imprisoned in the county jail not less than five nor more than thirty days, and be liable to the injured party for any damage sustained by him in consequence thereof.

SEC. 3970. [**Officers failing to pay over fees.**—If any justice of the peace, clerk of the district or other court, county recorder or any other officer who by law is authorized to receive and required to pay over fees of office, or who is or may be authorized to impose or collect fines, shall fail, neglect, or refuse to pay over as prescribed or may hereafter be prescribed by law, all such fees and fines, he shall be deemed guilty of a misdemeanor, besides being liable in a civil action for the amount of such fines and fees as he may have thus illegally withheld or appropriated.

SEC. 3971. [**Making false entries in relation to fees.**—If any justice of the peace, clerk of the district or other court which is now or may hereafter be established, county recorder, or other officer, who by law is authorized or required to keep a court docket, or who is or may be required to keep an account of fees or fines, and to pay over, or in any way account for the same, shall in any manner falsify such docket or account, or shall fail, neglect, or refuse to make an entry upon such docket, or account for such fees and fines, as are required to be paid over according to law, such justice of the peace, clerk of the district court, or clerk of any other court, county recorder and other officer, shall be guilty of a misdemeanor, and shall be subject and liable to be prosecuted therefor in any court having jurisdiction of the offense.

SEC. 3972. [**Officers appropriating fees to their own use.**—Any justice of the peace, clerk of the district or of any other court which is or may be established, county recorder, or other officer who may be found guilty of the offense of appropriating to his own use fees of office or fines collected for violation of law, or of neglecting to pay over the same as prescribed by law, shall be removed from office by the court before or by whom the offense may be tried and judgment or conviction had, and each and every person so found guilty shall be punished by a fine not exceeding three hundred dollars nor less than ten dollars, or imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment, in the discretion of the court.

SEC. 3973. [**Officers to report fees to supervisors.**—All officers required by the provisions of the code to collect and pay over fines and fees, shall, on the first Monday in January in each year, make report thereof under oath to the board of supervisors of the proper county, showing the amount of fines assessed and the amount of fines and fees collected, together with the vouchers for the payment of all sums by him collected to the proper officer required to keep the same.

SEC. 3974. [**Clerks and justices to report fines, fees, etc.: penalty for failure.**—The clerks of the several courts of this state, except of the supreme

court, and all mayors of incorporated towns and cities, and justices of the peace, shall on the first Monday of January of each year, make a report in writing to the board of supervisors of their respective counties, of all forfeited recognizances in their several offices; of all fines, penalties and forfeitures imposed in their respective courts, and which by law go into the county treasury for the benefit of the school fund; in what cause or proceedings, when, for what purpose, against whom, and for what amount rendered; whether said fines, penalties, forfeitures and recognizances have been paid, remitted, canceled or otherwise satisfied; if so, when, how, and in what manner; if not paid, remitted, canceled or otherwise satisfied, what steps have been taken to enforce the collection thereof, and the prospect of such collection. Such report must be verified under oath, to the effect that the same is full, true and complete of the matters therein contained, and of all things required by this section to be reported; and any officer failing so to do shall be deemed guilty of a misdemeanor, and upon conviction thereof, may be fined in any sum not less than one hundred dollars.

SEC. 3975. [Notary public exercising improperly duties of office.]—If any notary public exercise the duties of his office after the expiration of his commission, or when otherwise disqualified, or appends his official signature to documents when the parties have not appeared before him, he shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than fifty dollars, and shall also be removed from office by the governor.

SEC. 3976. [Failure to take oath before entering on duties of office.]—If any officer or person willfully fails to take the oath required by law before entering on the discharge of the duties of any office, trust or station, or makes any contract which contemplates an expenditure in excess of the law under which he was elected or appointed, or fails to report to the proper officer showing the expenditure of all public moneys with proper vouchers therefor by the time required by law, he shall be punished by a fine not exceeding five thousand dollars, or by imprisonment in the penitentiary not exceeding five years, or by both at the discretion of the court.

(CHAPTER 83, LAWS OF 1888.)

An Act to punish bribe taking by state, county, township, city, school or other municipal officers, and to punish bribery or the attempt to bribe, or conspiracy to bribe said officers.

SECTION 1. [Accepting bribes punished.]—*Be it enacted by the general assembly of the state Iowa,* That if any state, county, township, city, school or other municipal officer, not mentioned in section 3940 or 3948 of the code of Iowa of 1873, at any time after his election or appointment to such office, shall, directly or indirectly, accept any valuable consideration gratuity, service, or benefit whatever, or a promise thereof, other than the compensation allowed said officer by law, conditioned upon said officer doing or performing any official act, casting an official vote, making or procuring the appointment of any person to a place of trust or profit, or using his official influence or authority, to give or procure for any person public employment, or conditioned upon said officer refraining from doing or performing any of the foregoing acts or things enumerated. Such officer shall, upon conviction thereof, be punished by imprisonment in the penitentiary for any term of time, not exceeding two years, or in the county jail not exceeding one year, or fined in any sum not less than twenty or more than three hundred dollars.

SEC. 2. [Conspiracy to bribe.]—That if any person directly or indirectly give, offer or promise, or conspire with others to give, offer, or promise to any officer, contemplated in the foregoing section, after said officer's election or appointment to office any valuable consideration, gratuity, service or benefit whatever with a view

or for the purpose of corruptly influencing said officer's official acts or votes, such persons shall be imprisoned in the penitentiary for any term of time not exceeding two years, or in the county jail not exceeding one year, or be fined in any sum not exceeding three hundred dollars, or less than twenty dollars.

Approved April 13, 1888.

CHAPTER 7.

MALICIOUS MISCHIEF AND TRESPASS ON PROPERTY.

SECTION 3977. [Injuries to beasts.]—If any person maliciously kill, maim, or disfigure any horse, cattle, or other domestic beast of another; or maliciously administer poison to any such animals; or expose any poisonous substance with intent that the same should be taken by them, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding three hundred dollars.

See section 2 of chapter 106, laws of 1878, *ante*, p. 87.

In an indictment for maliciously killing a hog, it is not necessary to allege that the animal was a domestic beast. *The State v. Enslow*, 10 Iowa, 115.

In an indictment for malicious injury, it is sufficient to aver ownership, without setting out the character of the title or interest. *The State v. Brant*, 14 Id., 180.

To sustain an indictment under this section for maliciously killing a domestic animal, it is not necessary that the jury should find the existence of malice against the owner of the animal personally, but it is sufficient if the act is done maliciously and with intent to injure the owner, though he may be unknown to the defendant, and malice may be inferred from the act of the defendant. *The State v. Linde et al.*, 54 Id., 139. See, also, *State v. Harris*, 11 Id., 415; *McCord v. High*, 24 Id., 336.

In a prosecution under this section for maiming a horse maliciously, the following instruction held correct: "If you find that the injury, if any, was inflicted by the defendant willfully and wantonly, and without any reasonable excuse shown therefor, then the law will imply malice toward the owner." *The State v. Williamson*, 68 Id., 351.

SEC. 3978. [To dams, locks, mills, machinery, etc.]—If any person maliciously injure or destroy any dam, lock, canal, trench, or reservoir, or any of the appurtenances thereof, or any of the gear or machinery of any mill or manufactory; or maliciously draw off the water from any mill pond, reservoir, canal, or trench; or destroy, injure, or render useless any engine or the apparatus thereto belonging, prepared or kept for the extinguishing of fires, he shall be punished by imprisonment in the county jail not exceeding one year and by fine not exceeding five hundred dollars.

SEC. 3979. [To bridges, railways, etc.]—If any person maliciously injure, remove, or destroy any bridge, rail or plank road; or place or cause to be placed any obstruction on such bridge or road; or willfully obstruct or injure any public road or highway; or maliciously cut, burn, or in any way break down, injure, or destroy any telegraph post, or in any way cut, break, or injure the wires or any apparatus thereto belonging, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

The obstruction of a legally established highway, which cannot be used by the public for the purposes of a highway in consequence of natural obstacles, is not a punishable offense under the statute. *The State v. Shinkle*, 40 Iowa, 131.

When a part of the property laid out highway was not used on account of natural obstructions, and another line was established by prescription, crossing the other at one or more places, it was held that proof of the natural obstructions would not justify the owner of the adjacent land in fencing the traveled road, whether established by prescription or by county authority. *The State v. McGee*, Id., 595.

In a prosecution for the obstruction of a highway, the state is not confined to documentary

evidence of its establishment the same as under an indictment for obstructing a *county road*, but may prove the existence of the highway by evidence of user and consent for the requisite length of time. *The State v. Robinson*, 28 Id., 514. An indictment may be maintained for obstructing a highway established by user, which is less in width than a state or county road established according to the statute. *Id.*

It is not necessary, under this section, to allege in the indictment, or prove on the trial, that the obstruction willfully or maliciously placed on the track of a railway, actually did obstruct or hinder its trains. *The State v. Clemens*, 38 Id., 257.

SEC. 3980. [**Setting loose rafts, boats, and injuries to.**—If any person maliciously cut away, let loose, injure or destroy any boom or raft of wood, logs or other lumber, or any boat or vessel fastened to any place, of which he is not the owner or legal possessor, he shall be punished by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, and shall also forfeit to the use of the person so injured double the amount of damages by him thereby sustained, to be recovered in an action at law.

SEC. 3981. [**Injuring trees and breaking down fences, gates, etc.**—If any person maliciously cut down, injure or destroy any fruit or ornamental trees or other tree, vine or shrub of another, standing or growing for ornament or use; or maliciously break down, mar, deface, or injure any fence, hedge or ditch enclosing lands belonging to another; or throw down or open any gate or bars not his own or under his charge and leave them open, whereby an injury is done to another; or maliciously injure, destroy or sever from the land of another and produce thereof, or anything attached thereto, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one hundred dollars, or by both imprisonment and fine at the discretion of the court.

SEC. 3982. [**Injuring monuments, mile stones, sign boards, etc.**—If any person maliciously take down, injure or remove any monument erected on [or] any tree marked as a boundary of any tract of land, city, or town lot; or destroy, deface or alter the marks of any such monument or tree made for the purpose of designating such boundary or injure or deface any mile stone, post, or guide board erected on any public way; or remove, deface or injure any sign board; or break or remove any lamp or lamp post, or extinguish any lamp on any bridge, way, street or passage, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.

SEC. 3983. [**Trespass by digging, cutting, carrying away, etc.**—If any person willfully commit any trespass by cutting down or destroying any timber or wood standing or growing on the land of another; or by carrying away timber or wood being on such land; or by digging or carrying away any earth, stone, marble, slate, coal, copper, lead, iron ore or any other ore or metal; or by taking and carrying from such land any grass, hay, corn, grain, fruit or other vegetables; or carrying away from any wharf, street or landing place, any goods whatever in which he has no interest, he shall be punished by fine not exceeding five hundred dollars or imprisonment in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court. If in any case the value of the property so cut down, carried away, or otherwise taken, shall not exceed the sum of fifty dollars, then the person so offending shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days.

Where the property cut down, carried away or destroyed is of value not exceeding fifty dollars, the offense is triable and punishable before a justice of the peace. *The State v. Van Horton*, 26 Iowa, 402. See, also, *Londegan v. Hammer*, 30 Id., 508, 509.

An indictment founded upon this section for trespass in cutting down and carrying away the timber, standing and growing upon the land of another, should aver the name of the owner of the land upon which the alleged trespass was committed. *The State v. McConkey*, 20 Id., 574.

One who cuts and stacks hay on uninclosed prairie lands owned by another, without authority,

acquires no property in such hay, and, having neither ownership nor possession, cannot maintain an action for its destruction. *Murphy v. The S. C. & P. R. Co.*, 55 Id., 473.

In an indictment for willful trespass by cutting down and destroying timber, it is sufficient to allege that the injury was done by *cutting down and destroying*, without being more specific. *The State v. Watrous*, 13 Id., 489.

One statement of the venue, in the indictment is sufficient, and when it is averred that the trespass was committed upon the land of a person named, and it is described by section, township and range, omitting its situation with reference to the nearest meridian line, it is sufficient if the county wherein it is situated is named. *Id.*

SEC. 3984. [**On garden, orchards, etc.**].—If any person willfully commit any trespass by entering upon the garden, orchard or improved land of another, with intent to take, carry away, destroy or injure the trees, shrubs, grain, grass, hay, fruit or vegetables there being, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not more than thirty days.

SEC. 3985. [**Injuries to buildings, papers, etc.**].—If any person maliciously injure, deface or destroy any building or fixture attached thereto, or willfully or maliciously destroy, injure or secrete any goods, chattels or valuable papers of another, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, and is liable to the party injured in a sum equal to three times the value of the property so destroyed or injured in a civil action.

In a civil action for damages, under this section, a verdict for three times the value of the property destroyed, or three times the amount of the injury is authorized. *Garland v. Wholebau*, 20 Iowa, 271, 273.

SEC. 3986. [**Defacing public buildings.**].—If any person willfully write, make marks, or draw characters on the walls or any other part of any church, college, academy, school-house, court-house, or other public building; or willfully injure or deface the same, or any wall or fence enclosing the same, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not more than thirty days.

SEC. 3987. [**Defacing and destroying proclamations, notices, etc.**].—If any person intentionally deface, obliterate, tear down, or destroy in whole or in part, any transcript, or extract from or of any law of the United States, or of this state, or any proclamation, advertisement, or notification set up at any place within this state by authority of law or by order of any court, during the time for which the same is to remain up, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days.

SEC. 3988. [**Taking property from boat or vessel.**].—If any owner, master, clerk, or any other person having charge of or belonging to any boat, vessel, or raft, take any cord wood or any other species of property from the owner or his agent, without the knowledge of such owner or agent, or without paying the customary price for the same, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months.

SEC. 3989. [**Injuries to monuments of state boundary.**].—If any person willfully dig up, pull down, break, or destroy, or in any other manner injure or remove any of the cast iron pillars or other evidences planted and fixed, or which may hereafter be planted or fixed, in and along any part of the boundaries of this state, he may be indicted therefor, and upon conviction before any court having competent jurisdiction, shall be punished by fine not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the penitentiary for a term not less than six months, or by both such fine and imprisonment at the discretion of the court.

SEC. 3990. [**Placing obstructions on railways.**].—If any person or persons shall willfully and maliciously place any obstruction on the track of any railroad in this state, or remove any rail therefrom, or in any other way injure such railroad, or do any other thing thereto, whereby the life of any person is or may

be endangered, he or they shall be punished by confinement in the state penitentiary for life, or for any term not less than two years.

That the defendant was the owner of the land over which a railroad passed, and had never granted the right of way to the same, is no defense to an indictment under this section for placing obstructions on the track of the road at a point on his own land. *The State v. Hessenkamp*, 17 Iowa, 25.

Nor will a breach of the contract by which a railroad company has secured the right of way over certain lands justify the owner in placing obstructions on the railroad track where it crosses his land. *Id.*

SEC. 3991. [Breaking levees.]—If any person maliciously injure, break, or cause to be broken, any levee erected to prevent the overflow of land within this state, such person so offending shall, upon conviction, be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

SEC. 3992. [Obstructing public ditches or drains.]—If any person place any obstruction in any of the public ditches or drains made for the purpose of draining any of the swamp lands in this state, he shall, upon conviction, be compelled to remove said obstructions and be fined not less than five dollars nor more than one hundred dollars, or be imprisoned in the county jail not more than thirty days at the discretion of the court.

SEC. 3992½. [Penalty for obstructing or defacing roads.]—If any person without authority or permission from the proper road supervisor, shall in any manner obstruct; deface, or injure any public road or highway, by breaking up, plowing, or digging within the boundary lines thereof, he shall, upon conviction, be punished by a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment in the county jail not more than thirty days, at the discretion of the court.

A highway cannot be established by user alone, although the owner of the land had knowledge of such use, unless the owner had express notice that a highway was claimed, independent of the mere use. *The State v. Mitchell*, 58 Iowa, 567.

In a prosecution for defacing a highway under this section evidence offered by the defendant to prove that the change which he made in the highway was an improvement and not an injury to it was properly excluded. *The State v. Hunter*, 68 Id., 447.

(CHAPTER 148, LAWS OF 1876.)

TO PUNISH INTERFERENCE WITH THE PROPERTY OF RAILROAD COMPANIES.

An Act to diminish liability to railroad accidents and to punish interference with, and injury to, the property of railroad companies.

SECTION 1. [Discharging fire-arms, etc., at railroad trains.]—(*Be it enacted by the general assembly of the state of Iowa.*) If any person shall throw any stone, or other substance of any nature whatever, or shall present or discharge any gun, pistol, or other fire-arm at any railroad train, cars or locomotive engine, he shall be deemed guilty of a misdemeanor and be punished accordingly.

SEC. 2. [Jumping off cars while in motion.]—If any person not employed thereon, or not an officer of the law in discharge of his duty, without the consent of the person having the same in charge, shall get upon, or off, any locomotive engine, or car of any railroad company, when said engine or car is in motion, or elsewhere than at the established depots of such company, or who shall get upon cling to, or otherwise attach himself to any such engine or car, for the purpose of riding upon the same, intending to jump therefrom, when such engine or car is in motion, he shall be guilty of a misdemeanor and be punished by a fine not exceeding \$100, or by imprisonment not exceeding thirty days.

Approved, March 17, 1876.

(CHAPTER 112, LAWS OF 1882.)

PUNISHING MALICIOUS MISCHIEF TO RAILROAD PROPERTY.

An Act to further diminish liability to railroad accidents, and to punish interference with, and injury to, railroad property.

SECTION 1. [**Maliciously uncoupling cars punished as felony.**—(*Be it enacted by the general assembly of the state of Iowa.*) If any person shall willfully and maliciously uncouple or detach the locomotive or tender or any of the cars of any railroad train, or shall in any manner aid, abet, or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiary not exceeding five years, or by fine not exceeding one thousand dollars, or both, at the discretion of the court.

SEC. 2. [**Running off locomotive, same.**—If any person shall unlawfully seize upon any locomotive, with or without any express, mail, baggage or other car attached thereto, and run the same upon any railroad, or shall aid, abet, or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiary not exceeding ten years, or by fine not exceeding two thousand dollars, or both at the discretion of the court.

SEC. 3. [**Running off hand-car misdemeanor: when felony, when manslaughter.**—If any person shall without permission from the proper authority, wrongfully take or run any hand-car upon any railroad in this state, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not more than one hundred dollars, or imprisoned not more than thirty days, at the discretion of the court; *Provided*, that if by such unlawful use of any hand-car, any locomotive or car is thrown from the track, or a collision produced or any person injured thereby, he shall, on conviction, be imprisoned in the penitentiary for a term of not more than five years; *and provided further*, that, if by reason of such unlawful use of any hand-car any person is killed, such person so offending shall be deemed guilty of manslaughter.

SEC. 4. [**Same penalty for meddling with air-brake or bell-rope.**—If any person not an employe upon the railroad shall wrongfully interfere with any automatic air-brake or bell-rope upon any railroad car, or use the same for the purpose of stopping or in any way controlling the movement of the train [he] shall be subject to the penalty provided in section three of this act for the unlawful running of a hand-car on any railroad; and any conductor or brakeman on a railroad train shall have power to arrest such person so offending and deliver him to some peace officer on the line of the railroad.

Approved, March 16, 1882.

CHAPTER 8.

OFFENSES AGAINST THE RIGHT OF SUFFRAGE.

SECTION 3993. [Bribery of electors.]—If any person offer or give a bribe to any elector for the purpose of influencing his vote at an election authorized by law; and if any elector entitled to vote at such election receives such bribe, he shall be punished by fine not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.

The giving of facilities for the public convenience of the whole county, as an inducement to vote for the removal of the county seat, or the offering of a public advantage to an entire community, as an inducement to the members of such community to vote for such removal, does not constitute bribery within the meaning of the statute. *Dishon v. Smith*, 10 Iowa, 212.

SEC. 3994. [Voting more than once.]—If any elector unlawfully vote more than once at any election which may be held by virtue of any law of this state he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year.

SEC. 3995. [When not qualified.]—If any person knowing himself not to be qualified, vote at any election authorized by law, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months.

A charge in an indictment for illegal voting, that the defendant voted at an election then and there holden as authorized by law, includes the further idea that it was held by the proper officers. *The State v. Douglas*, 7 Iowa, 413.

In an indictment under this section, the essence of the offense is that the defendant voted, knowing that he was disqualified, and under such charge the state may prove that he was in fact disqualified, without proving in what the disqualification consisted. *Id.*

SEC. 3996. [When not a resident of the county.]—If any person go or come into any county of this state, and vote in such county, not being a resident thereof, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year.

SEC. 3997. [When not a resident of the state for six months.]—If any person willfully vote who has not been a resident of this state for six months next preceding the election, or who, at the time of the election, is not twenty-one years of age, or who is not a citizen of the United States, or who is not duly qualified from other disability to vote at the place where, and time when the vote is to be given, he shall be fined in a sum not exceeding three hundred dollars, or imprisoned in the county jail not exceeding one year.

In the trial of an indictment under this section of the statute, "for willfully voting when not a citizen of the United States," the court did not err in refusing to instruct the jury "that knowledge is not to be presumed in such case, but is to be alleged and proved as any other fact," for the reason that the instruction was not pertinent. *State v. Sheeley*, 15 Iowa, 404.

On the trial of an indictment under this section, evidence that the defendant consulted "friends" as to his right to vote, "and was advised by them that such right existed," is inadmissible. It seems that evidence that the defendant had consulted persons learned in the law and that upon being informed of all the facts they advised him that he was a legal voter may be admitted as tending to disprove a criminal intent; but such evidence would not be conclusive. *Id.*

Voting in a township of which the voter is not a resident, is an offense under this section of the code; and an indictment for such offense is not affected by the fact that he is also liable to be indicted for perjury. *The State v. Minnick*, 15 Iowa, 123.

SEC. 3998. [Counseling one to vote when not qualified.]—If any person procure, aid, assist, counsel, or advise another to give his vote, knowing that such person is disqualified, he shall be punished by fine not exceeding five hundred dollars nor less than fifty dollars, and by imprisonment in the county jail not exceeding one year.

SEC. 3999. [**Inducing one to vote by false representation.**]-If any person furnish an elector with a ticket or ballot, informing him that it contains a name or names different from those which are written or printed therein, with an intent to induce him to vote contrary to his inclination, or fraudulently or deceitfully change a ballot of any elector, by which such elector is deprived of voting for such candidate or person as he intended, he shall be punished by imprisonment in the county jail not exceeding two years, and by fine not exceeding one thousand dollars nor less than one hundred dollars.

SEC. 4000. [**Preventing from voting by force or threats.**]-If any person unlawfully and by force, or threats of force, prevent, or endeavor to prevent, an elector from giving his vote at any public election in this state, he shall be punished by imprisonment in the county jail not exceeding six months, and a fine not more than two hundred dollars.

SEC. 4001. [**Bribing clerks, judges, etc.**]-If any person give or offer a bribe to any judge, clerk, or canvasser of any election authorized by law, or any executive officer attending the same, as a consideration for some act done, or omitted to be done, contrary to his official duty in relation to such election, he shall be punished by fine not exceeding seven hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 4002. [**Procuring vote by influence or threats.**]-If any person procure, or endeavor to procure, the vote of any elector, or the influence of any person over other electors at any election, for himself, or for or against any candidate by means of violence, threats of violence, or threats of withdrawing custom, or dealing in business or trade, or enforcing the payment of debts, or bringing a suit or criminal prosecution, or any other threat of injury to be inflicted by him, or by his means, he shall be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not more than one year.

SEC. 4003. [**Judges or clerks making false entries, etc.**]-If any judge or clerk of any election authorized by law, knowingly make or consent to any false entry on the list of voters, or poll-books; or put into the ballot-box, or permit to be so put in, any ballot not given by a voter; or take out of such box, or permit to be so taken out, any ballot deposited therein, except in the manner prescribed by law; or by any other act or omission designedly destroy or change the ballots given by the electors, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

SEC. 4004. [**Refusing to permit electors to vote and the contrary.**]-When any one who offers to vote at any election is objected to by an elector as a person not possessing the requisite qualifications, if any judge of such election unlawfully permit him to vote without producing proof of such qualification in the manner directed by law, or if any such judge willfully refuse the vote of any person who complies with the requisites prescribed by law to prove his qualifications, he shall be punished by fine not exceeding two hundred dollars nor less than twenty dollars, or by imprisonment in the county jail not exceeding six months.

SEC. 4005. [**Officers doing any act which renders election void.**]-If any judge, clerk, or executive officer designedly omit to do any official act required by law; or designedly do any illegal act in relation to any public election, by which act or omission the votes taken at any such election in any city, town, precinct, township or district, be lost, or the electors thereof be deprived of their suffrage at such election; or designedly do any act which renders such election void, he shall be fined not less than one hundred dollars, nor more than one thousand dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court.

SEC. 4006. [**Not returning poll books.**—If any judge, clerk, or messenger, after having been deputed by the judges of election to carry the poll-books of such election to the place where by law they are to be canvassed, willfully or negligently fail to deliver such poll-books within the time prescribed by law, safe, with the seal unbroken, he shall, for every such offense, be punished by fine not exceeding five hundred dollars, nor less than fifty dollars.

SEC. 4007. [**Improper registry as a voter.**—Any person who shall cause his name to be registered, knowing that he is not or will not become a qualified voter, in the township where his name is registered previous to the next election, or who shall wrongfully personate any registered voter, and any person causing, aiding, or abetting any person in either of said acts, shall be deemed guilty of a felony, and punished for each offense by imprisonment in the state prison not less than one year.

CHAPTER 9.

OFFENSES AGAINST CHASTITY, MORALITY, AND DECENCY.

SECTION 4008. [**Adultery.**—Every person who commits the crime of adultery, shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year; and when the crime is committed between parties only one of whom is married, both are guilty of adultery and shall be punished accordingly. No prosecution for adultery can be commenced but on the complaint of the husband or wife.

Under this section of the statute, a prosecution for adultery *commenced* by the husband or wife may be continued without further co-operation on their part. *The State v. Baldy*, 17 Iowa, 39; *The State v. Roth*, Id., 336.

The commencement of a prosecution for adultery by husband or wife of one against the other, does not authorize a prosecution against both. *The State v. Roth*, 17 Id., 336.

An averment in an indictment for adultery that the prosecution is commenced by the husband or wife is not conclusive upon the defendant, but may be rebutted. *Id.*

Under this section, an unmarried person may be *alone* indicted and convicted of adultery, upon the complaint of the husband or wife (as the case may be) of the person with whom the crime was committed. *The State v. Wilson*, 22 Id., 364.

Where the wife filed an information before a justice of the peace, charging her husband with the crime of adultery, it was held that the prosecution was thereby commenced by the wife within the meaning of the statute, and that her non-appearance before the grand jury by which an indictment was found against him does not affect the validity of the indictment. *The State v. Dingee*, 17 Id., 232.

On the trial of an indictment for adultery, record evidences of the marriage, is not indispensable. The fact may be proved by the testimony of either the husband or wife, corroborated by their long and continued cohabitation as such, so as to throw the burden on the defendant to rebut the presumption of legal marriage arising from such evidence. *Id.*

In a prosecution for adultery the prior admissions of the defendant are admissible for the purpose of proving marriage. *The State v. Sanders*, 30 Id., 582.

To constitute the crime of adultery, as against the man, the consent of the woman to the carnal intercourse is not indispensable, but the offense may, as against him, exist, though the connection was effected by force and against her will. *Id.*

On the trial of an indictment for adultery against the wife and her paramour, the husband is a competent witness for the state, and is not disqualified from testifying against the wife. *The State v. Bennett*, 31 Id., 24.

The mere fact that a wife, in obedience to a subpoena, testifies before the grand jury upon the question of her husband's adultery, does not constitute a complaint by her against him, within the meaning of this section as to the commencement of a prosecution for adultery. *State v. Stout*, 71 Id., 343.

Under this section if the husband or wife of the defendant begins a prosecution for adultery by preliminary information before a magistrate, and the defendant is thereupon bound over and

indicted by the grand jury, a conviction may be had upon such indictment, though the husband or wife does not voluntarily pursue the prosecution beyond the justice's court. *The State v. Briggs*, 68 Id., 416.

An averment in an indictment for adultery, that the action was commenced by the wife of the defendant, is not presumptive of its truth, but the fact that it was so commenced must be established by evidence. *The State v. Henke*, 58 Id., 457.

This section, which provides that "no prosecution for adultery can be commenced but no complaint of the husband or wife," mean the husband or wife sought to be prosecuted, and not the husband or wife of the other party to the crime, against whom no complaint is made; and where upon *habeas corpus*, sued out by one held under such charge, the answer of the officer showed that the prosecution was not commenced or sanctioned by the wife of the accused, a demurrer thereto should have been sustained, and the plaintiff discharged. *Bush v. Workman, Sheriff*, 64 Id., 205.

SEC. 4009. [Bigamy.]—If any person who has a former husband or wife living marry another person, or continue to cohabit with such second husband or wife in this state he or she, except in the cases mentioned in the following sections, is guilty of bigamy and shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

Under this section, one who contracts a bigamous marriage in another state, and cohabits with the person so married in this state, is, by reason of such cohabitation, guilty of bigamy in this state, no matter how brief may be the sojourn of the parties in the state where they were married. *The State v. Nadal*, 69 Iowa, 478.

SEC. 4010. [Exceptions.]—The provisions of the preceding section do not extend to any person whose husband or wife has continually remained beyond seas, or who has voluntarily withdrawn from the other and remained absent for the space of three years together, the party marrying again not knowing the other to be living within that time; nor to any person who has good reason to believe such husband or wife to be dead; nor to any person who has been legally divorced from the bonds of matrimony.

The provisions of this section for the establishment of innocence in prosecution for bigamy, cannot be made the means of establishing guilt on an indictment for adultery. A presumption of death does not arise until the party has been absent seven years without any intelligence concerning him. *The State v. Henke*, 58 Iowa, 457.

SEC. 4011. [Knowingly marrying husband or wife.]—Every unmarried person who knowingly marries the husband or wife of another, when such husband or wife is guilty of bigamy thereby, shall be punished by imprisonment in the penitentiary not exceeding three years, or by fine not more than three hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 4012. [Lewdness.]—If any man or woman not being married to each other lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and designedly make any open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding two hundred dollars.

An indictment under this section for lewdness must charge that the parties were not married to each other. *The State v. Clinch*, 8 Iowa, 401.

Evidence tending to show two acts of incontinence is not sufficient to sustain an indictment under this section for lewd and lascivious conduct. *The State v. Marvin*, 12 Id., 499.

SEC. 4013. (As substituted by ch. 142, 20th g. a.) [Penalty for keeping house of ill-fame.]—(If any person keep a house of ill-fame, resorted to for the purpose of prostitution or lewdness, such person shall be punished by imprisonment in the penitentiary not less than six months nor more than five years.)

An indictment under this section for keeping a house resorted to for the purpose of prostitution, is sufficient as to venue when it charges the offense as committed within the county. *The State v. Shaw*, 35 Iowa, 575.

The offense defined in this section has no technical name given to it by the statute, and to name it in an indictment as a "nuisance" is mere surplusage and should be disregarded. *Id.*

So, if a name be given in an indictment, to an offense which has no name by statute, which is repugnant to the facts alleged, it will be deemed surplusage. *Id.*

On the trial of an indictment for keeping a house of ill-fame, found under this section, proof of a prior conviction of the defendant on an indictment based on section 4091 of the code, but which did not charge the keeping of a house of ill-fame, was held inadmissible to establish a former conviction for a like offense, for the purpose of increasing the penalty under the statute. *The State v. Holmes*, 56 Id., 588.

The power to suppress and restrain disorderly houses, etc., conferred upon cities by section 456 of the code, does not authorize the passage of an ordinance declaring the keeping of such house a misdemeanor and imposing a punishment by fine and imprisonment. *The City of Chariton v. Barber*, 54 Id., 360. See, also, *The City of Mount Pleasant v. Breeze*, 11 Id., 396.

An indictment alleging that the defendant kept a house of ill-fame, resorted to for the purpose of prostitution and lewdness, "and at which, prostitution and lewdness were carried on and permitted, to the disturbance of others," was held to sufficiently charge an offense under section 4091 of the code, and did not come under section 4013. *The State v. Odell*, 42 Id., 75.

To same effect is *The State v. Alderman*, 40 Id., 375.

SEC. 4014. [Lease of to persons convicted void.]—When the lessee of a dwelling-house is convicted of keeping the same as a house of ill-fame, the lease or contract for letting such house is, at the option of the lessor, void, and such lessor may thereupon have the like remedy to recover possession as against a tenant holding over after the expiration of his term.

SEC. 4015. [Leasing house for such purpose.]—If any person let any house, knowing that the lessee intends to use it as a place or resort for the purpose of prostitution or lewdness, or knowingly permit such lessee to use the same for such purpose, he shall be punished by fine not exceeding three hundred dollars, or imprisoned in the county jail not exceeding six months.

The power to suppress and restrain disorderly houses, etc., conferred upon cities by section 456 of the code, does not authorize the passage of an ordinance declaring the keeping of such house a misdemeanor and imposing a punishment by fine and imprisonment. *The City of Chariton v. Barber*, 54 Iowa, 360. See, also, *City of Mt. Pleasant v. Breeze*, 11 Id., 396.

In an indictment alleging that the defendant kept a house of ill-fame, resorted to for the purpose of prostitution and lewdness, "and at which prostitution and lewdness were carried on and permitted, to the disturbance of others," was held to sufficiently charge an offense under section 4091 of the code and did not come under section 4013. *The State v. Odell*, 42 Id., 96.

To make a lessor of premises liable under this section of the statute for knowingly permitting the lessee to use the same for the purposes of prostitution and lewdness, there must be shown on the part of such lessor a consent to such use, either expressly given or given by his silent acquiescence. His mere failure to act or prohibit would not amount to a permission, unless the occupants were so far under the control of the lessor as that he could prohibit such use of the premises by his mere dissent or order. *Abrahams v. The State*, 4 Id., 541.

SEC. 4016. (As amended by ch. 142, 20th g. a.) [Enticing females to house of ill-fame.]—If any person entice back into a life of shame any person who has heretofore been guilty of the crime of prostitution, or who shall inveigle or entice any female before reported virtuous to a house of ill-fame, or knowingly conceal, or assist or abet in concealing such female, so deluded or enticed for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the penitentiary not less than three nor more than ten years.

SEC. 4017. (As amended by ch. 142, 20th g. a.) [Violations punished.]—[If any person, without lawful authority, willfully dig up, disinter, remove or carry away any human body, or the remains thereof, from its place of interment; or aid, assist, encourage, intice or procure the same to be done or attempted; or willfully receive conceal, or dispose of any such human body, or the remains thereof; or if any person, with the intent to commit any of the aforesaid acts, partially perform the same; or if any person willfully and unnecessarily, and in an improper manner, indecently expose, throw away, or abandon any human body, or the remains thereof, in any public place, or in any river, stream, pond, or other place, every such offender shall be punished by imprisonment in the penitentiary not more than two years, or by fine not exceeding twenty-five hundred dollars, or by both fine and imprisonment.]

SEC. 4018. (Id.) [What bodies may be delivered to medical schools.]—[Any coroner or undertaker, or the superintendent or managing officer of any public

asylum, hospital, poor house, or penitentiary shall deliver to any medical college or school, or any physician in this state, for the purpose of medical and surgical study, the body or remains of any deceased person, except when such body has been interred, but no such body shall be so delivered without the consent of the relatives or friends of such deceased person, if any such are known, nor when such deceased person expressed a desire during his last sickness that his body should be interred. If the body of any person is so delivered and the same shall be subsequently claimed by any relative or friend of such deceased person, such body shall be given up to such relative or friend. Any person who delivers or receives any body or remains, having knowledge that any of the foregoing provisions have been violated shall, upon conviction thereof, be punished as provided in the foregoing section.]

(CHAPTER 142, LAWS OF 1884.)

HOUSES OF ILL-FAME.

An Act to repeal sections 4013 and 4016 of the code and to enact substitutes therefor, relating to houses of ill-fame and to prostitution, and to enact an additional provision relating to houses of ill-fame and prostitution and lewdness.

Be it enacted by the general assembly of the state of Iowa:

(Sections 1 and 2 amend sections 4013 and 4016, which are shown above as amended.)

SEC. 3. [**Penalty for lewdness.**].—If any person for the purpose of prostitution or lewdness resorts to, uses, occupies or inhabits any house of ill-fame or place kept for such purpose or if any person be found at any hotel, boarding house, cigar store or other place leading a life of prostitution and lewdness such person shall be punished by imprisonment in the penitentiary not more than five years.

SEC. 4. [**Evidence on trial.**].—The state upon the trial of any person indicted for keeping a house of ill-fame, may, for the purpose of establishing the character of the house kept by defendant, introduce evidence of the general reputation of such house as so kept, and such evidence shall be competent for such purpose.

Approved, April 3, 1884.

Section 4 of chapter 142, laws of 1884, providing that "the state upon the trial of any person indicted for keeping a house of ill-fame, may, for the purpose of establishing the character of the house kept by defendant, introduce evidence of the general reputation of the house so kept, and such evidence shall be competent for such purpose, is not unconstitutional on the ground that it authorizes a conviction upon evidence of reputation merely; for a conviction cannot be had without further establishing the fact that the house is resorted to for the purpose of prostitution or lewdness. *The State v. Haberle*, 72 Id., 138.

SEC. 4019. [**Burial of remains.**].—The person receiving such body as contemplated in the preceding section, shall decently bury the remains thereof after such body shall have been used as aforesaid, and in case of a failure to so do such person shall be deemed guilty of a misdemeanor, and punished by fine not less than ten nor more than fifty dollars.

SEC. 4019½ [*New section by ch. 182, sec. 2, 18 g. a.*,] [**Must keep a record.**].—Any physician receiving the body or remains of a deceased person for the purpose of medical or surgical study; and any professor or person in charge of a medical college or school at which such body or remains are received for such purpose, shall, in a suitable book, make or cause to be made a legible record of the time when, the name and the description of the person from whom, and the place where, such body or remains were received, and whether or not such body or remains when so received was enclosed in any box, cask or other receptacle, and, if so enclosed, shall record a description of such box, cask or receptacle, sufficient to identify the same,

together with the shipping marks or directions, if any, on same; and also a description of such body or remains, including the length, weight and sex of same, the apparent age of the person at the time of death, color of hair, or beard if any, any and all marks or scars on such body by which same might be identified, and whether or not such body when so received was mutilated so as to prevent identification of same. And such physician, professor or person, shall keep the said record, and on demand exhibit the same, as also any and all such bodies or remains of deceased persons then in his charge, for the inspection of any sheriff or his deputy: *Provided*, such record shall not be required one year or more after such body was received. Any physician or professor or teacher in a medical college or school who uses or allows or permits others under his or her control or charge to use the body or remains of a deceased person for the purpose of medical or surgical study without the record as aforesaid having been first made; or on demand being made by the sheriff or his deputy as aforesaid, shall refuse and fail to exhibit any such record or body in his charge or under his control to such officer for his inspection, shall be guilty of a misdemeanor, and upon conviction be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.]

SEC. 4020. [**Remains to be used for medical study alone.**—The remains of any person received as aforesaid, shall be used for the purpose of medical and surgical study alone, and in this state only, and whoever shall use such remains for any other purpose, or shall remove the same beyond the limits of this state, or in any manner traffic therein, shall be guilty of a misdemeanor, and shall, on conviction, be imprisoned for a term not exceeding one year in a county jail.

SEC. 4021. [**Injuring monuments, etc.**—If any person willfully destroy or injure any tomb, grave-stone, monument, or other thing placed or designated as a memorial of the dead; or any fence, railing, or other thing placed about the same; or any place enclosed for the burial of the dead; or willfully destroy, injure, or remove any tree, shrub, or plant within such enclosure, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both fine and imprisonment.

SEC. 4022. [**Selling obscene books, etc.**—If any person import, print, publish, sell, or distribute any book, pamphlet, ballad, or any printed paper containing obscene language or obscene prints, pictures, or descriptions manifestly tending to corrupt the morals of youth; or introduce into any family, school, or place of education; or buy, procure, receive, or have in his possession any such book, pamphlet, ballad, printed paper, picture, or description, either for the purpose of loan, sale, exhibition, or circulation; or with intent to introduce the same into any family, school, or place of education, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

SEC. 4023. [**Disturbing congregations.**—If any person willfully disturb or disquiet any assembly of persons met for religious worship, by profane discourse or rude and indecent behavior, or by making a noise either within the place of worship or so near as to disturb the order and solemnity of the assembly, he shall be punished by imprisonment in the county jail not more than thirty days or by fine not exceeding one hundred dollars. If any person or persons unlawfully or willfully disturb or interrupt any school, school meeting, teachers' institute, lyceum, literary society, or any other lawful assembly of persons being in the peace of the state, such person or persons shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

SEC. 4024. [**Same.**—If any person within one mile from the place where any religious society is collected together for religious worship in any field or woodland, expose to sale or gift any spirituous or other liquors, or any article of mer-

chandise, or any provisions or other article of traffic, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

SEC. 4025. [**Exceptions.**—The preceding section does not apply to tavern or grocery keepers exercising their calling or business in the places mentioned in their licenses, if they have such; nor to any distillers or manufacturers or others in the prosecution of their ordinary calling or business, so as to prevent them from vending or exposing to sale the articles above prohibited at their place of residence; nor to any person who has a written permit from the person having the charge of such religious society to sell any of such prohibited articles, on complying with the regulations of such religious assembly and with the laws of the state.

SEC. 4026. [**Keeping gambling houses.**—If any person keep a house, shop, or place resorted to for the purpose of gambling; or permit or suffer any person in any house, shop, or other place under his control or care to play at cards, dice, faro roulette, equality, or other game, for money or other thing, such offender shall be fined in a sum not less than fifty dollars nor more than three hundred dollars, or be imprisoned in the county jail not exceeding one year, or be both fined and imprisoned. In a prosecution under this section, any person who has the charge of or attends to any such house, shop, or place, may be deemed the keeper thereof.

The playing of games of chance "for the drinks round," to be delivered when the game is ended is gambling within the meaning of the statute; and the owner of a house who knowingly permits such games to be played therein, is guilty of keeping a gambling house within the meaning of the law. *The State v. Leicht* 17 Iowa, 28.

An indictment under this section which charged the defendant, in the first count, with keeping a gambling house, and, in the second count, with permitting other persons, in a place under his control, to play for money or other things, was held not objectionable as charging two offenses. *The State v. Cooster*, 10 Id., 453.

An indictment under this section which charged that the defendant at a time and place stated "being then and there the keeper of a house resorted to for the purpose of gambling, knowingly and unlawfully did permit, and suffer evil disposed persons whose names are to the grand jurors unknown, then and there to play at cards for money, whiskey and other property," etc., was held sufficient. *The State v. Middleton*, 11 Id., 246.

It is not essential to the crime of gambling that the stakes should be put up before the game progresses. *Id.*

Where it was shown by the evidence that the defendant kept a house where games were played for the use of the tables or of the instruments of gambling, and for beer, oysters or cigars, it was held that this constituted the offense of keeping a gambling house under section 4026 of the code. *The State v. Bishel*, 39 Id., 42; *The State v. Book*, 41 Id., 550.

An indictment which charged the defendant with keeping and controlling a building where intoxicating liquors were sold in violation of the statute, and where "gambling, fighting, drunkenness and breaches of the peace" were permitted by him, was held, not vulnerable to the objection that it charged two distinct offenses. *The State v. Dean et al.*, 44 Id., 648.

An indictment charging that the defendant "did keep a house, place and shop under his care and control, in which house, shop, and place, he did permit divers person, to the jurors unknown to play at cards, dice, and dominos, and other games for money, cigars, beer, and other things, contrary to the form of the statute," etc., was held sufficient under this section. *State v. Kaufman*, 59 Id., 273. Following *State v. Cure*, 7 Id., 479; *State v. Cooster*, 10 Id., 452; *State v. Middleton*, 11 Id., 246.

SEC. 4027. [**Search warrant against.**—If any person make oath before a justice of the peace that he has probable cause to suspect and does suspect that any house, building, or place, naming the house or place and the occupant, is unlawfully used as a common gaming house or place for the purpose of gaming for money or other property, and that persons resort to the same for that purpose, whether they be known to the complainant or not, such justice may issue his warrant for the purpose of searching such house or building for all such implements or gambling devices mentioned in the preceding section, and for the apprehension of the occupant or keeper of said house or building; and after such search, seizure and arrest, the said implements and keeper shall be carried before

such justice of the peace to be dealt with as provided by law. And any gambling device brought before the justice may be destroyed by him, and an entry thereof shall be made upon his docket.

SEC. 4028. [**Gaming and betting.**—]If any person play at any game for any sum of money or other property of any value, or make any bet or wager for money or other property of value, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

Where persons engage in playing billiards with the understanding that the loser shall pay for the use of the billiard table, the owner of the table is guilty, under the statute, of the offense of keeping a house resorted to for the purpose of gambling. *The State v. Book*, 41 Iowa, 550.

Under this section of the code, the playing of billiards, with the understanding that the loser of the game shall pay for the use of the table, constitutes gambling. Whether the game played is one of skill or chance is immaterial. (Following the *State v. Book*, 41 Iowa, 450.) *The State v. Miller et al.*, 53 Id., 154.

SEC. 4029. [**Gaming contracts void.**—]All promises, agreements, notes, bills, bonds, or other contracts, mortgages or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, staked, or bet, at or upon any game of any kind or on any wager, are absolutely void and of no effect.

While an action will not lie to recover money lost in gaming or betting, and actually paid over, a party depositing and losing money on a bet may recover the same before it is paid over. *Thrifty v. Redman*, 13 Iowa., 25; *Shannon v. Baumer*, 10 Id., 210; *Shaw v. Gardner*, 30 Id., 111, 112.

Where one of the parties to a bet deposited, instead of money, the note of a third person, which exceeded the amount of the bet, and the same was delivered by the stakeholder to the winner, who converted it to his own use, it was held, that the latter was liable to the other party as for money had and received, for the amount which the value of the note exceeded the wager. *Shaw v. Gardner*, *supra*.

An action will lie and a recovery may be had against a stakeholder for the amount of a wager placed in his hands, and which he paid over to the other party, after being notified by the plaintiff not to do so. *Adkins v. Fleming*, 29 Iowa, 122.

Under this section of the code a promissory note given for money lost in a gambling contract is absolutely void and of no effect, and no life or vitality is imparted to it by transferring it to an innocent holder for value before due. See cases cited in opinion. *The Trader's Bank of Chicago v. Alsop*, 64 Id., 97.

Section 8, chapter 75, laws of 1880.—Proof that persons drank liquor in a pharmacy raises the presumption that such liquor had been unlawfully given or sold therein by the proprietor thereof as provided by this statute. *State v. Cloughly*, 35 N. W. R., 625.

The commissioners of pharmacy have power to cancel a pharmacist's certificate and strike his name from the registry only upon receipt of a transcript of conviction for the unlawful sale of liquors, in court. *Straight v. Crawford*, 35 N. W. R., 652.

Chapter 83 of laws of 1886, relating to sales of intoxicating liquors by pharmacists for medicine, is complete in itself, and contains all the law in relation to such sales, and the manner of obtaining permits to sell such liquors, and by implication repeals the provisions of the code so far as relates to pharmacists. *State v. Courtney*, 35 N. W. R., 685.

Since the passage of chapter 83, laws of 1886, a pharmacist is not required to give a bond to obtain a permit to sell liquors for medical purposes, and such permit is limited to one year. *Id.*

SEC. 4030. [**Incest.**—]If any man marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter; or if any woman marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son or sister's son; or if any person being within the degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally known each other, they shall be deemed guilty of incest, and shall be punished by imprisonment in the state penitentiary for a term not exceeding ten years and not less than one year.

The intermarriage of persons within the degrees of consanguinity forbidden by this section of the statute constitutes the crime of incest as therein provided. To sustain a conviction, it is not necessary for the state to show, in addition, carnal knowledge between the parties. *The State v. Schauhurst*, 34 Iowa, 547.

Nor, where the prosecution is against brother and sister, is it necessary to show that their father and mother were lawfully married. The statute, in effect, forbids and declares criminal the intermarriage of illegitimate children of the same parents. *Id.*

The register of marriages, kept by the circuit court, wherein the marriage of the defendants is shown, is sufficient *prima facie* under code, section 2197, to establish the fact of marriage. *Id.*

The identity of the defendants, with the persons named in the marriage record, may be established by their admissions, the identity of the names, and by the absence of evidence that there are other persons of the same name. *Id.*

So, too, the relationship of the defendants may be sufficiently established by their acts and declarations. *Id.*

SEC. 4031. [**Cruelty to animals.**—If any person torture, torment, deprive of necessary sustenance, cruelly beat, mutilate, cruelly kill, or overdrive any animal; or unnecessarily fail to provide the same with proper food, drink, shelter, or protection from the weather; or cruelly drive or work the same when unfit for labor; or cruelly abandon the same; or carry or cause the same to be carried on any vehicle, or otherwise, in an unnecessarily cruel and inhuman manner, he shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars.

SEC. 4032. [**By railways: when transporting.**—No railway company in this state, in the carrying or transportation of cattle, sheep, swine, or other animals, shall confine the same in cars for a longer period than twenty-eight consecutive hours, unless delayed by storm or other accidental cause, without unloading for rest, water, and feeding, for a period of at least five consecutive hours. In estimating such confinement, the time the animals have been confined without such rest on connecting railways from which they are received shall be computed, it being the intention of this section to prevent their continuous confinement beyond twenty-eight hours, except upon contingencies hereinbefore stated; and animals unloaded for rest, water, and feeding, under the provisions of this section, shall be properly, fed watered, and sheltered during such rest by the owners or persons in custody thereof, or in case of their default in so doing, then by the railway company transporting them, at the expense of said owners or persons in custody thereof, and said company shall have a lien upon such animals for food, care and custody furnished, and shall not be liable for any detention of such animals authorized by this section. Any railway company, owner, or custodian of such animals who shall fail to comply with the provisions of this section, shall, for each and every such offense, be liable for, and forfeit and pay a penalty of not less than one hundred and not greater than five hundred dollars. But when such animals shall be carried in cars in which they shall and do have proper food, water, space, and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply.

SEC. 4033. [**Keeping cockpits and fighting dogs, bears, etc.**—If any person keep or use, or in any way be connected with, or be interested in the management of, or receive money for the admission of any person to any place kept or used for the purpose of fighting any bull, bear, dog, cock, or other creature, or engage in, aid, abet, encourage, or assist in any bull, bear, dog, or cock fight, or a fight between any other creature he shall be deemed guilty of a misdemeanor.

SEC. 4034 [**Impounding animals without food or water.**—If any person impound or confine, or cause to be impounded or confined in any pound or other place, any creature, and fail to supply the same during such confinement with a sufficient quantity of food and water, he shall be deemed guilty of a misdemeanor.

CHAPTER 10.

OFFENSES AGAINST PUBLIC HEALTH.

SECTION 4035. [**Selling unwholesome provisions.**]—If any person knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer, he shall be punished by imprisonment in the county jail, not more than thirty days, or by fine not exceeding one hundred dollars.

SEC. 4036. [**Adulterating food, etc.**]—If any person fraudulently adulterate for the purpose of sale, any substance intended for food, or any wine, spirituous or malt liquor, or other liquor intended for drinking, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding three hundred dollars, and the article so adulterated shall be forfeited and destroyed.

SEC. 4037. [**Drugs or medicines.**]—If any person fraudulently adulterate, for the purpose of sale, any drug or medicine in such manner as to lessen the efficacy, or change the operation of such drugs or medicines, or to make them injurious to health; or sell them knowing that they are thus adulterated, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, and such adulterated drugs and medicines shall be forfeited and destroyed.

SEC. 4038. [**Neglecting to label poisons.**]—If any apothecary, druggist, or other person, sell and deliver any arsenic, corrosive sublimate, prussic acid, or any poisonous liquor or substance, without having the word "poison," and the true name thereof written or printed upon a label attached to the vial, box, or parcel containing the same, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. Any person who may dispose of at retail any poisonous substance or liquid to any one, for any purpose, is hereby required to enter in a book, to be kept by such apothecary, druggist, or other person so disposing, the name of the poison, when bought, by whom, and for what purpose; and if the person who calls for such poison is not personally known to the vendor, then such person shall be identified by some one known to the vendor, whose name shall also be entered in such book. Any failure to comply with the requirements of this provision shall subject the party so failing to imprisonment in the county jail not more than thirty days, or to a fine not exceeding one hundred dollars.

SEC. 4039. (*As amended by ch. 102, 20th g. a.*) [**Inoculating with small pox.**]—If any person inoculates himself or any other person, or suffer himself to be inoculated with the small-pox within this state, or come within the state with the intent to cause the prevalence or spread of this infectious disease, he shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [Or, if any person shall place, or put, or aid, or abet, in placing or putting any person upon any railroad car, steamboat, or other public conveyance, knowing such persons to be infected with diphtheria, small-pox, or scarlet fever, he shall be punished by fine of not more than one hundred dollars, or by imprisonment in the county jail not more than thirty days.]

SEC. 4040. [**Selling drugged liquors.**]—If any person willfully sell, or keep for sale, intoxicating, malt, or vinous liquors, which have been adulterated or drugged by admixture with any deleterious or poisonous substance, he shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a

fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding two years.

SEC. 4041. [**Throwing dead animals in stream, spring, etc.**].—If any person throw or cause to be thrown, any dead animal into any river, well, spring, cistern, reservoir, stream or pond, he shall be punished by imprisonment in the county jail not less than ten nor more than thirty days, or by fine not less than five nor more than one hundred dollars.

SEC. 4042. [**Selling diluted milk, etc.**].—If any person knowingly sell to another, or knowingly deliver or bring to be manufactured, to any cheese or butter manufactory in this state, any milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as “skimmed milk,” or shall keep back any part of milk known as “strippings” with intent to defraud, or shall knowingly sell the milk, the product of a diseased animal or animals, or shall knowingly use any poisonous or deleterious material in the manufacture of cheese or butter, he shall, upon conviction thereof, be fined in any sum not less than twenty-five dollars, nor more than one hundred dollars, and be liable in double the amount of damages to the person or persons, firm, association, or corporation, upon whom such fraud shall be committed.

(CHAPTER 75, LAWS OF 1880.)

TO REGULATE SALE OF MEDICINES AND POISONS.

An Act to regulate the practice of pharmacy, and the sale of medicines and poisons.

SECTION 1. [**Who may sell.**].—*Be it enacted by the general assembly of the State of Iowa,* That from and after the passage of this act it shall be unlawful for any person, not a registered pharmacist within the meaning of this act, to conduct any pharmacy, drug store, apothecary shop or store for the purpose of retailing, compounding or dispensing medicines or poisons for medical use, except as hereinafter provided.

SEC. 2. [**Who may compound.**].—That it shall be unlawful for the proprietor of any store or pharmacy to allow any person except a registered pharmacist to compound or dispense the prescriptions of physicians, or to retail or dispense poisons for medical use, except as an aid to, and under the supervision of, a registered pharmacist. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be liable to a fine of not less than twenty-five dollars, nor more than one hundred dollars, for each and every such offense.

SEC. 3. (*As amended by ch. 83, 21st g. a.*) [**Appointment of commissioners, etc.**].—The governor, with the advice of the executive council, shall appoint three persons from among the most competent pharmacists of the state, all of whom shall have been residents of the state for five years, and of at least five years' practical experience in their profession, who shall be known and styled as commissioners of pharmacy for the state of Iowa; one of whom shall hold his office for one year, one for two years, and the other for three years, and each until his successor shall be appointed and qualified; and each year thereafter another commissioner shall be so appointed for three years, and until a successor be appointed and qualified. If a vacancy occur in said commission, another shall be appointed, as aforesaid, to fill the unexpired term thereof. Said commissioners shall have power to make by-laws and all necessary regulations for the proper fulfillment of their duties under this act, without expense to the state. [Except that the secretary of state is authorized to furnish said commissioners with

stationery and blanks necessary for their office, and said commissioners are authorized to administer oaths, and take and certify acknowledgments of instruments in writing.]

SEC. 4. [**Duties.**—The commissioners of pharmacy shall register in a suitable book, a duplicate of which is to be kept in the secretary of state's office, the names and places of residence of all persons to whom they issue certificates, and dates thereof. [Druggists and pharmacists who were registered without examination forfeit their registration when they have voluntarily sold, parted with, or severed their connection with the drug business for a period of two years at the place designated in certificate of registration. Should such party who has thus forfeited his registration wish to re-engage in the practice of pharmacy he is required to be registered by examination as per section five.] (*As amended by ch. 106, 22d g. a.*) [Provided, That registered pharmacists who remove to another locality, and re-engage in the practice of pharmacy within a period of two years, and have paid the commissioner of pharmacy the sum of one dollar on or before the 22d day of March of each year as provided in this chapter. Such registered pharmacist shall not be required to register by examination, but his former registration shall be in full force and effect.]

(*As amended by ch. 137, 19th g. a.*) Every registered pharmacist who desires to continue his profession, shall, on or before the 22d day of March of each year, pay to the commission of pharmacy the sum of one dollar, for which he shall receive a renewal of his certificate unless his name has been stricken from the register for violation of the law. It shall be the duty of each registered pharmacist, before changing his locality as designated in his certificate of registration to notify the secretary of the commission of pharmacy of his new place of business, and for recording the same and certification thereto the secretary shall be entitled to receive fifty cents for each certificate. It shall be the duty of every registered pharmacist to conspicuously post his certificate of registration in his place of business. Any person continuing in business, who shall fail or neglect to procure his annual renewal of registration, or who shall change his place of business without complying with this section, or who shall fail to conspicuously post his certificate of registration in his place of business, shall for each such offense be liable to a fine of ten dollars for each calendar month during which he is so delinquent.]

SEC. 5. [**Examination of applicants.**—That the said commissioners of pharmacy shall, upon application, and at such time and place, and in such manner as they may determine, examine either by a schedule of questions, to be answered and subscribed to under oath, or orally, each and every person who shall desire to conduct the business of selling at retail, compounding or dispensing drugs, medicines or chemicals for medicinal use or compounding or dispensing physicians prescriptions as pharmacists, and if a majority of said commissioners shall be satisfied that said person is competent and fully qualified to conduct said business of compounding or dispensing drugs, medicines or chemicals for medicinal use, or to compound and dispense physicians' prescriptions, they shall enter the name of such person as a registered pharmacist in the book provided for in section 4 of this act; and that all graduates in pharmacy, having a diploma from an incorporated college or school of pharmacy that requires a practical experience in pharmacy of not less than four years before granting a diploma, shall be entitled to have their names registered as pharmacists, by said commissioners of pharmacy without examination.

SEC. 6. [**Fee without examination.**—That the commissioners of pharmacy shall be entitled to demand and receive from each person whom they register and furnish a certificate as a registered pharmacist, without examination, the sum of two dollars; and from each and every person whom they examine orally, or whose answer to a schedule of questions are returned subscribed to under oath, the sum

of five dollars, which shall be in full for all services. And in case the examination of said person shall prove defective and unsatisfactory and his name not be registered, he shall be permitted to present himself for re-examination within any period not exceeding twelve months next thereafter, and no charge shall be made for such re-examination.

The creation of a board of pharmacy, with the powers conferred therein, by chapter 75, acts of 1880, is not void as being an attempt to delegate the powers which the constitution vests only in the general assembly. *Hildreth v. Crawford et al., Commissioners of Pharmacy, etc.*, 65 Iowa, 339.

For the unlawful sale of intoxicating liquors, the commissioners of pharmacy may revoke the certificate of a registered pharmacist and strike his name from the register. *Id.*

Plaintiff's certificate as a pharmacist was revoked, and his name stricken from the register, by the commissioners of pharmacy upon the record proof of his conviction by a competent tribunal of the unlawful sale of intoxicating liquors. *Held*, that he could not complain that he was deprived of his property without due process of law. *Id.*

Under sections 8 and 9 of this chapter, a pharmacist's license may be revoked by the commissioners of pharmacy for the illegal sale of either intoxicating or alcoholic liquors; and such license may be revoked for a single unlawful sale of such liquors. *Id.*

A pharmacist who has violated the provisions of this chapter cannot, upon an information for having in possession intoxicating liquors, protect himself by alleging that the liquor when seized was not in his actual possession, or that the search and seizure of a portion of the goods was made without a warrant. *The State v. Ward et al.*, 36 N. W. R., 766.

Under the Iowa pharmacy law, ignorance of the habits of intoxication, or of the minority of the purchaser of intoxicating liquors, is no defense to an indictment for unlawful sales. *The State v. Thompson*, 37 *Id.*, 104.

SEC. 7. [Responsibility of pharmacists.]—Every registered pharmacist shall be held responsible for the quality of all drugs, chemicals and medicines he may sell or dispense, with the exception of those sold in the original packages of the manufacturer, and also those known as "patent medicines" and should he knowingly, intentionally and fraudulently adulterate, or cause to be adulterated, such drugs, chemicals or medical preparations, he shall be deemed guilty of a misdemeanor and, upon conviction thereof, be liable to a penalty not exceeding one hundred dollars, and in addition thereto, his name be stricken from the register.

SEC. 8. (As amended by ch. 83, 21st g. a.) [Pharmacists whose certificates of registration are in full force and effect, shall have the sole right to keep and to sell, under such regulations as have been or may be established from time to time by the commissioners of pharmacy, all medicines and poisons, including intoxicating liquors only for the actual necessities of medicine; provided, that such pharmacists shall have procured permits therefor as hereinafter prescribed. Provided further, that nothing herein contained shall be so construed as to shield [shield] the person who in any wise abuses this trust, for the legitimate and actual necessities of medicine only, from the utmost rigors of the law, now or hereafter in force relating to intoxicating liquors, and in addition thereto, for a second violation thereof, his name shall be stricken from the register by the commissioners of pharmacy upon receipt of transcript of conviction, which shall be transmitted by the court or by order of the court before whom conviction is had. Twenty-five per cent of all moneys recovered as fines under the provisions of this act shall be paid into the state treasury, and reported to the state auditor, and held subject to the order of the commissioners of pharmacy as needed, to be by them used solely to defray the expenses of prosecutions, under, and the enforcement of this act or acts to which this is amendatory. In order to procure a permit to sell intoxicating liquors as aforesaid and a shipping permit he shall present to such board of supervisors a petition signed by at least one-fourth of the freeholders having the qualification of electors of the township, town or ward wherein such business is located, certifying that the registered pharmacist applying is a person of good moral character, is not a minor, and is, and for the six months last preceding has been, lawfully conducting a pharmacy as proprietor in such township, town or ward, and

that they believe him to be a proper person to buy and sell intoxicating liquors for the purposes named in this act. The board being satisfied that all the provisions of the law have been complied with, a permit shall be issued.

Provided, however, that any resident of the township, town or ward, may appear and show cause why such permit should not be granted, and the same shall be refused unless the board are fully satisfied that all the requirements of the law have been complied with, ten days notice of the time for granting such permit, having been given by publication in a newspaper published in the county or by posting notices in the township, town or ward in which the business is to be conducted. The county auditor shall give to such pharmacist, his certificate of registration and his permit to buy and sell, being in full force and effect, a permit to receive intoxicating liquors within the county in which he does business, and the presentation of said permit to any railway company, express company or common carrier within the borders or traversing the territory of the state, shall convey full authority to receive, transport and deliver, intoxicating liquors to the persons named in such permit; *provided,* that such permit shall be for specified packages and kinds of liquors, and that a certified copy of such permit shall be kept on file in the office of the auditor issuing the same. The commissioners of pharmacy shall, on the revocation or forfeiture of any certificate of registration, subsequent to their last biennial report or abstract of the state pharmacy register, report such revocation or forfeiture to the county auditor of the county wherein such certificate was last in force. On or before the tenth day of each month said pharmacist shall make to the county auditor a complete report, verified by his affidavit specifically showing all sales of intoxicating liquors made during the preceding calendar month, to whom sold, and the purpose for which the same was to be used as represented by duplicate applications executed by each purchaser. The registred pharmacists to whom application is made shall refuse to execute same, if he has reason to believe that the application is not made in good faith, and that the liquor would be used as a beverage. He shall not accept an application from a minor or from any person who is in the habit of becoming intoxicated, or when any relative of such person has given written notice to said pharmacist that such person uses intoxicating liquors as a beverage. The drinking of intoxicating liquors in a pharmacy, whether under a permit or not, shall be presumptive evidence that the same was sold or given away by such pharmacist contrary to law.]

Proof that persons drank liquor in a pharmacy raises the presumption that such liquor had been unlawfully given or sold therein by the proprietor thereof as provided by this act. *State v. Cloughly*, 35 N. W. R., 652.

SEC. 9. [Regulations as to sale of poisons.]—It shall be unlawful for any person from and after the passage of this act, to retail any poisons enumerated in schedules "A" and "B," excepts as follows:

SCHEDULE A.

Arsenic, and its preparations, corrosive sublimate, white precipitate, red precipitate, biniiodide of mercury, cyanide of potassium, hydrocyanic acid, strychnia and all other poisonous vegetables alkaloids, and their salts, essential oil of bitter almonds, opium and its preparations, except paregoric and other preparations of opium containing less than two grains to the ounce.

SCHEDULE B.

Aconite, belladonna, colchicum, conium, nux vomie, hebane, savin, ergot, cotton root, cantharides, creosote, digitalis, and their pharmaceutical preparations; croton

oil, chloroform, chloral hydrate, sulphate of zinc, mineral acids, carboic acid and oxalic acid, without distinctly labeling the box, vessel or paper in which the said poison is contained, and also the outside wrapper or cover, with the name of the article, the word "poison," and the name and place of business of the seller. Nor shall it be lawful for any person to sell or deliver any poison enumerated in schedules "A" and "B" unless, upon due inquiry, it be found that the purchaser is aware of its poisonous character, and represents that it is to be used for legitimate purposes. Nor shall it be lawful for any registered pharmacist to sell any poisons included in schedule "A" without, before delivering the same to the purchaser, causing an entry to be made, in a book kept for that purpose, stating the date of sale, the name and address of the purchaser, the name of the poison sold, the purpose for which it is represented by the purchaser to be required, and the name of the dispenser; such book to be always open for inspection by the proper authorities, and to be preserved for at least five years. The provisions of this section shall not apply to the dispensing of poisons, in not unusual quantities or doses, upon the prescriptions of practitioners of medicine. Nor shall it be lawful for any licensed or registered druggist or pharmacist to retail, or sell, or give away, any alcoholic liquors or compounds as a beverage, and any violations of the provisions of this section shall make the owner or principal of said store or pharmacy liable to a fine of not less than twenty-five dollars, and not more than one hundred dollars, to be collected in the usual manner; and, in addition thereto, for repeated violations of this section, his name shall be stricken from the register.

SEC. 10. Any itinerant vender of any drug, nostrum, ointment or appliance of any kind, intended for the treatment of diseases or injury, who shall, by writing or printing, or any other method, publicly profess to cure or treat diseases, or injury, or deformity, by any drug, nostrum, or manipulation, or other expedient, shall pay a license of one hundred dollars per annum, to be paid [to the treasurer of the commission of pharmacy. Whereupon the secretary of said commission shall issue such license for one year. Any person violating this section shall be deemed guilty of misdemeanor, and shall, upon conviction, pay a fine of not less than twenty-five dollars; all moneys received for licenses to be reported to the auditor of state. The sum of one thousand dollars per year, or as much thereof as may be necessary, is hereby appropriated out of the moneys so received for licenses for the expenses of said commission, all exceeding said amount to be paid into the state treasury.]

SEC. 11. (*As amended by ch. 137, 19th g. a.*) [**Penalty for false representations.**—That any person who shall procure, or attempt to procure registrations for himself or for another under this act, by making, or causing to be made, any false representations, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof, be liable to a penalty of not less than twenty-five nor more than one hundred dollars, and the name of the person so fraudulently registered shall be stricken from the register. Any person not a registered pharmacist, as provided for in this act, who shall conduct a store, pharmacy, or place for retailing, compounding or dispensing drugs, medicine or chemicals for medicine or for compounding or dispensing physicians' prescriptions, or who shall take, use or exhibit the title of registered pharmacist, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be liable to a penalty of not less than fifty dollars [nor more than two hundred dollars.]

SEC. 12. (*As amended by ch. 81, 22d g. a.*) [**Exceptions: proviso.**—Physicians dispensing their own prescriptions only, are not required to be registered pharmacists: *Provided*, that nothing in this act shall prevent any person not a registered pharmacist or not holding a permit, from keeping and selling proprietary medicines, and such other domestic remedies as do not include any intoxicating liquors or poisons. [Nor from selling concentrated lye and potash, provided,

however, that if any person sell or deliver said concentrated lye or potash without having the word "poison" and the true name thereof written or printed upon a label attached to the phial, box, or parcel containing the same, shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars, but they shall not be compelled to register the sales of said lye and potash as required by section 4038 of the code of 1873.]

SEC. 14. [**Repealing clause.**].—All acts and parts of acts in conflict with this act are hereby repealed.

Approved, March 22, 1880.

This chapter did not repeal chapter 6 of title II of the code, and it is not necessary in an indictment for the unlawful sale of intoxicating liquors to charge that the defendant was not a registered pharmacist, and a judgment rendered a plea of guilty, no facts being shown to impeach it, will not be set aside. *The State v. Mercer*, 58 Iowa, 182.

(CHAPTER 170, LAWS OF 1882.)

An Act to prevent and punish the adulteration of articles of food, drink, and medicine, and the sale thereof when adulterated.

SECTION 1. [**Mixing, coloring, staining, or powdering food prohibited.**].—*Be it enacted by the general assembly of the state of Iowa:* That no person shall mix, color, stain, or powder, or order or permit any other person to mix, color, stain, or powder, any article of food with any ingredient or material so as to render the article injurious to health, with the intent that the same may be sold, and no person shall sell or offer for sale any such articles so mixed, colored, stained or powdered.

SEC. 2. [**Same as to drugs and medicines.**].—No person shall, except for the purpose of compounding in the necessary preparation of medicine, mix, color, stain, or powder, or permit any other person to mix, color, stain, or powder, any drug or medicine with any ingredients or materials, so as to affect injuriously the quality or potency of such drug or medicine, with the intent to sell the same, or shall offer for sale any such drug or medicine so mixed, colored, stained, or powdered.

SEC. 3. [**Mixing, etc., food, drink, or medicine, or selling same prohibited.**].—No person shall mix, color, stain, or powder any article of food, drink or medicine, or any article which enters into the composition of food, drink, or medicine, with any other ingredient or material, whether injurious to health or not, for the purpose of gain or profit, or sell or offer for sale the same, or order or permit any other person to sell or offer for sale any article so mixed, colored, stained, or powdered, unless the same be so manufactured, used or sold, or offered for sale under its true and appropriate name, and notice that the same is mixed or impure is marked, printed, or stamped upon each package, roll, parcel, or vessel containing the same, so as to be and remain at all times readily visible, or unless the person purchasing the same is fully informed by the seller of the true names of the ingredients (if other than such as are known by the common name thereof) of such articles of food, drink or medicine, at the time of making the sale thereof or offering to sell the same: *Provided*, nothing in this section shall prevent the use of harmless coloring material used in coloring butter and cheese.

SEC. 4. [**Glucose not to be mixed with syrup: skimmed milk cheese to be branded.**].—No person shall mix any glucose or grape sugar with syrup, or sugar, intended for human food; and any cheese manufactured from skimmed milk, or from milk that is partly skimmed, shall be branded as skimmed-milk cheese, when the same is offered for sale, or any oleomargarine, suine, beef-fat, lard, or any other foreign substance with any butter, or cheese, intended for human food; or shall mix or mingle any glucose, grape sugar, or oleomargarine, with any

article without distinctly marking, stamping or labeling the article or the package containing the same with the true and appropriate name of such article, and the percentage in which glucose or grape sugar, oleomargarine or suine enters into its composition. Nor shall any person sell, or offer for sale, or permit to be sold, or offered for sale, any such food, into the composition of which glucose or grape sugar, oleomargarine or suine, has entered without at the same time informing the buyer of the fact and the proportion in which glucose or grape sugar, oleomargarine or suine has entered into the composition.

SEC. 5. [Penalty.]—Any person or persons convicted of violating any provisions of any of the foregoing sections of this act shall, for the first offense, be fined not less than ten dollars (\$10) nor more than fifty dollars (\$50). For the second offense they shall be fined not less than twenty-five (\$25) dollars nor more than one hundred dollars (\$100), or confined in the county jail not more than thirty days. And for the third and all subsequent offenses they shall be fined not to exceed [*less than?*] five hundred dollars (\$500) *nor more than one thousand dollars (\$1,000)*, and imprisonment[ed] in the state prison not less than one year nor more than five years.

SEC. 6. [Repeal.]—All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved, March 25, 1882.

(CHAPTER 104, LAWS OF 1886.)

An Act to regulate the practice of medicine and surgery in the state of Iowa.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa: That every person practicing medicine, surgery or obstetrics, in any of their departments, within this state shall possess the qualifications required by this act. If a graduate in medicine such person shall present his or her diploma to the state board of examiners, for verification as to its genuineness. If the diploma is found genuine, and is by a medical school legally organized and in good standing, of which the state board of examiners shall determine, and if the person presenting and claiming such diploma be a person to whom the same was originally granted, then the state board of examiners shall issue its certificates to that effect signed by not less than five physicians thereof, representing one or more physicians of the schools on the board, and such certificate shall be conclusive as to right of the lawful holder to practice medicine, surgery and obstetrics within this state. If not a graduate the person practicing medicine or surgery within this state, unless he or she shall have been in continuous practice in this state, for a period of not less than five years, of which he or she shall present to the state board of examiners satisfactory evidence in the form of affidavits, shall appear before said state board of examiners, and submit to such examination as said board may require. All examinations shall be conducted in writing, and all examination papers, together with the reports and action of the examiners thereon, shall be preserved as the records of the said board for a period of five years, during which time they shall remain open for inspection at the office of the said state board of examiners. Such examinations shall be in anatomy, physiology, general chemistry pathology, therapeutics, and the principles and practice of medicine, surgery and obstetrics. Provided, that each applicant upon receiving from the secretary of the board an order for an examination shall receive also a confidential number which he or she shall place upon his or her examination papers so that when said papers are passed upon by the examiners, the latter shall not know by what applicant said papers have been prepared. That upon each day of examination all candidates be given the same set or sets of questions. It is further provided that the examination*

papers shall be marked upon the scale of one hundred (100), and that in order to secure a license, it shall be necessary for the applicant to attain such average as shall hereafter be determined by the state board of examiners, and if such examination be satisfactory to at least five physicians of said board, representing the different schools of medicine on the board, the board shall issue a certificate which shall entitle the lawful holder thereof to all the rights and privileges herein provided, and the physicians and the secretary of the state board of health shall constitute, and be deemed a board of examiners for the purpose of this act.

SEC. 2. [Shall procure a seal and receive applications for certificates and examinations.]—The state board of examiners shall procure a seal within sixty days after the passage of this act, and through the secretary of said board shall receive applications for certificates and examinations. The president, or any member of the board, shall have the authority to administer oaths and take testimony in all matters relating to their duties as examiners aforesaid. The board shall provide three forms of certificates: One for persons in possession of genuine diplomas; one for candidates examined by the board, and one for persons who have practiced medicine or surgery in any of its departments for five years as provided in this act. Said certificate shall be signed by not less than five physicians of the board, and this number may act as an examining board in the absence of the full board: *Provided*, that one or more members of the different schools of medicine represented in the state board of health shall also be represented in the board of examiners. The board of examiners shall hold meetings at such places as will best accommodate applicants residing in different portions of the state, and at any such time as they shall deem best, and due notice of the time and place of such meetings shall be published.

SEC. 3. [Shall examine diplomas.]—The board shall examine all diplomas submitted to them for such purpose to determine their genuineness and the rightful ownership of the person presenting the same. The affidavit of the applicant and holder of any diploma that he or she is the person therein named, and is the lawful possessor thereof, shall be necessary to verify the same, with such other testimony of the board may require. Diplomas and accompanying affidavits may be presented in person or by proxy. If the diploma shall be found genuine, and in possession of the person to whom it was issued, the state board of examiners shall, upon the payment of a fee of two dollars, to the secretary of the board, issue a certificate to the holder of such diploma, and no further fee or sum shall be demanded or collected from said applicant by said board for such certificate. If the diploma shall be found to be fraudulent, or not lawfully in possession of the holder or owner thereof, the person presenting such diploma or holding or claiming possession thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof, before any court of competent jurisdiction, be fined not less than twenty dollars, nor more than one hundred dollars.

SEC. 4. [Certificates shall be recorded.]—Every person holding a certificate issued by the state board of examiners, shall, within sixty days after the date of such certificate, have the same recorded in the office of the county recorder in the county wherein he resides, and should he remove from one county to another to practice medicine, surgery or obstetrics, his certificate must be recorded in the county to which he removes. The county recorder shall endorse upon the certificate the date of record, and he shall be entitled to charge and receive a fee of fifty cents for his services, the fee to be paid by the applicant.

SEC. 5. [How recorded.]—The county recorder shall record in a book provided for that purpose, a complete list of the certificates presented for record, and the date of their issue by the state board of examiners. If the certificate is issued by reason of a diploma, the name of the medical college conferring the same, and the date when conferred shall be recorded; and when such certificate shall have

been granted upon the examination of the board, or because of five years practice in the state, such fact shall be recorded. Said records shall be open for inspection during business hours.

SEC. 6. [**Fees for examination.**—Candidates for examination shall pay in advance to the secretary of the state board of examiners, a fee of ten dollars, which fee, together with the fees received for certificates, shall defray the entire expense of the aforesaid board of examiners, and the balance shall be turned over to the state treasurer for the benefit of the school fund, except such an amount as will pay each member of the board ten dollars (\$10) per day during the time he is in actual attendance upon the session of the said board for the purpose of performing the duties required of him under this act, and, as will pay the secretary of the board such a salary as they may allow, not to exceed five dollars per day during the time he is actually engaged in performing the work of the board under this act, and each member of the board of examiners shall also receive a sufficient amount to defray his actual and necessary expenses while in the discharge of the duties herein provided. Any one failing to pass the required examination shall be entitled to a second examination within twelve months without fee, *provided*, that any applicant for examination by notice in writing to the secretary shall be entitled to an examination within three months from the time of said notice and a failure to give such opportunity, shall entitle such applicant to practice without the certificate required by this act until the next regular meeting of said board. (*As amended ch. 66, 22d g. a.*) [*Provided, further*, that the board may also issue certificates to persons, who, upon application present a certificate of having passed satisfactory examination before any other state board of medical examiners, upon the payment of the fee provided in section three.]

SEC. 7. [**Certificates may not be granted, when.**—The state board of examiners may refuse to grant a certificate to any person who has been convicted of a felony committed in the practice of his profession or in connection therewith or may revoke certificates for like cause, or for palpable evidence of incompetency, and such refusal or revocation shall prohibit such person from practicing medicine, surgery or obstetrics, *provided*, such refusal or revocation of a certificate can only be made with the affirmative vote of at least five physicians of the state board of examiners, in which number shall be included one or more members of the different schools of medicine represented in said board; *and provided further*, that the standing of a legally chartered medical college, from which a diploma may be presented, shall not be questioned except by a like vote.

SEC. 8. [**Who deemed as practicing medicine.**—Any person shall be deemed as practicing medicine, surgery or obstetrics, or to be a physician within the meaning of this act, who shall publicly profess to be a physician, surgeon or obstetrician, and assume the duties, or who shall make a practice of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal, by any means whatsoever, but nothing in this act shall be construed to prohibit students of medicine, surgery or obstetrics, from prescribing under the supervision of preceptors, or gratuitous service in case of emergency, nor shall this act extend to prohibit women who are at this time engaged in the practice of midwifery nor to prevent the advertising, selling or prescribing natural mineral waters flowing from wells or springs, nor shall this act apply to surgeons of the United States army or navy, marine hospital service, nor to physicians as defined herein who have been in practice in this state for five consecutive years, three years of which time shall have been in one locality; *provided*, such physician shall furnish the state board of examiners satisfactory evidence of such practice, and shall procure the proper certificate, as provided in this act, and for which certificate such physician shall pay the secretary of the state board of examiners a fee of two dollars, and said board shall issue to the applicant such

certificate, nor shall this apply to registered pharmacists when filling prescriptions, nor shall it be construed to interfere with the sale of patent or proprietary medicines in the regular course of trade.

SEC. 9. [**Penalty.**]—Any person who shall practice medicine or surgery within this state, without having complied with the provisions of this act, and who is not embraced in any of the exceptions or after being prohibited from so doing as provided in section seven of this act, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of not less than fifty nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days, nor more than thirty days.

SEC. 10. [**Penalty.**]—Any person who shall file, or attempt to file, with the state board of examiners, as his or her own, the diploma of another person, or who shall file, or attempt to file with the county recorder the certificate of another person, as his or her own, or who shall file or attempt to file a diploma or certificate with the true name erased therefrom and the claimant's name inserted, or who shall file or attempt to file any forged affidavit of identification, shall be deemed guilty of the crime of forgery.

SEC. 11. [**Time of taking effect.**]—The penalties, as provided in this act, or violations thereof, shall not be enforced prior to first day of January, A. D. 1887.

SEC. 12. [**Repeal.**]—All acts and parts of acts in conflict with this act are hereby repealed.

Approved April 8, 1886.

(CHAPTER 79, LAWS OF 1886.)

PROHIBITING TRAFFIC IN DISEASED HOGS.

An Act to prohibit the traffic in hogs infected with swine plague or hog cholera and to prevent the spread of the same.

SECTION 1. (*As amended by ch. 67, 22d g. a.*) [**Traffic in diseased swine prohibited.**]—*Be it enacted by the general assembly of the state of Iowa:* All traffic in swine which have died with the swine plague or hog cholera or from other infectious or contagious diseases within the state is hereby prohibited and it shall be unlawful for any person to haul in any vehicle or public conveyance any dead hogs which have so died or are known to be affected with such diseases, upon any public road or highway or upon any enclosure other than that upon which said hogs have died. It shall also be unlawful for any person negligently or willfully to allow his hogs, or those under his control infested with hog cholera or other plague or contagious disease to escape his control or run at large.]

SEC. 2. [**Shall be burned or buried.**]—Any person having in his possession swine which have died from the swine plague hog cholera or other infectious disease shall within a reasonable time cause the same to be burned or buried to a depth of at least thirty inches so as to prevent the spread of the disease.

SEC. 3. [**Penalty for violation.**]—Any person violating or failing to comply with any provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by fine of not less than five dollars nor more than one hundred dollars at the discretion of the court.

Approved April 6, 1886.

(CHAPTER 174, LAWS OF 1886.)

TO PREVENT FRAUD IN CANNED FOOD.

An Act in relation to canned or preserved food.

SECTION 1. [**Canned fruits and vegetables, etc.**].—*Be it enacted by the general assembly of the state of Iowa:* It shall hereafter be unlawful in this state for any packer of or dealer in hermetically sealed, canned or preserved fruits, vegetables, or other articles of food to knowingly offer such canned or preserved articles for sale for consumption in this state after October 1st, 1886, unless the cans or jars which contain the same shall bear the name, address and place of business of the person, firm or corporation that canned or packed the articles so offered, or the name of the wholesale dealer in this state who sells or offers the same for sale; together in all cases with the name of the state, city, town or village, where the same were packed, plainly printed thereon, preceded by the words "packed at," such name, address and place of business shall be, plainly printed on the label together with a mark or term indicating clearly the grade or quality of the articles contained therein.

SEC. 2. [**Soaked goods shall be so marked.**].—All packers of and dealers in soaked goods or goods put up from products dried or cured before canning shall, in addition to complying with provisions of section one of this act, cause to be plainly branded on the face of the label in good legible type, one-half of an inch in height and three-eighths of an inch in width the word "soaked."

SEC. 3. [**Exemptions.**].—All goods packed prior to the passage of this act are exempted from the provisions of this act.

SEC. 4. [**Violation a misdemeanor: penalty.**].—Any packer or dealer who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and punished by a fine of not more than fifty dollars for each offense in the case of retail dealers, and in case of wholesale dealers and packers by a fine of not less than five hundred dollars nor more than one thousand dollars for each offense. The term "packer" and "dealer," as used in this act, shall be deemed to include any firm or corporation doing business as a dealer in or packer of the articles mentioned in this act. It shall be the duty of any board of health in this state, cognizant of any violation of this act, to inform the district attorney whose duty it shall be to institute proceedings against any person who is charged with a violation of the provisions of this act, and in case of conviction shall receive twenty-five per cent of the fines actually collected which shall be in addition to any salary he may now receive under the law.

SEC. 5. [**Application.**].—The provisions of this act shall not apply to canned or condensed milk or cream.

Approved April 13, 1886.

CHAPTER 11.

OFFENSES AGAINST PUBLIC POLICY.

SECTION 4043. [Lotteries, and selling tickets.]—If any person make, or aid in making or establishing any lottery in this state; or advertise or make public any scheme for any such lottery; or advertise or offer for sale any ticket or part of a ticket in any lottery; or sell, negotiate, dispose of, purchase or receive the same; or have in his possession any ticket or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars, or by both fine and imprisonment at the discretion of the court.

In order to sell a tract of land at a good price, the owner had it subdivided into lots, and these lots then divided into three classes, denominated first, second and third class. They were sold in this manner, upon a species of lottery or drawing as follows, parties who subscribed for one or more shares, paid down \$25 per share, with the condition that if they drew a lot in the first class they should pay \$225 more; if in the second, \$200; if in the third, \$175. The inducement held out was that there was a house on one of the lots in the first-class which was worth more than \$250. The aggregate value of all the lots in a certain class, divided by the number of lots in the class, gave the value affixed on each lot, but in each class there were some lots worth more, and some worth less, than the price. In an action upon a bond given for one of the lots thus purchased it was held, that the manner of sale constituted a lottery scheme, and the contract would not be enforced. *P. & C. Gunther v. Devin*, 11 Iowa, 133.

SEC. 4044. [Disposing of liquors to an Indian or intoxicated person.]—If any person give, sell, or dispose of, any spiritous or intoxicating drinks to any Indian within this state, or to any person who is intoxicated, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.

SEC. 4045. [Bringing paupers into this state.]—If any person knowingly bring within this state any pauper or poor person, with the intent of making him a charge on any of the townships or counties therein, he shall be punished by fine not exceeding five hundred dollars and stand charged with his support.

SEC. 4046. [Transacting business without liscence.]—If any person carry on or transact any business or occupation without liscence therefor when such liscense is required by any law of this state, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days.

SEC. 4047. [Circulation of foreign bank notes prohibited: penalty for.]—If any person pay out, or offer to pay, or in any manner put in circulation, or offer to put in circulation, any bank note, bill or other instrument intended to circulate as money issued or purporting to be issued by any bank, individual or corporation elsewhere than in this state; excepting treasury notes, notes of any bank organized under the laws of the United States, any other description of currency issued by the authority of congress, or notes of the branches of the state bank of Iowa, he shall be deemed guilty of a misdemeanor, and shall, upon conviction before any court having jurisdiction, be fined the sum of five dollars for each note, bill or other instrument as aforesaid so paid out or offered to be paid out, put in circulation or offered to be put in circulation. In prosecutions under this section it shall not be necessary to state in the indictment or information the name of the bank issuing the notes, nor to prove the existence of the bank or other person purporting to issue the notes; but it shall be sufficient to allege in general terms the fact of paying out, or attempting to pay out, as the case may be, of bank notes issued out of this state; and the proofs may be made as if the particulars were alleged;

and any number of offenses may be included in the same prosecution, provided that where the total fines alleged shall not exceed one hundred dollars, the offense shall be cognizable and may be tried before a justice of the peace or other coordinate jurisdictions; and when the total fines alleged exceed one hundred dollars, it shall be within the jurisdiction of the district court.

(Sections 4048, 4049, 4050, and 4051 were repealed and substituted by chapter 69, laws of 1874, which were amended by chapter 122, laws of 1876, and all repealed by chapter 156, laws of 1878.)

(Sections 4052 and 4053, repealed by chapter 50, laws of 1874.)

SEC. 4054. (*As amended by ch. 50, laws 15th g. a.*) [**Trapping fish on the premises of another.**—Any person who shall go upon the premises of any person or corporation, whether enclosed or not, and shall be found seeking to take, by any means whatsoever, except by hook and line, any fish, shall be deemed guilty of trespass, and may be prosecuted in the name of the state of Iowa by any person in possession of said premises, before any justice of the peace, or other court of competent jurisdiction, and fined in any sum not less than five nor more than fifty dollars.

SEC. 4055. [**Bringing diseased sheep into the state.**—If the owner of sheep, or any person having the same in charge knowingly import or drive into this state sheep having any contagious disease; or turn out or suffer any sheep having any contagious disease, knowing the same to be so diseased, to run at large upon any common highway, or unenclosed lands; or sell or dispose of any sheep, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall be punished by fine in any sum not less than fifty dollars nor more than one hundred dollars.

SEC. 4056. [**Same as to horses, mules, etc.**—If any person knowingly import or bring within this state, any horse, mule, or ass, affected by the disease known as nasal gleet, glanders, or button-farcey, or suffer the same to run at large upon any common, highway, or unenclosed land, or use or tie the same to any public place, or off his own premises, or sell, trade, or offer for sale or trade any such horse, mule, or ass, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine, of not less than fifty dollars nor more than five hundred dollars; and in default of payment shall be imprisoned for any period not to exceed twelve months, or by both fined and imprisonment at the discretion of the court.

SEC. 4057. [**Diseased horses, mules, etc., running at large.**—If any horse, mule, or ass, reasonably supposed to be diseased with nasal gleet, glanders, or button-farcey, be found running at large without any known owner, it shall be lawful for the finder thereof to take such horse, mule or ass, so found before some justice of the peace, who shall forthwith cause the same to be examined by some veterinary surgeon, or other person skilled in such diseases, and if, on examination, it is ascertained to be so diseased, it shall be lawful for such justice of the peace to order such diseased animal to be immediately destroyed and buried; and the necessary expense accruing under the provisions of this section shall be defrayed out of the county treasury.

SEC. 4058. (*As substituted by ch. 156, 21st g. a.*) [**Deemed a misdemeanor.**—[Any person or persons driving any cattle into this state, or any agent, servant, or employe of any railroad or other corporation who shall carry, transport, or ship any cattle into this state, or any railroad company, or other corporation or person who shall carry, ship or deliver any cattle into this state, or the owners, controllers lessees, or agents or employes of any stock yards, receiving into such stock yards or in any other enclosures for the detention of cattle in transit, or shipment, or re-shipment or sale, any cattle brought or shipped in any manner into this state which at the time they were either driven, brought, shipped, or transported into this state,

were in such condition as to infect with or to communicate to the other cattle, pleuropneumoin[ni]a, or splenic or Texas fever, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than three hundred dollars and not more than one thousand dollars, or by both fine and imprisonment in the county jail not exceeding six months, in the discretion of the court.]

SEC. 4059. [Any person who shall be injured or damaged by any of the acts of the persons named in section 4058, and which are prohibited by such section, in addition to the remedy therein provided, may bring an action at law against any such persons, agents, employes or corporations mentioned therein, and recover the actual damages sustained by the person or persons so injured, and neither said criminal proceeding nor said civil action, in any stage of the same be a bar to a conviction or to a recovery in the other.]

SEC. 4060. [**Diseased hop roots.**]-If any person use, transplant, or cultivate, or bring into this state for the purpose of using, planting, cultivating, or selling, any hop roots, plants, or cuttings, which may be diseased in any manner, or infected with lice or vermin of any kind, or which may be brought from any state or country in which the cultivation of hops has been retarded or impaired by the presence of any disease, lice, or vermin of a contagious character, he shall be fined not less than ten nor more than one hundred dollars, and imprisoned not less than five nor more than twenty days.

SEC. 4061. [**Search warrant and seizure, etc.**]-If complaint is made before a justice of the peace by one or more responsible persons, that they have good reason to believe that hop roots have been introduced into, or are being cultivated in the city or township where they reside in violation of this act, the justice before whom such complaint is made shall issue a warrant authorizing any peace officer to seize such roots, and they shall be held in charge by such officer until suit has been brought against the person or persons so offending, and the cause determined; and in case it is found that the said plants, roots, or cuttings are diseased, or are infected by lice or vermin of a contagious character, the officer before whom suit is brought will order the said roots, plants, or cuttings to be burned, charging the expense of doing the same as costs upon the party owning or cultivating the roots, plants or cuttings; and in no case will he allow them to be planted or delivered to a third party, until the fact is established that they are not infected with any vermin or disease of a contagious character.

SEC. 4062. [**Canada thistles.**]-If any person or corporation, after having been notified in writing of the presence of Canada thistles on any lands owned or occupied by such person or corporation; or if any highway supervisor, after having been notified in writing of the presence of Canada thistles on the highway under his jurisdiction, shall permit such thistles or any part thereof to blossom or mature, such person, corporation or highway supervisor shall be deemed guilty of a misdemeanor and be punished accordingly.

SEC. 4063. (*As amended by ch. 103, 22d g. a.*) [**Killing birds, etc.**]-If any person kill, trap, ensnare or in any manner destroy any of the birds of this state, excepting birds of prey, the migratory aquatic birds [English sparrow] and those which are useful for food, and the killing of which at certain seasons of the year is now permitted by law, or in any manner destroy the eggs of such birds as are hereby intended to be protected from destruction, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than five nor more than twenty-five dollars. But persons killing birds for scientific purposes, or for preservation in museums and cabinets, shall be exempt from the penalties of this section, upon making satisfactory proof of the purpose for which they have killed any such bird or birds.

SEC. 4064. [**Running threshing machines without boxing tumbling rods.**]
—If any person run any threshing machine in this state, without having the two lengths of tumbling rods next the machines, together with the knuckles or joints and jacks of the tumbling rods safely boxed and secured while the machine is running, he shall be deemed guilty of a misdemeanor and be punished by fine of not less than ten nor more than fifty dollars for every day or part of a day he shall violate this section; [and any person who shall, knowingly, permit either his own grain, or any that may be in his possession or under his control, to be threshed by a machine, the rods, knuckles, or joints of which are not boxed in accordance with the requirements of this section, shall be liable to a like fine as that prescribed for the person running such machine, both of which fines may be recovered in an action brought before any court of competent jurisdiction.]

This provision was not intended to change the general rule applicable to such cases, that a plaintiff cannot recover for injuries resulting from the negligence of another person, if his own negligence in any degree contributed directly to the injury. The statute merely provides that a failure to box the tumbling rods as required is, *per se*, negligence on the part of the owner or person running the machine, leaving the rule respecting contributory negligence on part of the person injured to apply the same as in other cases. *Reynolds v. Hindman*, 32 Iowa, 146.

In an action to recover for services rendered by the plaintiff in threshing the grain of the defendant, the defendant pleaded as a defense "that it was agreed by and between the plaintiff and defendant that the threshing, for which the plaintiff seeks to recover in this action, was to be done with a machine, all the rods, knuckles, or joints of which were unboxed, and that said threshing was in fact done with a machine the rods and knuckles of which were wholly unboxed," it was held, that this was a good defense, and that no recovery could be had for threshing done on such a contract. *Dillon et al. v. Allen*, 46 Id., 289.

Where a person is employed about a threshing machine, the rods and boxes of which are not boxed as required by the statute, he may recover for injuries caused thereby to which his own negligence does not contribute. *Messenger v. Pate et al.*, 42 Id., 443; *Reynolds v. Windham*, 32 Id., 146.

Where an act is prohibited by statute, one who is injured by the violation of the statute may maintain an action therefor, and such violation, if established by proof, constitutes negligence. *Id.*

(CHAPTER 103, LAWS OF 1888.)

An Act to amend section 4063 of the code and fix penalty for violation thereof and defining duty of peace officers, in relation to offences against public policy in such a way as to provide further protection for the song birds and birds of beautiful plumage in this state.

SECTION 1. [**Duty of peace officers to file information**]
—*Be it enacted by the general assembly of the state of Iowa:* That it shall be the duty of every peace officer who may have knowledge of any violation of the provisions of section 4063 of the code to immediately file an information against the person so violating said provisions before some justice of the peace having jurisdiction of said offense and to cause the arrest of such person and to immediately give to the county attorney all information within his knowledge concerning such violation.

SEC. 2. [**Neglect of duty.**]
—Any peace officer who may have knowledge of any violation of the provisions of said section 4063 and shall fail and neglect to perform his duty as herein specified shall be deemed guilty of a misdemeanor and conviction thereof shall be fined not less than two nor more than ten dollars.

SEC. 3. [**Amendment of section 4063 of the code.**]
—Section 4063 of the code is hereby amended by inserting after the words "aquatic birds" the words "English sparrows."

Approved April 11, 1888.

(CHAPTER 14, LAWS OF 1874.)

RELATING TO STEAM-BOILERS.

An Act to punish carelessness in the use of steam-boilers. [Additional to code, title XI, "Of the police of the state," and title XXIV, chapter 11, concerning "Offenses against public policy."]

SECTION 1. [**Steam boilers, how to be equipped.**]*—Be it enacted by the general assembly of the state of Iowa:* That it shall be the duty of any person own(ing) or operating steam-boilers in this state to provide such boilers with steam-gauge, safety-valve, and water-gauge, and keep the same in good order.

SEC. 2. [**Fine for neglect, \$50 to \$500.**]*—That any person neglecting to comply with the the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine not less fifty nor more than five hundred dollars.*

Approved March 12, 1874.

(CHAPTER 59, LAWS OF 1874.)

MINORS IN BILLIARD SALOONS, ETC.

An Act to prohibit the encouragement of minors to remain in certain buildings. [Additional to code, title XXIV, chapter 12 (11) relating to "Offenses against public policy."]

SECTION 1. [**Minors not to be allowed to remain in billiard-rooms, saloons, etc.**]*—Be it enacted by the general assembly of the state of Iowa:* It shall be unlawful for any person who keeps a billard-hall, beer saloon, or nine or ten pin alley, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, saloon, or alley, to permit any minor or minors to remain in such hall, saloon, or alley or to take part in any of the games known as billards, nine or ten pins.

SEC. 2. [**Penalty for violation.**]*—For a violation of the provisions of the foregoing section the offender shall, on conviction thereof, be punished by a fine not less than five dollars nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.*

Approved, March 21, 1874.

Under this chapter by which it is made unlawful for the keeper of a billard saloon or his employes, to permit minors to remain in the saloon, a conviction may be had without proving that the defendant knew of the presence of the minor, or of the fact of his minority. *State v. Probasco*, 62 Iowa, 400.

If the keeper of a saloon fails to enforce watchfulness on the part of his employes and a minor is thus allowed to remain in the saloon he and the employe are both guilty and he cannot avoid punishment on the ground that the offense was the offense of the servant only. *Id.*

(CHAPTER 50, LAWS OF 1874.)

CARE AND PROPAGATION OF FISH.

An Act to provide for the appointment of a board of fish commissioners for the construction of fish-ways, for the protection and propagation of fish, and to repeal sections 4052 and 4053, and to amend section 4054 [Code, title XXIV, chapter 2, relating to offenses against public policy].

SECTION 1. (*As amended by sec. 12, ch. 70, 16th g. a.*) [**State fish commissioners appointed.**]*—Be it enacted by the general assembly of the State of Iowa,* That the governor of the state is hereby authorized and required to appoint [one competent person who shall be known as fish commissioner], who shall hold his position for the period of two years, and any vacancies occurring in said commission by death, resignation, or otherwise, shall, for the unexpired term be filled by the appointment and commission of the governor. The general duties of the said commissioner, in addition to other duties prescribed by this act, shall be to forward the restoration of fish to the rivers and waters of this state, and to stock the same with fish as he may be supplied with means for that purpose by the United States fish commissioners and by societies and individuals interested in the propagation of fish in the waters of the state.

SEC. 2. [**To examine methods, etc.**]*—It shall also be the duty of the fish commissioner to make an examination of the various improved fish-ladders, fish-ways, and of the methods necessary to be used to secure the passage of migratory fish up through or over the dams now constructed in the state, and to report to the next general assembly, through the governor, the cost of construction of the various improved methods with the applicability thereof to the streams of the state, with such other information as in his judgment may be proper, with the cause or causes of the decrease of fish in the streams of the state, and the means that must be used to secure fish in abundance therein; and to report also what arrangements it will be necessary to make with the owners of mill-dams now constructed to secure the construction of fish-ways in such dams without doing injustice to the owners of such dams and to report generally such facts in connection with the construction of fish-ways and the stocking of the streams of the state with fish as in their opinion may be needed for the information of the general assembly.*

SEC. 3. (*As substituted by ch. 70, 16th g. a.*) [**The fish commissioner shall receive in full compensation for his services, twelve hundred dollars per year, to be paid out of the appropriation as herein made, and he shall, by virtue of his office act as superintendent and secretary.**]

SEC. 4. [**To enforce this act.**]*—It shall also be the duty of said fish commissioner to see that the provisions of this act are enforced, and for that purpose he shall have the right to call to his assistance any prosecuting attorney, to prosecute all violations of this act in the judicial district, where such violation occurs.*

SEC. 5. [**Dams hereafter constructed to have fish-ways.**]*—It shall be the duty of any person or persons, or corporations, hereafter erecting or constructing any dam in any of the rivers within the state, or their tributaries accessible to migratory fishes, to put in or upon the same, fish-ways, under the direction and approval of said fish commissioner, without which every such dam shall be deemed a public nuisance, and liable to be abated upon the information of any one complaining; and the person or persons constructing a dam, in violation of this section, shall be liable to a fine of ten dollars for each day such dam shall be con-*

tinued without a fish-way, such as shall be required by the commissioners under this act.

SEC. 6. (*As amended by sec. 12, ch. 70, 16th g. a.*) [**Obstructions.**]*—*No person shall place, erect, or cause to be placed or erected across any of the rivers, creeks, ponds, or lakes, [of] the state, any dam, seine, weire, fish-dam, or other obstruction in such manner as [to prevent] the free passage of fish up or down through such watercourse [unless otherwise ordered by the commissioner] and from and after the passage of this act it shall be unlawful for any person to use any seine or net for the purpose of catching fish, except minnows [that are natives] of the waters of the state, [*provided always*, that it shall be lawful for the fish commissioner to take fish in any of the public waters at any time, and by any method, for the purpose of propagation, or for the purpose of exchanging with fish commissioners of other states or of the United States. Nothing in this section shall be so construed as to prohibit the erection of dams for manufacturing purposes as now provided by law.]

SEC. 7. [**Fine for violation.**]*—*Any person found guilty of a violation of the provisions of section six of this act shall upon conviction before a justice of the peace be fined not less than five nor more than fifty dollars for the first offense, and for the second or any subsequent offense not less than twenty dollars, and shall stand committed until such fine be paid.

SEC. 8. [**Lime, etc., with intent etc., prohibited.**]*—*No person shall place in any of the waters of the state any lime, ashes, drug, or medicated bait, with intent thereby to injure, poison, or catch fish. Any person violating the provisions of this section shall be punished as provided in section seven of this act.

SEC. 9. [**Fishing within half mile of fish-way, except with hook and line or spear unlawful.**]*—*It shall not be lawful to fish with nets or any other method of entrapping fish, except with hook and line, or spear, in the ordinary manner of fishing, within half a mile of any dam in which there is or may be constructed a fish way, for the purpose of the passage of fish up and down any stream in the state. Any person found guilty of the violation of the provisions of this section shall, on conviction, be fined as provided in section seven of this act.

SEC. 10. [**Where prosecution may be brought.**]*—*Prosecutions for violations of this act may be brought either in the county in which the offense was committed or in any other county where the person, company or corporation complained of has had or has in his or their possession any birds or animals herein named, bought, sold, killed, trapped or ensnared, in violation of any of the provisions of this act.

SEC. 11. [**Court to appoint attorney.**]*—*In all prosecutions under this act the court before whom the same is brought shall appoint some attorney-at-law for the purpose of managing the prosecution of the cause, and such attorney shall be entitled to a fee of ten dollars in each and every case in which he is so appointed, and the person filing an information under this act shall, in case of conviction, be entitled to a fee equal to one-half of the amount of the fine imposed on each conviction, and both the fee of such attorney and the informant shall be taxed as costs in the case against the person convicted.

Provided, That the county shall in no case be held liable for said attorney's fee or penalty.

SEC. 12. [**Repeal.**]*—*All acts and parts of acts inconsistent with this act are hereby repealed.

(Took effect by publication in newspapers, March 29, 1878.)

(CHAPTER 70, LAWS OF 1876.)

RELATING TO THE PROPAGATION OF FISH.

An Act to promote fish culture in the state of Iowa, and amend chapter fifty, of the laws of the fifteenth general assembly, enlarge and define the duties of fish commissioner, and appropriate money to carry out the provisions of this act.

SECTION 1. [**Duty of commissioner.**]*—Be it enacted by the general assembly of the state of Iowa:* That it is hereby made the duty of the fish commissioner to proceed without unnecessary delay to distribute among the several counties in the state, fairly and as equally as in the judgment of the commissioner may be to the best interest of the state, all the fish now on hand at the state hatching house at Anamosa, that are now ready and fit for distribution; *provided*, always, that counties that have heretofore been partially supplied shall receive less, in proportion to the numbers they have heretofore received.

SEC. 2. [**Five hundred thousand eels to be distributed.**]*—That said commissioner is hereby further authorized and empowered to procure and distribute among the several counties of the state during the year 1876, 500,000 live eels, in such lakes, ponds or water courses, throughout said counties, as in the judgment of the fish commissioner are best adapted to the increase and support of the same; said eels to be procured of the United States fish commissioner, or from such other source or sources as are most expedient and of the least expense to the state; and that all fish that may hereafter be bred or hatched at the state hatching house at Anamosa shall, as soon as the same are ready and fit for distribution, be distributed among the several counties, and at such seasons as the fish commissioner shall deem best adapted to the preservation and increase of the same; provided, that not more than one thousand dollars shall be used for this purpose.*

SEC. 3. [**May expend for increase of native fish.**]*—That during the years 1876 and 1877, the fish commissioner shall have the power to expend one thousand dollars of the money hereinafer appropriated, in facilitating the increase of the number of fish that are natives of the waters of this state, and in such ways and manner as in the judgment of said commissioner shall be most conducive to that end.*

And be it further enacted, That sections 6 and 7, of chapter 50 of the laws of the fifteenth general assembly be amended to read as follows:

SEC. 6. [**Obstructions prohibited.**]*—[No person shall place, erect, or cause to be placed or erected, across any of the rivers, creeks, ponds or lakes of this state, any dam, seine, weir, fish-dam or other obstruction, in such manner as to prevent the free passage of fish up or down through such water courses, unless otherwise ordered by the commissioner; and from and after the passage of this act, it shall be unlawful for any person to use any seine or net for the purpose of catching fish, except minnows that are natives of the waters of the state; provided, always, that it shall be lawful for the fish commissioner to take fish in any of the public waters at any time, and by any method, for the purpose of propagation, or for the purpose of exchanging with fish commissioners of other states or of the United States. Nothing in this section shall be so construed as to prohibit the erection of dams for manufacturing purposes, as now provided by law.]*

SEC. 7. [**Fine.**]*—Any person found guilty of a violation of the provisions of section six of this act, shall upon a conviction before a justice of the peace, be fined not less than five nor more than fifty dollars for the first offense, and for*

the second, or any subsequent offense, not less than twenty dollars, and shall stand committed until such fine be paid.]

SEC. 4. [**Fish in waters of private parties.**]—Persons raising or propagating fish on their own premises, or owning premises on which there are waters having no natural outlet, supplied with fish, shall absolutely own said fish, and any person taking fish therefrom, or attempting to take fish therefrom without the consent of the owner, or his agent, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than twenty-five dollars, nor less than five dollars, or imprisoned in the county jail not more than thirty days, and shall be liable to the owners of the fish in damages in double the amount of damages sustained, the same to be recovered in a civil action before any court having jurisdiction over the same.

SEC. 5. [**\$8,750 appropriated.**]—That for the purpose of carrying out the provisions of this act, there is hereby appropriated out of any money belonging to the state, and not otherwise appropriated, the sum of eight thousand seven hundred and fifty dollars (\$8,750) or so much thereof as may be necessary to carry out the provisions of this act, and chapter fifty of the laws of the fifteenth general assembly on the same subject; *provided*, that the said eight thousand seven hundred and fifty dollars (\$8,750) shall be under the control of the executive council, as provided in section one, of chapter seventy-four, of the private, local and temporary laws of the fifteenth general assembly. *And provided further*, that the fish commissioner make a detailed, itemized and sworn statement to said executive council on or before the 15th day of November, 1876, and annually thereafter, showing the amount of money expended, for what purpose or purposes expended; the number and kind of fish distributed, and when and where distributed, together with such general information on the subject of fish culture as said commissioner may think proper; and upon the submission of such report, and each subsequent report, the executive council shall cause to be printed 2,000 copies thereof; and when so printed shall transmit by mail not less than fifteen of said reports to the auditor of each county in this state for general distribution.

SEC. 6. [**When it shall be unlawful to kill certain fish.**]—It shall be unlawful to catch and kill any bass or wall-eyed pike between the first day of April and the first day of June, or any salmon or trout between the first day of November and the first day of February, of any year, in any manner whatever.

SEC. 7. [**Fine.**]—Any person found guilty of a violation of section six of this act shall, on conviction before a justice of the peace, be fined not less than five dollars nor more than twenty-five dollars for each offense, and shall stand committed until such fine be paid.

SEC. 8. [**Commissioner to purchase certain land.**]—The commissioner is further authorized to purchase on behalf of the state a certain piece of land situated in Jones county, said to contain twenty acres, upon which the state fish hatching house is located, and pay therefor the sum of three hundred and sixty dollars, and take a deed of said land in the name of the state of Iowa, and have the same recorded in the proper office for the record of such deed.

SEC. 9. [**Superintendent.**]—The commissioner may, with the consent of the executive council, employ a person as superintendent and secretary, who may be one of the said commissioner[s], whose duties shall be to attend to the correspondence and accounts of the commission, supervise the obtaining of ova, the hatching and distribution of fish, and such other duties as the commissioner may from time to time prescribe.

SEC. 10. (*As amended by ch. 92, 18th g. a.*) [**Proviso.**]—*Provided*, that nothing herein contained shall be held to apply to fishing in the Mississippi and Missouri rivers [nor in so much of the Des Moines river as forms the boundary between the states of Iowa and Missouri.]

SEC. 11. [**Repealing clause.**—All acts or parts of acts inconsistent with this act are hereby repealed.

SEC. 12. **That section 1, of chapter 50**, of the laws of the fifteenth general assembly, be amended by striking out of the second and third lines thereof the words "three competent persons who shall be known as fish commissioners," and inserting in lieu thereof the words "one competent person who shall be known as fish commissioner," and that said act be so amended as to read and apply to one commissioner, instead of commissioners.

SEC. 13. **That Section 3, of chapter 50**, of the laws of the fifteenth general assembly, be, and the same is hereby repealed, and that there be enacted in lieu thereof the following:

[SEC. 3.] [**Compensation.**—The fish commissioner shall receive in full compensation for his services twelve hundred dollars per year, to be paid out of the appropriation as herein made, and he shall, by virtue of his office, act as superintendent and secretary.

(Took effect by publication in newspapers March 18, 1876.)

[NOTE.—The sections of the foregoing chapter seem to be confused in their order, but except as to the amendment to section 10, the statute is an exact copy of the law as published in the official publications of 1876.]

(CHAPTER 80, LAWS OF 1878.)

PROPAGATION OF FISH.

An Act entitled "An Act to promote fish culture in the state of Iowa, and to amend and consolidate the enactments heretofore passed for that purpose, amending chapter 70, acts of the sixteenth general assembly.

SECTION 1. [**One commissioner appointed.**—*Be it enacted by the general assembly of the state of Iowa:* That the governor of the state is hereby authorized and required to appoint, after the expiration of the term of the present incumbent, and biennially thereafter, one competent person, who shall be known as the state fish commissioner, who shall hold his position for the term of two years; and any vacancy that may occur, for the unexpired term, or by reason of the expiration of the term of said office, shall be filled by the appointment and commission of the governor.

[**Duties.**—The general duties of said commissioner, including the present incumbent, shall be to have general charge and superintendence of the state hatching house, now located at Anamosa, to forward the restoration of fish to the rivers and waters of the state, and to stock the same, with fish from said hatching house, and elsewhere to the extent that means therefor may be furnished by the state, and to the extent that means for that purpose may be furnished by the United States fish commissioner, and by societies and individuals interested in the propagation of fish in the waters of this state.

SEC. 2. [**Salary.**—The fish commissioner, including the present incumbent, shall receive, in full compensation of his services, twelve hundred dollars per year, to be paid out of any money in the state treasury not otherwise appropriated.

SEC. 3. [**Six thousand dollars appropriated.**—That for the purpose of carrying out the provisions of this act, and continuing the work as contemplated in laws of 1876, chapter 70 thereof, there is hereby appropriated out of any money belonging to the state, not otherwise appropriated, the sum of six thousand dollars, or so much thereof as may be necessary to carry out the provisions of this act:

Provided, that said amount be under the control of the executive council of the state.

SEC. 4. [**Report of commissioner.**—That it shall be the duty of said fish commissioners to make a detailed, itemized and sworn statement, on or before two years after the 15th day of November, 1877, and every two years thereafter, showing the amount of money expended, for what purpose or purposes expended, the number and kinds of fish distributed, together with such general information on the subject of fish culture as such commissioner may think proper; and upon the submission of such report, and each subsequent, the same shall be caused to be printed and distributed to the same extent and in the same manner as now provided by law for the printing and distribution of the reports of public officers of the state.

SEC. 5. [**Obstructions prohibited.**—No person shall place, erect, or cause to be placed or erected, across any of the rivers, creeks, ponds or lakes of this state, any trot-line, dam, seine, weir, fish-dam or other obstruction, in such manner as to prevent the free passage of fish up, down or through such water courses, unless the same be done by the instruction or under the direction of the fish commissioner, and that when the same is so done by or through the instruction, or under the direction of the fish commissioner, it shall be unlawful for any person or persons to remove, or in any way interfere with the same. This section shall not be construed to prohibit the erection of dams for manufacturing purposes as provided by law.

SEC. 6. [**Penalty.**—Any person found guilty of a violation of the provisions of section five of this act, shall upon conviction before a justice of the peace, be fined not less than twenty-five, nor more than one hundred dollars, or imprisoned in the county jail not less than ten days, nor more than thirty days, in the discretion of the court.

SEC. 7. [**Repeal.**—All acts or parts of acts in conflict herewith are hereby repealed.

(Took effect by publication in newspapers, March 31, 1878.)

(CHAPTER 188, LAWS OF 1878.)

CONSTRUCTION OF FISH-WAYS.

An act to provide for the construction and maintainance of fish-ways to enable fish to pass over dams across the rivers and streams of the state of Iowa.

SECTION 1. [**Shall be constructed within reasonable time.**—*Be it enacted by the general assembly of the state of Iowa:* That the owner or owners of any dam or obstruction across any river or stream, creek, pond, lake, or water course, in this state, shall, within a reasonable time, erect, construct and maintain, over or across said dam or obstruction, a suitable fish-way of suitable capacity and facility to afford a free passage for fish up and down through such water course when the water of said stream is running over the said dam.

SEC. 2. [**Dam or obstruction a nuisance.**—Any dam or obstruction mentioned in section one of this act, not provided with such fish-way within a reasonable time after the taking effect of this act, is hereby declared a nuisance, and may be abated accordingly.

SEC. 3. [**Penalty.**—Any person guilty of the violation of the provisions of this act, shall, upon conviction before a justice of the peace, be fined not less than five nor more than fifty dollars for the first offense, and not less than twenty dollars for each subsequent offense, and shall stand committed until such fine is paid.

Approved, March 26, 1878.

(Took effect by publication in newspapers, April 7, 1878.)

(CHAPTER 9, LAWS OF 1884.)

PRESERVATION OF FISH IN PERMANENT LAKES.

An Act to protect and preserve the fish in the permanent lakes and ponds within the state of Iowa.

SECTION 1. [Spearing season.]—*Be it enacted by the general assembly of the state of Iowa:* That no person shall take by spearing with a gaff, spear or other device any fish from any of the permanent lakes or ponds, or outlets or inlets thereto within the state of Iowa, between the first day of November and the thirty-first day of May next following.

SEC. 2. [Unlawful vending.]—It shall be unlawful for any person, company or corporation, knowingly to buy or sell, or offer for sale, or have in his or their possession, any fish which shall have been taken from any of the permanent lakes or ponds, or outlets or inlets thereto within this state by spearing with gaff, spear, or other device between the first day of November and the thirty-first day of May next following. And any person who may draw from the water any game fish such as pike, bass, and the like when seining for minnows for bait, shall return the same without injury under the penalties of this act.

SEC. 3. [Penalty.]—Any person found guilty of a violation of any of the provisions of this act shall upon conviction before any magistrate be fined not less than five dollars nor more than twenty dollars for the first offense, and for the second or any subsequent offense not less than twenty dollars nor more than one hundred dollars, and shall stand committed until such fine be paid.

SEC. 4. [Place of action.]—Prosecution for violations of this act may be brought and maintained in any county in which the offense was committed or in any county where the person, company, or corporation against whom complaint is made, has or has had or has bought or sold or offered for sale any fish which were taken by spearing in violation of this act.

SEC. 5. [Prosecutor appointed.]—In all prosecutions under this act the court before whom the same is brought, or in which it shall be prosecuted, shall appoint an attorney for the prosecution of the case, and such attorney and the person filing the information under this act shall each be entitled to a fee of five dollars for each and every conviction, which fees of such attorney and informant shall be taxed as costs in the case against the person or persons so convicted, and any fish found in the possession of any person, company or corporation in violation of the provision of this act may be seized and sold for the purpose of paying the costs in the case, but in no case under this act shall any county be liable for the fees of such attorney or informant.

SEC. 6. [Spearing on one's own land.]—Nothing in this act shall prevent any person from taking fish of his own propagation or from waters wholly within his own land, to which there is no natural outlet through which the fish pass up or down.

Approved, March 6, 1884.

Took effect by publication in newspapers.

(CHAPTER 155, LAWS OF 1886.)

ESTABLISHING FISH HATCHING AT SPIRIT LAKE.

An Act to locate the state fish hatching house at Spirit Lake, and sell the property heretofore used for fish hatchery in Jones county, to abolish the office of assistant fish commissioner and to appropriate money for the purposes of this act.

SECTION 1. [Hatchery in Jones county transferred to Spirit Lake.]—*Be it enacted by the general assembly of the state of the Iowa:* The state fish hatchery now located in Jones county, is hereby transferred and located at Spirit Lake in Dickinson county, Iowa, and the state shall hereafter keep and maintain but the one hatchery located in Dickinson county.

SEC. 2. [Commissioner authorized to purchase land for same.]—The fish commissioner is hereby authorized to purchase on behalf of the state the necessary land at an expense to the state not to exceed one dollar, upon which the state fish hatching house shall be located and to take a deed of said land in the name of the state of Iowa and have the same recorded in the proper office for the record of such deed.

SEC. 3. [Time when hatchery shall be removed.]—The fish commissioner shall as soon as practicable, and not later than the first day of September, 1886, remove all fish and movable property belonging to the state now at said hatching house in Jones county to Spirit Lake, and shall proceed as soon as possible to make the necessary improvements and preparations for a fish hatching house at Spirit Lake.

SEC. 4. The fish commissioner is hereby directed, with the approval of the executive council, to sell the real estate and such other property as cannot be profitably removed, now located in Jones county, as soon as the same can be sold for the best interest of the state. Said sale may be either public or private as shall be deemed best. The proceeds of said property, or so much thereof as may be necessary, shall be expended in purchasing and improving the grounds for the hatchery at Spirit Lake. There is hereby appropriated out of any money in the treasury not otherwise appropriated, for the purposes of this act the sum of two thousand dollars, one thousand dollars of which may be drawn prior to June, 1887, and the balance prior to June, 1888.

SEC. 5. Whenever the law in regard to the propagation of fish now in force refers to the hatching house at Anamosa the same shall be deemed hereafter to refer so far as applicable to the hatching house at Spirit Lake.

SEC. 6. The office of assistant commissioner is hereby abolished.

SEC. 7. The fish commissioner shall hereafter have his office and headquarters at Spirit Lake, Dickinson county, Iowa.

Approved, April 10, 1886.

(CHAPTER 164, LAWS OF 1884.)

FOR THE PRESERVATION OF QUAIL.

An Act for the protection and preservation of quail.

SECTION 1. [Unlawful to destroy quail for two years from October.]—*Be it enacted by the general assembly of the state of Iowa:* That it shall be unlawful for any person or persons within this state, to shoot or kill, to catch or attempt to catch, in any snare, trap or net, any quail from and after the first day of October

1884, for and during the period of two years from said date except for the preservation of the same during the winter months.

SEC. 2. [**Penalty.**—The same penalty, as it now exists, in section 7, chapter 156, of the laws of 1878 shall be held to apply to any violation of this act.

Approved April 5, 1884.

(CHAPTER 156, LAWS OF 1878.)

PROTECTION OF GAME.

An Act to repeal sections 4048, 4049, 4050 and 4051, chapter 11, title XXIV, of the code, chapter 69 of the public laws of the fifteenth general assembly, and chapter 122 of the laws of the sixteenth general assembly, in relation to the protection of game, and to enact a substitute in lieu thereof.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa,* That section 4048, 4049, 4050 and 4051 of the code, chapter 69, of the public laws of the fifteenth general assembly, and chapter 122, of the laws of the sixteenth general assembly be repealed, and the following enacted in lieu thereof:

SEC. 2. (*As amended by ch. 67, 20th g. a.*) [**Killing of certain game at certain seasons punished.**—It shall be unlawful for any person within this state to shoot or kill any pinnated grouse or prairie chicken between the first day of December and the [first day of September] next following; any woodcock between the first day of January and the tenth day of July; any ruffed grouse or pheasant, wild turkey or quail, between the first of January and the first day of October; any wild duck, goose or brant, between the first day of May and the fifteenth day of August; or any wild deer, elk or fawn, between the first day of January and the first day of September.

SEC. 3. [**Killing of certain game at any time punished.**—It shall be unlawful for any person, at any time, or at any place within this state to shoot or kill for traffic any pinnated grouse or prairie chicken, woodcock, quail, ruffed grouse or pheasant; or for any one person to shoot or kill during any one day, more than twenty-five of either kind of said named birds; or for any one person, firm or corporation, to have more than twenty-five of either kind of said named birds in his or their possession at any one time, unless lawfully received for transportation; or to catch or take, or attempt to catch or take, with any trap, snare or net, any of the birds or animals named in section two (2) of this act, or in any manner willfully to destroy the eggs or nests of any of the birds hereby intended to be protected from destruction.

SEC. 4. [**Trapping beaver, etc.**—It shall be unlawful for any person to kill, trap or ensnare, any beaver, mink, otter, or muskrat, between the first day of April and the first day of November, except where such killing, trapping, or snaring may be for the protection of private property.

SEC. 5. [**Unlawful to have in possession certain birds at certain seasons.**—It shall be unlawful for any person, company or corporation, to buy or sell, or have in possession any of the birds or animals named in section two (2) of this act during the period when the killing of such bird or animal is prohibited by said section two (2) except during the first five days of such prohibited period; and the having in possession by any person, company or corporation of any such birds or animals during such prohibited period except during the first five days thereof, shall be deemed *prima facie* evidence of a violation of this act.

SEC. 6. [**Shipping of birds out of the state prohibited.**—It shall be unlawful for any person, company or corporation at any time to ship, take or

carry out of this state any of the birds or animals named in section two (2) of this act; but it shall be lawful for any person to ship to any person within this state, any game birds, named in said section two (2) not to exceed one dozen in number in any one day, during the period, when by this act the killing of such birds is not prohibited: *Provided*, he shall first make an affidavit before some person authorized to administer oaths, that said birds have not been unlawfully killed, bought, sold or had in possession, are not being shipped for sale or profit, giving the name and postoffice address of the person to whom shipped and the number of birds to be so shipped. A copy of such affidavit, indorsed, "A true copy of the original," by the person administering the oath, shall be furnished by him to the affiant, who shall deliver the same to the railroad agent or common carrier receiving such birds for transportation, and the same shall operate as a release to such carrier or agent from any liability in the shipment or carrying of such birds.

The original affidavit shall be retained by the officer taking the same, and may be used as evidence in any prosecution for violation of this act. Any person swearing falsely to any material fact of said affidavit, shall be guilty of perjury, and punished accordingly.

SEC. 7. [Penalty for violation of this act.]—If any person shall kill, trap, ensnare, buy, sell, ship or have in possession, or ship, take or carry out of the state, contrary to the provisions of this act, any of the birds or animals named in this act, or shall willfully destroy any eggs or nests of birds named in this act, he shall be punished by a fine of ten dollars for each bird, beaver, mink otter or muskrat; twenty-five dollars for each wild deer, elk or fawn, and ten dollar for each nest or the eggs therein, so killed, trapped, ensnared, bought, sold, shipped, had in possession, destroyed or shipped, taken or carried out of the state, and shall stand committed to the county jail for thirty days unless such fine and costs of prosecution are sooner paid.

SEC. 8. Penalty against railways, etc., who shall transport.]—If any railway, express company, or other common carrier, or any of their agents or servants, knowingly receive any of the above mentioned birds or animals for transportation or other purpose, during the periods hereinbefore limited and prohibited, or at any other time except in the manner provided in section six (6) of this act, they shall be punished by a fine of not less than one hundred nor more than three hundred dollars, or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment.

SEC. 9. Penalty for using swivel gun or poison.]—If any person shall shoot or kill any wild duck, goose or brant, with any swivel gun, or any kind of gun except such as is commonly shot from the shoulder; or shall use medicated or poisoned food to capture or kill any of the birds named in this act, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined twenty-five dollars for each offense, and shall stand committed to the county jail for thirty days, unless such fine and the costs of prosecution are sooner paid.

SEC. 10. [Where prosecution may be brought.]—Prosecutions for violations of this act may be brought either in the county in which the offense was committed or in any other county where the person, company or corporation complained of has had or has in his or their possession any birds or animals herein named, bought, sold, killed, trapped or ensnared, in violation of any of the provisions of this act.

SEC. 11. [Court to appoint attorney.]—In all prosecutions under this act the court before whom the same is brought shall appoint some attorney-at-law for the purpose of managing the prosecution of the cause, and such attorney shall be entitled to a fee of ten dollars in each and every case in which he is so appointed, and the person filing an information under this act shall, in case of conviction, be entitled to a fee equal to one half of the amount of the fine imposed on each con-

viction, and both the fee of such attorney and the informant shall be taxed as costs in in the case against the person convicted; *provided*, that the county shall in no case be held liable for said attorney's fee or penalty.

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

(CHAPTER 144, LAWS OF 1878.)

TO PREVENT OFFICERS OF STATE INSTITUTIONS FROM BEING INTERESTED IN CONTRACTS FOR SUPPLIES.

An Act to prevent trustees and other officers of state institutions from furnishing supplies to or being interested in contracts with such institutions, and to punish the violation of the same.

SECTION 1. [**No officer shall be interested in furnishing supplies:**]
Be it enacted by the general assembly of the state of Iowa: That it shall be unlawful for any trustee, warden, superintendent, steward, or any other officer of any educational, penal, charitable, or reformatory institution, supported in whole or in part by the state, to be interested directly or indirectly in any contract to furnish or in furnishing provisions, material, or supplies of any kind, to or for the institution of which he is an officer; and it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer, directly or indirectly, to receive in money or any valuable thing any commission, percentage, discount, or rebate on any provision, material, or supplies furnished for or to any institution of which he is an officer. And it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer of any state institution to be directly or indirectly interested in any contract with the state to build repair, or furnish any institution of which he may be an officer.

SEC. 2. [**Penalty.**]*—*Any person violating the provisions of section 1 of this act shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars, nor more than one thousand dollars, in the discretion of the court, or imprisoned in the county jail not exceeding one year, or both such fine and imprisonment, in the discretion of the court.

Approved, March 25, 1878.

(CHAPTER 79, LAWS OF 1888.)

An Act to prevent fraud in the sale of lard, and to provide punishment for the violation thereof.

SECTION 1. (*Be it enacted by the general assembly of the state of Iowa:*) **No manufacturer or other person** or persons shall sell, deliver, prepare, put up, expose or offer for sale any lard or any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine in any tierce, bucket, pail, package, or other vessel or wrapper, or under any label bearing the words "pure," "refined," "family," or either of said words alone or in combination with other words of like import, unless every tierce, bucket, pail, package or other vessel, wrapper or label, in or under which said article is sold, delivered, prepared, put up, exposed or offered for sale bears on the top or outer side thereof, in letters not less than one half-inch in length and plainly exposed to view, the words "Compound Lard" and the name and proportion in pounds and fractional parts thereof of each ingredient contained therein.

SEC. 2. **Any person who violates** any provisions hereof shall be deemed guilty of a misdemeanor for each violation, and upon conviction thereof shall be

fined for the first offense not less than twenty dollars nor more than fifty dollars, and every subsequent offense under this act shall be fined not less than fifty dollars nor more than one hundred dollars.

Approved March 10, 1888.

(CHAPTER 137, LAWS OF 1880.)

TO PREVENT FRAUD IN SALE OF LARD.

An Act to prevent fraud in the sale of lard in certain cases.

SECTION 1. [Information to be given.]—*Be it enacted by the general assembly of the state of Iowa:* That all persons or associations who shall engage in the business of selling lard rendered from swine that have died of hog cholera, or other diseases, shall, before selling or offering to sell such lard, plainly stamp, print, or write upon the cask, barrel, or other vessel containing such lard, the words: "Lard from hogs which have died of disease"; or, if sold without such cask, barrel, or other receptacles, the purchaser shall be informed that the lard is from hogs which have died of disease.

SEC. 2. [For not giving such notice, fine or imprisonment.]—For a violation of the provisions of the foregoing section the offender shall, on conviction thereof, be punished by a fine not less than five dollars, nor exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

(Took effect by publication in newspapers, April 2, 1880.)

(CHAPTER 76, LAWS OF 1880.)

TO PUNISH FRAUDS ON HOTEL-KEEPERS, ETC.

An Act to define and punish frauds upon hotel, inn, boarding and eating house keepers.

SECTION 1. *Be it enacted by the general assembly of the State of Iowa,* That any person who shall obtain food, lodging, or other accommodations at any hotel, inn, boarding or eating house, with intent to defraud the owner or keeper thereof, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding thirty days.

SEC. 2. Proof that lodging, food, or other accommodation, was obtained by false pretense, or by false or fictitious show or pretense of baggage, or that the party refused or neglected to pay for such food, lodging, or other accommodation, on demand, or that he absconded or left the premises without paying or offering to pay for such food, lodging, or other accommodation, or that he surreptitiously removed, or attempted to remove his baggage, shall be *prima facie* proof of the fraudulent intent mentioned in section one of this act; but this act shall not apply to regular boarders, nor where there has been an agreement for delay in payment.

Approved March 22, 1880.

(CHAPTER 78, LAWS OF 1888.)

FRAUD IN SALE OF GRAIN PUNISHED.

An Act to punish and prevent fraud in the sale of grain, seed and other cereals.

SECTION 1. *Be it enacted by the general assembly of the State of Iowa*, That whoever, either for his own benefit or as the agent of any corporation, company, association or person, obtains from any other person anything of value, or procures the signature of any such person, as maker, indorser, grantor or surety thereon, to any bond, bill, receipt, promissory note, draft, check, or any other evidence of indebtedness, as the whole or part consideration of any bond, contract or promise given the vendee of any grain, seed or cereals binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed, or cereals at a fictitious price, or at a price equal to or more than four times the market price of such grain, seed or cereals; and whoever sells, barter, or disposes of, or offers to sell, barter or dispose of, either for his own benefit or as the agent of any corporation, company, association or person, any bond, bill, receipt, promissory note, draft, check, or other evidence of indebtedness, knowing the same to have been obtained as the whole or part consideration of any bond, contract or promise given the vendee of any grain, seed or cereals binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed or cereals at a fictitious price, or at a price equal to or more than four times the market price of such grain, seed or cereals, shall on conviction thereof be imprisoned in the penitentiary not more than three years, or be fined in the sum of not more than \$500 nor less than \$100, or both, at the discretion of the court.

SEC. 2. This act being deemed of immediate importance, shall be in full force and effect from and after its publication in the Iowa State Register and Des Moines Leader, newspapers published at Des Moines, Iowa.

Approved April 9, 1888.

(CHAPTER 80, LAWS OF 1888.)

An act to prevent fraud in the sale of flour and other mill products.

SECTION 1. [**Packages to be marked.**]*—Be it enacted by the general assembly of the state of Iowa*: That in all cases where flour, meal, and other mill products are sold by the sack or package purporting to weigh a certain number of pounds, the weight of each sack, or package, shall be plainly marked, or stamped thereon.

And if any such sack or package sold, shall weigh less than the amount marked thereon, the person so selling the same shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than five dollars, or more than twenty-five dollars, in the discretion of the court.

Approved March 30, 1888.

(CHAPTER 52, LAWS OF 1886.)

PREVENT DECEPTION IN MANUFACTURE AND SALE OF IMITATIONS OF BUTTER AND CHEESE, AND CREATE DAIRY COMMISSIONER.

An Act to prevent deception in the manufacture and sale of imitations of butter and cheese.

SECTION 1. [**Imitation butter and cheese defined.**]*—Be it enacted by the general assembly of the state of Iowa:* That for the purposes of this act every article, substance or compound other than that produced from pure milk or cream from the same made in semblance of butter and designed to be used as a substitute for butter made from pure milk or cream from the same is hereby declared to be imitation butter; and that for the purposes of this act every article, substance or compound other than that produced from pure milk or cream from the same made in the semblance of cheese and designed to be used as a substitute for cheese made of pure milk or cream from the same is hereby declared to be imitation cheese; *provided*, that the use of salt, rennet, and harmless matter for coloring the product of pure milk or cream, shall not be construed to render such product an imitation.

SEC. 2. [**Shall be marked, how: misdemeanor: penalty.**]*—*Each person who manufactures imitation butter or imitation cheese shall mark by branding, stamping or stenciling upon the top and sides of each tub, firkin, box or other package in which such article shall be kept and in which it shall be removed from the place where it is produced, in a clear and durable manner, in the English language, the name of the contents thereof as herein designated, in printed letters of plain roman type, each of which shall be not less than one inch in length by one-half of one inch in width. Every person who by himself or another violates the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed two hundred and fifty dollars or by imprisonment in the county jail not to exceed sixty days.

SEC. 3. [**Shall not be shipped unless marked.**]*—*No person by himself or another shall knowingly ship, consign or forward by any carrier whether public or private any imitation butter or imitation cheese, unless the same be marked as provided by section two of this act; and no carrier shall knowingly receive for the purpose of forwarding or transporting any imitation butter or imitation cheese, unless it shall be marked as hereinbefore provided, consigned, and by the carrier receipted for by its name as designated by this act; *provided* that this act shall not apply to any goods in transit between foreign states and across the state of Iowa.

SEC. 4. [**Possession.**]*—*No person shall knowingly have in his possession or under his control any imitation butter or imitation cheese unless the tub, firkin, box or other package containing the same be clearly and durably marked as provided by section two of this act; *provided*, that this section shall not be deemed to apply to persons who have the same in their possession for the actual consumption of themselves or family.

SEC. 5. [**Selling without being marked.**]*—*No person by himself or another shall knowingly sell or offer for sale imitation butter or imitation cheese under the name of, or under the pretense that the same is pure butter or pure cheese; and no person by himself or another shall knowingly sell any imitation butter or imitation cheese unless he shall have informed the purchaser distinctly at the time of the sale, that the same is imitation butter or imitation cheese, as the case may be, and shall have delivered to the purchaser at the time of the sale a statement clearly printed in the English language, which shall refer to the article sold and

which shall contain in prominent and plain roman type the name of the article sold as fixed by this act and shall give the name and place of business of the maker.

SEC. 6. [**Hotels, eating houses, etc.**].—No keeper of a hotel, boarding house, restaurant, or other public place of entertainment shall knowingly place before any patron for the use as food any imitation butter or imitation cheese unless the same be accompanied by a placard containing the name in English of such article as fixed by this act printed in plain roman type. Each violation of this section shall be deemed a misdemeanor.

SEC. 7. [**Action on contract.**].—No action can be maintained on account of any sale or other contract made in violation of or with intent to violate this act by or through any person who was knowingly a party to such wrongful sale or other contract.

SEC. 8. [**Possession presumes knowledge.**].—Every person having possession or control of any imitation butter or imitation cheese which is not marked as required by the provisions of this act shall be presumed to have known during the time of such possession or control the true character and name as fixed by this act of such imitation product.

SEC. 9. [**Defacing or removing marks.**].—Whoever shall deface, erase, cancel or remove any mark provided for by this act with intent to mislead, deceive or to violate any of the provisions of this act shall be deemed guilty of a misdemeanor.

SEC. 10. [**Penalty for violation.**].—Whoever shall violate any of the provisions of the third, fourth and fifth sections of this act shall, for the first offense, be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment not exceeding thirty days, and for each subsequent offense shall be punished by a fine of not less than two hundred and fifty dollars nor more than five hundred dollars or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment in the discretion of the court.

SEC. 11. (*As amended by ch. 98, 22d g. a.*) [**Governor to appoint dairy commissioner.**].—[The governor shall on or before the first day of April of each even-numbered year appoint an officer who shall be known as the Iowa state dairy commissioner, who shall have practical experience in the manufacture of dairy products, and who shall hold his office for a term of two years from the first day of May following his appointment and until his successor is appointed and qualified.]

[**Give bond.**].—Said commissioner shall give an official bond conditioned for the faithful performance of the duties of his office in the sum of ten thousand dollars, with sureties to be approved by the governor. He may be removed from office by the governor, with the approval of the executive council, for neglect or violation of duty. Any vacancy shall be filled by the appointment of the governor by and with the advice and consent of the executive council.

SEC. 12. [**Salary.**].—The state dairy commissioner shall receive a salary of fifteen hundred dollars per annum, payable monthly, and the expenses necessarily incurred in the proper discharge of the duties of his office; *provided*, that a complete itemized statement of all expenses shall be kept by the commissioner and by him filed with the auditor of state, after having been duly verified by (him) before receiving the same. He shall be furnished a room in the agricultural department of the capitol at Des Moines, in which he shall keep his office and all correspondence, documents, records and property of the state pertaining thereto, all of which shall be turned over to his successor in office. He may, if it is found to be necessary, employ a clerk, whose salary shall not exceed the sum of fifty dollars per month. Said salaries and expenses to be paid from the appropriation provided for in section seventeen of this act. The commissioner provided for by this act shall hold no other official position under the laws of Iowa, or a professorship in any of the state institutions.

SEC. 13. [**Duties.**]—It shall be the duty of the state dairy commissioner to secure, so far as possible, the enforcement of this act. He shall collect, arrange and present in annual reports to the governor, on or before the first day of November of each year, a detailed statement of all matters relating to the purposes of this act, which he shall deem of public importance, including the receipts and disbursements of his office; such reports shall be published with the reports of the state agricultural society.

SEC. 14. [**Power.**]—The state dairy commissioner shall have power in all cases where he shall deem it important for the discharge of the duties of his office, to administer oaths, to issue subpoenas for witnesses and to examine them under oath and to enforce their attendance to the same extent and in the same manner as a justice of the peace may now do; and such witnesses shall be paid by the commissioner the same fees now allowed witnesses in justices' courts.

SEC. 15. [**Possession construed.**]—Whoever shall have possession or control of any imitation butter or imitation cheese, contrary to the provisions of this act, shall be construed to have possession of property with intent to use it as a means of committing a public offense within the meaning of chapter 50, of title XXV, of the code; *provided*, that it shall be the duty of the officer who serves a search warrant issued for imitation butter or imitation cheese, to deliver to the state dairy commissioner, or to any person by such commissioner authorized in writing to receive the same, a perfect sample of each article seized by virtue of such warrant, for the purpose of having the same analyzed, and forthwith to return to the person from whom it was taken the remainder of each article seized as aforesaid. If any sample be found to be imitation butter or imitation cheese it shall be returned to and retained by the magistrate as, and for, the purpose contemplated by section 4648 of the code, but if any sample be found not to be imitation butter or imitation cheese, it shall be returned forthwith to the person from whom it was taken.

SEC. 16. [**Costs.**]—It shall be the duty of the court in each action for the violation of this act to tax as costs in the cause, the actual and necessary expense of analyzing the alleged imitation butter or imitation cheese which shall be in controversy in such proceeding, provided that the amounts so taxed shall not exceed the sum of twenty-five dollars. It shall be the duty of the district or county attorney, upon the application of the dairy commissioner, to attend to the prosecution in the name of the state of any suit brought for violation of any of the provisions of this act within his district, and in case of conviction he shall receive twenty-five per cent of the fines collected, which shall be in addition to any salary he may receive, to be taxed as costs in the case.

SEC. 17. (*As substituted by ch. 98, 22d g. a.*) [**\$20,000 appropriated.**]—That the unexpended portion of the appropriation provided by section 17 of the 52d chapter of the acts of the twenty-first general assembly, is hereby appropriated for the next biennial period, or so much thereof as may be necessary for the proper carrying out of the purposes of this act; but not more than one half of said unexpended balance shall be drawn from the state treasury prior to the first day of May, 1889. The amount hereby appropriated shall be expended only under the direction and with the approval of the executive council. And all salaries, fees, costs and expenses of every kind incurred in the carrying out of this law shall be drawn from the sum so appropriated.

SEC. 18. Chapter 39, of the acts of the eighteenth general assembly of Iowa, and all acts and parts of acts in conflict with this act, are hereby repealed.

(The foregoing chapter 52, laws of 1886, as amended by chapter 98, twenty-second general assembly, is also amended by that act declared to be a general and permanent statute of the state. See section 3 of the act.)

(CHAPTER 93, LAWS OF 1884.)

TO PUNISH GAMBLING IN GRAIN AND PRODUCE.

An Act to prevent gambling by means of fictitious contracts for the buying or selling of grain or other produce, on margins and to provide a punishment therefor.

SECTION 1. [**Unlawful to keep a place to deal in margins.**] *Be it enacted by the general assembly of the state of Iowa:* That it shall be unlawful for any corporation, association or society, person or persons to keep within this state any store, office or other place, wherein is conducted or permitted the pretended buying or selling of grain, pork, lard, or any mercantile or agricultural products on margins, without any intention of future delivery, whether such pretended contracts are to be performed within or without this state; and the keeping of all such places is hereby prohibited; and it shall be unlawful for any person, corporation, association or society, within this state, to make or enter into any contract, or pretended contract such as is above stated and referred to, and all such contracts are hereby prohibited. The intention of this act being to prevent and prohibit within this state the business now engaged in and conducted in places commonly known and designated as bucket shops. *Provided,* however that this act shall not apply to or in any way affect any contract for the actual buying or selling of any commodity whatever for present or future delivery, where the actual delivery or receipt of the thing sold is contemplated, and in good faith intended by either of the parties to the contract.

SEC. 2. [**Punishment.**]—Any person whether acting individually or as a member of any copartnership, corporation, association or society, guilty of violating any of the provisions of this act shall upon conviction thereof be adjudged to pay a fine for each offense of not less than one hundred dollars or more than five hundred dollars or be imprisoned in the county jail not less than thirty days nor more than one year, or be both fined and imprisoned at the discretion of the court.

Approved March 29, 1884.

(CHAPTER 36, LAWS OF 1882.)

TO PROVIDE FOR THE BETTER EDUCATION OF DENTISTS.

An Act to insure the better education of practioners of dentistry in the state of Iowa.

SECTION 1. [**Examination required.**] *Be it enacted by the general assembly of the state of Iowa:* That it shall be unlawful for any person who is not at the time of the passage of this act, engaged in the practice of dentistry in this state to commence such practice unless such person shall have received a license from the board of examiners, or some member thereof as hereinafter provided, or a diploma from the faculty of some reputable dental college, duly authorized by the laws of this state, or by some other of the United States, or by the laws of some foreign country, in which college, or colleges, there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery.

SEC. 2. [**A board of five examiners to be appointed.**]—A board of examiners is hereby created whose duty it shall be to carry out the purposes and enforce the provisions of this act. The members of said board shall be appointed by the governor, and shall consist of five practicing dentists, who shall have been engaged

in the continuous practice of dentistry in the state for five years or over, at the time of, or prior to, the passage of this act. The term for which the members of said board shall hold their office shall be five years, except that the members of the board first to be appointed under this act shall hold their offices for the term[s] of one, two, three, four, and five years, respectively, and until their successors shall be duly appointed. In case of vacancy occurring in said board, such vacancy shall be filled by the governor.

SEC. 3. [Officers and meetings of the board: quorum and records.]—

Said board shall choose one of its members president, and one secretary thereof; and it shall meet at least once in each year, and as much oftener, and at such times and places, as it may deem necessary. A majority of said board shall at all times constitute a quorum, and the proceedings thereof shall at all reasonable times be open to public inspection.

SEC. 4. [All dentists to register within six months.]—It shall be the duty of every person who is engaged in the practice of dentistry in this state, within six months from the date of the taking effect of this act, to cause his or her name and residence, or place of business, to be registered with the said board of examiners, who shall keep a book for that purpose; and every person, who shall so register with said board as a practitioner of dentistry, may continue to practice the same as such without incurring any of the liabilities or penalties of this act.

SEC. 5. [All persons not registered prohibited.]—No person whose name is not registered on the books of said board as regular practitioner of dentistry, within the limits prescribed in the preceding section, shall be permitted to practice dentistry in this state until such person shall have been duly examined by said board, and regularly licensed in accordance with the provisions of this act.

SEC. 6. [All other persons applying to be examined.]—Any and all persons, who shall so desire, may appear before said board at any of its regular meetings, and be examined with reference to their knowledge and skill in dental surgery, and, if such person shall be found after having been so examined to possess the requisite qualifications, said board shall issue a license to such person to practice dentistry in accordance with the provisions of this act. But said board shall at all times issue a license to any regular graduate of any reputable dental college, without examination, upon the payment by such graduate, to the said board, of a fee of one dollar. All licenses issued by said board shall be signed by the members thereof, and be attested by its president and secretary; and such license shall be *prima facie* evidence of the right of the holder to practice dentistry in the state of Iowa.

SEC. 7. [Temporary license.]—Any member of said board shall issue a temporary license to any applicant, upon the presentation by such applicant of the evidence of the necessary qualifications to practice dentistry; and such temporary license shall remain in force until the next regular meeting of said board occurring after the date of such temporary license, and no longer.

SEC. 8. [Penalty.]—Any person who shall violate any or the provisions of this act shall be liable to prosecution, before any court of competent jurisdiction, upon information, and upon conviction shall be fined not less than twenty-five dollars nor more than fifty dollars for each and every offense.

SEC. 9. [Fee for examination.]—In order to provide the means for carrying out and maintaining the provisions of this act, the said board of examiners may charge each person applying to or appearing before them for examination for license to practice dentistry a fee of two dollars; and out of the funds coming into the possession of the board, from the fees so charged, the members of said board may receive as compensation the sum of five dollars for each day actually engaged in the duties of their office. And no part of the salary or other expenses of the board shall ever be paid out of the state treasury. All moneys received in excess of

said per diem allowance shall be held by the secretary of said board as a special fund for meeting the expenses of said board, he giving such bond as the board shall from time to time direct. The said board shall make an annual report of its proceedings to the governor, by the fifteenth of November of each year, together with an account of all moneys received and disbursed by them pursuant to this act.

SEC. 10. [**License to be registered with county clerk.**]—Any person who shall be licensed by said board, to practice dentistry, shall cause his or her license to be registered with the county clerk of any county, or counties, in which such persons may desire to engage in the practice of dentistry; and the county clerks of the several counties in this state shall charge for registering such license a fee of twenty-five cents for each registration. Any failure, neglect, or refusal on the part of any person holding such license to register the same with the county clerk as above directed, for a period of six months, shall work a forfeiture of the license; and no license, when once forfeited, shall be restored, except upon the payment to the said board of examiners of the sum of twenty-five dollars, as a penalty for such neglect, failure, or refusal.

SEC. 11. Nothing in this act shall be construed to prevent persons from extracting teeth.

Approved, March 8, 1882.

(CHAPTER 177, LAWS OF 1886.)

RELATING TO OBSCENE LITERATURE.

An Act to suppress the circulation, advertising and vending of obscene and immoral literature, and articles of indecent and immoral use, and to confiscate such property.

SECTION 1. [**Obscene literature.**]*—Be it enacted by the general assembly of the state of Iowa:* Whoever sells, or offers for sale, or gives away, or has in his possession with intent to sell, loan or give away, any obscene, lewd, indecent, or lascivious book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, model, cast, or any instrument, or article of indecent or immoral use, or any medicine, article, or thing designed or intended for procuring abortion, or preventing conception, or advertises the same for sale, or writes or prints any letter, circular, hand bill, card, book, pamphlet, advertisement, or notice of any kind, giving information, directly, or indirectly, when, where, how, or by what means any of the articles or things herein before mentioned can be purchased or otherwise obtained or made, shall, on conviction thereof, be punished by a fine of not more than one thousand dollars, nor less than fifty dollars, or by imprisonment in the county jail not more than one year, or both such fine and imprisonment at the discretion of the court.

SEC. 2. [**Circulating through the mail prohibited.**]*—*Whoever deposits in any post-office within this state, or places in charge of any person to be carried or conveyed, any of the articles or things named in section 1, of this act, or any circular, handbill, card, advertisement, book, pamphlet or notice of any kind, giving information, directly or indirectly, when, how, where, or by what means any of the articles or things mentioned in section 1, of this act, can be purchased or obtained, or knowingly or willfully receives the same to carry or convey, or knowingly carries or conveys the same in any manner, except in the United States mail, shall, upon conviction, be punished by a fine of not more than one thousand dollars, nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both fined and imprisoned at the discretion of the court.

SEC. 3. [**Printing or publishing same prohibited.**—Whoever prints or publishes or causes to be printed or published in any newspaper published or circulated in this state any advertisement of medicine, drug, nostrum or apparatus for the cure of private or venereal diseases, or shall circulate or distribute any newspaper containing such an advertisement or notice mentioned in this section, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than one thousand dollars, nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court.

SEC. 4. [**Giving or showing to minors, obscene or immoral literature, etc., prohibited.**—Whoever sells, lends, gives away, or shows or has in his possession with or without intent to sell, give away or show to any minor child, any book, pamphlet, magazine, newspaper, story paper or other paper devoted to the publication, or principally made up of criminal news, police reports or accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibits upon any street or highway, or any place within the view, or which may be within the view of any minor child, any of the above described books, papers or pictures, or uses or employes any minor child to give away, sell or distribute, or who, having the care, custody or control of any minor child, permits such child to sell, give away or distribute any such books, papers or pictures above described, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than five hundred dollars nor less than fifty dollars, or be imprisoned not more than six months in the county jail, or both fined and imprisoned at the discretion of the court.

SEC. 5. [**Magistrates have power to issue warrants for search for or seizure of articles prohibited by this chapter.**—All magistrates and police judges in this state are authorized, on due complaint, supported by oath or affirmation, of one or more persons, to issue a warrant directed to the sheriff of the county within which such complaint shall be made, or to any constable or police officer within said county, directing him or them, or any of them, to search for, seize, and take possession of such books, papers, pictures, circulars, articles and things named in sections 1, of this act, and said magistrate or police judge shall deliver personally or shall transmit, enclosed and under seal, specimens thereof to the prosecuting attorney of his county, and shall deposit within the county jail of his county or other secure place as to him shall seem meet, enclosed and under seal, the remainder thereof, and shall, upon the conviction of the person or persons offending under the provisions of this act, forthwith, in the presence of the person or persons upon whose complaint the said seizure or arrest was made, if he or they shall elect to be present, destroy, or cause to be destroyed, the remainder thereof so seized as aforesaid, and shall be caused to be entered upon the record of his court the fact of such destruction.

SEC. 6. [**Exceptions.**—Nothing in this act shall be construed to affect teaching in regularly chartered medical colleges; or the publication or use of standard medical books, or the practice of regular practitioners of medicine, or druggists in their regular business; or the possession by artists of models in the necessary line of their art.

SEC. 7. [**Repealing clause.**—All acts inconsistent with this (act) are hereby repealed.

Approved April 13, 1886.

(CHAPTER 107, LAWS OF 1888.)

An Act to provide for the greater safety of passengers on board all sail and steam boats on the inland waters of the state of Iowa.

SECTION 1. [**Must have license.**] *Be it enacted by the general assembly of the state of Iowa:* That from and after the taking effect of this act it shall be unlawful for any person as owner, agent or master of any sail or steam boat plying on the inland waters of this state, having capacity to carry five persons or more, to hire such boat for the carrying of persons, or to receive passengers for carriage thereon for hire, without each year before the boating season and before its use first obtaining a license for the said boat as hereinafter provided: and every person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished accordingly. *Provided,* that the provisions of this act shall not apply to any sail or steam boat duly licensed under laws of the United States during the term covered by such license.

SEC. 2. [**Governor to appoint inspectors.**]—That the governor shall on or before the (2d) second Monday in May in each year appoint such number of competent and suitable persons inspectors of boats as he may deem necessary, to serve until the second Monday in May of the next ensuing even numbered year, unless sooner removed by the governor. The person so appointed shall qualify by taking an oath to be endorsed upon his certificate of appointment, to faithfully and honestly discharge the duties of his office.

SEC. 3. [**Inspectors' duty.**]—That it shall be the duty of any inspector, upon demand of any owner, or master of any sail or steam boat, having capacity for the carrying of five passengers or more, plying upon the inland waters of the state, and upon payment to him of a fee hereinafter provided for, to thoroughly and carefully inspect such boat and all its machinery and appliances, and if such boat is found safe and suitable to be hired for the carrying of persons or for the carrying of passengers, to give to such owner, agent or master, a certificate to that effect, and certifying therein the number of persons that may be carried thereon, which certificate shall entitle such boat to be used for the carrying of passengers for the season from the date thereon; and said certificate or a copy thereof shall be posted in a conspicuous place on or in said boat, and any owner, agent or master of such boat knowingly permitting or receiving for carriage on such boat a greater number of persons than authorized in such certificate shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less than twenty dollars nor more than one thousand dollars.

SEC. 4. [**Pilots and engineers must have license.**]—That it shall be unlawful for any person to act as pilot or engineer on any steamboat carrying passengers on the inland waters of this state without first obtaining a license so to do as hereinafter provided. And any person violating this provision shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not less than twenty dollars nor more than five hundred dollars. That any person desiring license as such pilot or engineer shall apply therefor to some inspector appointed under this act whose duty it shall be, upon payment to him of the fee hereinafter provided for, to forthwith inquire into the competence of such applicant. If such applicant is found to be of sober habits, competent and capable of performing the duties of a pilot or engineer as the case may be, the inspector shall issue to such pilot or engineer a certificate entitling him to act as such pilot or engineer, as the case may be for five years from the date thereof, unless sooner revoked for good cause by some inspector of the state with the approval of the governor.

SEC. 5. [**Inspector's fees.**]—That said inspector shall be entitled to charge the following fees and require payment thereof in advance: For each sail boat inspected (\$1.00) one dollar; for each steamboat inspected (\$10.00) ten dollars; provided that steamers with capacity of twenty or less passengers shall be inspected for five dollars, whether the same be licensed or not, and for each application for license as a pilot or engineer (\$3.00) three dollars, whether license is granted or not.

SEC. 6. [**Inspector's report.**]—Said inspectors shall report on or before January first of each year, to the governor of the state, the whole number of licenses granted by them to pilots and engineers and to whom granted, the total number of sail boats and steam boats inspected by them, also the total amount of fees received by them for such licenses and inspection.

Approved, April 12, 1888.

(CHAPTER 104, LAWS OF 1888.)

An Act to prevent persons from unlawfully using or wearing the emblems and badges of the grand army of the republic, or of the military order of the loyal legion of the United States.

SECTION 1. [**Unlawful wearing of badge of G. A. R. punished.**]—*Be it enacted by the general assembly of the state of Iowa:* That any person who shall willfully wear the badge or button of the grand army of the republic, or the insignia or rosette of the military order of the loyal legion of the United States, or use the same to obtain aid or assistance within this state, unless he shall be entitled to wear the same under the rules and regulations or constitution of such organizations, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for a term not to exceed thirty days, or a fine not to exceed twenty dollars.

Approved, April 9, 1888.

(CHAPTER 102, LAWS OF 1888.)

An Act to provide that owners and keepers of pure bred or thorough bred bulls, standard bred or thorough bred stallions shall post notice of their registration.

SECTION 1. [**Certificate of registration required.**]—*Be it enacted by the general assembly of the state of Iowa:* Any owner or keeper of a stallion or bull for public service, who represents him to be a pure bred or thorough bred bull, or standard bred, or thoroughbred stallion or bull, of any breed of horses or cattle, that have a stud or herd book for the registration of their pedigrees, shall place a copy of certificate of registration on the door of the stall or stable where said stallion is usually kept, giving the number of registration, name of breeder and name of animal and the volume and page of the stud or herd book in which said stallion or bull is recorded, and when requested to do so shall give to any patron a copy of said certificate.

SEC 2. [**Penalty for violation.**]—Any owner or keeper of such stallion or bull who shall violate the provisions of this act shall be deemed guilty of a misdemeanor, and shall be punished accordingly.

Approved, April 3, 1888.

CHAPTER 12.

OFFENSES AGAINST THE PUBLIC PEACE.

SECTION 4065. [**Affray between two or more persons.**]-If two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence towards each other in an angry or quarrelsome manner, in any public place to the disturbance of others, they are guilty of an affray, and shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars.

SEC. 4066. [**Unlawful assembly of three or more.**]-When three or more persons in a violent or tumultuous manner assemble together to do an unlawful act, or, when together, attempt to do an act, whether lawful or unlawful, in an unlawful, violent, or tumultuous manner to the disturbance of others, they are guilty of an unlawful assembly, and every such offender shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

SEC. 4067. [**Riot.**]-When three or more persons together and in a violent or tumultuous manner commit an unlawful act, or together do a lawful act in an unlawful, violent, or tumultuous manner to the disturbance of others, they are guilty of a riot, and every such offender shall be punished as is provided in the preceding section.

SEC. 4068. [**Who may be convicted.**]-Any person guilty of unlawfully assembling, or of a riot, may alone be indicted and convicted thereof, but it must be alleged in the indictment and proved on the trial that three or more persons were engaged therein.

SEC. 4069. [**Exciting disturbance in certain houses.**]-If any person make or excite any disturbance in any tavern, store, or grocery, or at any election, or public meeting, or in any other place where the citizens are peaceably and lawfully assembled, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

SEC. 4070. [**Injuring or destroying houses, boats, etc.**]-If any person or persons unlawfully or riotously assemble, pull down, injure, or destroy, or begin to pull down, injure or destroy, any dwelling house or other building; or destroy or attempt to injure or destroy any boat or vessel; or perpetrate any premeditated injury on the person of another, not being a felony, he shall be punished by imprisonment in the penitentiary not more than five years, or by a fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, and shall also be answerable to any person injured to the full amount of the damages by him sustained in an action at law.

SEC. 4071. [**Racing or fast driving on highways.**]-Any person who shall be guilty of racing horses, or driving upon the public highway in a manner likely to endanger the persons or lives of others, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

Horse racing, except on the public highway, is not an offense under the statute. *Delier v. The Plymouth County Agricultural Society*, 57 Iowa, 481, 485.

SEC. 4072. [**Breach of Sabbath.**]-If any person be found on the first day of the week, commonly called sabbath, engaged in any riot, fighting, or offering to fight, or hunting, shooting, carrying fire arms, fishing, horse-racing, dancing, or in any manner disturbing any worshiping assembly, or private family; or in buying or selling property of any kind, or in any labor, the work of necessity and charity only excepted, every person so offending shall, on conviction, be fined in a sum not

more than five dollars nor less than one dollar, to be recovered before any justice of the peace in the county where such offense is committed, and shall be committed to the jail of said county until the said fine, together with the costs of prosecution shall be paid; but nothing herein contained shall be construed to extend to those who conscientiously observe the seventh day of the week as the sabbath, or to prevent persons traveling, or families emigrating from pursuing their journey, or keepers of toll bridges, toll gates, and ferrymen from attending the same.

The courts of this state will not enforce an express or implied contract for the sale of property made on the sabbath day, where the parties thereto do not come within the exceptions expressed in section 4072 of the code. *Pike v. King*, 16 Iowa, 49; *Sayre v. Wheeler*, 32 Id., 559; *Sayre v. Wheeler*, 31 Id., 112; *Clough v. Goggins*, 46 Id., 325. And the same rule applies to a contract made in another state, in the absence of evidence that the contract was valid under the laws of the state where made. *Sayre v. Wheeler*, 31 Id., 112; *Sayre v. Wheeler*, 31 Id., 559.

A contract made in violation of a statute and against the policy of the state, *malum in se* or *malum prohibitum* is invalid, and cannot be enforced by action. *Id.*

A contract void because made on Sunday, does not prevent the parties from making a valid contract with reference to the same subject matter on a subsequent week-day; nor it would seem from otherwise ratifying the original contract. *Harrison v. Colton*, 32 Id., 16.

Where a promissory note is void because executed on Sunday, the payee is not precluded from recovering upon the original contract which was the consideration for the note. *Sayre v. Wheeler*, 31 Id., 112.

A written contract for the conveyance of land made on Sunday, but bearing the date of another day of the week, when transferred, will be enforced in the hands of the transferee in good faith and without notice of the infirmity. *Jones v. Bailey et al.*, 45 Id., 241.

A contract for an exchange of horses was made on Saturday which included the discharge of a debt due from one of the parties to the other, but the plaintiff took possession of the horse he traded for on Sunday; *Held*, that there was such a consummation of the contract on Saturday as rendered it valid. *Peake v. Conlan*, 43 Id., 297.

In an action for damages for injuries sustained by the plaintiff as the result of the frightening of his horse on the highway by the defendant's dogs, it was *held*, that plaintiff's right to recover was not affected by the fact that the accident occurred on Sunday while he was riding on a business errand. *Schmidt v. Humphrey*, 48 Id., 652.

A promissory note actually made on Sunday, but dated on a week day, is valid in the hands of a *bona fide* purchaser for value before maturity. *The Clinton National Bank v. Graves et al.*, 43 Id., 228.

An admission that a debt is unpaid, contained in a letter written on Sunday, is sufficient to remove the bar of the statute of limitations, and the letter is admissible as evidence for that purpose. *Ayres v. Bane*, 39 Id., 518.

A railroad company incurs no other liability for running trains on Sunday than the fine provided by this section. The liability for killing stock by a train run on that day is to be determined by the same rules as if done on a secular day. *Gingle v. The C. B. & Q. R'y Co.*, 60 Id., 333.

(CHAPTER 57, LAWS OF 1888.)

An Act for the protection of discharged employes and to prevent black listing.

SECTION 1. [Penalty for preventing employment.]—*Be it enacted by the general assembly of the state of Iowa:* That if any person, agent, company or corporation, after having discharged any employe from his or its service shall prevent or attempt to prevent by word or writing of any kind such discharged employe from obtaining employment with any other person, company or corporation, except by furnishing in writing on request a truthful statement as to the cause of his discharge, such person, agent or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars nor less than one hundred dollars, and such person, agent, company or corporation shall be liable in penal damages to such discharged person to be recovered by civil action; but this section shall not be construed as prohibiting any person or agent of any company or corporation from informing in writing any other person, company or corporation setting forth a truthful statement of the reasons for such discharge.

SEC. 2. [**Employes not to be blacklisted by agents.**]¹⁸⁸⁸—If any railroad company or partnership or corporation in this state shall authorize or allow any of its or their agents to blacklist any discharged employes or attempt by word or writing or any other means whatever to prevent such discharged employe or any employe who may have voluntarily left said company's service from obtaining employment with any other person or company except as provided in section one thereof, such company or co-partnership shall be liable in treble damages to such employe so prevented from obtaining employment, to be recovered by him by a civil action.

Approved, April 16, 1888.

Took effect by publication in newspapers.

(CHAPTER 84, LAWS OF 1888.)

PUNISHMENT OF POOLS AND TRUSTS.

An Act for the punishment of pools, trusts, and conspiracies, and as to evidence in such cases.

SECTION 1. [**Parties entering pools guilty of conspiracy.**]*—Be it enacted by the general assembly of the state of Iowa:* If any corporation organized under the laws of this state, or any other state or country for transacting or conducting any kind of business in this state, or any partnership or individual shall create, enter into, become a member of or a party to any pool, trust, agreement, combination or confederation with any other corporation, partnership or individual to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever; or shall create, enter into, become a member of or a party to any pool, agreement, combination or confederation to fix or limit the amount or quantity of any commodity or article to be manufactured, mined, produced or sold in this state, shall be deemed guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in the next section.

SEC. 2. [**Punishment.**]*—*Any person or corporation found guilty of a violation of this act shall be punished by a fine of not less than one hundred dollars, nor to exceed five thousand dollars, and stand committed until such fine is paid.

SEC. 3. [**Trials: witnesses.**]*—*Upon the trial of any indictment against a corporation or a copartnership for a violation of the first section of this act, all officers and agents of such corporation or copartnership shall be competent witnesses against the defendant on trial, and such officers and agents may be compelled to testify against such defendant, and produce all books and papers in his custody or under his control pertinent to the issue in such trial, and shall not be excused from answering any such question, or from producing any books and papers because the same might tend to criminate such witness; but nothing which such witness shall testify to, and no books or papers produced by him shall in any manner be used against him in any suit, civil or criminal, to which he is a party.

SEC. 4. [**Repeal.**]*—*That all acts and parts of acts in conflict with this act be and the same are hereby repealed.

Approved, April 16, 1888.

(CHAPTER 78, LAWS OF 1888.)

An Act to punish and prevent fraud in the sale of grain, seed and other cereals.

SECTION 1. [**Penalty for selling at fictitious prices.**] *Be it enacted by the general assembly of the state of Iowa:* That whoever, either for his own benefit or as the agent of any corporation, company, association or person, obtains from any other person anything of value, or procures the signature of any such person, as maker, indorser, grantor or surety thereon; to any bond, bill, receipt, promissory note, draft, check, or any other evidence of indebtedness, as the whole or part consideration of any bond, contract or promise given the vendee of any grain seed or cereals binding the vendor or any other person, corporation, company, association or the agent thereof, to sell for such vendee any grain, seed, or cereals at a fictitious price, or at a price equal to or more than four times the market price of such grain, seed or cereals; and whoever sells, barter or disposes of, or offers to sell, barter or dispose of, either for his own benefit or as the agent of any corporation, company, association or person, any bond, bill, receipt, promissory note, draft, check, or other evidence of indebtedness, knowing the same to have been obtained as the whole or part consideration of any bond, contract or promise given the vendee of any grain, seed or cereals binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed or cereals at a fictitious price, or at a price equal to or more than four times the market price of such grain, seed or cereals, shall on conviction thereof be imprisoned in the penitentiary not more than three years, or be fined in the sum of not more than \$500 nor less than \$100, or both at the discretion of the court.

Approved, April 9, 1888.

CHAPTER 13.

CHEATING, BY FALSE PRETENSES, GROSS FRAUDS, AND CONSPIRACY.

SECTION 4073. [**False pretenses.**]—If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods or other property; or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

To obtain a credit on a note, held by another person against the defendant, is not obtaining money, goods or property, within the meaning of this section of this statute. *The State v. Moore*, 15 Iowa, 412.

False pretenses cannot be predicated upon representations which are mere matters of opinion. *The State v. Webb*, 26 Id., 262.

It is essential to the commission of the crime of obtaining a signature by false pretenses to a written instrument, that the instrument be delivered; and an indictment which fails to charge the delivery of the instrument is insufficient. *State v. McGinnis*, 71 Id., 685; *State v. Clark*, 72 Id., 30.

An indictment which alleges that the defendant procured the signature of another to a note by "false pretenses" sufficiently charges the crime of cheating by false pretenses. *The State v. Joaquin*, 43 Id., 131. See *The State v. Dowe*, 27 Id., 273, where the facts and circumstances constituting the alleged offense were set out in the indictment, and it was held insufficient.

It is not necessary that an indictment for obtaining property by false pretenses should state in terms that credit was given to the alleged false representations, when it contained the allegation that by the representation so made the defendant obtained the property. *The State v. McConkey*, 49 Id., 499.

An indictment will lie for false pretenses for pointing out to a purchaser valuable property as that sold to him, and in fact conveying other property which is worthless, and in such case the indictment need not allege want of ownership in the seller of the property pointed out. *Id.*

SEC. 4074. [Fraudulent conveyances.]—Any person who knowingly being a party to any conveyance, or assignment of any estate or interest in lands, goods or things in action, or of any rents or profits arising therefrom; or being a party to any charge on such estate, interest, rents or profits, made or created with intent to defraud prior or subsequent purchasers, or to hinder, delay or defraud creditors or other persons; and every person who being privy to, or knowing of such fraudulent conveyance, assignment or charge, puts the same in use as having been made in good faith, shall be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year.

The intent of the parties to a mortgage, in executing the same, to hinder and delay the creditors of the mortgagor, in the collection of their claims, is a legal fraud, as much so as the actual intent to defraud, and renders the mortgage equally void as to existing creditors. *Davenport v. Cummings*, 15 Iowa, 219.

Fraud in the execution of a mortgage may be shown by direct and positive evidence, or it may be inferred from facts and circumstances established by a preponderance of evidence. *Id.*

That a mortgage on its face purports to be made for a larger consideration than that which actually passed between the parties, is a badge of fraud. *Id.*

The making of a conveyance for the purpose of defrauding creditors constitutes a crime under this section of the code. *Day v. Lown*, 51 Id., 364, 369.

In a civil action where there is an issue upon the alleged fraudulent character of a sale, a fair preponderance only of the evidence is required to establish the fraud. It need not be proved beyond a reasonable doubt as in a criminal case. *Gillie v. McMillan*, 52 Id., 463. And see also *Barton v. Thompson*, 46 Id., 30.

Under this section providing that any person who knowingly is a party to any conveyance of goods made with intent to defraud creditors shall be fined and imprisoned, the defendant in an action to enforce a chattel mortgage executed by him in fraud of his creditors may show by parol evidence that plaintiff gave no consideration for such mortgage, and that he took it with intent to defeat a judgment creditor of defendant. *Galpin v. Galpin*, 33 N. W. R., 156.

SEC. 4075. [Suppression of last will.]—If any person has in his possession, or under his control, any last will and testament of any deceased person, willfully suppress, secrete, deface, or destroy the same, or any codicil thereto belonging, with intent to injure or defraud any devisee, legatee, or other person, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

SEC. 4076. [False weights and measures.]—If any person with intent to defraud, use a false ballance, weight, or measure, in the weighing or measuring of anything whatever that is purchased, sold, bartered, shipped or delivered for sale or barter, or that is pledged or given in payment, he shall be punished by a fine not exceeding five hundred dollars nor less than fifty dollars, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment at the discretion of the court.

To say of a person "you are a cheat and a swindler, and you defrauded me," is not indictable *per se*. The words charged do not import an indictable offense. *Lucas v. Flinn*, 35 Iowa, 9, 11.

SEC. 4077. [Same.]—The magistrate granting the warrant of arrest for this offense must also direct the seizure of the false weights, balances or measures; and if the party be convicted, or they are found to be false, they shall be forfeited to the county, and, after being made of the standard weight or measure, may be sold and the money arising from such sale must be paid into the county treasury.

SEC. 4078. [Altering brands, stamp, etc.]—If any person falsely alter any stamp, brand, or mark on any cask, package, box or bale, containing merchandise or produce, made by a public officer appointed for that purpose, in order to denote the quality, weight, or quantity of the contents thereof, with intent to defraud, he shall be fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year.

SEC. 4079. [**Counterfeiting marks of another.**]—If any person counterfeit any mark, stamp, or brand of another, or falsely mark any cask, package, box, or bale, as to quality or quantity, with intent to defraud, he shall be punished by fine not exceeding two hundred dollars or by imprisonment in the county jail not more than six months, or by both fine and imprisonment.

SEC. 4080. [**Using box marked by another with intent to defraud.**]—If any person with intent to defraud, use any cask, package, box, or bale, marked, branded, or stamped by another, for the sale of merchandise or produce of an inferior quality, or less in quantity or weight than is denoted by such mark, stamp or brand, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding two hundred dollars, or by both fine and imprisonment at the discretion of the court.

SEC. 4081. [**Gross fraud or cheat.**]—Every person who is convicted of any gross fraud or cheat at common law, shall be punished as provided in the preceding section.

SEC. 4082. [**Fraudulent destruction of boats, etc.**]—If any person cast away, sink, or otherwise destroy, any raft, boat or vessel within any county of this state with the intent to defraud any owner or insurer thereof; or the owner or insurer of any property laden on board the same, or of any part thereof, he shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding two thousand dollars and imprisoned in the county jail not exceeding one year.

SEC. 4083. [**Fitting out for that purpose.**]—If any person lade, equip, or fit out, or assist in lading, equipping, or fitting out, any raft, boat or vessel, with intent that the same be cast away, burnt, sunk, or otherwise destroyed, to injure or defraud any owner or insurer thereof, or of any property laden on board the same he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

SEC. 4084. [**Making false bill of lading.**]—If any owner of any boat or vessel, or of any property laden or pretended to be laden on board the same; or if any person concerned in the lading or fitting out such boat or vessel, make out and either exhibit, or cause to be made out and exhibited, any false estimate of any goods or property laden, or pretended to be laden, on board such boat or vessel with intent to injure or defraud any insurer of such boat or vessel or property, or any part thereof, he shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not more than three years.

SEC. 4085. [**Making false affidavits or protests.**]—If any master or other officer of any boat or vessel, make, or cause to be made, any false affidavit or protest, or if any owner or other person concerned in such boat or vessel, or in the goods or property laden on board the same, procure any such false affidavit or protest to be made, or exhibit the same with intent to injure, deceive, or defraud any insurer of such boat or vessel, or of the goods or property laden on board of the same, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding three thousand dollars and imprisonment in the county jail not exceeding one year.

SEC. 4086. [**Conspiracy to prosecute.**]—If two or more persons conspire or confederate together with intent, falsely and maliciously, to cause or procure another person to be indicted, or in any way impleaded or prosecuted for an offense of which he is innocent, whether such person be impleaded, indicted, or prosecuted or not, they shall be deemed guilty of a conspiracy, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollar nor less than one hundred dollars and imprisonment in the county jail not exceeding one year.

An indictment for a conspiracy must allege the conspiracy to be for the purpose of doing an

illegal act, or a legal act by illegal means. *The State v. Harris et al.*, 38 Iowa, 242. In the same case Miller, Justice, in a dissenting opinion held that the indictment should show the conspiracy to be for the purpose of doing a *criminal* act, or that the act was to be accomplished by *criminal* means.

An indictment for conspiracy, which charged that the defendants did unlawfully and feloniously conspire to rob and steal from, etc., is not open to the objection of charging more than one offense. *The State v. Sterling*, 34 Id., 443.

SEC. 4087. [In other cases.]—If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, or property of another; or to do any illegal act injurious to the public trade, health, morals or police; or to the administration of public justice; or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law, shall be punished by imprisonment in the penitentiary not more than three years.

To constitute a valid indictment for conspiracy, the particular circumstances of the offense must be charged when they are necessary to constitute a complete offense. *The State v. Potter*, 28 Iowa, 554.

In the trial of an indictment for conspiracy to injure the property of another, under this section of the statute, evidence that the injury was done in the exercise of an avowed legal right which the testimony tended to establish, and without malicious intent, will not sustain a conviction. *The State v. Flynn*, 28 Id., 26.

An indictment for conspiracy under this section must show either that the object of the conspiracy was criminal, or allege facts which show that the means employed to accomplish the object was criminal. *The State v. Stevens et al.*, 30 Id., 391; *The State v. Potter*, 28 Id., 554.

The injury to property contemplated by the statute against conspiracy must be such as is punishable as a crime. *Id.*

The injury must also be a direct one against the property itself, and not against an inchoate right, as that of the wife in the property of her husband. *Id.*

An indictment charging that the defendant did "conspire * * * to cause * * * S. to go with them * * * with the view, purpose and intent, with the intention of bringing about a sham marriage, or pretended marriage between her, the said S., and him, the said defendant, and thus bring about the seduction of the said S., in violation of law," was held, to charge a conspiracy to commit a crime. *The State v. Savoye*, 48 Id., 562.

The indictment in the case for a conspiracy to injure the person and character of another held sufficient to charge the offense defined in this section of the code. *The State v. Ormiston et al.*, 66 Id., 143.

SEC. 4088. [Issuing false voucher by warehouse men, etc.]—If any person issue any receipt or voucher, stating or purporting to state the receipt by him from another, of any property for storage or safe keeping without having in good faith received, and at the time having in his possession or under his control, such property; or issue any second receipt or voucher for any property while his former receipt or voucher for the same, or any part thereof, shall be outstanding and uncanceled; or sell, encumber, transfer, ship or in any manner remove beyond his immediate control, any property for which a receipt or voucher has been given by him as aforesaid, in violation of the terms of such receipt or voucher, without the written consent of the person holding such receipt or voucher, except to enforce his lien for storage and warehouse charges as provided by law; or sell, transfer or dispose of any receipt or voucher, given or purporting to have been given by any person for property in store, knowing that such person has not in his possession such property or any part thereof, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the penitentiary of this state not exceeding five years.

Where the defendant had received wheat in store in his warehouse for which he executed a receipt as follows: "Received from Wm. Petrie 178 34-60 bushels wheat, quality as sample preserved, to be stored until he is ready to sell;" and he afterwards shipped the wheat out of the state while the receipt was outstanding, it was held he thereby rendered himself criminally liable under this section of the code, and that evidence tending to show that such shipment was made with the knowledge and verbal consent of the owner of the wheat, was immaterial and properly rejected, the statute being designed to protect third persons who may purchase the receipt as well as the one to whom it is issued. *The State v. Stevenson*, 52 Iowa, 702.

(CHAPTER 102. LAWS OF 1876.)

TO DEFINE AND PUNISH THE CRIME OF SWINDLING.

An Act to define the crime of swindling and to punish the same.

SECTION 1. [Swindling defined and punishment for.]—*Be it enacted by the general assembly of the state of Iowa:* That whoever by the means of three-card monte so-called or any other form or device, sleight-of hand or other means whatever, by use of cards or instruments of like character, obtains from another person any money or other property of any description, shall be deemed guilty of the crime of swindling, and shall, on conviction thereof, be punished by a fine not less than two hundred dollars nor more than two thousand dollars, or by imprisonment in the penitentiary not less than two years nor more than five years, or by both such fine and imprisonment in the discretion of the court. All persons aiding, encouraging, advising or confederating with, or knowingly harboring or concealing, any such person or persons, or in any manner being accessory to the commission of the above-described offense, or confederating together for the purpose of playing such games shall be deemed principals therein, and punished accordingly.

SEC. 2. [Jurisdiction.]—The jurisdiction of all the offences described in section one (1) of this act, which shall be committed on any railroad car, coach, train, boat or other public conveyance, or in or at any railroad station or depot shall be in any county through which said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate, and in all other cases the jurisdiction shall be in the county in which the offense is committed.

SEC. 3. [Who may make arrest.]—Every person shall possess the power and authority, and it shall be the duty of every conductor, or other employe on any railroad, car or train, and of every captain, clerk or other employe on any boat, or station agent at any railway depot, or the officers of any fairs or fair grounds, and the proprietors of any place of public resort, and their employes, with or without warrant to arrest any person or persons whom they or either of them shall find in the act of committing any of the offenses mentioned in the first section of this act, or any person or persons whom he or they may have good reason to believe to have been guilty of the commission of the said offenses, and to take such person or persons before a magistrate in any county where jurisdiction to try said offenses exists by virtue of this act, and deliver such person or persons so arrested to the magistrate, and make written complaints under oath of the facts. And for executing the powers conferred by this section, the person making the arrest shall possess the same powers in all respects as are exercised by officers with warrants, including the power to summon assistance; and it shall be the duty of the person making such arrest to also arrest the person injured or defrauded by reason of the commission of any of the offenses mentioned in section one (1) of this act, and take such person before the examining magistrate, who shall require such person to give security to appear and testify on the trial of the cause, and such person or persons shall not be deemed to be guilty of the offense mentioned in section one (1) of this act, nor of the offense of gambling, unless such person or persons shall have failed to appear and give evidence on the trial.

[Compensation.]—And the person performing the services required by this act shall receive the same compensation as sheriffs receive for like services.

SEC. 4. [Duty of conductor, captain, etc.]—It shall be the duty of any conductor, captain, hotel or saloon keeper, proprietor or manager of any public con-

veyance or place of public resort, and the officers of any fair or fair grounds, to eject from his car, train, boat, hotel, saloon, public conveyance, fair grounds or place of public resort, any person known to him or whom he has good reason to believe to be a three-card-monte-man, or who offers to wager or bet money or other valuable things upon what is commonly known as three-card-monte, or bet on any trick, or game with cards, or other gaming device, and for such ejection no action for damages shall be maintained. And any parties operating any public conveyance by which passengers are carried shall keep posted up a copy of this law in such conveyance.

SEC. 5. [**Conductor, captain, etc., to be deemed guilty.**]—Any conductor of a railroad train, captain of any steamboat, proprietor or manager of any public conveyance, officer of any fair or fair grounds, or place of public resort, any hotel or saloon keeper, or their agent or employe, who shall fail, neglect or refuse to perform the duties herein mentioned, or who shall knowingly suffer or permit a violation of this act shall be deemed guilty of a misdemeanor, and the jurisdiction of such offense shall be the same as that provided in section 2 of this act.

SEC. 6. Any person may be convicted for violation of section number one (1) of this act, on his own confession out of court, or upon the testimony of an accomplice.

(Took effect by publication in newspapers March 24, 1876.)

(This act is identical with chapter 30, passed by the same general assembly.)

CHAPTER 14.

NUISANCES, AND ABATEMENT THEREOF.

SECTION 4089. [**When deemed nuisances.**]—The erecting, continuing or using any building or other place for the exercise of any trade, employment or manufacture which by occasioning noxious exhalations, offensive smells, or other annoyances becomes injurious and dangerous to the health, comfort or property of individuals or the public, the causing or suffering any offal, filth or noisome substance to be collected or to remain in any place to the prejudice of others; the obstructing or impeding without legal authority the passage of any navigable river, harbor or collection of water; or the corrupting or rendering unwholesome or impure the waters of any river, stream or pond; or unlawfully diverting the same from its natural course or state to the injury or prejudice of others; and the obstructing or incumbering by fences, buildings or otherwise of public highways, private ways, streets, alleys, commons, landing places, or burying grounds, are nuisances.

Where an indictment, charged that the defendant “unlawfully and injuriously did erect, continue and use a certain enclosure or pen in which cattle and hogs were confined, fed and watered, and the excrement, decayed food, slop and other filth were retained,” whereby were occasioned “noxious exhalations and offensive smells greatly corrupting and infesting the air; and other annoyances dangerous to the health, comfort and property of the good people residing in that immediate neighborhood,” it was *held*, that the acts charged constituted a public indictable nuisance, both under this section of the statute and at common law. *The State v. Kaster*, 35 Iowa, 221.

In a prosecution for nuisance, the defendant will not be permitted to show in justification that the public benefit resulting from his acts equal the public inconvenience. *Id.*

Where an indictment charged “that the defendant in, etc., on, etc., being possessed of a certain mill-dam and mill, with their appurtenances, situated near and adjacent to a common highway and public road, and the dwelling houses of diverse persons and citizens of Johnson county, did at etc., unlawfully and injuriously cause and permit the waters of said mill-dam to overflow the adjacent lands, as well of others as his own, by means whereof the water of said dam was rendered impure, corrupted and unwholesome, and the land overflowed, as aforesaid, rendered and

kept marshy, and filled with noxious weeds and putrid vegetation, and corrupted, impure and unwholesome water, whereby the air became corrupted and infected, to the injury and prejudice of others," etc., it was held, that the indictment sufficiently charged a public or common nuisance under the statute. *The State v. Close*, 35 Id., 570.

While the owner of premises may lawfully erect a mill-dam across an unnavigable stream, yet if it be so erected or managed as to become prejudicial to the health or comfort of others, it thereby becomes a nuisance. *Id.*

SEC. 4090. [**Manufacture of gunpowder.**]—If any person carrying on the business of manufacturing gunpowder, or of mixing or grinding the composition therefor in any building within eighty rods of any valuable building erected at the time when such business may be commenced, the building in which such business is thus carried on is a public nuisance, and such person is liable to be prosecuted accordingly.

SEC. 4091. [**Houses of ill-fame, gambling, etc.**]—Houses of ill-fame kept for the purpose of prostitution and lewdness, gambling houses, or houses where drunkenness, quarreling, fighting, or breaches of the peace are carried on or permitted, to the disturbance of others are nuisances, and may be abated and punished as provided in this chapter.

It is competent to charge in one indictment the various acts which go to make up the offense of nuisance as enumerated in section 4091 of the code. *The State v. Spurbeck et al.*, 44 Id., 667.

A person may be tried in our courts for keeping a house of ill-fame on a boat in the Mississippi river, although such boat may, when so used, for a portion of the time, as the water recedes, rest on the soil of an island, and on the east side thereof, near to the Illinois shore. *The State v. Mullen*, 35 Id., 199.

Where a farmer manufactured and sold native wine at his house to persons who, after buying the same at his house, drank and became intoxicated while in the highway leading therefrom, and by noisy and riotous conduct disturbed the neighbors living from one-half to one and a half miles from the farmer's, it was held, that these facts did not authorize his conviction for keeping a disorderly house under this section. *The State v. Dieffenbach*, 47 Id., 638.

Under this section, a saloon keeper, who but once permitted drunkenness, quarreling, fighting, and breaches of the peace to occur in his saloon, to the disturbance of others, is guilty of keeping a nuisance. And so far as the language of the indictment in the case at bar charged a repetition of such disturbances, it was surplusage, and proof of a single disturbance was sufficient to support a verdict of guilty; and an instruction to that effect was approved. *The State v. Pierce*, 65 Id., 85.

On the trial of an indictment for nuisance under this section, for keeping a disorderly house, the defendant may be convicted upon proof that he kept the house, though the disorderly conduct did not occur in the house, but on the sidewalk in front of it, if it was the character of the house that attracted the disorderly persons there who caused the disturbance. *The State v. Webb*, 25 Id., 235.

The keeping for sale of wine of his own manufacture by the defendant, who lived on a farm, and the fact that persons buying the same at his house drank it and became intoxicated while in the highways leading therefrom, and by noisy and riotous conduct disturbed the neighbors, living from one-half to one and a half miles from defendant's house, was held, not to authorize the conviction of defendant for keeping a nuisance under section 4091 of the code.

An indictment under this section, charging the defendant with keeping "a house of ill-fame for the purpose of prostitution and lewdness, to the disturbance of others," is sufficient and conforms to the statute. *The State v. Alderman*, 40 Id., 375.

So, also, an indictment alleging that the defendant kept a house of ill-fame, resorted to for the purpose of prostitution and lewdness, "and which prostitution and lewdness were carried on and permitted, to disturbance of others," was held to sufficiently charge the offense of nuisance under this section. *The State v. Odell*, 42 Id., 75.

It is competent to charge in one indictment the various acts which go to make up the offense of nuisance as enumerated in section 4091 of the code. *The State v. Spurbeck*, 44 Id., 667.

SEC. 4092. [**Punishment and abatement of.**]—Whoever is convicted of erecting, causing or continuing a public or common nuisance as described in this chapter, or at common law when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be punished by a fine not exceeding one thousand dollars, and the court, with or without such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided.

See *The State v. Kaster*, 35 Iowa, 221.

The provisions of this section were held not to govern in cases of convictions for violations of the prohibitory liquor law, but that such cases were governed by chapter 69, laws of 1870. *The State v. Winstrand*, 37 Id., 110.

A defendant convicted under this section may be imprisoned until the fine be paid, but the power of the court to imprison is limited to one day for every three and one-third dollars of the fine, (3.4509) and the defendant is not entitled to credit on the judgment by serving out such term of imprisonment. *The State v. Jordan*, 39 Id., 387.

The punishment for the offense defined in this section is a fine not exceeding one thousand dollars. *The State v. Reninghaus*, 43 Id., 149, 151; *The State v. Dean*, 44 Id., 648, 650.

A defendant convicted of nuisance and sentenced to pay a fine can only be ordered to be imprisoned for a term of which the number of days shall be equal to one for every three and one-third dollars of the fine; and if sentenced to confinement at hard labor, he is entitled to a credit upon the judgment of one dollar and fifty cents for each day's labor. *The State v. Anverda*, 40 Id., 151; *The State v. Jordan*, 39 Id., 387.

The supreme court having held that the amendment to the constitution, submitted to the people July 27, 1882, prohibiting the sale of beer was not lawfully adopted, it was accordingly held that an indictment under this section of the code, for selling beer to divers persons, to the common nuisance and annoyance of the neighborhood, could not be sustained. Beck, J., dissenting. *The State v. Johnson*, 61 Id., 504.

SEC. 4093. [Process.]—When upon indictment, complaint or action, any person is adjudged guilty of a nuisance, the court before whom such conviction is had, may, in addition to the fine imposed, if any, or to the judgment for damages or cost for which a separate execution may issue, order that such nuisance be abated or removed at the expense of the defendant, and after inquiry into and estimating as nearly as may be the sum necessary to defray the expenses of such abatement, the court may issue a warrant therefor.

Where on an indictment for nuisance the district court, in the judgment, directed that the property where the nuisance was kept, being a boat moored to an island in the Mississippi river, be seized by the sheriff and sold, and that the proceeds be applied to the payment of the fine imposed, and the nuisance abated, it was held that the judgment was authorized by this section of the statute. *The State v. Mullen*, 36 Iowa, 199, 205.

In an action to abate as a nuisance the obstruction of a highway, where the jury found generally for the plaintiff, but the petition failed to locate the alleged obstruction, and to state on whose land it was, held, that a motion in arrest of judgment was properly sustained, because from the facts of record, the court could not in its order of abatement, describe the alleged obstruction, and could not tax the costs of such abatement against the defendant. *Sloan et al. v. Rebman*, 66 Id., 81.

SEC. 4094. [Warrant.]—When the conviction is had upon an action before a justice of the peace and no appeal is taken, the justice, after estimating as aforesaid the sum necessary to defray the expenses of removing or abating the nuisance, may issue a like warrant.

SEC. 4095. [Execution of stayed.]—Instead of issuing such warrant, the court or justice may order the same to be stayed upon motion of the defendant, and upon his entering into an undertaking in such sum and with such surety as the court or justice may direct, to the state, conditioned either that the defendant will discontinue such nuisance, or that within a time limited by the court and not exceeding six months, he will cause the same to be abated and removed, as either is directed by the court; and upon his default to perform the condition of his undertaking the same shall be forfeited, and the court in term time or vacation, or justice of the peace, as the case may be, upon being satisfied of such default, may order such warrant forthwith to issue, and a *scire facias* on such undertaking.

SEC. 4096. [Expenses.]—The expense of abating a nuisance by virtue of a warrant can be collected by the officer in the same manner as damages and costs are collected on execution, except that the materials of any buildings, fences or other things that may be removed as a nuisance, may be first levied upon and sold by the officer, and if any of the proceeds remain after satisfying the expense of the removal, such balance must be paid by the officer to the defendant or to the owner of the property levied upon, and if said proceeds are not sufficient to pay such expenses the officer must collect the residue thereof.

CHAPTER 15.

OF LIBEL.

SECTION 4097. [Definition.]—A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends.

Where the language charged as libelous was to the effect that plaintiffs had, by entering into a combination for that purpose, reduced the price of grain at the place where they did business, held, that the language was not actionable *per se*; and that no recovery could be had for the publication of the language without proof of special damages. *Achorn & Co. v. Piper*, 66 Iowa, 694.

In an action for libel the information and charges made by the defendant in a criminal proceeding against the plaintiff, are not admissible to establish the libel. *Mass v. Meire et ux.*, 37 Iowa, 97.

SEC. 4098. [Punishment.]—Every person who makes, composes, dictates, or procures the same to be done; or who willfully publishes or circulates such libel; or in any way knowingly or willfully aids or assists in making, publishing or circulating the same, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars.

SEC. 4099. [Truth given in evidence.]—In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted.

SEC. 4100. [Publication.]—No printing, writing or other thing is a libel unless there has been a publication thereof.

SEC. 4101. [Definition of.]—The delivering, selling, reading or otherwise communicating a libel; or causing the same to be delivered, sold, read or otherwise communicated to one or more persons, or to the party libeled, is a publication thereof.

SEC. 4102. [Law and fact.]—In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine at their discretion the law and the fact.

TITLE XXV.

OF CRIMINAL PROCEDURE.

CHAPTER 1.

OF PUBLIC OFFENSES.

SECTION 4103. [Division of.]—Public offenses are divided into:

1. Felonies;
2. Misdemeanors.

SEC. 4104. [Felonv.]—A felony is a public offense which is, or in the discretion of the court may be punished by imprisonment in the penitentiary.

SEC. 4105. [Misdemeanor.]—Every other public offense is a misdemeanor.

SEC. 4106. [How punishable.]—No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof.

There are no crimes in this state but those expressly declared by statute. Per DAY, J., in *Polk County v. Hierb*, 37 Iowa, 367.

SEC. 4107. (As amended by ch. 103, 17th g. a.) [All offenses bailable except.]—All defendants are bailable both before and after conviction, by sufficient surety except for offenses heretofore punishable with death under the laws of the state, where the proof is evident, or the presumption great; [but no defendant convicted of murder shall be admitted to bail.]

When a defendant is accused of an offense that may be punished capitally, he may be admitted to bail by the examining magistrate when the evidence is slight or tends to show that the offense was committed under mitigating circumstances and would not be punished with death. *The State v. Klingman*, 14 Iowa, 404; *The State v. Huffman*, 23 Id., 579.

CHAPTER 2.

OF THE TERM MAGISTRATE, AND HIS POWERS, PEACE OFFICERS AND OFFICERS OF JUSTICE, AND COMPLAINTS.

SECTION 4108. [Who are magistrates: duties.]—Any judge of the supreme, district or circuit courts, any judge of any city court, any justice of the peace, any mayor of any incorporated city or town, any police or other special justice of such city or town, shall have power to hear complaints and preliminary informations, to issue warrants, order arrests, require security to keep the peace, make commitments, and take bail in the manner directed by this code. They are designated under the general term magistrate, and may exercise the jurisdiction hereby conferred on them as follows:

1. Judges of the supreme, district and circuit courts throughout the state, in any county in which they may be at the time of complaint made;

2. Judges of city courts, justices of the peace, mayors of incorporated cities and towns, and police and other special justices of such cities and towns, within their respective counties.

The general term "magistrate," applies to each of the officers named in this section. *The State v. Emerson*, 16 Iowa, 206, 209.

SEC. 4109. [**Who are peace officers.**—The following persons respectively are designated in this code under the general term, peace officer:

1. Sheriffs and their deputies;
2. Constables;
3. Marshals and policemen of incorporated cities and towns.

Peace officers are sheriffs, and their deputies, constables, marshals and policemen of incorporated cities and towns, and it is their sworn duty to keep the peace and prevent crime, as well as to arrest those charged therewith. *Blair v. Dubuque County*, 27 Iowa, 181, 183.

A town marshal has authority by virtue of his office to execute an order of a justice committing a vagrant to the county jail; and such authority is not taken away by his appointment by the justice as special constable for that purpose; and one rescuing the prisoner from his custody is indictable therefor. *The State v. Watson*, 66 Id., 670.

SEC. 4110. **Magistrates and peace officers** are sometimes designated by the term, officers of justice.

SEC. 4111. **Complaint of preliminary information** is a statement in writing, under oath or affirmation made before a magistrate, of the commission, or threatened commission, of a public offense and accusing some one thereof.

Section 4111 of the code embraces two classes of what are termed complaints of preliminary information, those of the *commission* of a public offense, and those of the *threatened* commission of a public offense. Per DAX, Ch. J., in *The State v. Darrington*, 47 Iowa, 519.

CHAPTER 3.

OF THE PREVENTION OF PUBLIC OFFENSES BY THE RESISTANCE OF THE PARTY ABOUT TO BE INJURED AND OTHERS.

SECTION 4112. [**Who may resist.**—Lawful resistance to the commission of a public offense may be made by the party about to be injured, or by others.

In a civil action for slander or libel, in which a crime is imputed to the plaintiff, if the defendant pleads in justification, he must in order to sustain his plea, adduce such evidence as would be required to convict the plaintiff, if he were on trial for the crime imputed to him. *Forshee v. Abrams et al.*, 2 Iowa, 571; *Fountain v. West*, 23 Id., 9; *Bradley v. Kennedy*, 2 G. Greene, 231.

SEC. 4113. [**In what cases.**—Resistance sufficient to prevent the offense may be made by the party about to be injured;

1. To prevent an offense against his person;
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

A party may repel force by force in the defense of his person, habitation or property, against one who manifestly intends, by violence or surprise, to commit a felony against either; and, if, in making such defense, he takes life, the killing is excusable. But if the assault is not felonious, the rule is different. An assault without a weapon when there is no reason for a belief on the part of the person assaulted, that his person was in danger of death or great bodily harm, will not justify or excuse the person so assaulted in using a deadly weapon in a deadly manner. *The State v. Kennedy*, 20 Iowa, 569.

While it is necessary, in order to justify a homicide on the ground of self-defense, that there should have been actual and urgent danger, it is not necessary that the danger should exist in fact, but if it exists to the defendant's comprehension as a reasonable man, it is sufficient. *The State v. Collins*, 32 Id., 36; *The State v. Neeley*, 20 Id., 108; *The State v. Thompson*, 9 Id., 188; *The State v. Tweedy*, 5 Id., 333; *The State v. Benham*, 23 Id., 154.

A person may lawfully take the life of his assailant, when reasonably necessary to save himself from imminent and great bodily harm. The right of self-defense exists in such cases, the same as where the killing is necessary to save life. *The State v. Barker*, 30 Id., 331; *The State v. Benham*, 23 Id., 154, 162; *The State v. Fraunburg*, 40 Id., 555.

Where the assault is only a simple or ordinary non-felonious assault, with the intention simply to whip or chastise the person assaulted, he would not be excusable if he should take the life of his assailant. *The State v. Benham*, 23 Id., 154.

If in an altercation between two persons, one of whom is armed with a club, the other succeeds in wresting it from him, whereupon the latter retreats, the former is justified in pursuing him, if he believes the latter is going for a dangerous weapon, and that he cannot reasonably get out of the way, and he *may* be justified in taking life; but if he could retreat with safety, without resorting to the slaying of his adversary, then the killing is not justifiable. *The State v. Maloy*, 44 Id., 104.

Before a person will be justified in pursuing another and taking life on the ground of self-defense, he should at least stand his ground until he sees whether there is reasonable apprehension of danger. *Id.*

Sections 4112 and 4113 of the code do not change the common law rule in respect to self-defense. *Id.*

Where a person is assailed in a manner plainly indicating an intention on the part of the assailant to commit a felony, he is not compelled to flee when he cannot do so without manifest danger to his life. *The State v. Thompson*, 9 Id., 183; *The State v. Tweedy*, 5 Id., 334.

It is not sufficient defense to an indictment for a felonious homicide, that the defendant *believed*, when he committed the homicide, that he was in imminent danger, unless the facts and circumstances were such as to satisfy the jury that he had reasonable grounds for his belief. *Id.*

On the trial of an indictment for murder, the court instructed the jury that to sustain the plea of self-defense, the defendant must show that the deceased assaulted him and that the assault was eminently perilous, and the danger to the defendant *actual* and urgent: *Held*, that the term *actual* did not imply that the danger must have *existed in fact*, but implied danger apparent to the defendant's comprehension, and that it did not vitiate the instruction. *The State v. Neeley*, 20 Id., 108.

Nor will a person be excusable in taking the life of another in self-defense, if he sought the deceased for the purpose of provoking a difficulty or bringing on a quarrel. *Id.* See, also, *The State v. Neeley*, 20 Id., 108; *The State v. Stanley*, 33 Id., 526.

An instruction to the jury as follows: "If however, you find that the defendant inflicted the blow upon the deceased that caused his death, then the burden of proof is upon the defendant to show that he did it in self-defense," was *held* erroneous, on the ground that in effect it took away from the defendant the benefit of any reasonable doubt, under the facts, as to whether the act was willful. *The State v. Porter*, 34 Id., 131.

SEC. 4114. [**Any person may aid another.**].—Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

CHAPTER 4.

OF SECURITY TO KEEP THE PEACE.

SECTION 4115. [**Duty of magistrate when complaint is made that a public offense is threatened.**].—Whenever complaint is made before a magistrate that any person has threatened to commit any public offense punishable by the laws of this state, and such magistrate is satisfied that there is reason to fear the commission of such offense, he may issue a warrant for the arrest of the person complained of; and the officer to whom the same shall be delivered for service shall forthwith arrest and bring the accused before such magistrate, or, in case of his absence or inability to act, before the nearest and most accessible magistrate of the same county. When the name of the person complained of is unknown, he may be designated in the warrant by any name, and the warrant issued in pursuance hereof may be executed by any peace officer in any county of the state; *provided*, that when issued by a magistrate other than a judge of the supreme, district or circuit courts, it cannot be served in any county other than that in which it is issued, unless authenticated as is required in case of a warrant of arrest issued on a preliminary information.

SEC. 4116. [**Proceedings when taken before magistrate.**].—When the person arrested is taken before a magistrate other than the one who issued the

warrant, the peace officer who executed the same, and who has charge of the person arrested, must, at the same time, deliver to the magistrate before whom the person arrested is taken, the warrant with his return indorsed and subscribed by him, and the complaint and other affidavits, if any, on which the warrant was issued, may be sent to the magistrate before whom the person arrested is taken, and if they cannot be procured, the complainant and his witnesses, if any, must be subpoenaed, if necessary, by the magistrate before whom the person arrested is taken, to appear before him and make a new complaint and affidavits.

SEC. 4117. (*As amended by ch. 35, 17th g. a.*) [Same.]—When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. [And a change of venue may be had as in preliminary examinations.] The evidence must be reduced to writing and subscribed by the witness.

If the magistrate fails to reduce the testimony of the witnesses to writing as directed in this section, that fact furnishes no good reason for dismissing the proceedings, on motion, in the district court. *Gribble v. The State*, 3 Iowa, 217.

SEC. 4118. [Discharge ordered: costs, etc.]—If it appear that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged, and the complainant may be ordered to pay the costs of the proceeding if the magistrate regard the complaint as unfounded and frivolous, and, unless when the proceeding is before a judge of the supreme, district, or circuit court, may issue execution therefor, and when the proceeding is before a judge of the supreme, district, or circuit court, he shall transmit the complaint, affidavits, warrant, and order, to the clerk of the district court of the county, who shall file the same, make a memorandum thereof in the judgment docket, and issue execution therefor immediately.

SEC. 4119. [Defendants bound over.]—If there be just reason to fear the commission of the offense the person complained of shall be required to enter into an undertaking in such sum as the magistrate may direct, with one or more sufficient sureties, to abide the order of the district court of the county at the next term thereof, and in the meantime to keep the peace towards the people of this state, and particularly towards the person against whom, or whose property, there is reason to fear the offense may be committed.

SEC. 4120. [Committed to jail.]—If the undertaking required by the last section be given, the party complained of must be discharged. If he do not give it, the magistrate must commit him to prison, specifying in the warrant the requirements to give security, the amount thereof, and the omission to give the same.

SEC. 4121. [May be discharged.]—If the person complained of be committed for not giving an undertaking, he may be discharged by a magistrate upon giving the same.

SEC. 4122. [Disposition of papers.]—The undertaking, together with the complaint, affidavits, if any, and other papers in the proceeding, must be returned by the magistrate to the district court of the county by the first day of the next term thereof.

SEC. 4123. [Assault in the presence of court or magistrate.]—Any person who, in the presence of a court or magistrate, shall assault or threaten to assault another, or to commit an offense against the person or property of another, or contends with another with angry words, may be ordered, without the process, to enter into an undertaking to keep the peace for a period of time not exceeding beyond the next term of the district court of the county as hereinbefore provided, and in case of his omission to comply with said order, he may be committed accordingly.

IN DISTRICT COURT.

SEC. 4124. [**Undertaking to keep the peace.**].—The district court, may on the conviction of any person for an offense against the person or property of another, when necessary for the public good, require the defendant to enter into an undertaking to keep the peace as hereinbefore provided, and on his omission to do so, may commit him accordingly.

SEC. 4125. [**Same.**].—A person who entered into an undertaking to keep the peace, when required by a magistrate as hereinbefore provided, must appear on the first day of the next term of the district court of the county, and if the complainant appear and the person bound by the undertaking does not appear, the court may forfeit his undertaking, and order the same to be prosecuted unless his default be excused.

SEC. 4126. [**Judgment.**].—If the principal in an undertaking appear, and the complainant does not appear, or if neither of the parties appear, the court, shall enter an order discharging the undertaking; but if both parties appear, the court shall hear their proofs, and may require a new undertaking in such sum as it shall prescribe for a period not exceeding one year; and may commit the defendant until the same be given. Judgment shall be entered against the party held to keep the peace for all the costs of the proceeding; but if it is made to appear to the court that the proceeding was instituted without probable cause, the court may render judgment against the complainant for such costs.

The failure of the prosecuting witnesses to appear at the district court and further prosecute a defendant who has, upon his complaint, been bound over to keep the peace, does not warrant a judgment against the complainant for the costs that have been incurred. *The State v. Holliday*, 22 Iowa, 397; *The State v. Lathers*, 16 Id., 406; *Gribble v. The State*, 3 Id., 217.

Where a party has been required by a magistrate to enter into bonds to keep the peace and he is discharged from his recognizance by the district court, he is entitled also to be discharged from the payment of costs in that court, but not from the prior costs before the magistrate. *Gribble v. The State*, 3 Id., 217.

The inquiry in the district court is as to whether there is still any just reason to fear a commission of the offense against the person or property of the complainant. The jurisdiction of the district court is in no sense in the nature of an appeal from the decision of the magistrate. It will be presumed that the magistrate has properly exercised his authority. *Id.*

In the district court the fullest investigation may be had, and neither party is restricted to the evidence heard before the magistrate. *Id.*

A party bound over to keep the peace in a preliminary examination before a magistrate upon a complaint of having threatened to commit a public offense was held not a competent witness in his own behalf. *The State v. Darrington*, 47 Id., 518. But see chapter 168, laws of 1878, section 1.

Where the defendant was required by a justice of the peace to enter into a recognizance to keep the peace, and at the next term of the district court he appeared and demanded a trial but the complainant did not appear, it was held that the court was authorized under this section of the code to refuse a trial, and to discharge the defendant and render judgment against him for costs. *The State v. White*, 47 Id., 555.

SEC. 4127. [**When undertaking broken.**].—An undertaking to keep the peace is broken by the forfeiture of the same, by the court, as hereinbefore provided, or upon the conviction of the party bound by the undertaking of a breach of the peace.

SEC. 4128. [**District attorney to bring suit.**].—Upon the district attorney producing evidence of such conviction to the district court to which the undertaking is returned, the court must order the undertaking to be prosecuted, and the district attorney must, thereat, commence an action upon it.

SEC. 4129. [**Record of conviction.**].—In the action, the offense stated in the record of conviction must be alleged as the breach of the undertaking, and is conclusive evidence thereof.

CHAPTER 5.

OF VAGRANTS.

SECTION 4130. [**Who are.**]—The following persons are vagrants: All persons who tell fortunes, or where lost or stolen goods may be found; all common prostitutes and keepers of bawdy houses or houses for the resort of prostitutes; all habitual drunkards, gamesters, or other disorderly persons; all persons wandering about and having no visible calling or business to maintain themselves; all persons begging in public places, or from house to house, or procuring children so to do; all persons going about as collectors of alms for charitable institutions under any false or fraudulent pretenses; all persons playing or betting in any street or public or open place, at or with any table or instrument of gaming at any game or pretended game of chance.

SEC. 4131. [**Complaint: warrant: arrest.**]—Upon complaint made on oath to any magistrate against any person as being vagrant within his local jurisdiction as defined in this code, he shall issue a warrant for the arrest of such person, and his examination, and the complaint, warrant and arrest shall be governed by the provisions of the last chapter, as nearly as practicable, except as hereinafter provided.

SEC. 4132. [**Duty of peace officers.**]—All peace officers shall arrest any vagrant whom they may find at large and not in the care of some discreet person, and take him before some magistrate of the county, city or town in which the arrest is made.

SEC. 4133. [**Time of making arrest.**]—If the arrests authorized in the last two sections are made during the night, the officer must keep the person arrested in confinement until the next morning, and if arrests are made within the local jurisdiction of the police or city court, the persons arrested must be taken before a justice of such court, unless he be absent.

SEC. 4134. [**Security for good behavior.**]—If it appear by the confession of such person, or by competent testimony, that such person is a vagrant, the magistrate before whom he is brought may require of such person an undertaking, with sufficient surety, for good behavior for the term of one year thereafter.

SEC. 4135. [**Committed in default of security.**]—The magistrate shall make up, sign, and file with the clerk of the district court of the county, a record of conviction of such person as a vagrant, specifying generally the nature and circumstances of the charge, and shall, in default of such security being given, by warrant under his hand, commit such vagrant to the county jail of the county, city or town, as the case may be, until such security be found, or such vagrant discharged according to law.

SEC. 4136. [**Breach of undertaking.**]—The committing of any of the acts which constitute such person so bound a vagrant, shall be deemed a breach of the condition of such undertaking.

SEC. 4137. [**New security.**]—On a recovery upon any such undertaking, the court before which such recovery may be had may, in its discretion, either require new sureties for good behavior, or may commit such vagrant to the common jail of the county for any time not exceeding six months.

SEC. 4138. [**Discharge of bail.**]—Any person committed to jail for not finding sureties for good behavior, may be discharged by any magistrate upon giving such sureties for good behavior as were originally required of such person.

TRIAL IN DISTRICT COURT.

SEC. 4139. [**Hearing in district court.**]—The district court to which the papers are returned, shall, on demand of the defendant, impanel a jury to inquire into and determine the truth of the charge made against him; and the rules and regulations of law governing said court in the trials or misdemeanors shall be applicable to and govern it in the trial herein contemplated.

SEC. 4140. [**Judgment.**]—If no jury be demanded, the district court may revise such conviction and discharge such vagrant from the undertaking or confinement absolutely, or upon sureties for good behavior, in its discretion.

SEC. 4141. [**Imprisonment.**]—Such district court may, in its discretion, order any such vagrant to be kept in the common jail for any time not exceeding six months at hard labor.

SEC. 4142. [**Labor.**]—If there be no means in such jail for employing offenders at hard labor, such court may direct the keeper thereof to furnish such employment as it shall specify to such vagrant as may be committed thereto either by a justice or any court, and for that purpose to purchase any necessary raw materials and implements, not exceeding such amount as the court shall prescribe, and to compel such persons to perform such work as shall be allotted to them.

SEC. 4143. [**Expenses.**]—The expenses incurred in pursuance of such order shall be audited by the board of supervisors of the county, and paid out of the county treasury.

SEC. 4144. [**Proceeds of labor.**]—One-half of the net proceeds of such labor shall be paid to the person earning the same, upon his discharge from imprisonment, and the other half shall be paid into the county treasury for the use of the county.

(CHAPTER 69, LAWS OF 1876.)

VAGRANTS.

An Act to restrain vegrancy and common beggary.

SECTION 1. [**Male vagrants to be kept at hard labor.**]—(*Be it enacted by the general assembly of the state of Iowa:* That if any male person, physically able to perform manual labor, shall be found in a state of vagrancy or practicing common begging, he shall, on conviction thereof, be fined in any sum not exceeding fifty dollars, and sentenced to hard labor in the jail of the county, for which *they* [he] shall receive a credit at the rate of seventy-five cents per day until said fine and cost of prosecution, and accruing costs, shall be paid.

SEC. 2. [**Duty of boards of supervisors.**]—The board of supervisors of the several counties are hereby authorized to provide for carrying the provisions of the foregoing section into effect, for which purpose they may, by order entered upon their journals, declare that the jail shall extend to and include the lands of the proper county, and every form and kind of labor commonly performed therein by male persons.

(Took effect by publication in newspapers, March 16, 1876.)

CHAPTER 6.

OF RESISTANCE TO PROCESS AND SUPPRESSION OF RIOTS.

SECTION 4145. [**Calling out power of county.**].—When the sheriff or other officer authorized to execute process, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may command as many male inhabitants of his county as he may think proper, and any military companies in the county, armed and equipped, to assist him in overcoming the resistance, and if necessary, in seizing, arresting and confining the resisters, and their aiders and abettors, to be punished by law.

SEC. 4146. [**Cetify to court names of resisters.**].—The officer shall certify to the court from which the process issued, the names of the resisters, and their aiders and abettors, to the end that they may be punished for a contempt.

SEC. 4147. [**Refuses to assist.**].—Every person commanded by a public officer to assist him in the execution of process, as provided in section four thousand one hundred and forty-five of this chapter, who, without lawful cause, refuses or neglects to obey such command, is guilty of a misdemeanor.

SEC. 4148. [**When power of county not sufficient.**].—If it appear to the governor that the power of any county is not sufficient to enable the sheriff to execute process delivered to him, he may, on the application of the sheriff, order such posse or military force from any other county or counties as is necessary.

SEC. 4149. [**Unlawful assemblages.**].—When persons to the number of twelve or more, armed with dangerous weapons, or persons to the number of thirty or more, whether armed or not, are unlawfully or riotously assembled in any city or town, the judges, sheriff and his deputies if they be present, the mayor, aldermen, marshal, constables, and justices of the peace of such city or town, must go among the persons assembled, or as near them as may be safe, and command them, in the name of the state, immediately to disperse.

SEC. 4150. [**Arrest.**].—If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, that they may be punished according to law, and for that purpose may command the aid of all persons present or within the county.

SEC. 4151. [**Refusing to aid.**].—If any person commanded to aid the magistrate or officer, without good cause neglect to do so, he is guilty of a misdemeanor.

SEC. 4152. [**Failure of duty.**].—If a magistrate or officer having notice of an unlawful or riotous assembly as above provided in this chapter, neglect to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the persons, he is guilty of a misdemeanor.

SEC. 4153. [**Assembly will not disperse.**].—If the persons so assembled and commanded to disperse, do not immediately disperse, any two of the magistrates or officers before mentioned, may command the aid of a sufficient number of persons, and may proceed in such manner as, in their judgment, is necessary to disperse the assembly and arrest the offenders.

SEC. 4154. [**When armed force is called out.**].—When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, it must obey such orders in relation thereto as have been made by the governor, or by a judge of the supreme, district or circuit court, a sheriff or magistrate, as the case may be.

CHAPTER 7.

OF LOCAL JURISDICTION OF PUBLIC OFFENSES.

SECTION 4155. [Who liable to laws of this state.]—Every person, whether an inhabitant of this or any other state or country, or of a territory, or district of the United States, is liable to punishment by the laws of this state for a public offense committed by him therein, except where it is cognizable exclusively in the courts of the United States.

SEC. 4156. [Of district court.]—The local jurisdiction of the district court, is of offenses committed within the county in which it is held, and of such other cases as are, or may be, provided by law.

SEC. 4157. [Offenses commenced without but consummated within.]—When the commission of a public offense commenced without this state is consummated within the boundaries thereof, the defendant is liable to punishment therefor in this state, though he was without the state at the time of the commission of the offense charged; *provided*, he consummated the offense through the intervention of an innocent or guilty agent within this state, or any other means proceeding directly from himself; and in such case the jurisdiction is in the county in which the offense is consummated.

The stealing of property in another state and bringing it into this state is not the commencement of an offense in another state and its consummation in this, within the meaning of this section. *The State v. Benyett*, 14 Iowa, 479.

When stolen property is brought into this state, the crime of larceny is completed in any county into which the property is brought by the thief, and he may be therein indicted and convicted. *Id.*

SEC. 4158. [Fighting duel without the state.]—When an inhabitant or resident of this state, by previous appointment or engagement, fights a duel, or is concerned as second therein, without the jurisdiction of the state, and in such duel a wound is inflicted upon any person whereof he die within this state, the jurisdiction of the offense is in the county where the death may happen.

SEC. 4159. [Offense part in one county.]—When a public offense is committed in part in one county and part within another, or when the acts or effects constituting, or requisite to the consummation of the offense, occur in two or more counties, jurisdiction is in either county.

The jurisdiction of a case of abortion under section 4159 of the code, is in the county where the medicine intended to procure a miscarriage was administered, and not in another county in which the miscarriage took place. This section (4160) of the code does not apply to such a case, for the reason that the administering the medicine with the intent charged makes the crime complete. *The State v. Hollenbeck*, 36 Iowa, 112.

Where, by this section of the code, the jurisdiction of a crime lies in either of two counties, the court which first obtains jurisdiction of the *person of the defendant* retains it to the end, to the exclusion of the court of the other county, even though he may have been indicted first in such other county. *Ex parte Baldwin*, 69 *Id.*, 502.

SEC. 4160. [Near boundary of two counties.]—When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

Where jurisdiction is taken under this section and the case tried in a county other than the one in which the offense was committed, it is not entitled to recover the costs of the prosecution from such county under section 3841 of the code. *Floyd County v. Cerro Gordo County*, 47 Iowa, 186.

In the *State v. Pugsley*, 38 N. W. Rep., 498, it was held that this section which provides that "where a public offense is committed on the boundary of two or more counties, or within 500 yards thereof, jurisdiction is in either," was not in conflict with section 9, article 1, of the constitution which provides that "the right of trial by jury shall remain inviolate" when a similar statute was in force when the first constitution was adopted and has remained in force ever since.

SEC. 4161. [On boats, rafts, etc.]—When an offense is committed within the jurisdiction of this state on board a boat, raft, or vessel navigating a river, lake,

or canal, or lying therein in the prosecution of her voyage, the jurisdiction is in any county through which the boat, raft, or vessel is navigated in the course of her voyage, or in the county where the voyage shall terminate.

SEC. 4162. [Jurisdiction in any county in certain cases.]—The jurisdiction of an indictment for the crime of forcibly, and without lawful authority seizing and confining another, or kidnapping him with intent, against his will, to cause him to be confined or imprisoned within the state, or to be sent out of the state; or of taking or enticing away a child under the age of twelve years from the parents, guardian, or other person having the legal charge of the person, with the intent to detain or conceal such child; or of taking or enticing away an unmarried female of previously chaste character under the age of fifteen years, for the purpose of prostitution; or of taking any woman unlawfully and against her will, or by force, menace, or duress, compelling her to marry against her will; or of seducing and debauching any unmarried woman of previously chaste character, is in any county in which the offense is committed, or into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the offender in instigating, procuring, promoting, aiding in, or being an accessory to the commission of the offense, or in abetting the parties concerned therein.

SEC. 4163. [Bigamy.]—When the offense of bigamy is committed in one county, and the defendant is apprehended in another, the jurisdiction is in either county.

SEC. 4164. [When conviction a bar.]—When the offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to prosecution or indictment thereof in another.

CHAPTER 8.

THE TIME OF COMMENCING CRIMINAL ACTIONS.

SECTION 4165. [Murder.]—A prosecution for murder may be commenced at any time after the death of the person killed.

SEC. 4166. [Limitations within eighteen months.]—An indictment for a public offense must be found within eighteen months after the commission thereof, in the following cases, and not after:

1. Taking or enticing away an unmarried female, under the age of fifteen years, for the purpose of marriage or prostitution;
2. Seducing or debauching an unmarried female, of previously chaste character;
3. For rape and adultery;
4. For an assault with intent to commit a rape.

The statute of limitations cannot be properly set up by demurrer, by instructions to the jury, or by motion for a new trial; it must be specially pleaded so that the state may have an opportunity to reply. *The State v. Hussey*, 7 Iowa, 409.

An indictment for seduction if not found within one year after the commission of the offense, is barred by the statute of limitations. *The State v. Groome*, 10 Id., 308.

The precise time when the crime of seduction was committed need not be alleged in an indictment, time not being a material ingredient of the offense. *The State v. Deitrick*, 51 Id., 467.

An indictment charging the commission of adultery on a specific day, "and on divers other days and times within eighteen months prior to the finding of this indictment." Held not bad for duplicity, because, time not being an ingredient of the offense, it was competent to prove the commission of the crime on any day within the eighteen months prior to the finding of the indictment, and the quoted words were properly rejected as surplusage. *The State v. Briggs*, 68 Id., 416.

SEC. 4167. [Three years.]—In all other cases an indictment for public offense

must be found within three years after the commission thereof, and not afterwards.

SEC. 4168. [**Misdemeanor triable before a justice.**—A prosecution for a misdemeanor, triable before a justice of the peace, must be commenced within one year after the commission thereof, and not after.

SEC. 4169. [**Defendant out of the state.**—If, when the offense is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time limited after his coming into the state, and no period during which the party charged was not usually and publicly resident within this state is a part of the limitation.

SEC. 4170. [**When indictment is found.**—An indictment is found, within the meaning of this chapter, when it is duly presented by the grand jury in open court and there received and filed.

CHAPTER 9.

OF FUGITIVES FROM JUSTICE.

SECTION 4171. [**Agents appointed to apprehend: expense.**—The governor of the state may, in any case authorized by the constitution and laws of the United States, appoint agents to demand of the executive authority of any other state or territory, or from the executive authority of any foreign government, any fugitive from justice charged with treason or felony, and the accounts of the agents appointed for that purpose must be audited by the auditor of state and paid out of the state treasury.

(As amended by ch. 65, 17th g. a.) [**Expenses to be allowed agents.**—[The expenses to be allowed agents for returning fugitives from justice shall be the fees paid the officers of the state upon whose governor the requisition is made; and the agent shall receive not exceeding ten cents per mile, each way, for all necessary travel of himself, and for each fugitive five cents per mile additional for the number of miles which such fugitive shall have been conveyed.]

[**Form of bill of expenses.**—Bills for such expenses shall be made out in such manner as to show the actual route traveled, and the number of miles, and be verified by affidavit, and be accompanied by proof that the fugitive for whom requisition was made has been returned and delivered into the custody of the proper authority; *provided*, that the state shall in no case pay the costs of returning the fugitive where he has not been tried, unless it shall be shown to the satisfaction of the governor that the want of trial has not been owing to any fault or neglect on the part of the person or persons interested in the prosecution.]

SEC. 4172. [**No compensation except provided by law.**—No compensation, fee, or reward of any kind, can be paid to or received by a public officer of this state for a service rendered or expense incurred in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this state, or detaining him therein, except as provided by law.

Defendant became surety on an appeal bond of one who had been convicted of a felony, and who, pending the appeal, fled to the state of Kansas. Defendant then, in order to secure the fugitive and surrender him in his own exoneration, agreed to pay to the plaintiff, who was the deputy sheriff of the county, a reasonable compensation for securing and returning the fugitive. The plaintiff, under a requisition from the governor of Iowa, proceeded to Kansas and arrested and returned the fugitive and delivered him to the sheriff of the proper county, and this action was brought to recover the reasonable compensation promised. *Held*, that the agreement was repugnant to this section of the code, which provides that officers shall receive no other compensa-

tion for such services than that provided in section 4171 of the code, and that no recovery could be had. *Day v. Townsend*, 70 Iowa, 538.

SEC. 4173. [**Misdemeanor.**]-A violation of the last section is a misdemeanor.

SEC. 4174. [**Executive warrants: for fugitive: when to issue.**]-No executive warrant for the arrest and surrender of any person demanded by the executive authority of any state or territory, as a fugitive from the justice of such state or territory, and no requisition upon the executive authority of any other state or territory, for the surrender of any person as a fugitive from the justice of this state shall be issued, unless the requisition from the executive authority of such other state or territory, or the application for such requisition upon the executive authority of such other state or territory shall be accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or a duly attested copy of a complaint, made before a court or magistrate authorized to receive the same.

A citizen and resident of Iowa who is charged with having been constructively guilty of an offense in another state, upon which a requisition is based, but who never in fact has fled therefrom, is not a fugitive from justice within the meaning of the constitution. *Jones v. Leonard*, 50 Iowa, 106.

The determination of the governor that the sworn evidence accompanying the requisition is sufficient to establish the facts upon which the requisition is based, is not conclusive of the matters therein set forth. *Id.*

The statute providing for the arrest and surrender of fugitives contemplates that a charge of crime against the person to be arrested and delivered up must be made in the state where the crime was committed, in the form of an indictment, information or accusation known to the law of such state, before some court, magistrate, or officer thereof. *State v. Hufford*, 28 *Id.*, 391.

SEC. 4175. [**Requisition from another state.**]-Whenever a demand is made upon the governor of this state by the executive of any other state or territory, in any case authorized by the constitution and laws of the United States, for the delivery of any person charged in such state or territory with any crime, if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this state, he shall issue his warrant under the seal of the state authorizing the agent who makes such demand, either forthwith or at such time as may be designated in the warrant, to take and transport such person to the line of this state at the expense of such agent, and may also by such warrant require all peace officer to afford all needful assistance in the execution thereof.

EXAMINATION BY MAGISTRATE.

SEC. 4176. [**Warrant of magistrate: when to issue.**]-If any person be found in this state charged with any crime committed in any other state or territory, and liable by the constitution and laws of the United States to be delivered over upon the demand of the governor thereof, any magistrate may, upon complaint on oath setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant for the arrest of such person.

A person arrested in this state, under section 4176 of the code, charged before a magistrate with the crime of murder in the second degree, committed in another state, is upon an adjournment of the examination entitled to bail for his appearance before the magistrate on the day to which the case is adjourned; and in case of his failure to appear at that time according to the terms of his recognizance, the same may be declared forfeited, and an action maintained thereon against the bail. *The State v. Hufford*, 23 Iowa, 579.

SEC. 4177. [**Bail.**]-If, upon examination, it appear that there is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the governor, he shall, if not charged with murder, be required to enter into an undertaking, with sufficient surety in a reasonable sum, to appear before such magistrate at a future day, allowing reasonable time to obtain the warrant from the governor, and abide the order of such magistrate in the premises.

This chapter contemplates that a charge of the crime against the person to be arrested and delivered up must be made in the state where the crime was committed, in the form of an indictment, information or accusation known to the law of such state, before some court or officer thereof. *The State v. Hufford*, 28 Iowa, 391.

Unless a charge is thus made in the state from which the defendant is an alleged fugitive, a magistrate of this state has no jurisdiction under the statute to hold him to bail, and a bond given by the accused, in such case, is invalid, and though voluntarily executed does not estop the defendant from urging want of jurisdiction in the magistrate. *Id.*

A justice of the peace has no jurisdiction to hold to bail or take bail of a fugitive from justice, arrested under the provisions of section 4176 of the code, without a charge of crime by indictment or otherwise, having been made against such fugitive in the state where the crime was committed, and a bail bond thus taken was invalid. *Id.*

SEC. 4178. [**Committed.**]—If such person does not give bail, or if he is charged with the crime of murder, he must be committed to prison, and there detained until such day in like manner as if the offense charged had been committed within this state.

SEC. 4179. [**Forfeiture of bail.**]—A failure of such person to attend before the magistrate at the time and place mentioned in the undertaking, is a forfeiture thereof.

SEC. 4180. [**Discharge.**]—If such person appear before the magistrate upon the day ordered, he must be discharged unless he is demanded by some person authorized by the warrant of the governor to receive him, or unless the magistrate see good cause to commit him or to require him to enter into a new undertaking for his appearance at some other day to await a warrant from the governor.

SEC. 4181. [**Re-arrest on governor's warrant.**]—Whether the person so charged be bound to appear, be committed, or discharged, any person authorized by the warrant of the governor may at any time take him into custody, and the same is a discharge of the undertaking, if there be one.

SEC. 4182. [**Costs.**]—The complainant in any such case is answerable for all the costs and charges, and for the support in prison of any person so committed, and the magistrate before issuing his warrant or hearing the cause, must require the complainant to give security for the payment of all such costs, or may require them in advance.

SEC. 4183. [**Condition as to expense before appointing agent.**]—Upon the appointment of any agent for the arrest of a fugitive from justice under the provisions of this chapter, the governor is hereby authorized to make it a condition upon such appointment, and the issue of the writ, that the same shall be executed without expense to the state, if in his opinion justice and equity so require.

SEC. 4184. [**When expenses are paid by the state.**]—When, in the opinion of the governor, expenses incurred in the arrest of fugitives from justice should be paid by the state, such expenses shall be made out by items in detail, and sworn to, and approved by him and at least two other members of the executive council, and when so approved shall be audited and paid out of the general revenue of the state, and this section shall be sufficient authority for the payment of the same.

CHAPTER 10.

OF WARRANTS OF ARREST ON PRELIMINARY INFORMATION.

SECTION 4185. [**Complaint.**]-When complaint is made before a magistrate of the commission of some designated public offense; triable on indictment in the county in which such magistrate has local jurisdiction, and charging some person with the commission thereof, he may issue a warrant for the arrest of such person. The complaint may be in form substantially the same as provided in section four thousand six hundred and sixty-three of chapter fifty-two of this title.

SEC. 4186. [**Warrant: form of.**]-The warrant of arrest on a preliminary information, must be substantially in the following form:

COUNTY OF.

THE STATE OF IOWA,

To any Peace Officer of the State:

Preliminary information upon oath having been this day laid before me that the crime of (designating it,) has been committed, and accusing A. B. thereof:

You are, therefore, commanded forthwith to arrest the said A. B. and bring him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at this day of A. D. 18..

C.... D...., *Justice of the Peace.*
(or as the case may be.)

Subpœna as witnesses E....F.... and G....H....

SEC. 4187. **The warrant must specify** the name of the defendant, and if it be unknown to the magistrate, may designate him by any name. It must also state by name or general description, an offense which authorizes the magistrate to issue the warrant, the time of issuing it, and the county, city, town, township or village where it was issued, and must be signed by the magistrate with his name of office.

SEC. 4188 [**Directed.**]-It must be directed to "any peace officer in the state."

SEC. 4189. [**If the offense is a misdemeanor.**]-If the offense stated in the warrant be a misdemeanor, the magistrate issuing it must make an indorsement on the warrant as follows: "Let the defendant, when arrested, be admitted to bail in the sum ofdollars, if he desires to give bail," and fix in the indorsement the amount in which bail may be taken.

SEC. 4190. [**How served.**]-The warrant of arrest may be delivered to any peace officer for execution, and executed in any county in the state.

SEC. 4191. [**If offense be felony.**]-If the offense stated in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued it at the place mentioned in the command thereof, or, in the event of his absence or inability to act, before the nearest or most accessible magistrate in the county in which it was issued.

Where a defendant charged with a felony on a preliminary information before a justice of the peace, is arrested in another county, he is not entitled to be taken before a magistrate thereof for the purpose of giving bail, and recognizance taken by such magistrate for the appearance of the defendant at the district court of the county whence the warrant was issued, is under this section of the code invalid as a recognizance. *The State v. Cannon*, 34 Iowa, 322.

But the obligors on such bond, though not valid as a statutory bond, may nevertheless be made liable thereon as an obligation entered into by them at the request and for the benefit of the accused.

Id.

SEC. 4192. [**Bail in case of misdemeanor.**]—If the offense stated in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate or clerk of the district court of the same county in which he was arrested, for the purpose of giving bail, and the magistrate or clerk before whom he is taken in such county, must take bail from him accordingly for his appearance at the district court of the county in which the warrant was issued, on the first day of the next term thereof.

SEC. 4193. [**Order of discharge of defendant.**]—On taking bail in the case provided for in the preceding section, the magistrate or clerk taking such bail must make on the warrant an order, signed by him with his name of office, for the discharge of the defendant, substantially as follows:

COUNTY OF (here name the county),

THE STATE OF IOWA.

To (here state the name of the officer who has the defendant in custody, with the addition of his name of office thus, A. B. sheriff of county, according to the truth).

The defendant named in the warrant of arrest in your custody, under the authority thereof, for the offense therein designated, having given sufficient bail to answer the same, by the undertaking herewith delivered to you, you are commanded forthwith to discharge him from custody, and without unnecessary delay deliver this order, together with said undertaking of bail, to the clerk of the district court of county, on or before the first day of the next term thereof.

Dated at, this day of, A. D., (or as the case may be).

....., *Justice of the Peace.*

(or as the case may be).

And must deliver the warrant with the order thereon, together with the undertaking of bail, to the officer having the defendant in custody, who shall forthwith discharge the defendant from arrest and without unnecessary delay, and on or before the first day of the next term of the court at which the defendant is required to appear, deliver or transmit by mail or otherwise the warrant with the order thereon, together with the undertaking or bail, to the clerk of the court at which the defendant is required to appear, who shall forthwith file the same in his office; and the magistrate who issued the warrant shall return to the clerk the affidavits of the informant, and his witnesses upon which the warrant was issued, on or before the first day of the next term of the court, and the clerk shall, when the affidavits are returned by the magistrate, file the same in his office, with the warrant and undertaking of bail.

SEC. 4194. [**If bail be not given.**]—If bail be not forthwith given by the defendant, as provided in the two preceding sections, the magistrate or clerk must redeliver to the officer the warrant, and the officer must take the defendant before the magistrate who issued it, at the place mentioned in the command thereof, or, if he be absent or unable to act, before the nearest or most accessible magistrate in the county in which the warrant was issued.

SEC. 4195. [**Proceedings after arrest.**]—In all cases when the defendant is arrested, he must be taken before the magistrate or clerk without unnecessary delay, and the officer must at the same time deliver to the magistrate or clerk the warrant, with his return thereon, indorsed and subscribed by him in his name of office.

SEC. 4196. [**Same.**]—If the defendant be taken before a magistrate in the county in which the warrant was issued, other than the magistrate who issued it as hereinbefore provided, the affidavits on which the warrant was issued must be sent to such magistrate, or if they cannot be procured the informant and his witnesses must be subpoenaed to make new affidavits.

CHAPTER 11.

OF ARREST, AND BY WHOM AND HOW MADE.

SECTION 4197. **Arrest is the taking of a person in custody** in a case, and in the manner authorized by law.

SEC. 4198. [**By whom.**]—An arrest may be made by a peace officer, or by a private person.

SEC. 4199. [**With warrant.**]—A peace officer may make an arrest in obedience to a warrant delivered to him.

SEC. 4200. [**Without, by peace officer.**]—A peace officer without a warrant may make an arrest:

1. For a public offense committed or attempted in his presence;

2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

The power to detain an offender in custody for a *reasonable* length of time is inherent to the duties of a peace officer, and may be pleaded in justification in an action for false imprisonment. *Hutchison v. Sangster*, 4 G. Greene, 340.

SEC. 4201. [**By private person.**]—A private person may make an arrest:

1. For a public offense committed or attempted in his presence;

2. When a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

SEC. 4202. [**Magistrate may orally order arrest.**]—A magistrate may orally order a peace officer, or a private person, to arrest any one committing, or attempting to commit, a public offense in the presence of such magistrate, which order shall authorize the arrest.

SEC. 4203. [**When made.**]—An arrest may be made on any day, or at any time of the day or night.

SEC. 4204. [**How to be made.**]—The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, of his authority to make it, and that he is a peace officer, if such be the case, and require him to submit to his custody, except when the person to be arrested is actually engaged in the commission of, or attempt to commit the offense, or flies immediately after its commission, and if acting under the authority of a warrant, he must give information thereof, and show the warrant if required.

SEC. 4205. [**When resisted.**]—When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

SEC. 4206. [**May break and enter premises.**]—To make an arrest if the offense be a felony, a private person, if any public offense, a peace officer acting under the authority of a warrant, or without a warrant, may break open a door or window of a house in which the person to be arrested may be, or in which they have reasonable grounds for believing he is, after having demanded admittance and explained the purpose for which admittance is desired.

SEC. 4207. [**In order to get out.**]—Any person who has lawfully entered a house for the purpose of making an arrest under the provisions of the preceding section may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself; and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, and by his command, lawfully entered for the purpose of making an arrest, and detained therein.

SEC. 4208. [**Refuses to assist in making arrest.**]—Any person making an arrest, may orally summon as many persons as he deems necessary to aid him in

making the arrest, and all persons failing to obey such summons shall be guilty of a misdemeanor.

SEC. 4209. [**Arrest: how made.**].—An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest.

SEC. 4210. [**Force.**].—No unnecessary force or violence shall be used in making an arrest.

SEC. 4211. [**How created.**].—A person arrested is not to be subjected to any more restraint than is necessary for his detention.

SEC. 4212. [**May take weapons from persons arrested.**].—He who makes an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken to be disposed of according to law.

SEC. 4213. [**Escape.**].—If a person, after being arrested, either by a peace officer without a warrant, or by a private person, escape, or be rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him in any part of the state, and for that purpose may, if necessary, break open the door or window of a house in which he may be, or in which he has reasonable grounds to believe he is, after having stated his purpose and demanded admittance, and when the person escaping or rescued was in custody under a warrant or commitment, this may be done at any time under the original warrant or commitment.

SEC. 4214. [**Arrest by bystander.**].—A peace officer may take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

SEC. 4215. [**When arrest is by private person.**].—A private person who has arrested another for the commission of an offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer.

SEC. 4216. A private person who makes an arrest and delivers the person arrested to a peace officer, must also accompany the officer before the magistrate.

SEC. 4217. [**By officer with warrant.**].—An officer making an arrest in obedience to a warrant, shall proceed with the person arrested as commanded by the warrant, or as provided by law.

An officer serving a warrant would be authorized to discharge the prisoner upon his giving bail in the required amount. *The State v. Archer*, 48 Iowa, 310, 312.

SEC. 4218. [**When without warrant.**].—When an arrest is made without a warrant, whether by a peace officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made; and the grounds on which the arrest was made shall be stated to the magistrate by affidavit, subscribed and sworn to by the person making the statement before the magistrate, in the same manner as upon a preliminary information, as nearly as may be.

HEARING BEFORE MAGISTRATE.

SEC. 4219. [**Magistrate may order information to be filed.**].—If the magistrate believes from the statements in the affidavit that the offense charged is triable in the county in which the arrest was made, and that there is sufficient ground for a trial or preliminary examination, as the case may require, and that it will not be inconvenient for the witnesses on the part of the state that such trial or preliminary examination should be had before him, he shall proceed as if the person arrested had been brought before him on arrest under a warrant, and if the case be one within his jurisdiction to try and determine, shall order an information to be filed against him.

SEC. 4220. [May order hearing to take place before another magistrate.]—If the magistrate believes from the statements in the affidavit that the offense charged is triable in the county in which the arrest is made, and that there is sufficient ground for a trial or preliminary examination, and that it will be more convenient for the witnesses on the part of the state that such trial or examination should be had before some other magistrate, he shall, by a written order by him signed with his name of office, commit the person arrested to a peace officer, to be by him taken before such magistrate in the same county who has jurisdiction to try or examine the charge as the case may require, and as shall be convenient for the witnesses on the part of the state, and deliver the affidavit and the order of commitment to the peace officer, who shall proceed with the person arrested as directed by the order; and such magistrate, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and, if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested.

SEC. 4221. [When the offense is triable in another county.]—If the magistrate believes from the statements in the affidavit that the offense charged is triable in a county different from that in which the arrest is made, and that there is sufficient ground for a trial or preliminary examination, he shall, by a written order by him signed with his name of office, commit the person arrested to a peace officer, to be by him taken before a magistrate in the county in which the offense is triable, who has jurisdiction to make either preliminary examination into the charges, or try and determine the same, as the case may require, and, if the offense be a misdemeanor only triable on indictment, shall fix in the order the amount of bail which the person arrested may give for his appearance at the district court of the county in which the offense is indictable, on the first day of the next term thereof, to answer an indictment.

SEC. 4222. [Bail: commitment: discharge.]—If bail be given as provided in the preceding section, it may be either before the magistrate making the order, or the magistrate in the county in which the offense is triable before whom he is taken under the order, or a magistrate of any county through which he passes in going from the county in which the arrest was made to that in which the offense is triable, or the clerk of the district court of either of said counties; and, when given, the magistrate or clerk taking the same shall make on the order of commitment an order for the discharge of the person arrested from custody, who shall forthwith be discharged accordingly, and to transmit by mail or otherwise, to the clerk of the district court of the county at which the person arrested is bound to appear, on or before the first day of the next term thereof, and as soon as it can be conveniently done after taking the bail, the affidavits, the order of commitment and discharge, together with the undertaking of the bail, who shall file the same together in his office.

SEC. 4223. [Same.]—If bail be not given as provided in the last two sections, before the magistrate in the county in which the arrest was made, or if the offense charged is a felony, or a misdemeanor, triable on information, the magistrate must deliver the affidavits and the order of commitment to a peace officer, who shall proceed with the person arrested as directed by the order, or provided by law; and the magistrate in the county in which the offense is triable, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested.

SEC. 4224. [Officer having person in custody to take him before magistrate.]—In the cases contemplated in the last three sections, the officer having the person arrested in custody, under the order, shall take him before the proper magistrate in the county in which the offense is triable, which is most

convenient for the witnesses on the part of the state, unless, in case of a misdemeanor triable on indictment as hereinbefore provided, the person arrested desires to give bail, in which case he shall take him before the most convenient magistrate in the county in which the offense with which he is charged is triable, or any county through which he passes in going from the county in which the arrest was made to the county in which the offense is triable, or before the clerk of the district court of either of said counties for the purpose of giving bail.

SEC. 4225. [**Officer's return, how made.**]—In all cases, the peace officer, when he takes a person committed to him under an order as provided in this chapter before a magistrate, or clerk of the district court, either for the purpose of giving bail, if bail be taken, or for trial or preliminary examination, must make his return on such order and sign such return with his name of office, and deliver the same to the magistrate or clerk.

CHAPTER 12.

OF PRELIMINARY EXAMINATIONS.

SECTION 4226. [**Right of defendant to counsel.**]—When the defendant is brought before the magistrate on arrest, either with or without a warrant, the magistrate must immediately inform him of the offense with which he is charged, and of his right to the aid of counsel in every stage of the proceedings.

SEC. 4227. [**Same.**]—The magistrate must allow the defendant a reasonable time to send for counsel, and, if necessary, must adjourn the examination for that purpose.

SEC. 4228. [**Examination.**]—The magistrate, immediately after the appearance of counsel, or, if the defendant require the aid of counsel, after waiting a reasonable time therefor, must proceed to examine the case; *provided, however*, that before said examination is commenced, said defendant may have a change of venue upon filing an affidavit that the magistrate is prejudiced against him, is a material witness for either party, or that the defendant cannot obtain justice before him, as affiant verily believes. On filing of such affidavit a change of venue must be allowed, and the magistrate must immediately transmit all original papers, and a transcript of the record entire in the case, to the next nearest magistrate in the township against whom no objection exists, if there be any; if not, to the next nearest magistrate in the county against whom no such objections in the opinion of the justice exists, who shall proceed with said examination as hereinafter provided. Only one such change of venue shall be allowed.

SEC. 4229. **The examination must be terminated** at one session unless the magistrate, for good cause shown, adjourn it.

SEC. 4230. **No examination can be adjourned** for a longer period than thirty days.

SEC. 4231. [**Bail.**]—If an adjournment be had for any cause, the magistrate shall commit the defendant for examination, or require him to give ample security for his appearance at the time and place to which the examination is adjourned.

SEC. 4232. **If there is no jail in the county**, the sheriff must retain the defendant in his custody until the examination.

SEC. 4233. [**Subpœnas.**]—The magistrate must issue subpœnas for any witnesses required either by the state or by the defendant, and the witnesses who appear at the examination must be examined in the presence of the defendant.

SEC. 4234. [**Depositions.**]—The deposition of a witness who resides out of the county in which the examination is had, may be taken on application of the

defendant on the order of the magistrate before any officer authorized to take depositions in civil cases; which order shall not be made until three days after the filing with the magistrate of the written interrogatories to be propounded to the witness; nor until three days after the service of notice on the state, or on the attorney who appears for the state, of the filing of such interrogatories.

SEC. 4235. [**Cross-interrogatories.**]—Before the order to take the deposition is made, the state may file cross-interrogatories to be propounded to the witness, which shall be answered by him in the deposition.

SEC. 4236. [**Read in evidence.**]—At the expiration of three days from the filing of the interrogatories, and the service of the notice thereof on the state as above provided, the magistrate may order the testimony of the witness to be taken in answer to the interrogatories and cross-interrogatories, if any, on file; and the deposition thus taken may be read as evidence on the examination; nor shall the same be excluded because of any irregularity in the taking of it, if the magistrate is satisfied that the irregularity complained of could work no substantial prejudice to the opposite party.

(Section 4237 repealed by section 2, chapter 168, of the laws of 1878.)

SEC. 4238. [**Cross-examination.**]—When the defendant testifies in his own behalf, he shall be subject to a cross-examination as an ordinary witness; *provided*, that, in the cross-examination, the state shall be strictly confined to the matters testified to in the examination in chief.

Where a defendant in a criminal prosecution testifies in his own behalf, he is subject to the same rules regulating cross-examination and impeachment as other witnesses. *The State v. Red*, 53 Iowa, 99.

TRIAL.

SEC. 4239. [**Witnesses excluded.**]—While a witness is under examination before the magistrate, he may exclude all others who have not been examined. He may also cause the witnesses to be kept separate, that they may not converse with each other until they are all examined.

SEC. 4240. [**Persons excluded.**]—The magistrate must also, upon the request of the defendant, exclude from hearing the examination all persons except the magistrate, his clerk, the peace officer who has the custody of the defendant, the attorney or attorneys representing the state, and the defendant and his counsel.

SEC. 4241. [**Testimony in writing.**]—The magistrate shall, in the minutes of the examination, write out, or cause to be written out, the substance of the testimony given on the examination by each witness examined before him, showing the name of the witness, his place of residence, and his business or profession, and the amount to which each witness is entitled for mileage and attendance.

The minutes of the testimony taken by the justice upon a preliminary examination, as prescribed in the statute are not conclusive when introduced by the defendant on his trial in the district court, as to what the witnesses testified to upon such examination. *The State v. Hull*, 26 Iowa, 292.

The minutes of evidence taken by a magistrate on a preliminary examination, or before a grand jury, are not admissible upon the trial of an indictment, for the purpose of impeaching a witness. *The State v. Hayden*, 47 Id., 11.

If the magistrate shall cause the testimony of the witnesses to be reduced to writing, he does it for his own convenience, and the county is not chargeable therefor. *Sanford v. Lee County*, 49 Id., 148.

Minutes of the testimony of a witness taken down by the magistrate in a preliminary examination before him, are not admissible in evidence against the defendant on trial. *The State v. Collins*, 32 Id., 69.

The minutes of the evidence given on a preliminary examination before a magistrate, or before the grand jury, are not admissible upon the trial for the purpose of impeaching a witness. *The State v. Hayden*, 45 Id., 11.

SEC. 4242. [**Magistrate's certificate.**]—After the examination is closed, the

magistrate must attach together the complaint, the warrant or order of commitment, if any, under which the defendant was brought before him, the minutes of the examination, including all depositions on file with him and used in the examination, and annexed thereto his certificate, which must set forth in substance the time and place of examination, and that the minutes thereof are true, and the certificate must be signed by the magistrate, with his name of office.

SEC. 4243. [**Judgment.**].—If, after hearing the testimony, it appear to the magistrate, either that a public offense has not been committed, or that there is no sufficient reason for believing the defendant guilty thereof, he must order the defendant to be discharged; and such order must be indorsed on the minutes of the examination or annexed thereto and signed by the magistrate, to the following effect: "There being no sufficient cause for believing the defendant guilty of the offense herein mentioned, or of any other offense, I order him to be discharged."

SEC. 4244. [**Same.**].—If it appears from the examination that a public offense triable on indictment has been committed, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall in like manner indorse on or annex to the minutes of the examination, an order signed by him to the following effect: "It appearing to me by the within minutes that the offense therein mentioned, or any other offense triable on indictment, according to the fact, stating generally the nature thereof, has been committed, and there is sufficient cause for believing the defendant guilty thereof, I order that he be held to answer the same."

BAIL.

SEC. 4245. [**Order admitting.**].—If bail be taken by the magistrate, the following words in substance must be added to the order mentioned in the preceding section, "and I have admitted him to bail to answer thereto by the undertaking hereto annexed," and the undertaking of bail must be annexed thereto.

When a defendant is accused of a capital offense he may be admitted to bail by the examining magistrate, when the evidence is slight, or tends to show that it was committed under mitigating circumstances and would not be punished with death. *The State v. Klingman*, 14 Iowa, 404; *The State v. Hufford*, 23 Id., 579.

Where a defendant is charged with a felony with a preliminary information before a magistrate, is arrested in another county, he is not entitled to be taken before a magistrate thereof for the purpose of giving bail. *The State v. Cannon*, 34 Id., 352.

SEC. 4246. [**Same.**].—If bail be not given by the defendant, then the magistrate must add to the order mentioned in section forty-two hundred and forty-four the following words in substance: "and that he be admitted to bail in the sum of (here state the amount), and that he be committed to the jail of the county of (here name the county) until he give such bail."

SEC. 4247. [**Mittimus.**].—If the magistrate order the defendant to be committed, he shall make out a warrant of commitment, signed by him with his name of office, and deliver it with the defendant to the officer to whom he is committed, or, if the officer be not present, to a peace officer who shall deliver the defendant into the proper custody, together with the warrant of commitment, which warrant may be in form following:

"THE STATE OF IOWA:
To the sheriff of county.

An order having been this day made by me, that A. B, (the name of the defendant) be held to answer upon a charge of (state the offense) you are commanded to receive him into your custody and detain him in the jail of the county until he be legally discharged.

Dated at this day of, A D. . . .

SEC. 4248. (*As amended by ch. 130, 18th g. a.*) [**Witnesses must give undertaking.**]—On holding the defendant to answer, the magistrate must take from each material witness examined by him on the part of the state, a written undertaking, to the effect that he will appear and testify at the court to which the defendant is bound to answer [when required in the further progress of the cause; and that he will not evade or attempt to evade the service of a subpoena], or that he will forfeit the sum of one hundred dollars.

If a witness before a magistrate on a preliminary examination refuses to comply with the order of the magistrate requiring him to enter into the undertaking with sureties for his appearance to testify, he may be committed until he does so or is legally discharged. *Markwell v. Warren County*, 53 Iowa, 422.

A witness confined in the county jail by order of a magistrate, for a failure to give security for his appearance to testify on behalf of the state in a criminal trial, cannot recover from the county his per diem as a witness for the time he is thus imprisoned. *Id.*

SEC. 4249. [**When to give security.**]—Whenever the magistrate is satisfied by oath, or otherwise, that there is reason to believe that any such witness will not fulfill his undertaking and appear and testify unless surety be required, he may order the witness to enter into a written undertaking with sureties, and in such sum as he may deem proper for his appearance.

SEC. 4250. [**Minors and married women.**]—Minors and married women who are material witnesses against the defendant, may, in like manner, be required to procure sureties for their appearance as provided in the preceding section.

SEC. 4251. [**Witness committed.**]—If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the magistrate must commit him until he comply or be legally discharged.

SEC. 4252. [**Papers returned to district court.**]—When a magistrate has discharged a defendant, or held him to answer an indictment, he must return to the district court of the county, on or before its opening, on the first day of the next term thereof, and as soon after the closing of the examination as practicable, all the papers mentioned in section four thousand two hundred and forty-two of this chapter, together with the undertaking of bail for the appearance of the defendant, and the undertakings of the witnesses, or for them, taken by him.

SEC. 4253. [**When magistrate to return papers.**]—If it appear from the examination that a public offense has been committed which is not triable on indictment, but on information only, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall retain all the papers, and forthwith order an information to be filed against the defendant, before him. If he have not jurisdiction to try and determine the same, he shall indorse on, or annex to, the minutes of the examination an order, signed by him to the following effect: "It appearing to me by the within minutes that the offense of (here state its name, or nature generally) has been committed, and that there is sufficient reason for believing the defendant guilty thereof, I order that an information be filed against him therefor before (here name some magistrate who is the nearest and most accessible in the same county, and who has jurisdiction, giving the name of office), and that the defendant be committed to any peace officer to be taken before such magistrate." And the magistrate shall thereupon cause each material witness on the part of the state to enter into a written undertaking, to the effect that he will appear forthwith before the magistrate before whom the defendant is to be taken, or that he will forfeit the sum of fifty dollars, and deliver the undertaking, with all the other papers, to a peace officer, who shall forthwith proceed as directed by the order, and take the defendant before such magistrate, and deliver all the papers with the undertakings of the witnesses to the magistrate directed in the order, and make his return thereto, and sign the same with his name of

office, and the magistrate before whom he is taken shall thereupon proceed accordingly.

SEC. 4254. (*As amended by ch. 30, 15th g. a.*) [**Costs.**]
—When the defendant is discharged, the justice shall, if he is satisfied that the prosecution is malicious or without probable cause, tax the costs against the complainant and render judgment therefor; but the person against whom such judgment is rendered may appeal in the same manner, and with the same effect, as is provided for a prosecuting witness in section four thousand six hundred and [ninety-one] of this code. [Otherwise the costs shall be taxed against the state.]

CHAPTER 13.

OF SELECTING, DRAWING, SUMMONING AND EMPANELING OF THE GRAND JURY.

SECTION 4255. [**Selecting grand jury.**]
—The selecting, drawing, and summoning of the grand jury is as prescribed in the code of civil practice.

SEC. 4256. (*As substituted by ch. 42, 21st g. a.*) [**Substitute.**]
—[At a term of court at which grand jurors are required to appear, the panel shall be called and the names of the grand jurors appearing shall be entered on the record. From the number of jurors thus summoned and appearing the clerk shall select, by lot, the required number. If more grand jurors have appeared than the number required to fill the panel, the remaining number shall be discharged for the term. If from any cause, either then or afterward, the number of the panel be reduced to a less number than required, the court may order the sheriff of the county to summon a sufficient number of qualified persons to complete the panel.]

If by reason of challenges sustained to individual jurors, or from any other cause, the grand jury becomes reduced to a less number than fifteen, it is the duty of the court to order the sheriff to fill the panel by summoning a sufficient number of qualified persons for that purpose. *The State v. Garhart*, 35 Iowa, 315.

Where a part of the grand jurors drawn fail to appear, it is competent for the court, under this section of the code, to orally direct the sheriff to summon a sufficient number to complete the panel. Section 244, requiring a second precept to issue, applies only to a case where the entire panel fail to appear or are illegally drawn. *The State v. Miller et al.*, 53 Id., 84; see, also, *The State v. Pierce*, 8 Id., 231.

Where a defendant in custody challenged one of the grand jurors, which challenge was sustained by the court, and the challenged juror retired from the grand jury room, when the defendant's case came up for consideration, and an indictment was found against the defendant by fourteen grand jurors, it was held that the indictment was found by a valid grand jury. *The State v. Ostrander*, 18 Id., 435.

When talesmen are called and placed on the grand jury to supply vacancies, such talesmen serve for the term, and if the jury is discharged and recalled during the term the talesmen must be summoned with the other jurors impaneled. *The State v. Reed*, 22 Id., 413.

A grand jury may be re-organized by the court after it has been impaneled for the term as where challenges to the jury are allowed after it has been impaneled. *The State v. Mooney* 10 Id., 506.

SEC. 4257. [**Same.**]
—Persons summoned by the sheriff to supply a deficiency in the requisite number of grand jurors, serve only during the term at which they are summoned.

SEC. 4258. [**Challenge.**]
—A defendant held to answer to a public offense, may challenge the panel of the grand jury, and the state or defendant may challenge an individual juror.

The defendant in a criminal case may waive his right to challenge the panel of the grand jury, or any individual juror; and such waiver will be inferred when, upon being held to bail, pending the action of the grand jury upon a re-submission of his case, after a demurrer to one indictment has been sustained, he then fails to exercise his right of challenge. *The State v. Harris et al.*, 38 Iowa, 242.

Where a party was indicted for murder and the cause continued until the next term of the court, at which a new grand jury was organized, and the former indictment withdrawn, and a new one found, which, on defendant's motion, was quashed on the ground that no opportunity had been allowed him to challenge the grand jury, the grand jury was then brought into court for the purpose of challenge, and the defendant asked one juror: "Have you formed or expressed an unqualified opinion that the prisoner is guilty of the crime with which he is charged?" To which the juror replied that he had in the grand jury room, in finding the indictment which had been quashed. The defendant then challenged the juror, and it was overruled. *Held*, that such ruling was erroneous. *The State v. Gillick*, 7 Id., 287.

And where in said case the court restricted the defendant in his challenge to said grand juror to the following question: "Have you formed or expressed an unqualified opinion as to the guilt of the prisoner prior to the time you were impaneled as a grand juror?" it was held error. *Id.*

The failure of a defendant held to answer to appear and challenge the grand jury operates only as a waiver of his right to challenge, but does not authorize the forfeiture of his bond. *The State v. Klingman*, 14 Id., 404; *Ringgold County v. Ross et al.*, 40 Id., 176.

SEC. 4259. **A challenge to an individual juror** may be made by the state, for one or more of the following causes:

1. That he is related either by affinity or consanguinity nearer than in the fifth degree, or stands in the relation of agent, clerk, servant or employe to any person held to answer for a public offense whose case may come before the grand jury;
2. That he is bail for any one held to answer for a public offense, whose case may come before the grand jury;
3. That he is defendant in a prosecution similar to any prosecution to be examined by the grand jury;
4. That he is, or within one year preceding has been, engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, and for which the juror may be indicted by the grand jury.

An objection to the grand jury or to an individual juror, cannot be interposed by a defendant for any cause of challenge, after the jury has been sworn. *The State v. Ingalls et al.*, 17 Iowa, 8.

Semble, that in the exercise of a challenge to the grand jury the accused need not necessarily be personally present, and that the privilege may be exercised or waived by his attorney in his absence. *The State v. Felter*, 25 Id., 67.

A judgment against a defendant on an indictment for a public offense will not be reversed on the ground that one of the names on the list of grand jurors, as drawn, does not appear upon the list returned by the judges of the election of that year, when it is not shown but that the proper steps were taken by the court below to correct this error, and thus have empaneled a legal grand jury. *The State v. Hart*, 29 Id., 268.

This objection should be taken by challenge to the panel of the grand jury, and not by demurrer to the indictment. *Id.*

SEC. 4260. **A challenge to the panel** can be interposed only for the reason that they were not appointed, drawn or summoned as prescribed by law.

The refusal of a defendant held to answer to a criminal charge to introduce evidence to sustain a challenge made by him to the panel of the grand jury is sufficient to authorize the court to overrule the challenge. *The State v. Gillick*, 10 Iowa, 98.

SEC. 4261. **[To individual jurors.]**—A challenge to an individual juror by the defendant may be made for one or more of the following causes only:

1. That he is a minor, insane or not competent by law to serve as such juror;
2. That he is a prosecutor upon a charge against the defendant;
3. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial.

That a grand juror was not a citizen of the United States, and, therefore, not qualified to act as such, is not ground for setting aside an indictment of a defendant who was held to answer before the finding of the indictment. He had the opportunity to and should have made the objection by way of, challenge to the juror before the grand jury was sworn. *The State v. Gibbs*, 39 Iowa, 318.

SEC. 4262. **[Decided by the court.]**—Challenges to the panel or to an individual juror, must be decided by the court.

SEC. 4263. [**When challenge allowed.**]-If a challenge to the panel be allowed, the grand jury is prohibited from inquiring into the charge against the defendant by whom it was interposed. If the jury does so and finds an indictment the court must set it aside.

SEC. 4264. [**Same.**]-If a challenge to an individual juror be allowed, he shall not be present at, or take any part in, the consideration of the charge against the defendant.

SEC. 4265. [**Inform the court.**]-The grand jury must inform the court of a violation of the last section, that it may be punished as a contempt.

SEC. 4266. [**Challenge to panel.**]-When several persons are held to answer for one and the same offense, no challenge to the panel can be made unless they all join in such challenge, nor can any objection be interposed by a defendant to the grand jury or to any individual juror for any cause of challenge after they are sworn.

An objection to the grand jury or to an individual grand juror, cannot be interposed by a defendant for any cause of challenge after the jury has been sworn. *State v. Ingalls et al.*, 17 Iowa, 8.

Where a defendant charged with a criminal offense is under arrest, or has given bail for his appearance to answer, he is required to make his challenge to the panel of the grand jury before the indictment is found. *Dixon v. State*, 3 Id., 416.

That a "grand jury was not selected, drawn, summoned or sworn, as prescribed by law," is not ground for setting aside the indictment of one who was held to answer before the finding of the indictment. *State v. Gibbs*, 39 Id., 318.

SEC. 4267. [**Foreman.**]-From the persons summoned to serve as grand jurors, the court must appoint a foreman; the court must also appoint a foreman when the person already appointed is discharged, excused or from any cause becomes unable to act before the grand jury is finally discharged.

A talesman selected by the sheriff from the bystanders, may be appointed, by the court, foreman of the grand jury. *State v. Brandt*, 41 Iowa, 573, 605.

SEC. 4268. [**Oath.**]-The following oath must be administered to the foreman of the grand jury: "You, as foreman of the grand jury, shall diligently inquire and true presentment make of all public offenses against the people of this state, committed or triable within this county, of which you have, or can obtain legal evidence; you shall present no person through malice, hatred, or ill will, nor leave any unrepresented, through fear, favor, or affection, or for any reward, or the promise or hope thereof, but in all your presentments, you shall present the truth, the whole truth and nothing but the truth, according to the best of your skill and understanding. So help you God."

SEC. 4269. [**Same.**]-The following oath must thereupon be administered to the other grand jurors present: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part. So help you God."

SEC. 4270. [**Charged by the court.**]-The grand jury being impaneled and sworn, may be charged by the court. In doing so, the court shall give them such information as it may deem proper as to the nature of their duties, and any charges for public offenses returned to the court or likely to come before the grand jury. And it is hereby made the duty of the court to specially give in charge to the grand jury, the provisions of law regulating the accounting by public officers for fines and fees collected by them, and providing for the suppression of intemperance.

SEC. 4271. [**Discharge.**]-The grand jury on the completion of its business shall be discharged by the court. But whether its business be completed or not it is discharged by the final adjournment thereof.

CHAPTER 14.

OF THE POWERS AND DUTIES OF THE GRAND JURY.

SECTION 4272. [**Power.**]—The grand jury has power, and it is made its duty, to inquire into all indictable offenses committed, or which may be tried, within the county and present them to the court by indictment.

The grand jury is endowed by law with the power and charged with the duty of inquiring into all indictable offenses committed or which may be tried within the county. Per DILLON, Ch. J., in *The State v. Schill*, 27 Iowa, 268.

SEC. 4273. (*As amended by ch. 130, 18th g. a.*) [**Indictment: how found.**]—The indictment must in all cases be found only upon evidence given by witnesses produced, sworn and examined before the grand jury, or furnished by legal documentary evidence, [or upon the minutes of the evidence given by witnesses before a committing magistrate.]

Before the enactment of chapter 130 of the acts of 1880, an indictment could be found only upon evidence given by witnesses produced, sworn and examined before the grand jury or furnished by legal documentary proof, but now section 4273 as amended by that chapter, the grand jury may find an indictment upon the minutes of the evidence given by the witnesses before the committing magistrate. *The State v. Kepper*, 65 Iowa, 745.

SEC. 4274. [**Administer oath.**]—The grand jury has power, by its foreman, to administer the oath to all witnesses produced and examined before it.

SEC. 4275. (*As amended by ch. 38, 22d g. a.*) [**Duty.**]—It is the duty of the grand jury to appoint one of its number, who is not foreman, clerk thereof, who must take and preserve the minutes of the proceedings and of the evidence given before it, except the votes of the individual members thereof on finding an indictment; *Provided*, that in counties having a population, as shown by the last preceding census, of twenty thousand or over, the court, in the exercise of a sound discretion, may appoint a competent person, not a member of the grand jury, clerk thereof, who shall receive a compensation of \$3.00 per day.

He shall take no part in the proceedings aside from his clerical duties, and he shall strictly abstain from expressing an opinion upon any question before the grand jury either to the jury or to any member thereof, and shall not be present when any vote is being taken upon the finding of an indictment. And *provided, further*, that the following oath must be administered to such clerk: "You as clerk of the grand jury shall faithfully and impartially perform the duties of clerk, and you will not reveal to any one the proceedings of the grand jury. You will strictly abstain from expressing any opinion upon any question before the grand jury, either to the jury or any member thereof, so help you God."

Approved April 3, 1888.

Took effect April 5th, 1888.

The statute expressly enjoins upon each member of the grand jury, the duty to keep secret its proceedings; this includes, of course, the votes taken on the question of finding an indictment, and, as respects the votes of the individual members of the grand jury, the clerk of the grand jury is prohibited from recording them. Per MILLER, Ch. J., in *The State v. Gibbs*, 39 Iowa, 322.

The minutes of the evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible on the trial for the purpose of impeaching a witness. *The State v. Hayden*, 45 Id., 11.

SEC. 4276. [**Same.**]—The grand jury is not bound to hear evidence for the defendant, but it is its duty to weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it may order such evidence to be produced.

When the grand jury have reason to believe that evidence within its reach will explain away the charge, it may order such evidence to be produced. *The State v. Houston*, 50 Iowa, 512, 513.

SEC. 4277. [**Of a member.**]—If a member of the grand jury knows, or has

reason to believe that a public offense has been committed, triable in the county, he must declare the same to his fellow jurors, and be sworn as a witness upon the investigation before them.

SEC. 4278. [**Special duties.**]—It is made the special duty of the grand jury to inquire:

1. Into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted;
2. Into the condition and management of the public prisons within the county;
3. Into the willful and corrupt misconduct in office of all county officers;
4. Into the obstruction of highways.

A grand jury has no power to present to the court, otherwise than by indictment, the misconduct of an officer; and a report by them to the district court charging an officer with malfeasance in office is not a privileged communication; but such a report, when made in good faith and in the belief that it came within the discharge of their duty, is not actionable. *Rector v. Smith*, 11 Iowa, 302.

SEC. 4279. [**Issue subpoenas.**]—The clerk of the court must, whenever required by the foreman of the grand jury or district attorney, issue subpoenas for witnesses to appear before the grand jury.

SEC. 4280. [**Access to county jail and public records.**]—The jury is entitled to free access at all reasonable times to the county jails, and to the examination without charge, of all public records within the county.

SEC. 4281. [**Ask advice of district attorney.**]—The grand jury may, at all reasonable times, ask the advice of the district attorney, or the court; and the district attorney may attend before it for the purpose of examining witnesses when the grand jury deems it necessary.

SEC. 4282. [**District attorney give information.**]—Such attorney shall be allowed at all times to appear before the grand jury on his own request, for the purpose of giving information relative to any matter cognizable by it; but no such attorney, nor any other officer or person, except the grand jury, must be present when the question is taken upon the finding of an indictment.

The mere presence of a bailiff of a court, in attendance on the grand jury, during the investigation by them of a criminal charge, is not a sufficient ground of objection to the indictment, if he were not present when the question was taken upon the finding of the indictment. But if it were, the objection should be made by motion to set aside the indictment, and not by motion for a new trial after verdict. *The State v. Kimball*, 29 Iowa, 267.

No person, except the members of the grand jury, are allowed to be present when the vote is taken upon finding an indictment. *The State v. Gibbs*, 39 Id., 318, 322.

The affidavits of grand jurors to the effect that they did not consent to the finding of an indictment, are not admissible in support of a motion to quash the indictment. *The State v. Mewhert*, 46 Id., 88; *The State v. Gibbs*, 39 Id., 318.

SEC. 4283. [**Should find indictment: when.**]—The grand jury should find an indictment when all the evidence before it, taken together, is such as in its own judgment would, if unexplained, warrant a conviction by the trial jury. When the evidence is not such, it should not.

SEC. 4284. [**Proceedings: secret.**]—Every member of the grand jury must keep secret the proceedings of that body and the testimony given before them, except as hereinafter required. Nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against any person not in custody or under bail, otherwise than by presenting the same in court, or issuing or executing process thereon, until such person has been arrested. A violation of this section is a misdemeanor.

See *The State v. Gibbs*, 39 Iowa, 318, 322, cited in notes to sections 4275 and 4282, *ante*.

SEC. 4285. [**Exception.**]—A member of the grand jury may be required by the court to disclose the testimony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given by the witness before court, or to disclose the testimony given before them by any witness upon a charge against him of perjury.

Perjury may be committed by a witness in willfully giving false testimony of a material character before a grand jury. *The State v. Schell*, 27 Iowa, 263, 268.

Grand jurors may be called as witnesses to impeach the testimony of a witness given before the court, by showing that he testified differently before the grand jury, but the minutes of the evidence kept by the clerk of the grand jury are not competent for that purpose. *The State v. Hayden*, 45 Id., 11, 15.

SEC. 4286. [**Jurors not to be questioned.**].—No grand juror shall be questioned for anything he may say, or any vote he may give, in a grand jury relative to a matter legally pending before them, except for perjury of which he may have been guilty in making an accusation, or in giving testimony to his fellow jurors.

A grand jury has no authority to present to the court otherwise than by indictment the misconduct of an officer; and a report made to the court by the grand jury charging an officer with malfeasance in office is not a privileged communication. But where such a report was made by the grand jury, imputing misconduct to an officer, when made in good faith and under the belief that it came within the discharge of their duty, was held not actionable. *Rector v. Smith*, 11 Iowa, 302.

SEC. 4287. [**When witness refuses to testify.**].—When a witness under examination before the grand jury, refuses to testify or to answer a question put to him by the grand jury, the grand jury shall proceed with the witness into the presence of the court, and the foreman shall then distinctly state to the court the refusal of the witness, and, if the court, upon hearing the witness, shall decide that he is bound to testify, or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and if he does, shall proceed with him as in cases of similar refusal in open court.

SEC. 4288. [**Or fails to obey subpoena.**].—If a witness fails to attend before the grand jury, in obedience to a subpoena issued for that purpose and duly served, the court shall, upon the application of the district attorney, or foreman of the grand jury, proceed and coerce the attendance of the witness, and may punish his disobedience as in the case of a witness failing to attend on the trial.

SEC. 4289. (*As substituted by sec. 3, ch. 130, 18th g. a.*) [**Papers relating to arrest and preliminary examination laid before grand jury.**].—[All the papers and other matters of evidence relating to the arrest and preliminary examination of the charge against defendants who have been held to answer, returned to the court by magistrate, shall be laid before the grand jury, and shall be competent evidence upon which an indictment may be found, if the grand jury are [is] satisfied that such evidence alone, or with other evidence, if unexplained, would warrant a conviction by the trial jury, and the grand jury need not have before them for examination any witness who was examined before the committing magistrate, and a minute of whose evidence has been returned by said magistrate, unless requested by the district attorney. And if indictment is found in whole or in part upon the minutes of evidence taken before a committing magistrate, the clerk of the grand jury shall write out a brief minute of the substance of such evidence and the same shall be returned to the court with the indictment. If upon investigation, the grand jury refuses to find an indictment it shall return all of said papers to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed, and thereupon the court must order the discharge of the defendant from custody, if in jail, or the exoneration of the bail, if bail be given, unless the court should, upon good cause shown, be of opinion that the charge should be again submitted to the grand jury in which case the defendant may be continued in custody, or on bail, until the next term of the court.]

This section does not require the minutes of a preliminary examination to be filed with the clerk of the district court, in a case where the defendant is discharged upon such examination. *The State v. Helvin*, 65 Id., 289.

SEC. 4290. [**Dismissal of charge.**].—Such dismissal of the charge does not prevent the same from being again submitted to a grand jury as often as the court may direct; but without such direction, it cannot again be submitted.

This section of the statute does not forbid the grand jury from finding an indictment upon their

own motion on a charge that has been dismissed, but which has not been re-submitted to them by the court. *State v. Collins*, 35 N. W. R., 625.

CHAPTER 15.

OF THE FINDING AND PRESENTMENT OF INDICTMENT.

SECTION 4291. (*As substituted by ch. 42, 21st g. a.*) [An indictment cannot be found without the concurrence of four grand jurors, when the grand jury is composed of five members; and not without the concurrence of five grand jurors when the grand jury is composed of seven members. Every indictment must be indorsed "a true bill" and the indorsement must be signed by the foreman of the grand jury.]

If the panel of the grand jury should be reduced by challenges to individual jurors, or by sickness or death, or any other cause, to less than twelve, no valid indictment can be found. *The State of Iowa v. Ostrander*, 18 Iowa, 435; *The Same v. Garhart*, 35 Id., 315, 317.

Whether the entire fifteen grand jurors must be present at a finding of the indictment, *querie*. See, *The State v. Ostrander*, 18 Id., 435; *Norris v. The State*, 3 G. Groene, 513.

Where James G. Thornburg was appointed foreman of the grand jury which returned an indictment indorsed "A true bill," and signed by "J. G. Thornburg, foreman" it was held, that the indictment was sufficiently indorsed under this section. *The State v. Groome*, 10 Id., 308.

SEC. 4292. [**Private prosecutor.**]—When an indictment is found at the instance of a private prosecutor, the following must be added to the indorsement required by the preceding section, "found at the instance of" (here state the name of the person), and in such case, if the prosecution fails, the court trying the cause may award costs against the private prosecutor, if satisfied, from all the circumstances, that the prosecution was malicious or without probable cause.

This section does not authorize a judgment for costs against a prosecuting witness for a failure to appear in the district court and prosecute a defendant who has, on his complaint, been placed under bond to keep the peace. *The State v. Holliday*, 22 Iowa, 397.

This section providing that the grand jury, when an indictment is found at the instance of a private prosecutor, to indorse that fact on the indictment, is merely directory, and such indorsement is not essential to the validity of the indictment. *The State v. Briggs*, 68 Id., 416.

SEC. 4293. (*As substituted by ch. 130, 18th g. a.*) [**Names of witnesses indorsed on indictment.**]—[When an indictment is found, the names of all witnesses, on whose evidence it is found, must be indorsed thereon before it is presented to the court, and the minutes of the evidence of such witnesses must be presented with the indictment to the court, and filed by the clerk of the court, and remain in his office as a record. but the minutes of evidence shall not be open for the inspection of any person except the judge of the court, and the district attorney or his clerk, the defendant and his counsel, or the clerk of such counsel, and the clerk of the court, must within two days after demand made, furnish the defendant or his counsel a copy thereof, without charge, or permit the defendant's counsel or the clerk of such counsel to take a copy.]

SEC. 5. [**Not open for general inspection.**]—That when on a demurrer [or] motion to set aside or otherwise, an indictment is held insufficient, and an order is made to re-submit the case to the same or other grand jury, or where the grand jury have [has] ignored a bill and the same has been ordered back to the same or other grand jury for further investigation, it shall be unnecessary to summon the witnesses again before such jury in such cases, but the minutes of the testimony returned with the defective indictment or ignored bill or information, shall be detached and returned to the grand jury, and thereupon without more, such grand jury may find a bill, and attach said minutes of the evidence thereto, and return said indictment therewith into court in the usual manner, and the grand jury may also, in either case, take additional testimony.

SEC. 6. All acts and parts of acts inconsistent with this act are hereby repealed.]

The district court may permit the introduction of a witness in behalf of the state, where the minutes of his evidence before the grand jury were not attached to the indictment, when they are otherwise identified as the minutes taken in the manner required by law. *The State v. Postlewait*, 14 Iowa, 446.

Where the grand jury examined numerous witnesses upon accusations against different persons for selling intoxicating liquors in violation of law, kept minutes of their evidence, and when indictments were found, returned these minutes as they had taken them, without first separating those portions relating to each indictment, it was held, that while this was irregular, it did not, in the absence of a showing of prejudice to the defendant, constitute sufficient ground for a reversal of the judgment. *The State v. Guiesenhouse*, 20 Id., 227.

Where the papers containing the minutes of evidence taken before a grand jury, are, by them, returned into court and deposited with the clerk, they are in fact filed, and the court upon being satisfied of the fact, may order them to be indorsed filed as of the date when filed in fact. *Id.*

Where the minutes of the evidence of witnesses before the grand jury were not attached to the indictment but were filed separately, while an indorsement upon the indictment set out the names of the witnesses examined before the grand jury, it was held that the witnesses were properly admitted to testify on the trial. *The State v. Hamilton*, 42 Id., 655.

The statute does not contemplate that the names of witnesses called before the grand jury, who give no material testimony, should be indorsed upon the indictment found. *The State v. Little*, 42 Id., 51.

An indictment is not demurrable on the ground that the minutes of the evidence on which it was found have not been filed with the clerk as this section provides. *The State v. Briggs*, 68 Id., 416.

They are sufficiently filed by handing them to the clerk, and he receiving them to be kept on file in his office. *Id.*

SEC. 4294. [Presented to the court.]—The indictment, when found and indorsed as prescribed by this chapter, must be presented by the foreman, in the presence of the grand jury, to the court, and marked "filed" by the clerk of the court, and remain in his office as a record.

The fact that an indictment was presented and filed after the adjournment of the court, cannot be established by affidavits. The correctness of the finding of the court below, that the indictment was regularly presented, will be presumed. *The State v. Gibbs*, 39 Iowa, 318.

The provisions of the statute requiring an indictment to be indorsed "a true bill," and marked "filed" by the clerk is directory merely, and a failure to comply therewith does not invalidate the proceedings. *The State v. Axt*, 6 Id., 511; *The State v. Jolly*, 7 Id., 15.

An indorsement upon an indictment as follows: "Presented to the district court of Marion county, Iowa, in the presence of the grand jury, on the eleventh day of February, 1853, A. B. Miller, Clerk D. C., M. C., Iowa," was held sufficient under section 2914, code of 1851. *Wrockledge v. The State*, 1 Id., 167.

An indictment presented in the proper court and properly filed therein, is not invalid because of an indorsement thereon reciting that it was found in another county. *The State v. Smouse*, 50 Id., 43.

Where an indictment found and returned into court by a grand jury, and is properly indorsed by the clerk, such indorsement is itself a record and the only record that should appear until after the arrest of the defendant; a subsequent entry in the record of the finding, return, etc., is not erroneous. *Herring v. The State*, 1 Id., 205.

CHAPTER 16.

OF INDICTMENT; ITS FORM AND REQUISITES.

SECTION 4295. [Indictment defined.]—An indictment is an accusation in writing found and presented by a grand jury, legally convoked and sworn to the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which, by law, is a public offense punishable on indictment.

SEC. 4296. [Must contain.]—The indictment must contain:

1. The title of the action, specifying the name of the court to which it is presented, and the name of the parties;
2. A statement of the facts constituting the offense, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

When the language, used in charging an offense in an indictment, shows, to the common understanding, what the pleader intended to charge, it is sufficient. *The State v. Schilling*, 14 Iowa, 455.

An indictment which contains a statement of the facts constituting an offense, is sufficient, though it does not set out the technical name of the offense. *The State v. Baldy*, 17 Id., 39; *The State v. Shaw*, 35 Id., 575; *The State v. Hessencamp*, 17 Id., 25; *The State v. Anseleme*, 15 Id., 44; *The State v. Davis*, 41 Id., 311.

An indictment charging an offense in the language of the statute defining it is sufficient. *The State v. Shaw*, 35 Id., 575; *The State v. Hessencamp*, 17 Id., 25; *The State v. Conlee*, 25 Id., 237; *The State v. Smith*, 46 Id., 670.

If the offense charged has no name given to it by the statute, the giving it a name in the indictment, which is repugnant to the facts alleged as constituting the facts will be regarded surplusage. *Id.*; *The State v. Davis*, 41 Id., 311.

An indictment in the form prescribed in the statute is sufficient as to the allegation of venue. *The State v. Winstrand*, 37 Id., 110.

And an indictment charging an offense in the language of the statute is not open to objection on account of its form. *The State v. Smith*, 46 Id., 670.

Where an indictment correctly defines an offense in the statement of facts therein, but in the charging part designates it by another name, it is nevertheless, a good indictment for the offense defined. *The State v. Davis*, 41 Id., 311, following *The State v. Shaw*, 35 Id., 575.

It was accordingly held, that where the offense was designated in the indictment as manslaughter, but the statement of facts defined the crime of murder, the defendant was properly put upon his trial for the latter offense. *Id.*

To constitute a valid indictment, the particular circumstances of the offense must be charged when they are necessary to constitute a complete offense. *The State v. Potter*, 28 Id., 554.

In all cases the facts constituting the specific crime intended to be charged must be stated in the indictment. *The State v. White*, 41 Id., 316, 318.

Where a statute defining an offense describes in terms which constitute simply a legal conclusion, it is not sufficient to charge the offense in the indictment in the language of the statute. The facts constituting the alleged crime must be pleaded. Per MILLER, Ch. J., and COLE, J., concurring in *The State v. Brandt*, 41 Id., 293; DAY, J., not concurring; BECK, J., dissenting.

An indictment in the form prescribed by section 4297 of the code, is sufficient as to the allegation of venue. *The State v. Winstrand*, 37 Id., 110.

An indictment cannot be aided by intendment, nor omissions therein supplied by construction; and while the acts charged may, under certain circumstances, be lawful, and these circumstances are not negatived, the indictment is insufficient, even though it be alleged that the acts charged were willfully and unlawfully done. *The State v. The C., B. & Pacific R'y Co.*, 63 Id., 508.

SEC. 4297. [Form.]—It may be substantially in the following form:

District court of the county of.....
 The state of Iowa, }
 against }
 A. B. }

The grand jury of the county of....., in the name and by the authority of the state of Iowa, accuse A. B. of the crime of (here insert the name of the offense

if it have one, such as treason, murder, manslaughter, robbery, larceny, or the like, or if it have no general name, then a brief general description of it is given by law, such as “mingling poison with food, with intent to kill a human being,”) committed as follows:

The said A. B., on the first day of January, A. D. 18.., in the county aforesaid (here insert the act or omission constituting the offense).

.....District Attorney,
of the....judicial district.

This section does not require that the form of the indictment therein given shall be literally followed. That the names of the parties were not set forth, and that there was no title to the action contained on the face of the indictment were held not valid objections. *State v. McIntire*, 59 Id., 264.

Where an indictment for larceny was in the exact language of this section, except that the word “aforesaid” was used instead of “as aforesaid,” it was held sufficient, the variance not being material. *State v. Gillard*, 59 Id., 479.

This section does not require that an indictment be signed by the district attorney, and that it is not so signed is not ground of demurrer, nor for motion in arrest of judgment. *State v. Ruby*, 60 Id., 86.

SEC. 4298. [Must be direct and certain.]—The indictment must be direct and certain as regards:

1. The party charged;
2. The offense charged;
3. The particular circumstances of the offense charged when they are necessary to constitute a complete offense.

It is generally sufficient to charge an offense, created and defined by the statute, in the language of the statute (*The State v. Shaw*, 35 Iowa, 575). But when the statute describes an offense by terms constituting rather a legal conclusion than a statement of the facts constituting it, the indictment must especially describe the offense by a statement of the facts. Per MILLER Ch. J., in *State v. Brandt*, 593, 603; COLE J., concurring.

Naming an offense murder in the first degree in the introductory and concluding parts of an indictment is not sufficient unless the facts charged constitute it such. *State v. McCormick*, 27 Id., 402.

SEC. 4299. [Defendant's name.]—When a defendant is indicted by a fictitious or erroneous name, and in any subsequent stage of the proceedings before execution, his true name is discovered, an entry shall be made in the record of the proceedings, of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name, substantially as follows:

The State of Iowa, }
 against }
A. B., indicted by the name of C. D. }

SEC. 4300. [Must charge but one offense.]—The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative; *provided*, that in case of compound offenses, where in the same transaction more than one offense has been committed, the indictment may charge the several offenses and the defendant may be convicted of any offense included therein; *provided further*, that this section shall in no manner affect any provision of this code providing for the suppression of intemperance.

An indictment may charge an offense in different forms, to meet the evidence; and if the offense may have been committed in different modes, or by different means, these may be alleged in the alternative; but in charging an offense in different forms, the pleader is not required to use the

alternate form of expression. *The State v. Watrous*, 13 Iowa, 489. See, also, *The State v. Abrams*, 1 Id., 117; *Same v. Vaughn*, 5 Id., 369; *Same v. Twogood*, 7 Id., 252; *Same v. Barrett*, 8 Id., 536; *Same v. McPherson*, 9 Id., 53.

The offense of nuisance, under section 1543 of the code, may be committed either by the manufacture, sale, or keeping with intent to sell, intoxicating liquors in violation of law; and while an indictment is sufficient which charges the commission of the offense by either one of the unlawful acts, it is not bad for duplicity if it charges the offense to have been committed by two or three of the specified unlawful acts. *The State v. Baughman*, 20 Id., 497; *Same v. Becker*, Id., 438.

Where an indictment charged that the defendant, on the 6th day of September, 1871, set fire to and burned a stack of hay of the value of \$300, and on the same day did burn a building used as a stable and granary, it was held, that the indictment charged two offenses, and was, therefore, bad. *The State v. Fidment*, 35 Id., 541.

The prosecutor, in case an indictment charges two distinct offenses, may be required to elect on which charge he will proceed. *Id. The State v. McPherson*, 9 Id., 53.

An indictment charging the defendant with burglariously and feloniously breaking and entering a store with intent to commit larceny, and with stealing and carrying away certain articles therein contained, was held, not liable to the objection of charging two distinct offenses. *The State v. Hayden*, 45 Id., 11.

So an indictment which charged the defendant with keeping and controlling a building where intoxicating liquors were sold in violation of the statute, and where "gambling, fighting, drunkenness and breaches of the peace" were permitted by him, was held, not as charging two offenses. *The State v. Dean*, 44 Id., 648.

Where an indictment charged that the defendant "committed an assault and battery upon the person of C. C. How, with the intent to inflict upon the person of said How a great bodily injury." it was held, that it charged but one offense. *Cokely v. The State*, 4 Id., 477.

Where an indictment charged the defendant in one count with keeping a gambling-house, and in another with permitting other persons, in a place under his control, to play for money or other things, it was held, not vulnerable to the objection of duplicity. *The State v. Cooster*, 10 Id., 453.

Where a statute contains different grades or degrees of the same offense, an indictment under it may charge a violation of them all, or of any of them; and the proof need cover only so much of the allegations of the indictment as constitute a complete offense. *The State v. Harris*, 11 Id., 414.

An indictment that charges the defendant with "injuring" and "defacing" a dwelling-house, charges but one offense. *The State v. Hockenberry*, 11 Id., 269.

An indictment charging that the defendant did unlawfully and feloniously conspire to rob and steal from, etc., charges but one offense—conspiracy. *The State v. Sterling*, 34 Id., 443.

An indictment charging the defendant with counterfeiting and with having in his possession counterfeit coin, with intent to utter the same, is not objectionable for duplicity. *The State v. Meyers*, 10 Id., 448; *The State v. Barrett*, 8 Id., 536.

Where an indictment in the first count charged the defendant with selling intoxicating liquors to one Arigoni, and in the second with selling such liquors to divers persons whose names were to the grand jury unknown, it was held not to charge two distinct offenses. *Walters v. The State* 5 Id., 507.

An information charging that the defendant "did, unlawfully, sell beer to persons unknown," charges but one sale to several persons jointly, and is not bad for duplicity under a city ordinance making each separate act of selling an offense. *The State v. King*, 37 Id., 462.

The term "compound offenses," as used in this section (4300), has reference only to cases where the act constitutes in itself more than one, and does not include cases in which two or more crimes are committed in succession. *The State v. Ridley and Johnson*, 48 Id., 370.

An indictment which charges the defendant with the commission of both burglary and larceny, is bad for duplicity, the one offense not being included in the other. *The State v. McFarland*, 49 Id., 99.

The crimes of rape and incest cannot both be committed by the same act, and cannot be charged in an indictment as a compound offense under this section of the code; the consent of both parties to the connection being necessary to constitute the crime of incest under the statute. *The State v. Thomas*, 53 Id., 214.

The crimes of forgery and of uttering forged paper are two distinct and separate offenses and cannot both be legally charged in the same indictment. *The State v. McCormack*, 56 Id., 535; (overruling *The State v. Nichols*, 33 Id., 110.)

An indictment for burglary with intent to steal is not bad for duplicity because it contains allegations of facts constituting larceny. The charge of stealing may be regarded as surplusage or as mere pleading of evidence which might properly have been introduced on the trial to support the charge of an intent to steal. *The State v. Shaffer*, 59 Id., 290. Following *State v. Hayden*, 45 Id., 11.

Where an indictment charges two offenses, but alleges the commission of one of them to have

been in another county, this allegation constitutes mere surplusage and will be disregarded. *The State v. Smouse*, 50 Id., 43.

An indictment is not vulnerable to an attack for duplicity which sets out the same transaction in different forms to meet the evidence. *The State v. Brannon*, 50 Id., 372.

An indictment charging that the defendant "in the day-time, did feloniously break and enter into the dwelling house of one W. K., then and there being with intent to commit a public offense, to-wit: the crime of larceny, and did then and there steal, take and carry away the personal goods and clothes of said W. K., two blankets of the value of six dollars each," etc., etc., describing the property stolen as being of the value of forty-three dollars, was held bad for duplicity. *The State v. Rhodes*, 48 Id., 702; *The State v. Ridley and Johnson*, Id., 370; see also *The State v. McFarland*, 49 Id., 99.

But see *The State v. Hayden*, 45 Id., 11, where an indictment charging the defendant with feloniously and burglariously breaking and entering a store with intent to commit larceny, and with stealing and carrying away certain articles therein contained, was held not liable to the objection of duplicity.

It is allowable, under this section, in an indictment for conspiracy, to state the facts constituting the conspiracy in different ways in several counts. *The State v. Kennedy*, 63 Id., 197.

Where an indictment, in one count, charged the keeping by the defendant of a building in which he kept intoxicating liquors with intent to sell the same contrary to law, and in another count it charged the unlawful sale of such liquors by defendant in a building kept and controlled by him; *held*, not bad for duplicity, since but one offense was charged in different forms, as this section allows. *The State v. Howarth*, (two cases), 70 Id., 157. See note to section 3903 *ante* from *State v. Elsham* Id., 531.

SEC. 4301. [Precise time need not be stated.]—The precise time at which the offense was committed need not be stated in the indictment, but it is sufficient if it allege that the offense was committed at any time prior to the time of the finding thereof, except where the time is a material ingredient in the offense.

The precise time at which an offense was committed need not be stated in an indictment, except where time is a material ingredient of the offense. *The State v. Layton*, 25 Iowa, 193, 196.

Time is sufficiently alleged in an indictment, by an allegation that the act constituting the offense was committed "on or about" a day thereon stated. *Cokely v. The State*, 4 Id., 477.

The precise time at which the crime of seduction was accomplished need not be stated in the indictment, time not being a material ingredient in the offense. *The State v. Deitrich*, 51 Id., 467.

An instruction in a criminal case under which the jury might have found the defendant guilty, if he had committed the offense after the information was filed against him, was erroneous, and in the absence of the evidence, must be presumed to have been prejudicial, where there was a verdict of guilty. *The State v. Johnson et al.*, 69 Id., 623.

Time not being a material ingredient of the offense of keeping a saloon where intoxicating liquors are sold contrary to law, the precise time of the offense need not be alleged in the indictment, and if alleged need not be proved as illegal. But it is competent in such case to prove the commission of the offense at any time within three years prior to the finding of the indictment. If it becomes necessary in such case to identify the crime by the time of its commission, as on a plea of former conviction or acquittal, the time may be shown for that purpose; but such proof is not necessary to support the indictment. *The State v. Wambold*, 72 Id., 468.

SEC. 4302. [Erroneous allegations not material: when.]—When an offense involves the commission of, or an attempt to commit, an injury to the person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured or attempted to be injured is not material.

An allegation as to the name of the person injured is not material in an indictment, under our statute, if the offense be, in other respects, described with sufficient certainty to identify the act. An error in name, or other similar error, which does not tend to prejudice the substantial rights of the defendant, will not render an indictment insufficient. *The State v. Eneigh*, 18 Iowa, 122.

In an indictment for resisting an officer an erroneous allegation as to the name of the officer resisted does not constitute a fatal variance. *The State v. Flynn*, 42 Id., 164.

A mistake in the name of the person injured, in an indictment for robbery, is not material unless it be shown that the party accused has suffered prejudice by reason of the mistake. *The State v. Carr & Brown*, 43 Id., 418.

A mistake in the name of the person injured, in an indictment for burglary, is not material unless it be shown that the party accused has suffered prejudice by reason of the mistake. *The State v. Franks et al.*, 64 Id., 39, 42.

Where an indictment charged the defendant with feloniously stealing from the person of one A. certain United States treasury notes, etc., the same being the property of the said A, and on the trial the evidence established the larceny but showed that the money was the property of A. and

his brother as partners, it was held that under the statute the variance was immaterial. *The State v. Cunningham*, 21 Id., 433.

Under this section in an indictment for burglary, it is sufficient designation of the person injured to allege that the owner of the property is to the jurors unknown, and the charge that a car broken was in the possession, care, control and custody of the C. B. & Q. Railroad Company, is an averment that said company had a special property in the car and was sufficient to allege the offense as against that company. *State v. McIntyre*, 59 Id., 264; same case, Id., 267.

Where an indictment charged the defendant with an assault with intent to kill Jesse Cameron, but the evidence showed the name of the person assaulted to be Jesse Cannon, held, in the absence of a showing of prejudice to defendant, that the variance was immaterial under section 4302 of the code. *The State v. Crawford*, 66 Id., 318.

Where an indictment for an assault with intent to kill George J. Farley, whose name thus appeared four times in the indictment, ended thus: "With a felonious intent * * * to kill and murder the said Frank I. Farley," held, that the court properly instructed the jury that if it was apparent that the writing of *Frank I. Farley* was a clerical error in drafting the indictment, and that George J. Farley was meant, and that the defendant was not misled by the mistake, the variance was not fatal, and that the defendant should not be acquitted by reason thereof. *The State v. McCunniff*, 70 Id., 217.

SEC. 4303. [Construction.]—The words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

Under our law it is not necessary, as it was at common law, in an indictment for murder, to specifically charge that the defendant "murdered" the deceased; but the use of allegations which import an equivalent meaning is sufficient. *The State v. O'Neil*, 23 Iowa, 272.

Where the body of an indictment was in the following form: "The said G. S., on, etc., in, etc., in and upon the body of one W. P., then and there being, willfully, feloniously, deliberately, premeditatedly, by lying in wait, and of his malice aforethought, did commit an assault with a deadly weapon, being a pistol, then and there held in the hands of the said G. S., and loaded and charged with powder and bullet, and then and there the said G. S. did lie in wait, with the specific intent to kill and murder the said W. P. willfully, feloniously, deliberately, premeditatedly and of his malice aforethought, shoot off and discharge the contents of said deadly weapon at, against, into and through the head and body of the said W. P. thereby willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, inflicting upon the head and body of the said W. P. a mortal wound, of which mortal wound the said W. P. then and there did die." Held: 1. That the indictment was sufficient as charging murder in the first degree; 2. That the time of the death was sufficiently alleged, as being at the time and place when and where the assault was made; 3. That the indictment was sufficient as charging that the deceased was a human being. *The State v. Stanley*, 33 Id., 526.

SEC. 4304. [Same.]—Words used in a statute to define a public offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used.

It was held under this section that an information charging a defendant with keeping intoxicating liquors "for the purpose of sale," is equivalent to one charging him with keeping "with intent to sell," the offense defined by the statute, and was sufficient. *The State v. Mohr*, 53 Iowa, 261.

SEC. 4305. [Indictment: when sufficient.]—The indictment is sufficient if it can be understood therefrom:

1. That it was found by a grand jury of the county empaneled in the court having authority to receive it, though the name of the court is not actually stated;

2. That the defendant is named, or, if his true name is unknown to the grand jury, that fact be stated, and that he be described by a fictitious name;

3. That the offense was committed within the jurisdiction of the court, or is triable therein;

4. That the offense was committed at some time prior to the time of the finding of the indictment;

5. That the act or omission charged as the offense, is stated with such a degree of certainty, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction according to the law of the case;

6. That when material, the name of the person injured, or attempted to be

injured, be set forth when known to the grand jury, or if not known to it, that it be so stated in the indictment.

An indictment is sufficient when the offense is charged with such certainty and in such manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to the law of the case. *The State v. Watrous*, 13 Iowa, 489; *The State v. Conlee*, 25 Id., 237; *State v. Newton*, 44 Id., 45, 47.

In an indictment for willful trespass in cutting down and destroying timber, it is sufficient to allege that the injury was done by cutting down and destroying, without being more specific. *Id.*

An indictment which describes the offense charged in the language of the statute is sufficient, though it does not set out the technical name of the offense. *The State v. Hessenkamp*, 17 Id., 25.

Although an indictment in charging a public offense may be greatly wanting in that clearness and certainty which is desirable in such pleadings, yet if it can be easily determined what was intended by the pleader, the indictment will be held sufficient. *The State v. Reed*, 20 Id., 413, 417.

In an indictment for breaking and entering a building in which valuable things are kept, with intent to commit a felony, the name of the owner of the building must be set out and averred, if known, and if not known, then it should be so stated therein. *The State v. Morrissey*, 22 Id., 158.

In charging a public offense in an indictment it is not necessary to follow the language of the statute; the use of equivalent language is sufficient. *The State v. Conlee*, 25 Id., 237.

Where an indictment for forgery it is necessary to set out a copy of the instrument alleged to be forged, it need not be prefaced by any technical form of words to express that it is so set out; and the words "of the purport and effect following," are sufficient under the statute. *The State v. Johnson et al.*, 26 Id., 407.

To constitute a good indictment for murder in the first degree, the facts showing the commission of the crime and degree must be alleged. *The State v. McCormick*, 27 Id., 402.

For the requisites of an indictment for murder in the first degree see notes to section 3849, *ante*.

An indictment for keeping a nuisance under section 1564 of the revision (code §, 1543), which charged the offense as having been committed "by using and keeping a room and place for the purpose of selling, and by selling therein intoxicating liquors, in violation of section 1562 of this revision," was held sufficient. *The State v. Freeman*, 27 Id., 333.

To constitute a valid indictment for conspiracy, the particular circumstances, of the offense must be charged when they are necessary to constitute a complete offense. *The State v. Potter*, 30 Id., 554.

An indictment which charged the larceny of "one hundred and eighty dollars in bank notes, usually known and described as greenbacks," was held sufficient certain as to the subject matter of the offense. *The State v. Hockenberry*, 30 Id., 504.

An information "charging that the defendant on, etc., at etc., did sell intoxicating liquors contrary to the statute," without stating to whom the sale was made, was held insufficient on the ground that the name of the person to whom the liquor was sold was not stated, nor was there a statement that his name was unknown. *The State v. Allen*, 32 Id., 491. This virtually overrules *The State v. Becker*, 20 Id., 438, as to this point.

It is only where the name of a person who is charged with a criminal offense cannot be discovered, that the state is permitted to describe him in an indictment by a fictitious name, with the averment that his true name is unknown. And where an indictment in such case described the person, as "a man in Turner Hall, whose name to the grand jurors is unknown," was held not meeting the requirements of the statute. *Geiger v. The State*, 5 Iowa, 484.

An indictment for perjury is sufficient under this section when the act charged as the offense is stated with such a degree of certainty, and in such manner as to enable a person of common understanding to know what is intended, and the court to pronounce sentence. *The State v. Schill*; 27 Id., 267.

In an indictment for perjury for giving false testimony before a grand jury on a criminal charge, it is not necessary to allege that the party charged was or was not guilty of the offense under investigation before the grand jury, nor the facts constituting such charge. *Id.*

Under these sections in an indictment for burglary, it is sufficient designation of the person injured to allege that the owner of the property is to the jurors unknown, and the charge that a car broken was in the possession, care, control and custody of the C. B. & Q. Railroad Company, is an averment that said company had a special property in the car, and was sufficient to allege the offense against that company. *The State v. McIntire*, 59 Id., 264, *Same Case*, Id., 267.

In an indictment for breaking and entering a building in which valuable things are kept, with intent to commit a felony, it is necessary to allege and set out the name of the owner, if known, and if not known, then it should be so stated. *The State v. Morrissey*, 22 Id., 158.

In an indictment for malicious injury, it is sufficient to aver ownership without setting out the character of the title or interest. *The State v. Brant*, 14 Id., 180.

Where an indictment for burglary alleged the ownership of a building in the husband, which was occupied by him and his wife, the fact that the legal title was in the latter was held to be on defense.

A defect in an indictment in the name of a state, where it does not prejudice the substantial right of the accused, is not fatal thereto. *The State v. Gurlock*, 14 Id., 444; *Wrockledge v. The State*, 1 Id., 167; *Barouse v. The State*, Id., 379; *Hintermeister v. The State*, Id., 101.

In an indictment for illegal voting it is not necessary to allege that candidates for any particular office were voted for or the names of the persons voted for. *The State v. Minnick*, 15 Id., 123.

Time is sufficiently alleged in an indictment, by an allegation that the offense was committed "on or about" a day therein stated. *Cokely v. The State*, 4 Id., 477.

SEC. 4306. [**When not insufficient.**].—No indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any of the following matters, which were formerly deemed defects, or imperfections:

1. For the want of an allegation of the time or place of any material fact, when the time and place have been once stated;

2. For the omission of any of the following allegations, namely: "with force and arms," "contrary to the form of the statute, or of the statutes," or "against the peace and dignity of the state";

3. For the omission to allege that the grand jury was impaneled, sworn or charged;

4. For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and person charged; nor,

5. Nor for any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

An indictment describing an offense in the language of the statute, though the offense be not named, is sufficient. *The State v. Shaw*, 35 Iowa, 575; *The State v. Davis*, 41 Id., 311.

Where an information, to obtain a warrant for the seizure of intoxicating liquors, was entitled "state of Iowa, Clayton county," it was unnecessary to allege in the information that the liquors were in Clayton county. *The State v. Thompson*, 44 Id., 399.

SEC. 4307. [**What need not be stated.**].—Neither presumptions of law nor matters of which judicial notice is taken need be stated in the indictment.

SEC. 4308. [**Pleading judicial proceedings.**].—In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, the facts conferring jurisdiction need not be stated in the indictment, but it is sufficient to state that the judgment or determination was duly made or the proceedings duly had, before such court or officer; but the facts constituting the jurisdiction must be established on the trial.

SEC. 4309. [**Same: private statute.**].—In pleading a private statute, or right derived therefrom, it is sufficient to refer to the same by its title and the day of its approval, and the court must thereupon take judicial notice thereof.

SEC. 4310. [**Indictment for libel.**].—An indictment for a libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter upon which the indictment is founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on trial.

SEC. 4311. [**Instrument destroyed or withheld.**].—When an instrument which is the subject of an indictment, has been destroyed or withheld by the act or procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial.

SEC. 4312. [**Indictment for perjury.**].—In an indictment for perjury or subornation of perjury, it is sufficient to set forth the substance of the controversy, or matter in respect to which the offense was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer the same, with proper allegations of the falsity of the matter on which the perjury is assigned; but the

indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or the authority of the court or person before whom the perjury was committed.

In an indictment for perjury it is essential to aver that the court or person, before whom the alleged false oath was taken, had authority to administer the oath. *State v. Nickerson*, 46 Iowa, 447.

An indictment is not objectionable in that it does not charge the oath to have been administered by any one, if it allege that the defendant was "duly sworn." *State v. O'Hagan*, 38 Id., 504.

SEC. 4313. [Intent to defraud.]—In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment an intent to defraud without naming the particular person or body corporate intended to be defrauded; and on the trial of such indictment it is sufficient if there appear to be an intent to defraud the United States, or any state, county, city, or township, or any body corporate, or any officer in his official capacity, or any co-partnership, or member thereof, or any particular person.

An indictment for forgery which charges generally an intent to defraud, without specifying the person intended to be defrauded, is sufficient under the statute. *State v. Maxwell*, 47 Iowa, 454.

In an indictment for forgery copies of the alleged forged instrument should be set out, or it should state a sufficient reason for not doing so. *State v. Callendine*, 8 Id., 288.

An indictment for forgery need not allege the name of the person to whom the forged instrument was uttered. *State v. Hart*, 67 Id., 142.

SEC. 4314. Distinction abrogated.]—The distinction between an accessory before the fact and a principal, is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, must hereafter be indicted, tried, and punished as principals.

By this section the distinction between a principal and an accessory before the fact is abolished, and all persons concerned in the commission of a public offense, including aiders and abettors, are guilty as principals. *The State v. Brown*, 25 Iowa, 561; *The State v. Thornton*, 26 Id., 79; *The State v. Comstock*, 46 Id., 265.

Two or more persons may be charged in an indictment with the commission of a crime, which from its nature could in fact have been committed by only one, those who aid and abet its commission being, under the code, chargeable as principals. *The State v. Comstock*, 46 Id., 265.

The mere fact that a person was in company with another, at the time of the commission of a crime by him will not render the former guilty; his participation in some manner must be shown. *The State v. Farr*, 33 Id., 553.

Where the court below instructed the jury that "aiding and abetting" in the commission of a public offense may consist in "agreeing to or taking care of the families of the parties" who have committed the theft, it was held, to be correct where there was evidence on which to base the instruction. *The State v. Stanley*, 48 Id., 221.

Accessories before the fact may be convicted under an indictment in the ordinary form charging them as principals. The indictment should be the same as though they were principals. *State v. Hessian*, 58 Id., 63.

Under this section an accessory is properly charged in an indictment as a principal, and evidence is admissible to show that he simply aided and abetted in the commission of the crime. *State v. Pugsley*, 33 N. W. R., 493.

SEC. 4315. [Accessory after the fact.]—An accessory after the fact to the commission of a public offense, may be indicted, tried and punished, though the principal be neither tried or convicted.

SEC. 4316. [Compounding offense.]—A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another, or a gratuity or reward, or engagement or promise thereof, upon agreement or understanding, express or implied, to compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original offense has not been indicted or tried.

SEC. 4317. [Indictment for embezzlement.]—In an indictment for the embezzlement or fraudulent conversion of money, it shall be sufficient to allege the

embezzlement or fraudulent conversion to have been of money generally, without designating its particular species; and proof that the defendant embezzled, or fraudulently converted any money or bank note, will be sufficient to support the averment, although the particular species be not proved.

CHAPTER 17.

OF PROCESS UPON AN INDICTMENT.

SECTION 4318. [By bench warrant.]—The process upon an indictment for the arrest of an individual, shall be a bench warrant.

Where a pary indicted for a criminal offense appeared and submitted to a trial without being arrested on a bench warrant, the issuance of such warrant was unnecessary and the court had jurisdiction of the person of the defendant. *The State v Ray*, 50 Iowa, 520, 521.

SEC. 4319. [Court or judge may order.]—When an indictment is filed by the clerk of the court against a defendant, not in custody, or under bail, or who has not deposited money instead of bail, the judge of the court shall make an order on the indictment, which shall be signed by him, with his name of office, that a bench warrant issue for the arrest of the defendant, and, if the offense charged in the indictment be bailable, fix the amount in which bail may be taken.

SEC. 4320. [Clerk to issue warrant.]—The clerk, on the application of the district attorney, shall accordingly, at any time after the making of the order of the judge, whether the court be in session or not, issue a bench warrant into one or more counties.

SEC. 4321. [Form, in case of felony.]—A bench warrant, if the offense be a felony, may be substantially, in the following form:

County of
The State of Iowa.

To any peace officer in the state:

An indictment having been found in the district court of said county, on the... day of, A. D., 18.. (the day on which the indictment is marked filed, by the clerk of the court), charging A. B. with the crime of (here designating the offense by the name, if it have one, or by a brief general description of it, as given by law, substantially, as in the indictment.)

You are, therefore, hereby commanded to arrest the said A. B., and bring him before said court to answer said indictment, if the said court be then in session in said county, or if the said court be not then in session in said county, that you deliver him into the custody of the sheriff of said county.

Given under my hand, and the seal of said court, at my office in,
[SEAL] in the county aforesaid, this day of, A.
D., 18..

By the order of the judge of the court.

SEC. 4322. [If misdemeanor.]—If the offense be a misdemeanor, the bench warrant may be in a similar form, adding to the body thereof a direction, substantially, to the following effect:

“Or, if the said A. B. require it, that you take him before a magistrate, or the clerk of the district court in said county, or in the county in which you arrest him, that he may give bail to answer the said indictment.”

SEC. 4323. [If bailable.]—If the offense charged be bailable, the clerk must make an indorsement on the bench warrant, to the following effect: “The defendant is to be admitted to bail in the sum of ... dollars.” (The amount fixed by the judge and indorsed on the indictment.)

SEC. 4324. [**Where served.**]—The bench warrant may be served in any county in the state.

SEC. 4325. [**Proceedings.**]—If the defendant, when arrested, be brought before a magistrate, or the clerk of the district court of the same county in which it was issued, or another county, for the purpose of giving bail, the same proceedings must be had, in all respects, as if he had been arrested on a warrant of arrest, issued by a magistrate on a preliminary information, as nearly as may be.

SEC. 4326. [**Indictment against a corporation: service of, and return.**]—The process upon an indictment against a corporation shall be a notice; which shall be issued by the clerk at any time after the filing of the indictment in his office, on the application of the district attorney. The notice shall be under the seal of the court, and shall, substantially, notify the defendant of the finding of the indictment, of the nature of the offense charged, and that he must forthwith appear and answer the same. It may be served by any peace officer in any county in the state on any officer or agent of the defendant, by reading the same to him and leaving with him a copy thereof. It shall be returned to the clerk's office without delay, with proper evidence of its service; and, from and after two days from the time of the making of such service, the defendant shall be considered in court, and thereafter shall be considered to be present to all proceedings had on the indictment.

CHAPTER 18.

OF ARRAIGNMENT OF THE DEFENDANT.

SECTION 4327. [**Defendant arraigned.**]—As soon as practicable after an indictment is found, the defendant must be arraigned thereon, unless he waive the same; but where a corporation is defendant, arraignment shall not be required.

If one indicted waives arraignment, he cannot afterwards object that he is not indicted by his right name. *The State v. Winststrand*, 37 Iowa, 110.

SEC. 4328. [**If for felony or misdemeanor.**]—If the indictment be for a felony, the defendant must be personally present, but if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon arraignment by counsel.

In the exercise of a challenge to the grand jury the accused need not necessarily be personally present, but the privilege may be exercised or waived by his attorney in the absence of the accused. *The State v. Felter*, 25 Iowa, 67.

That the prisoner on trial for forgery, was not present when the jury were brought into court after the case had been submitted, will not be ground for reversal, when it appears that no prejudice could have resulted to the prisoner from his irregularity. *The State v. Vaughan*, 29 Id., 286.

SEC. 4329. [**If in custody.**]—When he is in custody, the court must direct the officer in whose custody he is to bring him before it to be arraigned, and the officer must do so accordingly.

SEC. 4330. [**If on bail.**]—If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for arraignment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may, on motion of the district attorney, make an order directing the clerk to issue a bench warrant for his arrest, and fix the amount in which bail will be taken if the offense be bailable.

SEC. 4331. [**Clerk issue bench warrant: when.**]—The clerk on application of the district attorney, may, accordingly, at any time after the order, whether the court be in session or not, issue a bench warrant into one or more counties of this state for the arrest of the defendant.

SEC. 4332. [**Defendant's right to counsel.**]—If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desire the aid of counsel, and if he does, and is unable to employ any, must allow him to select, or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours.

SEC. 4333. [**Arraignment: by whom made and of what consists.**]—The arraignment may be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment to the defendant, and unless previously done, delivering to him a copy of the indictment^t and indorsements thereon, and informing him that if the name by which he is indicted is not his true name, he must then declare what his true name is, or be proceeded against by the name in the indictment, and asking him what he answers to the indictment.

SEC. 4334. [**Precluded from objecting: when.**]—If he gives no other name, or gives his true name, he is thereafter precluded from objecting to the indictment upon the ground of being therein improperly named.

The objection that the defendant is erroneously named in the indictment cannot be made for the first time after arraignment and trial. Failing to make the objection upon his arraignment, or to declare his true name, he thereby waives his right to subsequently make the objection. *The State v. White*, 32 Iowa, 17; See, also, *The State v. Winstrand*, 37 Id., 110.

If the record is silent as to the arraignment, it will be presumed that the defendant was properly arraigned and failed to give his true name, or that he waived the arraignment. *The State v. Winstrand*, 37 Id., 110.

SEC. 4335. [**Same.**]—If he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he was indicted.

SEC. 4336. [**Answer: time.**]—In answer to the arraignment, the defendant may move to set aside the indictment, or he may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he demand it.

CHAPTER 19.

OF SETTING ASIDE THE INDICTMENT.

SECTION 4337. [**Motion must be sustained.**]—The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained:

1. When it is not indorsed "a true bill," and the indorsement signed by the foreman of the grand jury as prescribed by this code;
2. When the names of all the witnesses examined before the grand jury are not indorsed thereon; when the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith;
3. When it has not been presented and marked "filed," as prescribed by this code;
4. When any person, other than the grand jurors, was present before the grand jury when the question was taken upon the finding of the indictment, or when any person, other than the grand jurors, was present before the grand jury during the investigation of the charge, except as required or permitted by law;
5. That the grand jury were not selected, drawn, summoned, impealed, or sworn as prescribed by law.

An objection to an indictment grounded upon the illegality of the grand jury should be taken

before pleading to the indictment. *The State v. Reed*, 20 Iowa, 413; *The State v. Ingalls*, 17 Id., 8; *The State v. Howard*, 10 Id., 101; *The State v. Ostrander*, 18 Id., 435.

Where papers containing minutes of the evidence taken before the grand jury are returned by them into court and deposited with the clerk, they are in fact filed, and the court, upon being satisfied of such fact, may order that they be endorsed "filed" as of that date. *The State v. Guisenhouse* 20 Id., 227.

Where the minutes of evidence taken before the grand jury in regard to sales of intoxicating liquors in violation of law, and several indictments were found, were returned by the grand jury as they were taken, without separating those portions of the evidence relating to each indictment, it was held, that while this was irregular, yet in the absence of a showing of prejudice to the accused by reason thereof, it did not afford sufficient ground for a reversal of the judgment. *Id.*

The admission of incompetent evidence before the grand jury does not constitute sufficient ground for setting aside an indictment. *The State v. Tucker*, Id., 508.

The mere presence of a bailiff of the court in attendance on the grand jury during their investigation of a criminal charge, is not a sufficient ground for setting aside an indictment, if he were not present when the question was taken upon the finding of the indictment. *The State v. Kimball*, 29 Id., 267.

An indictment will be set aside for irregularities in the selection of the grand jury only when there has been a departure from the requirements of the statute, affecting the substantial rights of the defendant. *The State v. Brandt*, 41 Id., 593; *The State v. Carney et al.*, 20 Id., 82.

Where the comparison of the ballots with the list of grand jurors was made by the clerk and the deputy sheriff in the absence of the sheriff, it was held that the grand jury thus selected was not a legal body, and incapable of finding a valid indictment. *The State v. Brandt*, Id.; following *Dutell v. The State*, 3 G. Greene, 125.

Where the testimony of witnesses examined before the grand jury is taken down and returned, as required by statute, but their names are not indorsed upon the indictment, it may be assailed by a motion to set aside; but if not thus assailed, the witnesses may be examined on the trial. *The State v. Flynn*, 42 Iowa, 164; *The State v. Robinson*, 47 Id., 489.

Where the name of a witness examined before the grand jury was not indorsed on the indictment, and after the jury had been called into the box the district attorney moved to have the indorsement made then; it was held, that the granting of the motion worked no prejudice to the defendant. *Id.*

That the minutes of evidence taken before the grand jury do not show sufficient to justify the finding of the indictment, is no ground for quashing or setting aside the indictment. *The State v. Morris*, 36 Id., 272; *The State v. Bowers*, 17 Id., 46; *The State v. Van Vleet*, 23 Id., 27.

The statute does not require that the names of witnesses before the grand jury, who gave no material testimony, should be indorsed on the indictment. *The State v. Little* 42 Id., 51.

An indictment presented in the proper court and properly filed therein, is not invalid because of an indorsement thereon reciting that it was found in another county. *The State v. Smouse*, 50 Id., 43.

When the minutes of the testimony of a witness before the grand jury are properly returned, the fact that his name is not indorsed upon the indictment will not prevent his examination as a witness on the trial. *The State v. Fowler*, 52 Id., 103; *The State v. Flynn*, 42 Id., 164.

That the names of the witnesses examined before the grand jury are not indorsed on the indictment is not ground for a motion to set aside the indictment; but if the motion is not made the witness may be examined on the trial. *Id.*

Witnesses whose names were indorsed on the indictment were competent to testify on the trial, prior to the revision of 1860, notwithstanding minutes of their evidence before the grand jury had not been returned with the indictment. *The State v. McComb*, 18 Id., 43; *The State v. Posilewait*, 14 Id., 446.

SEC. 4338. [When not sustained.]—A motion to set aside the indictment on the ground that the names of all the witnesses examined before the grand jury are not indorsed thereon; or that the name of any other witness than those so examined is indorsed thereon as prescribed in the second subdivision of section four thousand three hundred and thirty-seven hereof, shall not be sustained if the indorsement is corrected by the insertion or striking out of such names or name by the district attorney or the clerk of the court, under the direction of the court, so as to correspond with the minutes required to be kept by the clerk of the grand jury and returned and preserved with the indictment to the court.

The minutes of evidence taken before the grand jury, should be filed with the clerk, whereupon they become a part of the record, and cannot be contradicted by affidavits of grand jurors or

witnesses. This record is conclusive as to the persons who were thus examined as witnesses. *State v. Little*, 42 Iowa, 51.

The fact that witnesses were examined on the trial whose names were not indorsed on the indictment, may be taken advantage of by objection first raised after conviction. *State v. Houston* 50 Id., 512.

SEC. 4339. [**What ground of motion not allowed.**—The ground of the motion to set aside the indictment mentioned in the fifth subdivision of section four thousand three hundred and thirty-seven hereof, is not allowed to a defendant who has been held to answer before indictment.

That a "grand jury were not selected, drawn, summoned, impaneled or sworn as prescribed by law," is not ground for setting aside the indictment against one who was held to answer before the finding of the indictment. *State v. Gibbs*, 39 Iowa, 318.

The right to challenge a grand juror, on the ground that he is an alien, must be exercised before he is sworn. *State v. Gibbs*, 39 Id., 318.

Affidavits of grand jurors that they did not assent to the finding of an indictment, are not admissible on a motion to set it aside. *Id.*; *State v. Mewherter*, 46 Id., 88; *State v. Davis*, 41 Id., 311.

That one of the names upon the list of grand jurors, as drawn, does not appear upon the list returned by the judges of election for that year, is not ground for reversing a judgment in a criminal case when it is not shown but that the proper steps were taken in the court below to correct this error, and thus have impaneled a legal grand jury. *State v. Hart*, 29 Id., 268.

An indictment will be set aside for the irregularities in the selection of the grand jury, only when there has been a departure from the requirements of the statute affecting the substantial rights of the defendant. *State v. Brandt*, 41 Id., 593.

Where the proper number to serve on a grand jury had been returned from all the election precincts save one, and the county canvassers failed to supply the omission, but certain members of the board of supervisors suggested to the county auditor from the delinquent township to supply the deficiency, it was held, not to be such an irregularity as would render the grand jury an illegal body. *Id.*

Where, in the drawing of the jury, the comparison of the ballots with the list of grand jurors was made by the clerk and the deputy sheriff, in the absence of the sheriff, the grand jury thus selected was held not to be a legal body, and incapable of finding a valid indictment. *Id.*, following *Dutel v. State*, 3 G. Greene, 125.

SEC. 4340. [**Hearing.**—The motion must be heard when it is made, unless for good cause the court postpone the hearing to another time.

SEC. 4341. [**If denied.**—If the motion be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto.

When a motion to set aside an indictment is denied, the defendant must immediately demur or plead thereto, and upon his refusal to do either, a plea of "not guilty" must be entered by the court. *The State v. Morris*, 36 Iowa, 272.

SEC. 4342. [**If granted.**—If the motion be granted, the court must order the defendant, if in custody, to be discharged, or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the money deposited be refunded to him, unless the court direct that the case be re-submitted to the same or another grand jury.

SEC. 4343. [**If re-submitted.**—If the court direct that the case be re-submitted, the defendant, if already in custody, must so remain unless he be admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment.

SEC. 4344. [**Order to set aside, no bar.**—An order to set side the indictment as provided in this chapter, shall be no bar to a future prosecution for the same offense.

CHAPTER 20.

OF PLEADING BY THE DEFENDANT.

SECTION 4345. [**Demurrer or plea.**].—The only pleading on the part of the defendant is a demurrer or plea.

SEC. 4346. [**Where put in.**].—The demurrer and plea must be put in in open court, and may be oral; but an entry thereof must be made on the record.

CHAPTER 21.

OF THE MODE OF TRIAL.

SECTION 4347. [**Issues: by whom tried.**].—Issues of law shall be tried by the court. Issues of fact shall be tried by a jury.

SEC. 4348. [**Issues of law.**].—An issue of law arises upon a demurrer to the indictment. No joinder in demurrer is necessary.

SEC. 4349. [**Issues of fact.**].—An issue of fact arises on a plea of not guilty, or of former conviction or acquittal of the same offense. No replication or further pleading is necessary.

SEC. 4350. [**Same.**].—An issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded.

It is not possible, under this section, for the defendant in a criminal case to waive a jury and submit to a trial by the court alone. Such waiver gives the court no jurisdiction to try the cause without the aid of a jury, and a judgment of conviction rendered on such trial must be reversed. *SEEVERS, J., dissenting. The State v. Carman, 63 Iowa, 130.*

Where defendant has pleaded not guilty and a jury has been sworn to try the issue, and by agreement between the district attorney and defendant a verdict of guilty is rendered, it will be presumed, in absence of evidence to the contrary, that defendant admitted his guilt in open court, and the jury acting upon such admission rendered a verdict according to the evidence. *The State v. Keegan, 37 N. W. Rep., 120.*

SEC. 4351. [**Of the indictment.**].—If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if for a felony, he must be personally present.

See *The State v. Vaughan, 29 Iowa, 236*, cited in notes to section 4328, *ante*.

It is not necessary that a defendant convicted of felony shall be present in person upon the argument of a motion for a new trial, yet it is better that he should be. *The State v. Decklotts, 19 Iowa, 447.*

It is competent, under this section, for the defendant indicted for a misdemeanor to appear by counsel and demand a trial, and it is error to refuse a trial in such case on the ground of the personal absence of the defendant. *The State v. Connehan, 57 Id., 351.*

Where the record shows that a defendant in a criminal prosecution was present at the commencement and conclusion of his trial, in the absence of any affirmative showing to the contrary, it will be presumed that he was present during the trial and at the rendition of the verdict. *The State v. Wood, 17 Id., 18.*

The personal presence of the defendant, when the verdict of the jury is rendered in court is required in some cases—that of his counsel is required in none. When the verdict is for assault and battery, though charged with a higher offense, his presence when the verdict is rendered is not required. *The State v. Shephard, 10 Id., 126.*

CHAPTER 22.

OF DEMURRER.

SECTION 4352. [**Ground of.**]—The defendant may demur to the indictment when it appears upon its face, either:

1. That it does not substantially conform to the requirements of this code;
2. That the indictment contains any matter, which, if true, would constitute a legal defense or bar to the prosecution.

SEC. 4353. [**Entry: form.**]—The entry on the record of a demurrer, may be substantially in the following form: “The defendant demurs to the indictment.”

The defendant may demur when the indictment does not substantially conform to the various requirements of the case in regard thereto. *The State v. Morrissey*, 22 Iowa, 158, 159.

SEC. 4354. [**Objection: when heard.**]—When the demurrer is put in, the objection thereby presented must be heard immediately, or at such time as the court may appoint.

SEC. 4355. [**If sustained.**]—If the demurrer is sustained on the ground that the offense charged was within the exclusive jurisdiction of another county in this state, the same proceedings shall be had as provided in section four thousand four hundred and forty-six to four thousand four hundred and forty-nine, inclusive, of this code.

SEC. 4356. [**Same.**]—If the demurrer is sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final, and the defendant must be discharged.

SEC. 4357. [**Same.**]—If the demurrer is sustained on any other ground than that mentioned in the last two sections, the defendant must be dealt with as provided in section four thousand three hundred and forty-one of this code, unless the court is of opinion, on good cause shown, that the objection can be remedied or avoided in another indictment; in which case the court may order the cause to be re-submitted to the same or another grand jury, and the defendant may be dealt with as provided in section four thousand three hundred and forty-two of this code.

SEC. 4358. [**If overruled.**]—If the demurrer is overruled, the defendant has a right to put in a plea. If he fails to do so, final judgment may be rendered against him on the demurrer, and, if necessary, a jury may be impaneled to inquire and ascertain the the degree of the offense.

Where the defendant demurred to the indictment, and upon the overruling of the demurrer he neglected to plead, and through inadvertence the cause went to trial without any plea, but was tried in all respects as if a plea of not guilty had been entered, *held*, that the defendant was not prejudiced by the irregularity, and that a judgment of conviction upon a verdict of guilty should not be set aside because of the want of plea. *The State v. Greene*, 66 Id., 11.

CHAPTER 23.

OF PLEAS TO THE INDICTMENT.

SECTION 4359. [**Number of.**]—There are but three pleas to an indictment. A plea of:

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty.

SEC. 4360. [**Entry: form.**].—The plea may be entered on the record, substantially, in the following form:

1. A plea of guilty: "The defendant pleads that he is guilty of the offense charged in the indictment."

2. A plea of not guilty: "The defendant pleads that he is not guilty of the offense charged in the indictment."

3. A plea of former conviction or acquittal: "The defendant pleads that he has formerly been convicted, or acquitted (as the case may be), of the offense charged in the indictment, by the judgment of the court of (naming it), rendered on the . . . day of, A. D. 18.. (naming the time)".

SEC. 4361. [**Plea of guilty.**].—The plea of guilty can only be put in by the defendant himself in open court.

Where the defendant in a criminal action fails to have the names of the petit jurors called, and an attachment issued against those who are absent at the time the indictment is called for trial, as provided for in this section of the code, he waives the right to make objections on the ground of such absence during the progress of the trial. *The State v. Miller et al.*, 53 Iowa, 84.

SEC. 4362. [**Same.**].—At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted.

Where a criminal case has been appealed from a justice of the peace by the state, the district court may inquire into the circumstances, in order to settle and fix the amount of the punishment, though the defendant had pleaded guilty below, and though the plea is not withdrawn in the district court. Especially is this so, when the plea and judgment were entered in the absence of the prosecutor and before the day fixed for the trial. *The State v. Tait & Tait*, 22 Iowa, 140.

Under this section a defendant under indictment has the right to withdraw a plea of guilty and plead not guilty at any time before judgment. *The State v. Oehlshlager*, 38 Id., 297; *The State v. Kraft*, 10 Id., 330.

So, the defendant, after pleading not guilty to an indictment, has the right to withdraw the plea and file a motion to set aside the indictment. *The State v. Hale*, 44 Id., 96.

A defendant who pleaded guilty to an information for an assault and battery before a justice of the peace, has the right on appeal, to withdraw the plea, and plead assault only, or not guilty. *State v. Farlee*, 38 N. W. R., 155.

SEC. 4363. [**Plea of not guilty.**].—The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact may be given in evidence under it, except a former conviction or acquittal.

SEC. 4364. [**Conviction or acquittal a bar.**].—A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place.

A verdict of guilty upon a former indictment, where there was no judgment on the verdict, but where the court virtually set the verdict aside on a motion in arrest, was not such a former conviction as to bar a prosecution upon a new indictment for the same offense. *The State v. Clark*, 69 Iowa, 196.

SEC. 4365. [**Same.**].—When the defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former or for any lower degree of that offense, or for an offense necessarily included therein.

SEC. 4366. [**When judgment shall not bar.**].—The judgment for the defendant on a demurrer, except where it is otherwise provided, or for an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense.

SEC. 4367. [**Plea by court: when.**].—If the defendant fail or refuse to answer the indictment by demurrer or plea, a plea of not guilty must be entered by the court.

Where the defendant refuses to either demur or plead to the indictment, after a motion to set aside the same has been overruled, a plea of "not guilty" must be entered by the court. *The State v. Morris*, 36 Iowa, 272.

CHAPTER 24.

OF CHANGE OF VENUE IN CRIMINAL CASES.

SECTION 4368. [Defendant may petition for.]—In all criminal cases which may be pending in any of the district courts of this state, any defendant therein may petition the court for a change of venue to another county.

The discretion confined to the court by this and subsequent sections of the code, does not exist in applications in civil cases. *Miller v. Laraway*, 31 Iowa, 538; *Jones v. C. & N. W. R. Co.*, 36 Id., 68.

A trial and conviction for assault and battery, under an information charging that offense, is not a bar to a subsequent indictment and prosecution for an assault with intent to inflict a great bodily injury, based on the same act. *The State v. Foster*, 33 Id., 525.

SEC. 4369. [Petition may set forth.]—Such petition must set forth the nature of the prosecution, the court where the same is pending, and that such defendant cannot receive a fair and impartial trial owing to the prejudice of the judge, or to excitement or prejudice against him in such county, and must verify the same by his affidavit stating the same to be true as he verily believes.

SEC. 4370. [Verified: when.]—When the ground alleged in the petition is excitement and prejudice against him in the county, it must be verified by three disinterested persons, residents of the county from which the change is sought, in addition to the petitioner himself.

SEC. 4371. [Need not state facts.]—The petition need not state the facts upon which the belief of the petitioner, or other persons verifying the same is founded, but may allege the belief of the particular ground thereof in general terms.

SEC. 4372. [Additional testimony.]—The court may receive additional testimony, by affidavits only, either on the part of the defendant or the state, when the alleged ground in the petition is excitement and prejudice in the county against the petitioner.

SEC. 4373. [Same: filed with clerk.]—The petition and affidavits, if any, must be filed with the clerk, and are parts of the record.

SEC. 4374. (As amended by ch. 9, 18th g. a.) [Court must decide.]—The court, in the exercise of a sound discretion, must decide the matter of the petition, when fully advised, according to the very right of it.

Applications for change of venue, in criminal cases, on the ground of prejudice either of the judge or the people are addressed to the sound legal discretion of the court, and though the averments of the affidavits are in the very language of the statute, the supreme court will not interfere unless it be clearly shown that such discretion has been improperly exercised. *State v. Arnold*, 12 Iowa, 479; *State v. Ingalls & King*, 17 Id., 8; *State v. Hutchinson*, 27 Id., 212; *State v. Freeman*, Id., 333; *State v. Feller* 32 Id., 49; *State v. Ostrander*, 18 Id., 435; *State v. Knight*, 19 Id., 94; *State v. Westfall*, 49 Id., 328, 332; *State v. Spurbeck et al.*, 44 Id., 667; *State v. Mewherter*, 46 Id., 88; *State v. Ross et al.*, 21 Id., 467; *State v. Baldy*, Id., 39.

Affidavits showing the prejudice of the judge, if admissible at all, must state facts and not the opinions and belief of deponents. *State v. Mewherter*, 46 Id., 88.

When the application for change of venue is applied for on the ground of prejudice and excitement against the defendant on part of the people of the county, the petition must be verified by three disinterested residents of the county, and additional evidence also may be received by the court upon the allegations of the petition. When the petition is based upon the prejudice of the judge it need not be thus supported by the verification or testimony of witnesses. Per BECK J. in *State v. Mewherter*, Id., 91.

While the determination of applications for change of venue in criminal cases, based upon the local prejudice, is vested in the discretion of the court, yet it is not an absolute and arbitrary discretion, but a sound judicial discretion, subject to review in the appellate court. *State v. Canada*, 48 Id., 448.

An abuse of discretion must be shown in a refusal to grant a change of venue on account of prejudice of the judge, to constitute error. *State v. Ray*, 50 Id., 520; *State v. Mewherter*, 46 Id., 88; *State v. Linde*, 54 Id., 139, 141.

Although an application for a change of venue in a criminal cause, on the ground of prejudice of the judge, makes allegations upon which, if true a change should be granted, it does not fol-

low as a matter of course, that the change must be granted; for the judge may consult his own feelings as well as the papers, and grant or refuse the change as he may think right demands, in the exercise of a careful discretion; and his ruling will not be reversed on appeal, unless it has been made to appear that the prejudice in fact existed. *The State v. Foley et al.*, 65 Id., 51.

The statement of a mere belief that the judge is prejudiced, when founded on alleged facts of which the defendant has no personal knowledge is insufficient to overcome the presumption which arises from the denial which is implied in the order overruling the application for a change of venue in a criminal cause, but with the unequivocal statement of the judge that the alleged facts on which the belief of defendant is based, have no existence the question of the correctness of the ruling is not left to depend on the presumption which arises under the law in its favor, but is affirmatively established. *The State v. Hale*, 65 Id., 575.

SEC. 4375. [**Same.**].—If sustained, the court must, if the ground alleged be the prejudice of the judge, order the change of venue to the most convenient county in an adjoining district to which no objection exists.

SEC. 4376. [**Same.**].—If sustained on the ground of excitement and prejudice in the county, it must be awarded to such county in the same district in which no such objection exists.

SEC. 4377. [**Duty of clerk.**].—Upon the making of the order, if there be but one defendant in the case, unless all have joined in the petition, the clerk must make out and certify a transcript of all papers on file in the case, including the indictment, and file the same in his office; and a certified copy of all record entries, and all the original papers on file must be, without unnecessary delay, transmitted to the clerk of the court to which the change of venue is ordered.

The certificate of the clerk appended to a transcript of the cause in a change of venue, showed that it embraced all of the original papers filed, and a true copy of all the record entries made in the case; *held* sufficient. *The State v. Ross*, 21 Iowa, 467.

SEC. 4378. [**Same.**].—If there be more than one defendant in the case, and all the defendants have not joined in the petition, the clerk, upon the making of such order, must, without unnecessary delay, make out and certify a transcript of all entries appearing on the record, and of all the papers on file in the case, including the indictment, and transmit the transcript so certified to the clerk of the court to which the change of venue is ordered, retaining the originals.

SEC. 4379. [**Duty of sheriff.**].—If a defendant who has applied for a change of venue, which has been ordered, be in custody, the sheriff of the county from which the venue is changed, must, on the order of the court, transfer and deliver such defendant to the sheriff of the county to which such change is allowed, and upon such transfer and delivery, with a certified copy of such order, the sheriff last mentioned must receive and detain the defendant in his custody until legally discharged therefrom, and give a certificate of such delivery.

SEC. 4380. [**Court to which changed.**].—The court to which such change of venue is granted must take cognizance of the cause, and proceed therein to trial, judgment and execution, in all respects as if the indictment had been found by the grand jury impaneled in such court.

The clerk of the court to which a case is taken by change of venue has the same power to accept a recognizance as the one in the court where the indictment was found. *The State v. Merrihew*, 47 Iowa, 112.

SEC. 4381. [**Cost of change: by whom paid.**].—In all changes of venue under the provisions of this chapter, the county from which the change of venue was taken shall pay the expenses and charges of removing, delivering and keeping the defendant, and all other expenses necessary and consequent upon such change of venue and trial of such defendant, which shall be audited and allowed by the court trying such case.

Where the venue in a criminal case was changed, and the sheriff of the county where it was tried presented his bill for services rendered by him in the case to the successor of the trial judge, who made his indorsement thereon, finding it to be just and correct, and recommending its allowance, it was *held*, that such indorsement did not constitute the auditing and allowance by the court contemplated by this section of the code, and would not be binding upon the county to which it was presented for payment. The act should be that of the court. A mere indorsement

by a *judge*, not purporting to be the act of the court, and merely recommending the allowance of the account, is not what the statute contemplates. *Barnes v. Marion County*, 54 Iowa, 482.

When a criminal cause is tried in a county other than the one in which the offense was committed, the latter county is liable to the county where the trial is had for *all* the fees paid the jurors engaged in the trial. *Jones County v. Linn County*, 68 Id., 63.

SEC. 4382. [**Sheriff's fees.**—]—Sheriffs, for delivering prisoners under the provisions of this chapter, are entitled to the same fees therefor as are allowed for conveyance of convicts to the penitentiary.

SEC. 4383. [**District judge may transfer prosecutions from one county to another.**—]—When any district judge in this state is satisfied from his own knowledge or otherwise, that any organized county in his district does not contain a sufficient number of inhabitants possessing the qualifications of jurors to compose grand and trial jurors for the presentment and trial of any person or persons, charged with the commission of an offense in said county requiring the intervention of a grand jury, said judge shall make an order transferring all prosecutions for such offenses committed in said county to the next nearest county in the same judicial district possessing the requisite number of inhabitants qualified to serve as jurors.

SEC. 4384. [**Order may be made in vacation.**—]—Said order may be made by the judge in vacation or by the court, and the district court of the county to which said prosecution may be transferred, shall have full and complete jurisdiction of the offense, and the person or persons charged with committing the offense may be indicted and tried in the county to which the prosecution is so transferred, in the same manner as though the offense had been committed in said county.

SEC. 4385. [**Person charged required to appear and give bond.**—]—When any prosecution has been transferred by the court or judge under the provisions of this chapter, the person charged with committing the offense shall be required to appear at the next succeeding term of the district court of the county to which the prosecution is transferred, and shall give bond accordingly, and the court or judge may require all material witnesses in behalf of the prosecution to enter into cognizance for their appearance at the district court of the county to which the prosecution is transferred.

When the venue in a criminal case is changed the sureties, upon his recognizance for his appearance, etc., prior to the change, are liable for the appearance of the accused before the court to which the change is ordered; no new recognizance having been entered into for such appearance. *The State v. Brown*, 16 Iowa, 314.

The appearance of a defendant in a criminal cause does not discharge the sureties on his bond. They are still liable for any failure to obey the orders of the court before surrendered or discharged. *Id.*; *The State v. Merrihew*, 47 Id., 112.

SEC. 4386. [**Costs.**—]—The county in which the offense was committed, and from which the prosecution was transferred, shall pay all the costs attending the prosecution.

SEC. 4387. [**No appeal from order.**—]—No appeal or writ of error shall lie from any order for the transfer of prosecutions made under the provisions of this chapter.

SEC. 4388. [**This chapter, to what applicable.**—]—The provisions of this chapter apply to prosecutions or charges now pending, or that may hereafter be instituted for offenses heretofore or hereafter committed.

CHAPTER 25.

OF THE FORMATION OF TRIAL JURY.

SECTION 4389. [**How formed.**].—The jury for the trial of criminal actions is selected, drawn, and summoned as provided in the code of civil practice.

SEC. 4390. [**Ballots prepared by clerk.**].—At the opening of the court, the clerk shall prepare separate ballots, containing the names of the persons returned as jurors, which shall be folded each in the same manner, as near as may be, and so that the name thereon shall not be visible, and must deposit them in a box to be kept for that purpose.

The terms "opening of the court," used in this section, are to be understood as conveying the idea that the court is in session, organized for the transaction of judicial business. *Hobart v. Hobart*, 45 Iowa, 501, 504.

SEC. 4391. [**Parties may require names of jurors called.**].—When the indictment is called for trial and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and that an attachment issue against those who are absent, but the court may, in its discretion, wait or not for the return of the attachment.

SEC. 4392. [**Drawing jurors.**].—Before the name of any juror is drawn the box must be closed and shaken, so as to intermingle the ballots therein, and the clerk shall draw such ballots without seeing the names written on them, from the box, through the top or lid thereof.

SEC. 4393. [**Disposition of ballots.**].—When the jury is completed, the ballots containing the names of the jurors sworn must be laid aside and kept apart from the ballots containing the names of the other jurors, until the jury so sworn is discharged.

SEC. 4394. [**Same.**].—After the jury is so discharged, the ballots containing their names must be again folded and returned to the box, and so on, as often as a trial is had.

SEC. 4395. [**Juror absent.**].—If a juror be absent when his name is drawn or be set aside or excused from serving on that trial, the ballot containing his name must be folded and returned to the box as soon as the jury is sworn.

SEC. 4396. [**Talesmen.**].—If by reason of there being one or more juries impaneled, or for any other reason there should not remain any ballots undrawn, or if in consequence of jurors being set aside no jury can be obtained from the list of those returned by the sheriff for the trial of issues, the court may order the sheriff, or if he be a party to or interested in the cause, some other person, to summon jurors from the bystanders, or other persons, who shall be returned for the trial of the indictment.

When the sheriff summons from the bystanders persons to fill the jury, or if he brings them in under a formal process, selected from the court or those outside the court-house to serve for a particular trial only, he may call them in the order in which they were summoned by him, but the better practice is, when the jurors are summoned on process, to place their names on ballots and draw them as regular jurors, and this is necessary when they are summoned for the entire term. *The State v. Green*, 20 Iowa, 424.

The duty of selecting talesmen in a criminal case may be taken from the sheriff by the court and devolved on the coroner, where an affidavit is filed by the accused, to the effect that by reason of partiality and prejudice, he believes the sheriff will not act fairly in the selection of talesmen. *The State v. Hardin et al.*, 46 Id., 623.

Out of a panel of twenty-four trial jurors, only eighteen appeared, and the panel was exhausted before a jury for the trial of the indictment for murder was procured. But before it was known that a jury could not be obtained from the regular panel a special venire was issued "for the purpose of using the names of the jurors so drawn and summoned in the impaneling of a jury," in this case. When the regular panel was exhausted, the sheriff, under the direction of the court,

called the persons so drawn and summoned in the order in which their names stood on the list, beginning with the first until a jury was obtained. *Held* that in all this there was no error. *The State v. Ryan*, 70 Id., 154.

Where twenty jurors were summoned for the term, and the court excused two, and nine of the eighteen were engaged in another case when this case was called for trial, *held* that it was competent for the court to summon jurors from the by-standers for the trial of this case. *The State v. McCahill*, 72 Id., 111.

SEC. 4397. [**Jury: consists of.**—The jury consists of twelve men accepted and sworn to try the issue.

The defendant in a criminal action may, with the consent of the state, and the court, waive the provision of the statute enacted for his benefit. He may consent to proceed with but eleven jurors, and a trial with this number, with such consent is not prohibited by the state constitution. *The State v. Kaufman*, 51 Iowa, 578.

See, as recognizing the same doctrine, *Hughes v. The State*, 4 Iowa, 554; *The State v. Ostrander*, 18 Id., 435; *The State v. Reid*, 20 Id., 413; *The State v. Felter*, 25 Id., 67.

CHAPTER 26.

OF CHALLENGING THE JURY.

SECTION 4398. [**Challenge.**—A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel;
2. To an individual juror.

There is no such thing known to our statute as a challenge to the "array." We have two kinds of challenges, namely: to the panel, and to an individual juror. After challenges to the individual have been made, a challenge to the panel comes too late. *The State v. Davis*, 41 Iowa, 311. See, also, *The State v. Bryan*, 40 Id., 379.

SEC. 4399. [**No severance of.**—When several defendants are tried together, they are not allowed to sever their challenges, but must join therein.

SEC. 4400. [**To panel.**—A challenge to the panel can be interposed, only on the ground that they were not selected, drawn or summoned as prescribed by law.

It is not good ground for challenge to the jury, that the jurors heard the evidence which had been submitted to the court, to raise a doubt as to the insanity or imbecility of the prisoner. *The State v. Arnold*, 12 Iowa, 479.

SEC. 4401. [**When and how taken.**—A challenge to the panel must be taken before a challenge to any individual juror, and must be in writing, specifying distinctly and plainly the facts constituting the ground of challenge.

SEC. 4402. [**Trial of challenge.**—A challenge to the panel may be taken by either party, and upon the trial thereof the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the grounds of the challenge.

It is competent for the court to direct in what form evidence shall be presented on the trial of a challenge to a panel of jurors. *The State v. Linde*, 54 Iowa, 141.

SEC. 4403. [**Challenge allowed: jury discharged.**—If the facts of the challenge be allowed by the court, the jury must be discharged so far as the trial of the indictment in question is concerned. If it be disallowed, the court shall direct the jury to be impaneled.

SEC. 4404. [**To individual juror.**—A challenge to an individual juror may be taken orally, and is either:

1. For cause;
2. Peremptory.

SEC. 4405. [**For cause.**—A challenge for cause may be made, either by the state or by the defendant; it must distinctly specify the facts constituting the causes of challenge, and may be made for any of the following causes:

1. A previous conviction of the juror of a felony;

2. A want of any of the qualifications prescribed by statute to render a person a competent juror;

3. Unsoundness of mind, or such defects in the faculties of the mind or the organs of the body, as rendered him incapable of performing the duties of a juror;

4. Affinity, or consanguinity within the ninth degree, to the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance the prosecution was instituted, or to the defendant, to be computed according to the rule of the civil law;

5. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance the prosecution was instituted, or in his employ on wages;

6. Being a party adverse to the defendant in a civil action, or having been the prosecutor against, or accused by him, in a criminal prosecution;

7. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

8. Having served on a trial jury, which has tried another defendant for the offense charged in the indictment;

9. Having been on a jury formerly sworn to try the same indictment and whose verdict was set aside, or which was discharged without a verdict, after the cause was submitted to it;

10. Having served as a juror, in a civil action brought against the defendant, for the act charged as an offense;

11. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial;

12. Because of his being bail for any defendant in the indictment;

13. Because he is defendant in a similar indictment, or complainant or private prosecutor against the defendant or any other person indicted for a similar offense;

14. Because he is, or, within a year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, and when the defendant is indicted for a like offense;

15. Because he has been a witness, either for or against the defendant, on the preliminary trial or before the grand jury.

That a juror has served on a trial which convicted another defendant for an offense similar to the one charged in the indictment, is not a good cause of challenge under the statute. The eighth subdivision of section 4405 applies only to cases in which two or more persons have been jointly indicted for the same offense, and have severed in their trials; and not to causes in which the offense is necessarily single and cannot be committed jointly with another. *The State v. Sheeley*, 15 Iowa, 404.

A juror who stated upon his examination that he had not formed an opinion as to the guilt or innocence of the accused, but had in regard to some of the transactions in the case, stating further that he could render an impartial verdict upon the evidence, was *held* to be competent to serve. *The State v. Bryan*, 40 Id., 379.

Where persons called as jurors stated that "they had repeatedly heard the matters of the case talked over, and had said and thought that if the reports were true the defendant was guilty of the charge," and another person also called as a juror stated, "that if the reports I have heard are true, the defendant is guilty; unless my opinions are substantiated by the testimony, they would not modify my verdict." Each of said jurors stating that they had not *formed* or *expressed* an unqualified opinion as to the guilt or innocence of the defendant; it was *held*, that they were not disqualified to serve as jurors. *The State v. Ostrander*, 18 Id., 435, 451.

A juror, in answer to interrogatories, stated that he had formed and expressed an opinion as to the killing, but not as to the guilt of the defendant; it was *held*, 1. That he was a competent juror;

2. That an opinion formed and expressed by a juror does not affect his competency, or afford

cause for challenge, unless it is as to the guilt or innocence of the defendant, of the crime laid to his charge. *The State v. Thompson*, 9 Id., 188.

The failure of a defendant in a criminal action to object to a juror on the ground of incompetency is not cured by verdict. *The State v. Groome*, 10 Id., 308.

The defendant by accepting the jury waives any exception thereto, for bias or prejudice of any kind in the mind of the juror. And if he accepts the jury *with knowledge* that one of the jurors is incompetent, he thereby waives his right to object afterwards; but such knowledge must appear before a waiver will be inferred. *Id.*

Where the following question was put to one called as a juror: "If the defense in the case should be the insanity of the defendant, have you formed or expressed an opinion on the subject?" *Held*, that the question was improper in that it stated a supposed defense for the purpose of showing actual bias. *The State v. Arnold*, 12 Id., 579.

Where a juror was asked if he had not just "set upon a jury for the trial of a person indicted for the same kind of an offense," and upon giving an affirmative answer, was asked the further question, "if the evidence in this case should be the same as in the one just decided, if your mind is not made up as to the guilt or innocence of the defendant," it was *held*, that the court did not err in sustaining an objection to the question. *The State v. Leicht*, 17 Id., 28.

The propriety of recalling a petit juror, who had been challenged and excused from the jury box, for the purpose of allowing the other party to cross-examine him and thus disprove the ground of challenge, is within the discretion of the district court, and such discretion will not be controlled by the supreme court, unless it is shown to have been greatly abused. *The State v. Shelledy*, 8 Id., 477.

It was held sufficient cause of challenge to a petit juror on the part of the state, that he stated under oath that he thought he had formed or expressed an unqualified opinion or belief that the defendant was guilty or not guilty of the offense charged; and that it need not appear that such opinion or belief was in favor of the prisoner. *Id.*

Hypothetical opinions, founded on rumor, do not disqualify a petit juror. *The State v. Ostrander*, 18 Id., 435; *The State v. Hinkle*, 6 Id., 380; *The State v. Thompson*, 9 Id., 188; *The State v. Bryan*, 40 Id., 379.

A juror when challenged for cause, answered under oath as follows: "I read an account of this matter in the papers, and came to the conclusion that the defendant shot McNamara, and that it was a criminal thing for him to do so. * * * I have not formed such an opinion of the guilt or innocence of the accused as would prevent me from rendering a true verdict." *Held*, that the juror had not formed such an unqualified opinion as to render him incompetent as a juror in the case. *The State v. Bruce*, 48 Id., 530.

A person is not disqualified from sitting on a jury on the trial of one for the violation of a city ordinance, because he is a resident of the city. *The State v. Wells*, 46 Id., 662.

Jurors for the district and circuit courts may be drawn from the same list. A separate list is not required for the circuit court. *The State v. Lawrence*, 33 Id., 51.

An opinion formed in respect to the guilt of defendant, based on pretended facts learned from newspapers or otherwise, does not disqualify one to act as a juror, where the juror on his examination, states his opinion is subject to change upon his learning that the facts differ from what he supposed them to be, and that his opinion would not prevent him from rendering a true verdict according to the evidence given on the trial. *The State v. Sopher*, 70 Id., 494. See also, *State v. Bruce*, 48 Id., 530.

Where a juror in a criminal case admitted that he had formed an opinion as to the prisoner's guilt, and even stated, in answer to the question, that it was an unqualified opinion, yet, where he insisted all through the examination that it was not such an opinion as would disqualify him from rendering a true verdict upon the evidence, *held*, that the court did not err in overruling a challenge for cause based on the ground of such opinion. *The State v. Vatter*, 71 Id., 557.

SEC. 4406. [Exemption.]—An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

SEC. 4407. [Juror examined.]—Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon, but his answers shall not afterwards be testimony against him.

SEC. 4408. [Other witnesses examined.]—Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge.

SEC. 4409. [Court shall determine.]—In all challenges the court shall determine the law and the fact, and must either allow or disallow the challenge.

SEC. 4410. [**Challenges by state.**]—The state shall first complete its challenges for cause, and the defendant afterwards.

SEC. 4411. [**Peremptory challenges.**]—After twelve jurors have been obtained, against whom no cause of challenge has been found to exist, peremptory challenges may be made.

SEC. 4412. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court must exclude him.

SEC. 4413. (*As amended by ch. 39, 22d g. a.*) [**Same.**]—If the offense charged in the indictment is or may be punished with death or imprisonment for life, the state and defendant are each entitled to ten peremptory challenges; if any other felony to six each; and if a misdemeanor to three each.

SEC. 4414. [**Order of challenge.**]—The state shall be entitled to the first challenge and shall challenge one juror. The defendant shall be entitled to the second challenge and shall challenge one juror, the state shall be entitled to the third challenge and shall challenge one juror, the defendant shall be entitled to the fourth challenge and shall challenge one juror, and so on alternately until all the challenges are exhausted.

SEC. 4415. The challenges of either party need not be taken at once, but separately in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel;
2. To an individual juror, for cause;
3. To an individual juror, peremptorily;

SEC. 4416. After each challenge which is allowed, the vacancy occasioned thereby shall, if required, be filled before any further challenge is made, and any new juror thus introduced may be challenged for cause, as well as peremptorily, if the peremptory challenges are not exhausted.

SEC. 4417. [**Jurors: when sworn.**]—No juror shall be sworn to try the issue until twelve jurors are accepted.

SEC. 4418. [**Bias.**]—Bias in a juror against either party is no cause of challenge by the other. It may be waived by the party against whom it exists.

CHAPTER 27.

ON THE TRIAL OF AN ISSUE OF FACT IN AN INDICTMENT.

SECTION 4419. [**Provisions to civil code: to what applicable.**]—The provisions of the code of civil practice, relative to the continuances of the trial of civil causes, shall apply to the continuance of criminal actions, except that no judgment for costs shall be rendered against a defendant in a criminal action on account of such continuance; and except as in this code otherwise provided; and except that the defendant shall, if he, upon entering his plea demand it, be entitled to three days in which to prepare for trial.

If the state, in order to avoid a continuance applied for by the defendant in a criminal case on account of the absence of a witness, admits that the witness would, if present, swear to the facts stated in the affidavit for continuance, such statements assume the character of the witness' evidence, and cannot be impeached by showing that he has made statements out of court different from those in the affidavit. *The State v. Shannahan*, 22 Iowa, 435.

The ordinary rule, that the proper foundation must be laid before a witness can be impeached by proving statements made out of court, applies to this class of cases whether criminal or civil. The rule does not lose its application if the statements out of court were made under oath. *Id.*

Where in a criminal case, the facts stated in an affidavit for a continuance on the ground of absent witnesses, are admitted by the prosecution, and are read on the trial as the evidence of the

absent witnesses, in order to avoid a continuance, such affidavits are not admissible on a second trial of the cause at a subsequent term. *The State v. Felter*, 32 Id., 49.

SEC. 4420. (*As substituted by ch. 19, 17th g. a.*)—The jury having been impaneled and sworn, the court must proceed in the following order:

1. The clerk or district attorney must read the indictment, and state the defendant's plea to the jury, and the district attorney may briefly state the evidence by which he expects to sustain the indictment.

2. The attorney for the defendant may then briefly state his defense, and the evidence by which he expects to sustain it.

3. The state may then offer the evidence in support of the indictment.

4. The defendant or his counsel may then offer his evidence in support of his defense.

5. The parties may then respectively offer rebutting evidence only, unless the court, for good reasons in furtherance of justice, permit them to offer evidence upon their original case.

6. When the evidence is concluded, unless the case is submitted to the jury on both sides, without argument, the district attorney must commence, the defendant follow by one or two counsel at his option, unless the court shall permit him to be heard by a larger number, and the district attorney conclude, confining himself to a response to the arguments of the defendant's counsel, *provided* that where two or more defendants are on trial for the same offense, they may be heard by one counsel each; *and provided further*, that the court, when the affirmative of the issue is with the defendant, may, in its discretion, award to the defendant the last argument.

The court shall then charge the jury in writing without oral explanation or qualification.

Under this section the state is not, on the trial of an indictment, restricted, in the examination of a witness whose name is indorsed on the indictment, to the testimony given by him before the grand jury. If the name of a witness is indorsed on the indictment, and the minutes of his testimony are properly presented and filed, he may be examined as to any and all matters within his knowledge touching or bearing upon the defendant's guilt or innocence. Per LOWE and COLE, JJ. in *The State v. Bowers*, 17 Iowa, 46. WRIGHT, Ch. J. not concurring; DILLON, J. absent.

The state may, in a criminal case, introduce as rebutting evidence, the testimony of witnesses who were not before the grand jury and whose names are not indorsed on the indictment, and of whose introduction no notice has been given to the defendant. *The State v. Parish*, 22 Id., 284.

But that is not rebutting testimony which seeks by another witness, after the defense has closed, to sustain the character of the prosecuting witness whose testimony has been impeached, by showing that the statements of the prosecutor as he gave them on his examination, were in accordance with the facts of the case. *Id.*

The district court has the discretion to permit a witness to be examined on behalf of the state as to matters not rebutting, after the defendant has concluded his testimony. *The State v. Flynn*, 42 Id., 165.

The word *impaneled*, as applied to the formation of a jury, means the final act by the ascertaining who should be sworn immediately preceding the administration of the oath to the jurors. *The State v. Ostrander*, 18 Id., 435.

The fact that evidence upon the original case was offered in rebuttal would not prevent the court from admitting it, if in furtherance of justice it should be so admitted, and the fact that it was not ostensibly so admitted would not justify a reversal in the absence of a showing of prejudice by the manner of its admission. *The State v. Curran*, 51 Id., 113.

In a criminal prosecution it is the duty of the court before whom the cause is being tried, particularly where the charge is of a high crime, and the case complicated, whether requested by counsel or not, to point out to the jury the controverted questions of fact, and to see that the law applicable thereto is given to the jury in proper instructions. And where this is not done, and it is doubtful whether the verdict against the defendant effectuates justice, a new trial will be awarded. *The State v. Brainard*, 25 Id., 572.

But the objection that an instruction fails to present the law fully, will not be considered by the supreme court, where it does not appear that all of the instructions are embodied in the record. *The State v. Hamilton*, 32 Id., 572.

The trial court has a discretion under subdivision 4 of this section to allow the state in a criminal case to examine a witness in chief, after defendant has examined some of his witnesses. *State v. Falconer*, 70 Id., 416. See also *State v. Flynn*, 42 Id., 164.

SEC. 4421. [District attorney: offering evidence: notice.]—The district attorney in offering the evidence in support of the indictment, in pursuance of the order prescribed in the last section, under the second subdivision thereof, shall not be permitted to introduce any witness who was not examined before the grand jury; and the minutes of whose testimony was not taken by the clerk of the grand jury, and presented with the indictment to the court, unless he shall have given to the defendant a notice in writing, stating the name, place of residence, and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial: (*As amended by sec. 3, ch. 168, 17th g. a.*) [Provided, that whenever the district attorney desires to introduce evidence to support the indictment of which he shall not have given said four day's notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the name, place of residence, and occupation of the witnesses he desires to introduce, and the substance of what he expects to prove by said witnesses, and showing diligence such as is required in a motion for a continuance supported by affidavit, whereupon, if the court sustain said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witnesses shall then testify; and if said defendant shall not elect to have said cause continued, the district attorney may examine said witnesses in the same manner and with the same effect as though four days notice thereof had been given defendant as hereinbefore provided, except that the district attorney, in the examination of said witnesses, shall be strictly confined to the matters set out in his motion.]

The defendant in a criminal case who has accepted service of notice that a witness whose name is not endorsed on the indictment will be introduced on the trial, and who has agreed to treat such notice as personally served, cannot object that it was not signed by the district attorney. *The State v. Watrous*, 13 Iowa, 489. See *The State v. Flynn*, 42 Id., 164, cited in notes to section 4337, *ante*.

This section applies to evidence in support of an indictment, and does not preclude the testimony of witnesses who were not before the grand jury, and whose evidence is not reported with the indictment, as to the fact that a certain witness testified before the grand jury. *The State v. Fowler*, 52 Id., 103, 116.

Where the defendant's wife appeared and testified against him before the grand jury which indicted him, it was held, that objection for this cause could not be made after conviction. *The State v. Houston*, 50 Id., 512.

Nor could the fact that witnesses were examined on the trial whose names were not indorsed on the indictment be taken advantage of by objection first made after conviction. *Id.*; 1 G. Greene, 316.

In the trial of a criminal case the prosecution is not confined, in the examination of a witness to the points on which he was examined before the grand jury. *The State v. Ostrander*, 18 Id., 435; *The State v. McCoy*, 20 Id., 262; *The State v. Bowers*, 17 Id., 46.

This section is so far superseded by section 5 of chapter 143, laws of 1880, that an indictment may be found by the grand jury upon the minutes of the testimony returned to the court by the committing magistrate; and where the testimony of a witness has thus been properly taken and returned, and the name of the witness placed on the indictment, the witness is competent to testify on the trial, without having testified before the grand jury. *State v. Rodman*, 62 Id., 456.

Where on the trial of an indictment the state introduced evidence and rested, and the defendant introduced evidence, and the district attorney then moved for leave to introduce a witness who had not been before the grand jury, and of whose examination notice had not been given, and the motion was sustained, and the defendant then elected to have the cause continued, which was accordingly done, held that the defendant could not object to another trial on the ground that, he had already been put in jeopardy. *State v. Falconer*, 70 Id., 416. Following *State v. Parker*, 66 Id., 586.

Under this section which provides that the district attorney shall give the defendant a notice in writing, stating the name, place of residence and occupation of any witness, whose name is not indorsed on the indictment, and the substance of what he expects to prove by him, at least four days before the commencement of the trial, etc.; Held, that errors in the notice as to the place of residence of the witness and what is expected to be proved by him are not ground for reversal, not being shown to be prejudicial to defendant. *State v. Rainsbarger*, 37 N. W. R., 153.

Mere brevity of the minutes of evidence of a witness before the grand jury will not prevent the

witness from testifying as to the subject matter and facts embraced within them however brief they may be. *The State v. Vanleit*, 23 Iowa, 27; *The State v. Bower*, 17 Id., 46.

The state in a criminal trial may introduce as rebutting evidence the testimony of witnesses who were not before the grand jury, and whose names are not indorsed upon the indictment, without giving notice of the intention to do so. *The State v. Parish*, 22 Id., 284.

But that is not rebutting evidence which seeks by another witness, after the defense was closed, to sustain the character of the prosecuting witness whose testimony has been impeached, by showing that the statements of such witness as he gave them in his examination were according to the facts of the case. *Id.*

Where the court permitted evidence to be given to the jury, and, before the jury retired, excluded the same evidence, it was held that the party to the admission of the evidence was not thereby prejudiced. *State v. Postlewait*, 14 Id., 446.

In a criminal case the defendant was put upon trial and one witness on part of the state examined and cross-examined, when it was discovered that none of the state's witnesses had been examined before the grand jury, but that the indictment had been found upon the minutes of the evidence as returned by the committing magistrate, and that the district attorney had not given the notice required in such cases by section 4421 of the code. Thereupon the district attorney moved for and obtained an order, under the *proviso* of that section, compelling the defendant to allow the state's witnesses to be examined, notwithstanding the want of such notice, or else to allow the case to be continued. Defendant excepted to this ruling, and moved the court to direct a verdict for defendant, which motion was overruled, when, upon defendant's election, the cause was continued and jury discharged. *Held*, that defendant was not put in jeopardy by these proceedings, within the meaning of the fifth amendment to the constitution of the United States, and that he was not acquitted thereby, within the meaning of article 1, section 12 of the constitution of Iowa, and that he was properly put upon trial at the next term of the court for the same offense. *The State v. Parker*, 66 Id., 586. Following *State v. Redman*, 17 Id., 329.

Where the name of "Mrs. H." was indorsed on the indictment as one of the witnesses, and on the trial the state offered "Mrs. Mary E. H." as a witness, and it was objected that her name was not indorsed on the indictment, *held* that it was the duty of the court to determine whether "Mrs. H." and "Mrs. Mary E. H." were the same person, and that, in doing so, it was competent to consult not only the indorsement upon the indictment, but the minutes of the evidence; and, further, that, since the court overruled the objection, it must be presumed that it did consult such minutes, and therein found sufficient evidence to determine the identity of the witness. *The State v. Briggs*, 68 Id., 416.

The state in rebuttal is not limited to the witnesses who were examined before the grand jury, or of whose introduction the prescribed notice has been given. *Id.* See also, *State v. Parish*, 22 Id., 284.

SEC. 4422. [Defendant's plea.]—When the defendant's only plea is a former conviction or acquittal, the order prescribed in the second and third sub-divisions of the section immediately preceding the last, shall be reversed, and the defendant shall first offer his evidence in support of his defense.

SEC. 4423. [Counsel: time.]—The court shall not restrict counsel as to time in their arguments.

SEC. 4424. [Tried separately.]—When two or more defendants are jointly indicted for felony, any defendant requiring it may be tried separately. In other cases, defendants jointly indicted may be tried separately or jointly in the discretion of the court.

While two or more defendants jointly indicted may, in the discretion of the court, be tried jointly or separately, a separate judgment must be entered against each. *The State v. Hunter*, 33 Iowa, 361.

Where several parties have been jointly indicted, and they demand separate trials, the order in which they shall be tried may be determined by the district attorney, under the direction of the court. *The State v. Hudson*, 50 Id., 157.

Defendants jointly indicted for a misdemeanor may, under this section, be tried jointly or separately, at the discretion of the court. *The State v. Veiger*, 23 Id., 218; *The State v. Marion*, 12 Id., 499.

The refusal of a separate trial to one jointly indicted with another for an offense not amounting to a felony is within the discretion of the district court. *State v. Kirkpatrick*, 33 N. W. Rep. 380.

4425. [Trial for conspiracy.]—Upon a trial for a conspiracy, in a case where an overt act is required by law to constitute the offense, the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but other overt acts not alleged in the indictment may be given in evidence.

SEC. 4426. [Rules of evidence.]—The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided.

See as to verbal declarations as evidence, *County of Mahaska v. Ingalls*, 16 Id., 81; *State v. Woodward*, 20 Id., 542, 550.

In a trial for murder, where the defense is insanity, medical witnesses who have no personal knowledge of the prisoner cannot be allowed to state an opinion formed from the testimony in the case and the defendant's conduct on the trial, as to his sanity or insanity at the time of the commission of the act. This would practically be putting such witnesses in the place of the jury to decide the question. *State v. Felter*, 25 Id., 67.

It is competent to show the insanity of the defendant prior to the commission of the act; and a physician who visited him during such insanity, and from actual observation and examination became acquainted with his mental condition may give an opinion as to his sanity or insanity at the time when he thus observed or examined him. *Id.*

So also, it is competent to show, in such cases, that the defendant's father was subject to insanity. *Id.*

On an indictment for obtaining money under false pretenses, consisting of representations by defendant that he had money on deposit in a bank in another state, upon which he drew drafts and placed them in the hands of a local bank to be forwarded for collection, the notarial certificate of protest of the notary who protested the drafts thus drawn, is not admissible in evidence against the defendant to prove that he had no money on deposit in the bank upon which the drafts were drawn. *State v. Reidel*, 26 Id., 430.

When one of two defendants, jointly indicted, testifies on behalf of the other, he is liable to impeachment as a witness, under the same conditions as he would be if he were not himself on trial. *State v. Hardin et al.*, 46 Id., 623.

An *alibi* need not be established by such a preponderance of evidence as to "fully satisfy" the jury; a bare preponderance, at most, is all that is required. *Id.*

SEC. 4427. [Confession of defendant.]—The confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed.

An assumption by the court in an instruction to the jury in a criminal trial, that certain statements made by the defendant amount to a confession, when in fact they merely furnish evidence to be considered by the jury in arriving at a general verdict, is prejudicial error. *The State v. Jones*, 33 Iowa, 9.

Where the admissions of the defendant are supported by circumstances, a fact which constitutes but one ingredient of the crime charged may be established thereby. *The State v. Lewis*, 45 Id., 20.

A confession of guilt by one who has been charged with a crime, will not, in an action of slander, warrant the jury in finding, in justification of the charge, that the plaintiff had been guilty of the crime. *Georgia v. Keppord*, 45 Id., 48.

A confession made out of court, will not warrant a conviction unless there is other evidence that the offense charged has in fact been committed. The *corpus delicti* must be shown by proof *aliunde*. *The State v. Turner*, 19 Id., 144, 147.

Where there is no evidence of the commission of the crime charged, except the admissions of the defendant, made out of court, there cannot be a legal conviction, under this section. *State v. Dubois*, 54 Id., 363.

An admission of the defendant of the fact charged in an indictment against him is not sufficient to sustain a verdict of guilty unless corroborated. *The State v. Penny*, 70 Id., 190.

SEC. 4428. [Doubt.]—Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal.

An instruction which is susceptible of being understood to require the jury to convict, unless such individual juror shares in a reasonable doubt of the defendant's guilt, is prejudicial error. *The State v. Stewart*, 52 Iowa, 284.

On the trial of an indictment where the insanity of the defendant is the defense, it is incumbent upon him to overcome the presumption of sanity and establish his insanity by a preponderance of evidence, or evidence that is satisfactory. The rule requiring the evidence in a criminal case, to satisfy the jury beyond a reasonable doubt of the defendant's guilt, is applicable only to the general conclusion, of guilty or not guilty, upon the whole evidence, and not to any one fact in the case. *The State v. Felter*, 32 Id., 49. See also, *State v. Nash et al.*, 7 Id., 347; *The State v. Olander*, 18 Id., 435; *State v. Hayden*, 45 Id., 11.

Where the defense in a criminal case is an *alibi*, it is not required, in order to acquit, that the jury should be *fully satisfied* of the truth of the *alibi*. A bare preponderance is sufficient. *The State v. Hardin*, 46 Id., 623; *The State v. Henry*, 48 Id., 403; *The State v. Northrup, et al.*, Id., 583.

When the death of a person alleged to have been murdered is *prima facie* established by the

identification of the dead body as his, the burden of proof is upon the prisoner to show that such person is still alive. To establish a defense of this character, the same weight of evidence is required as that to sustain an *alibi* of the accused. *The State v. Vincent*, 24 Id., 570.

The giving of an instruction which is susceptible of being understood to require the jury to convict unless each individual juror shares a reasonable doubt of defendant's guilt, is error with prejudice. *Id.*

SEC. 4429. [Same.]—Where there is a reasonable doubt of the degree of the offense of which the defendant is proven to be guilty, he shall only be convicted of the lower degree.

It is the duty of the court to instruct the jury that if they have a reasonable doubt of the degree or character of the assault charged in the indictment they should only convict of a lower degree of crime which is included within that charged in the indictment. *The State v. Walters*, 45 Iowa, 389.

On the trial of an indictment for larceny, the value of the property charged to have been stolen must be established beyond a reasonable doubt; mere preponderance of evidence that it exceeds twenty dollars is not sufficient to justify a conviction for grand larceny. *The State v. Wood*, 46 Id., 116.

Where on the trial of an indictment for rape, the court omitted, in the instructions to refer to the provisions of this section and state to the jury that where there was a reasonable doubt as to the degree of guilt, the defendant should only be convicted of the lower degree, held erroneous and prejudicial. *The State v. Jay*, 57 Id., 164.

The court should direct a conviction of the lower degree of larceny, if the jury entertain a reasonable doubt as to whether the value of the property exceeded \$20, as provided in this section. *State v. McCarty*, 34 N. W. R., 606.

SEC. 4430. [Higher offense proved.]—If it appear by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged and all proceedings on the indictment to be suspended, and may order the defendant to be committed or continued on bail to answer any new indictment which may be found against him for the higher offense.

There are no degrees in the statutory crime of larceny, the intent in all cases being the same, and the subdivision into grand and petit larceny, based on the value of the property stolen, being only for the determination of the punishment. A conviction for petit larceny is a bar to a subsequent prosecution for grand larceny on the same facts. *State v. Murray*, 55 Iowa, 530.

SEC. 4431. [Same.]—If the indictment for the higher offense be submitted by the grand jury or be not found at the next term, the court must proceed to try the defendant on the original indictment.

SEC. 4432. [Jury view premises.]—Whenever, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which shall be shown them by a person appointed by the court for that purpose. The officers must be sworn to suffer no person to speak to or communicate with the jury, on any subject connected with the trial, nor to do so themselves, except the person appointed by the court for that purpose, and that only to show the place to be viewed, and to return them into court without any unnecessary delay at a specified time.

SEC. 4433. [Juror as a witness.]—If a juror have any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial; and if during the retirement of the jury, a juror declare any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court and the juror must be sworn as a witness, and examined in the presence of the parties, if his evidence be admissible.

SEPARATION OF JURY.

SEC. 4434. [Jury permitted to separate.]—The jurors sworn to try an indictment, may, at any time before the final submission of the cause to them, in

the discretion of the court, be permitted to separate, except where one of the parties object thereto, or be kept together in charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves, and to return them into court at the time to which it adjourns.

The district court may in its discretion, under section 4434 of the code, permit the jury in the trial of a capital case, to separate, under the admonition of the court as required by section 4435, at the various adjournments of the court during the trial, and prior to the final submission of the case to the jury, although the accused at the time objects to such separation. The discretion confided to the court by the statute, would however, be more safely exercised in granting than in denying the request of the accused. *The State v. Feller*, 25 Iowa, 67.

SEC. 4435. [Not to communicate or converse.]—The jury, whether permitted to separate or kept together in charge of sworn officers, must be admonished by the court that it is their duty not to permit any person to speak to or communicate with them on any subject connected with the trial, and that any and all attempts to do so, should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to them. This admonition must be given or referred to by the court at each adjournment, during the progress of the trial, previous to the final submission of the cause to the jury.

This section requires jurors, pending a trial in which they are acting, to keep their minds in *statu quo*, and if during the adjournments of court they do no act which impairs their mind or clouds their understanding, when again called to hear the evidence or arguments of counsel; the drinking of intoxicating liquors by them during such adjournments is not such misconduct as to prejudice either party. *The State v. Bruce*, 48 Id., 530, 537.

There is a wide distinction between the duty of a juror during an adjournment of the court pending the trial, and his duty after the case is submitted to him for his determination. *Id.*

TRIAL.

SEC. 4436. [Minutes of testimony kept.]—The court shall, on the trial of every indictment, when requested by either party, keep, or cause to be kept, by some person for that purpose by it appointed, full and accurate minutes of the testimony of each witness examined on the trial, showing the name of the witness, place of residence, and his occupation, as well as of any oral evidence introduced, either by the state or defendant, after a plea or verdict of guilty, to be considered by the court in aggravation or alleviation of the punishment in pronouncing sentence against the defendant, which shall be certified to be full and accurate by the judge, and signed by him, and filed with the clerk, and so marked by him, which shall be deemed a part of the record of the cause. The person who acts under such an appointment shall be entitled to such compensation for his services as may be allowed by the court, which shall be paid by the proper county, and shall be taxed as costs.

SEC. 4437. [When several defendants.]—Upon an indictment against several defendants, one or more may be convicted or acquitted.

SEC. 4438. [Trial for libel.]—On the trial of an indictment for a libel, the jury have the right to determine the law and the fact.

SEC. 4439. [Of offenses other than libel.]—On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court; saving the right of the defendant and the state to except. Questions of fact are to be tried by jury. And although the jury have the power to find a general verdict which includes questions of law as well as fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

INSTRUCTIONS.

SEC. 4440. [Court instruct jury.]—The court shall on motion of either party, instruct the jury on the law applicable to the case, which must always be in writing, signed by the judge and filed with the clerk, and so marked by him, and it is to be deemed a part of the record of the cause, and no oral qualification thereof shall be permitted.

This section of the code is directory only, and the failure to comply therewith will be held an error only when the party complaining is prejudiced thereby. *State v. Stanley*, 48 Iowa, 221.

The supreme court will not reverse a judgment because instructions given by the court to the jury which though correct as abstract propositions of law, should have been modified under the circumstances of the case, when the appellant did not ask for any such qualification. *State v. Tweedy*, 11 Id., 350.

While the court may in a criminal trial, direct an acquittal by the jury where there is no evidence sustaining the charge, or where it is light and indeterminate in its nature that a verdict would be instantly set aside, it cannot thus direct, and thereby usurp the province of the jury to pass upon the sufficiency of the evidence, where there is conflicting testimony of a material character elicited from several witnesses who have testified in the case. *State v. Smith*, 28 Id., 565.

Under this section requiring the instruction to the jury to be in writing, signed by the judge and filed with the clerk, an instruction that purports to include the indictment, but in fact leaves a blank where it should appear, having read the indictment in the hearing of the jury and there being no statement of the issues in the charge, held an erroneous method of charging the jury. *State v. Birmingham*, 38 N. W. Rep., 121.

SEC. 4441. [Same.]—Any instruction asked by either party to be given by the court must be in writing, and must be either given or refused, and so marked and signed by the judge, and filed with the clerk, and so marked by him, and is to be deemed a part of the record. It may be qualified in writing by the court, but not orally, and the qualification must be distinguished, intelligently, from the instruction as originally asked by the party, and signed by the judge.

The supreme court will not review instructions which have not been made a part of the record, either by the signature of the judge, as contemplated by sections 4440 and 4441 of the code, or by being incorporated into a bill of exceptions. *State v. Gibhardt*, 13 Iowa, 473.

Instructions which are not signed by the judge nor filed with the clerk, and which are not marked either as "given" or "refused," will not be considered by the supreme court. *State v. Watrous*, 13 Id., 489.

The practice of giving instructions to the jury, as framed by counsel, is condemned by the supreme court, who say that the better practice, as a general rule, is for the judge to put aside the instructions asked by counsel and cover the whole ground of controversy in a corrected and methodical charge of his own, stating the questions of fact to be decided, and the law applicable thereto, under the issues and the evidence. *State v. Collins*, 20 Id., 85.

SEC. 4442. [Deliberation: duty of officer in charge.]—After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place without meat or drink, water excepted, and not to suffer any person to speak to or communicate with them themselves, unless it be to ask them whether they have agreed upon their verdict, and not to communicate to any one the state of their deliberation or the verdict agreed upon, until after the same shall have been declared in open court, and received by the court, and to return them into court when they shall have so agreed upon their verdict, unless by permission or order of the court, or they be sooner discharged.

DISCHARGE OF JURY.

SEC. 4443. [When juror becomes sick.]—If before the conclusion of a trial a juror becomes sick so as to be unable to perform his duty, the court may order him to be discharged, and in such case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards be impaneled.

SEC. 4444. [**Want of jurisdiction.**].—The court may also discharge the jury where it appears that it has not jurisdiction of the offense, or that the facts as charged in the indictment do not constitute an offense punishable by law.

SEC. 4445. [**Same.**].—If the jury be discharged because the court has not jurisdiction of the offense charged in the indictment, and it appear that it was committed out of the jurisdiction of this state, the defendant must be discharged or ordered to be retained in custody a reasonable time, until the district attorney shall have a reasonable opportunity to inform the chief executive of the state in which the offense was committed of the facts, and for said officer to require the delivery of the offender.

SEC. 4446. [**When offense committed in another county.**].—If the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as shall be deemed reasonable to await a warrant from the proper county for his arrest; or, if the offense be bailable, he may be admitted to bail in an undertaking with sufficient sureties that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and if not sooner arrested thereon will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly designated in the undertaking, to surrender himself upon the warrant, if issued, or that the bail will forfeit such sum as the court may fix, to be mentioned in the undertaking.

SEC. 4447. [**Papers transmitted by clerk.**].—In the case provided for in the last section the clerk must transmit, forthwith, a certified copy of the indictment and all the papers in the action filed with him, except the undertaking mentioned in the last section, to the district attorney of the proper county.

SEC. 4448. [**Defendant discharged, when.**].—If the defendant be not arrested on a warrant from the proper county he shall be discharged from custody, or his bail in the action shall be exonerated, or money deposited instead of bail shall be refunded, as the case may be, and the sureties in the undertaking must be discharged.

SEC. 4449. [**When arrested.**].—If he be arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate.

SEC. 4450. [**Discharged when facts do not constitute offense.**].—If the jury be discharged because the facts set forth do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the money deposited be refunded, unless in its opinion a new indictment can be framed upon which the defendant can be legally convicted, in which case the court may direct that the case be submitted to the same or another grand jury.

SEC. 4451. [**When defendant under bail appears for trial.**].—When a defendant, having given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer to abide the judgment or further order of the court; and he shall be committed and held in custody accordingly.

CHAPTER 28.

OF THE CONDUCT OF JURY AFTER THE CAUSE IS SUBMITTED TO IT.

SECTION 4452. [**Jury may take papers.**—Upon retiring for deliberation, the jury may take with it all papers which have been received as evidence in the case, except depositions and copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

SEC. 4453. [**And notes of testimony.**—The jury may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

SEC. 4454. [**Disagreement: information desired.**—After the jury have retired for deliberation, if there be any disagreement between them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court, and upon their being brought in, the information required must be given in the presence of, or, after oral notice, to the district attorney, and the defendant or his counsel.

A bailiff in charge of a jury has no authority, when requested by the jury, to bring in the minutes of the testimony, in order to settle a disputed point of evidence. *The State v. Griffin*, 71 Iowa, 372.

SEC. 4455. [**Juror sick.**—If, after the retirement of the jury, one of them be taken sick so as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept together for deliberation, the court may discharge them.

SEC. 4456. [**When discharged.**—Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by the consent of both parties entered upon the record, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

The discharge of the jury, in a criminal case, on the ground that they are unable to agree, is a matter within the sound discretion of the court, and when not abused, will not work a discharge of the prisoner on the ground that he has been put in jeopardy. *The State v. Vaughn*, 29 Iowa, 286; *The State v. Redman*, 17 Id., 329.

SEC. 4457. [**New trial.**—In all cases where a jury is discharged or prevented from giving a verdict by reason of any accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term of the court.

SEC. 4458. [**Court may adjourn.**—While the jury is absent the court may adjourn from time to time as to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury until a verdict be rendered or the jury discharged.

SEC. 4459. [**Same.**—A final adjournment of the court discharges the jury.

CHAPTER 29.

OF THE VERDICT.

SECTION 4460. [**When jury have agreed.**—When the jury has agreed upon its verdict, it must be conducted into court by the officer having it in charge. The names of the jurors must then be called, and if all do not appear the rest must be discharged without giving a verdict. In such case the cause may again be tried at the same or another term.

SEC. 4461. [**Defendant present: when.**—If the indictment be for felony, the defendant must be present at the rendition of the verdict. If it be a misdemeanor the verdict may be rendered in his absence.

That the verdict was rendered in the absence of a defendant indicted for forgery and that the names of the jury were not called, is erroneous, but where it appears that no prejudice resulted therefrom the case will not be reversed. *The State v. Vaughn*, 29 Iowa, 286.

SEC. 4462. [**Verdict rendered.**—When the jury have answered to their names the court or clerk shall ask them whether they have agreed upon the verdict, and if the foreman answers in the affirmative they must, on being required, declare the same.

The provisions of sections 4460 and 4462 of the code, contemplate that the jury, after informing the court of their agreement upon a verdict, must, on being required by the court, declare the same, which may be done orally. Per MILLER, J., in *The State v. Collins*, 32 Iowa, 42.

SEC. 4463. [**General or special.**—The jury may either render a general verdict, or where they are in doubt as to the legal effect of the facts proven, they may, except upon an indictment for libel, find a special verdict.

On the trial of an indictment charging the defendant with "concealing," and with "receiving" and "aiding in the concealment of stolen property," the jury returned a verdict as follows: "We, the jury, find the defendant guilty of aiding in concealing the stolen property mentioned in the indictment, as charged therein, and assess the value of the same at one thousand dollars." This was held to be equivalent to a general verdict. *The State v. Turner*, 19 Iowa, 144.

The jury themselves are to determine whether their verdict shall be general or special. It can be special only when they are in doubt as to the legal effect of the facts proved. *The State v. Ridley & Johnson*, 48 Id., 370, 374.

SEC. 4464. [**General.**—A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal on every material allegation in the indictment. Upon a plea of a former conviction or acquittal of the same offense it is either "for the state" or "for the defendant."

A general verdict of guilty imports a conviction of the defendant in a criminal trial, on every material allegation or charge in the indictment. It is accordingly held, that an inquiry by the court of the jury, upon their returning a verdict of guilty, as to whether they found the defendant guilty of the particular charge mentioned in the indictment, was not erroneous. *The State v. Collins*, 32 Iowa, 36.

SEC. 4465. [**Finding an offense of different degrees.**—Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment.

Murder is the felonious killing with malice. Manslaughter is the felonious killing without malice. The latter is not a degree of the former. *The State v. White*, 45 Iowa, 325.

Where a party is put upon trial for murder in the first degree, all the degrees of criminal homicide should be explained and submitted to the jury, as they are all included therein. *The State v. Clemens*, 51 Id., 274.

Section 11 of article one (1) of the state constitution, does not prevent the conviction and punishment of an accused, of an offense, less than felony, under an indictment in the district court, when it is included in, or is only a less degree of, the offense charged in the indictment. *The State v. Jarvis*, 21 Id., 44.

A conviction of a defendant of the crime of manslaughter, on an indictment for murder in the second degree, operates as an acquittal of the higher crime, and he cannot again be placed on trial therefor. *The State v. Tweedy*, 11 Id., 350.

SEC. 4466. [Other offenses than charged.]—In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment.

Section 4466 of the code, authorizing the conviction and punishment of an accused for an offense less than felony, when it is included in or is only a less degree of the offense charged in the indictment, is not in conflict with section 11 Art. 1 of the state constitution. *State v. Jarvis*, 21 Iowa, 44.

On an indictment for an assault with the intent to commit murder, the defendant may be found guilty of an assault merely. *State v. White*, 41 Id., 316, 320.

An indictment for burglary includes the offense of entering a dwelling-house in the night-time without breaking, and will admit of a conviction for the latter offense. *State v. Maxwell*, 42 Id., 208.

On an indictment for rape, the defendant may be convicted for an assault with intent to commit a rape. *State v. McLaughlin*, 44 Id., 82, 87.

An assault with intent to commit manslaughter is included in an assault with intent to commit murder, and on an indictment for the latter offense, the defendant may be convicted of the former. *State v. White*, 45 Id., 325, overruling the same case in 41 Iowa, 316, which see.

So, on such an indictment, a conviction may be had for an assault and battery. *Dixon v. State* 3 Id., 416.

On an indictment for murder, the defendant may be found guilty of manslaughter. *Gordon v. State*, 3 Id., 410.

Under an indictment for maiming or disfiguring, the defendant may be convicted of an aggravated assault and battery. *Benham v. State*, 1 Id., 542.

The crime of an assault with the intent to inflict a great bodily injury is included within an indictment for an assault with intent to commit murder. *State v. Schele*, 52 Id., 608.

Where the defendant is found guilty of an offense which in the opinion of the court, was not included in the one charged in the indictment, it was held competent to sentence him for an offense included in the indictment, and also necessarily included in the verdict. *Id.*

In a trial of a party indicted for rape, he may be convicted of an assault with intent to commit a rape, or with a simple assault. *State v. Vinsant*, 49 Id., 241.

So on the trial of an indictment for an assault with intent to murder, the defendant may be convicted of an assault and battery, where a battery as well as an assault was charged in the indictment. *State v. Graham*, 51 Id., 72.

Where in an information for selling intoxicating liquors unlawfully, it was alleged that the defendant has been heretofore convicted of a like offense, it was held that he might be convicted as for a first offense. *State v. Ensley*, 10 Id., 149; *State v. Gordon*, 3 Id., 415; *State v. Benham*, 1 Id., 542.

A defendant cannot be convicted of assault and battery on an indictment charging assault with intent to commit rape, unless it is averred in the indictment that the attempt was accompanied by actual violence. *State v. McAvoy*, 35 N. W. Rep., 630.

SEC. 4467. [Indictment against several: finding of jury.]—On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury.

SEC. 4468. [Verdict insufficient.]—If the jury render a verdict which is neither a general nor special verdict, the court may direct them to reconsider it, and it shall not be recorded until it be entered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict or to find the facts specially and leave the judgment to the court.

Where under an indictment for burglary, the jury found the "defendant guilty of entering the dwelling-house of Charles E. Gale, in the night-time, as stated in the indictment," it was held that this was a special verdict, and failed to respond to all the facts necessary to the rendition of a judgment thereon, and that the court, therefore, had a right to direct the jury to reconsider it. *The State v. Maxwell*, 42 Iowa, 208, 214.

SEC. 4469. [Informal verdict.]—If the jury persist in finding an informal verdict, from which, however, it can be understood that their intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment be given against him upon a special verdict.

SEC. 4470. [**Verdict rendered: jury polled.**]—When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party; in which case they shall be severally asked whether it be their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation.

The right of a defendant in a criminal case to have the jury polled before their verdict is recorded is a substantial one, of which he cannot be deprived without his consent. *The State v. Callahan et al.*, 55 Iowa, 364.

SEC. 4471. [**If any juror disagrees.**]—When the verdict is given, and is such as the court may receive, the clerk may immediately enter it in full upon the record, and must read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the record, and the jury again sent out. But if no disagreement be expressed, the verdict is complete and the jury must be discharged from the case.

SEC. 4472. [**If defense be insanity: jury instructed.**]—If the defense be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state that fact in their verdict. The court may thereupon, if the defendant be in custody, and his discharge is deemed dangerous to the public peace and safety, order him to be committed to the Iowa insane hospital, or retained in custody until he becomes sane.

SEC. 4473. [**Defendant discharged.**]—If judgment of acquittal be given on a general verdict, and the defendant be not detained for any other legal cause, he must be discharged as soon as the judgment is given.

SPECIAL VERDICT.

SEC. 4474. [**Special verdict defined.**]—A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence and not the evidence to prove them, and these conclusion of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them.

SEC. 4475. [**Same.**]—The special verdict must be reduced to writing by the jury or in their presence, entered upon the minutes of the court, read to the jury and agreed to by them, before they are discharged.

SEC. 4476. [**Same.**]—The special verdict need not be in any particular form, but shall be sufficient if it present intelligibly the facts found by the jury.

SEC. 4477. [**Judgment upon.**]—The court must give judgment upon the special verdict as follows:

1. If the plea be not guilty and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted in law under that indictment, judgment shall be given accordingly. But if the facts found do not prove the defendant guilty of the offense charged, or of any offense of which he could be so convicted under the indictment, judgment of acquittal must be rendered;

2. If the plea be a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal according as the facts prove or fail to prove the former conviction or acquittal.

The judgment of a justice of the peace in a criminal proceeding instituted by the procurement of the defendants, in which their conviction or acquittal is secured by fraud or collusion, may be appealed to the appellate court, or disregarded and treated as void. It is no bar to other proceedings against the same defendants for the same offense. *The State v. Green and Mann*, 16 Iowa, 239.

SEC. 4478. [**Verdict insufficient.**]—If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions

of fact from the evidence as established to their satisfaction, the court may order them to retire for further deliberation.

CHAPTER 30.

OF BILLS OF EXCEPTION.

SECTION 4479. [**Exceptions.**].—On the trial of an indictment, exceptions may be taken by the state or by the defendant, to any decision of the court upon matters of law, in any of the following cases:

1. In disallowing a challenge to an individual juror;
2. In admitting or rejecting witnesses or evidence, on the trial of any challenge;
3. In admitting or rejecting witnesses or evidence, or in deciding any matter of law, not purely discretionary, on the trial of the issue.

SEC. 4480. [**How to be construed.**].—Nothing herein contained is to be construed so as to deprive either party of the right of excepting to any action or decision of the court which affects any other material or substantial right of either party, whether before or after the trial of the indictment, or on such trial.

SEC. 4481. [**Office of bill of exceptions.**].—The office of a bill of exceptions is to make a part of the proceedings or evidence appear of record which would not otherwise so appear.

Where the certificate of the judge shows the rulings made during the trial, and states that the same were duly excepted to, such certificate is a sufficient compliance with the statute respecting bills of exceptions. *The State v. Fay*, 43 Iowa, 651.

SEC. 4482. [**Papers deemed part of record.**].—All papers pertaining to the cause and filed with the clerk, and all entries made by the clerk in the record book pertaining to them, and showing the action or decision of the court upon them, or any part of them, are to be deemed parts of the record, and it is not necessary to except to any action or decision of the court so appearing of record.

SEC. 4483. [**Either party may except to decision.**].—Either party may allege an exception to any decision or action of the court, on any application of either party, which may be, and is made orally to the court, in any stage of the proceedings upon which the decision or action of the court is not required to be, and is not entered in the record book, and reduce the same to writing, and tender the same to the judge, whose duty it is to sign it; and if he sign the same, it shall be filed with the clerk and thereupon become a part of the record of the cause; but if the judge refuse to sign it, such refusal must be stated at the end thereof; and it may then be signed by two or more attorneys or officers of the court, or disinterested bystanders, and sworn to by the persons so signing the same, and filed with the clerk, and it shall thereupon become a part of the record of the cause.

SEC. 4484. [**Time allowed to examine.**].—The judge shall be allowed one clear day to examine the bill of exceptions, and the party excepting shall be allowed three clear days thereafter to procure the signatures and file the same.

SEC. 4485. [**May be modified.**].—If the judge and the party excepting can agree in modifying the bill of exceptions, it shall be modified accordingly.

SEC. 4486. [**Time allowed to prepare.**].—Time must be given to prepare the bill of exceptions when it is necessary. When it can be reasonably done, it shall be settled at the time of taking the exception.

In criminal as well as in civil actions the evidence, in order to be used in the appellate court must be preserved by bill of exceptions, or certificate of the trial judge, made at the trial term or within the time then fixed therefor by the court, and a judge's certificate or bill of exceptions signed after such time will not be considered by the supreme court. *The State v. Newcomb*, 56 Iowa, 335.

CHAPTER 31.

OF NEW TRIAL.

SECTION 4487. [Definition.]—A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given.

SEC. 4888. [Effect.]—The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in the evidence or in argument.

Where the district attorney, while addressing the jury, said: "He has been tried twice in this court by a jury of twelve men. Forty men have tried this defendant on this charge and have found him guilty." Held prejudicial error under the provisions of this section. *State v. Clouser*, 33 N. W. R., 686. See, also, *State v. Dow*, 37 Id., 114.

SEC. 4489. [Causes for.]—The court may grant a new trial for the following causes, or any of them:

1. When the trial has been had in the absence of the defendant, if the indictment be for a felony;
2. When the jury has received any evidence, paper, or document out of court not authorized by the court;
3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case;
4. When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all the jurors;
5. When the court has misdirected the jury in a material matter of law;
6. When the verdict is contrary to law or evidence. But no more than two new trials shall be granted for this cause alone;
7. When the court has refused properly to instruct the jury;
8. When from any other cause the defendant has not received a fair and impartial trial.

That one of the jurors left the room where they were considering a criminal case, for a proper purpose, in charge of the deputy sheriff, with whom he had no conversation about the case, did not justify the granting of a new trial. *The State v. Bowman*, 45 Iowa, 418.

An objection to the grand jury comes too late in a motion for a new trial. It should, at least, be made before pleading to the indictment. *The State v. Reid*, 20 Id., 413, 424, citing *The State v. Ingalls & King*, 17 Id., 8; *The State v. Howard & Cress*, 10 Id., 101; *The State v. Ostrander*, 18 Id., 435.

While it is better that the defendant should be present, when a motion for a new trial in a criminal case is made and passed upon by the court, it is not clear that it is necessary, and where the defendant objected to judgment on that ground, and the court offered to again consider and hear a re-argument of the motion, it was held that there was no error to the prejudice of the defendants. *The State v. Decklotts*, 19 Id., 448.

When the admission or absence of evidence would not have controlled the verdict, and the verdict is sustained by the clear and conclusive nature of the evidence properly admitted, the supreme court will hesitate before reversing a judgment on the ground that such evidence was improperly admitted. *The State v. Knight*, 19 Id., 94.

A new trial should be ordered where the verdict on the trial of a criminal case fails to pronounce affirmatively or negatively on all facts necessary to enable the court to give judgment; and where no order has been made that the jury retire for further deliberation, the defendant is not entitled to a discharge, but the court should set the verdict aside and order a new trial. *The State v. Arthur*, 21 Id., 322; *The State v. Turner*, 19 Id., 144. See, also, *The State v. Redman*, 17 Id., 329.

The admission of that which could have worked no prejudice to the defendant is not ground for a new trial. *The State v. Shean*, 32 Id., 88.

The refusal of the court below to sustain an objection to an improper question propounded to a witness, is no ground of reversal if the objecting party was not prejudiced thereby. *The State v. Groome*, 10 Id., 308.

Where a verdict of guilty was rendered upon proof of the stolen property being found in the

possession of the defendant, notwithstanding an *alibi* was testified to by several witnesses, whose testimony no attempt was made to impeach or contradict, a new trial was granted. *The State v. Woolsey*, 30 Id., 251.

Where the evidence on the part of the state in a criminal prosecution is insufficient to support a verdict of guilty, the supreme court will not hesitate to grant a new trial. *The State v. Moffitt*, 31 Id., 316; *The State v. Hilton & Gordon*, 22 Id., 241; *The State v. May* 20 Id., 305.

In a criminal trial for a high offense, where the case is complicated, it is the duty of the district court trying the cause, whether requested or not by counsel, to point out to the jury the controverted questions of fact, and to see that the law applicable thereto is given to the jury in proper instructions. And where this is not done, and it is doubtful whether the verdict against the defendant effectuates justice, a new trial will be awarded. *The State v. Brainard*, 25 Id., 572.

The giving of erroneous instructions to the jury will not be sufficient ground for a new trial if the evidence with the law given will sustain the verdict. *The State v. Cooster*, 10 Id., 453.

The refusal of the court to give instructions which are unobjectionable, will not justify a reversal of the judgment when the record does not contain all the instructions given to the jury. *The State v. Johnson*, 19 Id., 230.

A defendant will not be concluded by an erroneous assumption by his own counsel which resulted to his prejudice, but a new trial will not be ordered when it is apparent from the record that such an assumption did not operate to his prejudice. *State v. Turner*, 19 Id., 144.

When, from a view of all the equitable circumstances, it is evident that the defendant in a criminal case, without fault on his part, has not had a full and impartial trial, a new trial will be ordered, although no one of those circumstances amount to error in law. *Trulock v. The State*, 1 Id., 515. See, also, *State v. Tomlinson*, 11 Id., 401; *State v. Collins*, 20 Id., 85.

Greater latitude is allowed to the party asking a new trial in a criminal than in a civil case; and all the reasons that apply in favor of an interference with the verdict in a civil case apply with still greater force in criminal trials. *State v. Elliott*, 15 Id., 72; *State v. Tomlinson*, 11 Id., 401.

A motion for a new trial, on the ground that the jurors had, during their retirement, read the notes of the testimony as taken by one of the attorneys on the trial, was properly overruled. *State v. Acola*, 11 Id., 246.

When a juror, after retiring to consider upon the verdict, left the jury room in charge of the sheriff and went to a grocery store, where he drank a glass of ale or lager beer, and then returned to the jury room and participated in finding the verdict; *held*, that the misconduct of the juror was sufficient ground to set aside the verdict and grant a new trial. *State v. Baldy*, 17 Id., 39; *Bryan v. Harrow*, 27 Id., 494.

Where a juror, during the progress of a trial, used intoxicating liquors combined with curative agents, as a medicine, without medical advice, will not vitiate the verdict, in the absence of a showing that it was so used without the knowledge of the defendant or his attorney, or that its effects were intoxicating. *State v. Morphy*, 33 Id., 270.

Where a motion for a new trial is based upon the ground that one of the jurors, previous to the trial, had formed and expressed an unqualified opinion that the defendant was guilty of the offense charged, it must be made to appear of record that the juror was examined on oath as to whether he had formed or expressed such opinion, and if it be not thus shown, there is no ground for a new trial. *State v. Shelledy*, 8 Id., 477. See, also, *State v. Funk*, 17 Id., 365.

In such case, the affidavit of the defendant, nor a recital in the record that "the jury was impaneled and sworn," will not be sufficient to show that they were examined under oath as to whether they had formed or expressed an unqualified opinion as to the defendant's guilt. *Id.*

The supreme court may review an order of the district court granting or denying a new trial, on the ground that the verdict is against the evidence, but it will interfere only when it is made manifest that the discretion vested in the district court has been abused. *State v. Tomlinson*, 11 Id., 401; *State v. Lyon*, 10 Id., 340; *State v. Funk*, 17 Id., 365; *State v. Stoker*, 22 Id., 52; *State v. Polson*, 29 Id., 133; *State v. Collins*, 20 Id., 85.

A new trial will be granted in a criminal case where the verdict is against the *weight* of the evidence, and in the consideration of the evidence greater latitude is allowed than would be countenanced in civil cases. *State v. Tomlinson*, 11 Id., 401; *State v. Brainard*, 25 Id., 572; *State v. Woolsey*, 30 Id., 251; *State v. Elliott*, 15 Id., 72.

An instruction, which, when considered alone, would be erroneous, will not be sufficient ground of reversal, if when taken in connection with the other instruction it would have worked no prejudice to the defendant. *The State v. Johnson*, 8 Id., 525; *The State v. Finn*, 10 Id., 19.

On the hearing of a motion for a new trial in a criminal case, an affidavit of one of the jurors, that the verdict was never assented to by him, is not admissible. *The State v. Douglass*, 7 Id., 413.

Jurors cannot be compelled to make affidavits showing that the jury disregarded or refused to consider the instructions of the court; nor can their declarations be received to prove such facts. *Grady v. The State*, 4 Id., 461.

The supreme court, in reviewing the judgment of the court below, as to the sufficiency of the

evidence, will give much weight to the fact that the judgment is sustained by two different verdicts rendered by different juries upon different trials of the same cause. *The State v. Cross*, 12 Id., 66; *Jordan v. Reed*, 1 Id., 135.

Where the accused has been convicted on the uncorroborated testimony of an accomplice, a new trial should be granted. *Ray v. The State*, 1 G. Greene, 316.

A motion for a new trial must be made before judgment is rendered. *The State v. Bixby*, 39 Id., 465.

A proceeding by information for the condemnation of intoxicating liquors, kept for illegal sale, is in its nature a criminal one, and after trial in the district court on appeal it is error to sustain a motion by the state for a new trial. *The State v. Certain Intoxicating Liquors, etc.*, 40 Id., 95.

SEC. 4490. [**Application: when made.**]—The application for a new trial can be made only by the defendant, and must be made before judgment.

CHAPTER 32.

OF ARREST OF JUDGMENT.

SECTION 4491. [**Grounds of.**]—A motion in arrest of judgment, is an application to the court in which the trial was had, on the part of the defendant, that no judgment be rendered upon a verdict against him, or on a plea of guilty, and shall be granted:

1. Upon any ground which would have been ground for demurrer;
2. When upon the whole record no legal judgment can be pronounced.

If an indictment is not vulnerable to a demurrer, it cannot be assailed by motion in arrest of judgment. *The State v. Deitrick*, 51 Iowa, 467, 473.

SEC. 4492. [**On motion of court.**]—The court may also, upon its own observation of any of these grounds, arrest the judgment on its own motion.

SEC. 4493. [**Defendant held to answer.**]—If the court is of opinion from the evidence on the trial that the defendant is guilty of a public offense, of which no legal conviction can be had on the indictment, he may be held to answer the offense in like manner as upon a preliminary examination.

SEC. 4494. [**When motion made.**]—The motion may be made at any time before judgment, or after judgment, during the same term.

See notes under section 4489, on new trial.

CHAPTER 33.

ON JUDGMENT.

SECTION 4495. [**When rendered.**]—Upon a verdict of not guilty for the defendant, or special verdict upon which a judgment of acquittal must be given, the court must render judgment of acquittal immediately.

SEC. 4496. [**Time when judgment may be pronounced.**]—Upon a plea of guilty, upon a verdict of guilty or a special verdict, upon which a judgment of conviction must be rendered, the court must fix a time for pronouncing judgment. The time appointed for pronouncing judgment must be at least three clear days after the verdict is rendered, if the court remain in session so long, or if not, as remote a time as can reasonably be allowed, but in no case can the judgment be pronounced in less than six hours after the verdict is rendered.

The fact that no time was fixed for pronouncing judgment was held not prejudicial error where the judgment was not pronounced until a succeeding term, after a plea of guilty had been entered. *The State v. Stevens*, 47 Iowa, 276.

The failure to render judgment for the payment of a fine until the next term after the one when the defendant was convicted, was held not erroneous. *The State v. Ray*, 50 Iowa, 520.

Where the record shows that a judgment was rendered upon a verdict of guilty, in less than three days after the verdict was returned by the jury, and that the court continued in session for more than that time, the supreme court will, unless all presumptions of prejudice are clearly rebutted, remand the cause, not for a new trial, but for judgment on the verdict. *The State v. Watrous*, 13 Id., 489.

But where the record shows that judgment was rendered in less than three clear days after verdict, but is silent as to when the court adjourned, it will be presumed that the sentence was deferred as the law required. *The State v. Wood*, 17 Id., 18.

SEC. 4497. [**For felony: defendant present.**—For the purpose of judgment, if the conviction be for a felony, the defendant must be personally present; if it be for misdemeanor, judgment may be pronounced in his absence.

Where a defendant was convicted of an assault and battery, it was held, that judgment might be rendered against him in his absence. *Hughes v. State*, 4 Iowa, 554.

Where it is better that the defendant should be present when a motion for a new trial, in a case of felony, is made and passed upon by the court, it is not clear that it is necessary. *State v. Decklotts*, 19 Id., 447.

Although judgment for a misdemeanor may be pronounced in the absence of the defendant, yet where the judgment is of a fine, and imprisonment in default of the payment thereof, and the defendant is not present to submit to the imprisonment in case of such default, the court may then rightly declare a forfeiture of his recognizance for appearance. *State v. Howorth*, 70 Id., 157.

SEC. 4498. [**When defendant is out on bail.**—If the the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or money deposited may make an order directing the clerk to issue a bench warrant for his arrest.

SEC. 4499. [**Bench warrant.**—The clerk, on the application of the district attorney, may, accordingly, at any time after the order, whether the court be in session or not, issue a bench warrant into one or more counties for his arrest.

SEC. 4500. [**Form of.**—The bench warrant may be substantially in the following from.

COUNTY OF.....

THE STATE OF IOWA,

To any Peace Officer in the State:

A. B. having been duly convicted on the.....day of....., A. D. 18..., in the district court of.....county, of the crime of (here designate it generally, as in the indictment).

You are, therefore, hereby commanded to arrest the said A. B. and bring him before said court for judgment, if it be then in session, or if it be not then in session, you deliver him into the custody of the sheriff of said county.

[SEAL.] Given under my hand and the seal of said court, at my office in, in said county, this ... day of....., A. D. 18..

By order of the court., Clerk.

SEC. 4501. [**Service.**—The bench warrant may be served in any county in the state.

SEC. 4502. [**Same.**—Whether the bench warrant be served in the county where it was issued, or in another county, the officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant according to the command thereof.

SEC. 4503. [**Judgment.**—Where the defendant appears for judgment, he shall be informed by the court, or by the clerk under its direction, of the nature of the indictment and of his plea, and the verdict, if any thereon, and must be asked

whether he have any legal cause to show why judgment should not be pronounced against him.

When the record is silent, the supreme court will presume that in pronouncing sentence after verdict, the district court observed the directions of this section. *State v. Wood*, 17 Iowa, 18; *State v. Wells*, 46 Id., 662, 666.

SEC. 4504. [**Same.**].—He may show for cause against the judgment, that he is insane, or any sufficient ground for a new trial, or in arrest of judgment.

SEC. 4505. [**Insanity: how determined.**].—If the court is of opinion, that there is reasonable ground for believing him insane, the question of his insanity shall be determined as provided in this code, and if he is found to be insane, such proceedings shall be had as are herein directed.

SEC. 4506. [**New trial.**].—If he move for a new trial, or in arrest of judgment, the court shall defer the judgment, and proceed to hear and decide the motions.

SEC. 4507. [**Rendition of judgment.**].—If no sufficient cause be alleged or appear to the court why judgment should not be pronounced, it shall thereupon be rendered.

SEC. 4508. [**When convicted of two or more offenses.**].—If the defendant is convicted of two or more offenses, before judgment on either, the punishment of each of which is, or may be, imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses.

When a party arraigned under two indictments pleaded guilty upon both and was sentenced upon each to one year in the penitentiary, and it was not provided in either judgment which term of imprisonment should first commence nor that one term should commence at the expiration of the other, but the *mittimus* in the case in which judgment was last entered, provided that the term of imprisonment in that case should commence at the expiration of the first, *held* that both terms would not run concurrently, but one should commence at the expiration of the other. *Mieir v. McMillen*, 51 Iowa, 240.

SEC. 4509. [**Fine: how satisfied.**].—A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine.

Where a defendant, sentenced to imprisonment in default of the payment of a fine entered against him in a criminal case, substantially complied with sections 4881 and 5005 of the revision (sections 4509 and 4611, code), by suffering imprisonment for the time provided and executing his note to the treasurer as therein required, it was *held*, that he was not only entitled to his discharge from custody, but to have the judgment against him satisfied. *The State v. Van Fleet*, 23 Iowa, 168.

Under this section the power of the court to direct the imprisonment of the defendant until the fine is satisfied does not extend to the costs incurred in the case. Hence a payment of the fine, while it is sufficient to entitle the defendant to his discharge from custody, does not operate to release him from the costs adjudged against him in the case. *State v. Gray*, 35 Id., 503.

A defendant committed for the non-payment of a fine under section 4092 of the code, may be lawfully imprisoned, under section 4509, until the fine is paid, but the power of the court to imprison is limited under the latter section to one day for every three and one-third dollars of the fine, and the defendant is entitled to no credit on the fine therefor. But if he is sentenced to labor under section 4736 of the code, he is entitled to a credit of one dollar and half a day on the judgment. A sentence of imprisonment until the fine and costs are paid by labor *at one dollar and a half a day* is erroneous. *State v. Jordan*, 39 Id., 387.

A defendant sentenced to pay a fine can only be ordered to be imprisoned for a term of which the number of days shall be equal to one for every three and one-third dollars of the fine; and if sentenced at hard labor, he will be entitled to a credit upon the judgment of one dollar and a half for each day's labor. *State v. Amverda*, 40 Id., 151; *State v. Jordan*, 39 Id., 387; *The City of Keokuk v. Dressell*, 47 Id., 597.

The payment of a fine assessed against a defendant in a criminal case does not discharge him from the costs adjudged against him. *Gray v. Ferreby*, 36 Id., 146; following *State v. Gray*, 35 Id., 503.

A judgment that the defendant pay a fine and stand committed until it is satisfied, should specify the extent of the imprisonment, which cannot exceed one day for every three and one-third dollars of the fine. *State v. Myers*, 44 Id., 580.

Authority to imprison for the non-payment of costs not being expressly given by statute, will

not be inferred, and a court therefore cannot sentence a defendant to stand committed until a fine and costs are paid. *State v. Erwin*, 44 Id., 637; *State v. Jordon*, 39 Id., 387.

A person convicted of a crime and adjudged to pay a fine, and in default thereof to be imprisoned for a time named, cannot, after being imprisoned, pay a portion of the fine, and then demand that his term of imprisonment shall be reduced *pro tanto*; but he must serve for the whole term, unless the whole fine is sooner paid. *Galles v. Wilcox*, 68 Id., 664.

SEC. 4510. [**Committed to jail of another county.**]—When any person is, in any event, to be committed to jail, if there be no jail or no sufficient one in the county where the party would be committed under the ordinary provisions of law, the court or magistrate committing may order him to be committed to the jail of some other county, which shall be the one which is most convenient and safe, and the county to which the cause originally belonged shall be holden for all the expenses thereof.

Where the judgment in a criminal case, rendered in the Marshall district court, ordered that the defendant be confined in the Polk county jail for the term of imprisonment specified, and the record did not show that there was a sufficient jail in the county where the judgment was rendered, the presumption was in favor of the regularity of the proceeding of the court below, and the supreme court would not say there was error in directing the imprisonment in a different county. *Hughes v. The State*, 4 Iowa, 554.

SEC. 4511. [**Appeal.**]—In all cases, except murder in the first degree, the court rendering judgment must make an order fixing the amount in which bail must be taken, and there shall be no execution of the judgment until such order be made.

Where the district court, on rendering judgment of imprisonment for grand larceny, failed to fix the amount of bail as required by this section, the defendant was entitled to have the omission corrected, but he was not, on *habeas corpus*, entitled to be discharged from imprisonment on account of the omission. *Murphy v. McMillen*, 59 Iowa, 515.

CHAPTER 34.

OF EXECUTION.

SECTION 4512. [**Copy of judgment furnished officer.**]—When a judgment of imprisonment, either in the penitentiary or county jail is pronounced, a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution.

SEC. 4513. [**Commitment of defendant.**]—If the judgment be imprisonment, or fine and imprisonment until it be satisfied, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with or the defendant discharged by due course of law.

SEC. 4514. [**By whom executed.**]—When the judgment is imprisonment in the county jail of the county in which the trial is had, or a fine and that the defendant be imprisoned in such county jail until it be satisfied, the judgment must be executed by the sheriff of that county. In all other cases, when the judgment is imprisonment, the sheriff of the county in which the trial was had, must deliver the defendant to the proper officer in execution of the judgment.

SEC. 4515. [**Same.**]—If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, in the county jail of the county in which the trial was had, the sheriff of the county in which the trial was had shall deliver a certified copy of the entry of the judgment, together with the body of the defendant, to the keeper of the jail or prison in which the defendant is to be imprisoned, and take his receipt therefor on a duplicate copy of such entry, which he must forthwith return to the clerk of the court in which the judgment was rendered, with his return thereon.

SEC. 4516. [**Officer's authority in committing.**]—The sheriff, or his deputy, while conveying the defendant to the proper prison, has the same authority to require the assistance of any citizen of the state in securing the defendant, and retaking him if he escape, as if the sheriff were in his own county; and every person who neglects or refuses to assist the sheriff when so required shall be punishable as if the sheriff were in his own county.

SEC. 4517. [**Return.**]—An officer executing a judgment of imprisonment shall make a written return of the execution of such judgment forthwith after such execution, and file the same with the clerk of the court, by which the judgment was rendered.

SEC. 4518. [**Execution for fine.**]—Upon a judgment for a fine, a writ of execution may be issued as upon a judgment in a civil case.

SEC. 4519. [**How judgment for abatement of nuisance enforced.**]—When the judgment is for the abatement or removal of a nuisance, or for anything other than the payment of money by the defendant, a certified copy of the entry of such judgment, delivered to the sheriff of the proper county, shall authorize and require him to execute such judgment, and he shall return the same with his doings under the same thereon indorsed to the clerk of the court in which the judgment was rendered within seventy days after the date of the certificate of such certified copy, unless it be a judgment of imprisonment, which is hereinbefore provided for.

See note to section 4093, from *Sloan v. Rebman*, 66 Iowa, 81.

CHAPTER 35.

OF APPEALS.

SECTION 4520. [**In criminal cases.**]—The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case, is by an appeal.

SEC. 4521. [**Who may.**]—Either the defendant or the state may take an appeal.

If the state appeals in a criminal cause, the supreme court cannot reverse the judgment of the district court so that another trial may be had, but it may point out any errors in the proceedings or the measure of punishment. The effect of the decision is nothing more than an authoritative exposition of the law, to be followed by the inferior courts in other cases. *State v. Kinnog*, 44 Iowa, 444.

SEC. 4522. [**When taken.**]—No appeal can be taken until after judgment, and then only within one year thereafter.

In *The State v. Brandt*, 41 Iowa, 593, 639, it was held, by a majority of the court, that whenever the decision of a motion or demurrer involves the merits or the legality of the proceedings in a criminal cause, an appeal may be taken therefrom before final judgment is rendered. This point was overruled in *The State v. Swearingen*, 43 Id., 336, in which it was held that an appeal does not lie from an intermediate decision upon a demurrer to the indictment, but can only be taken from a final judgment. The same ruling was followed in *The State v. Davis*, 47 Id., 634.

A criminal cause cannot be appealed to the supreme court after the expiration of one year from the rendition of the judgment complained of. The consent of the attorney for the state cannot confer jurisdiction after that time. *State v. Fleming*, 13 Id., 443.

The right of appeal is waived by a defendant voluntarily paying the fine adjudged against him in a criminal cause. *State v. Westfall*, 37 Id., 575.

Where the abstract fails to show that a judgment was rendered in the court below, from which an appeal was taken to the supreme court, the appellate court has no jurisdiction, and the appeal must be dismissed. *State v. Wheeler*, 65 Id., 619.

SEC. 4523. [**How taken.**]—An appeal is taken by the party taking it, or the attorney of such party, serving on the adverse party, or the attorney of the adverse party who acted as attorney of record in the district court at the time of the rendi-

tion of the judgment, and also on the clerk of the district court by which the judgment was rendered, a notice in writing of the taking of the appeal from the judgment.

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

SEC. 4525. [**Transcript: duty of clerk.**—When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered, without *unnecessary delay*, to make out a full and perfect transcript of all papers in the case on file in his office, except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and of all entries made in the record book, and certify the same under his hand and the seal of the court, and transmit the same to the clerk of the supreme court.

SEC. 4526. [**Several defendants may join.**—When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterward.

SEC. 4527. [**Effect by state.**—An appeal taken by the state, in no case, stays the operation of a judgment in favor of the defendant.

See notes to section 4521.

SEC. 4528. [**By defendant.**—An appeal taken by the defendant does not stay the execution of the judgment unless bail be put in, except as provided in the next section.

SEC. 4529. [**Defendant detained in custody.**—Where the judgment is imprisonment in the penitentiary, and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, it may, in its discretion, order the sheriff or officer having the defendant in custody, to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desire it.

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

SEC. 4531. [**Appellant: appellee.**—The party taking the appeal is known as the appellant, the adverse party as the appellee, but the title of action shall not be changed in consequence of the appeal; it shall be docketed in the supreme court as it was in the district court.

SEC. 4532. [**How docketed: have precedence over other cases.**—Appeals, in criminal cases, shall be docketed in the supreme court for trial at the commencement of that portion of the term which has been assigned for trying causes from the judicial district from which the appeal comes. They shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, unless continued for cause, or by consent of the parties, and shall be decided, if practicable, at the same term.

TRIAL OF THE APPEAL.

SEC. 4533. [**Appearance of defendant.**].—The personal appearance of the defendant in the supreme court on the trial of the appeal, is in no case necessary.

SEC. 4534. [**Not dismissed for informality.**].—An appeal shall not be dismissed for any informality or defect in taking the appeal, if the same be corrected in a reasonable time, and the supreme court must direct how it shall be corrected.

SEC. 4535. [**Assignment of error.**].—No assignment of error, or joinder in error, shall be necessary.

SEC. 4536. [**Argument.**].—The defendant shall be entitled to close the argument.

SEC. 4537. [**Opinion.**].—The opinion of the supreme court must be in writing, filed with its clerk and recorded.

SEC. 4538. [**When appeal is taken by defendant.**].—If the appeal was taken by the defendant from a judgment against him, the supreme court must examine the record, and, without regard to technical errors or defects which do not affect the substantial rights of the parties, render the judgment, and render such judgment on the record as the law demands. It may affirm, reverse, or modify such judgment as the district court should have rendered, and may, if necessary or proper, order a new trial. It may reduce the punishment, but cannot increase it.

Although the defendant has failed to file an assignment of errors, or furnish any brief or argument, the supreme court is required to examine the record, and without regard to technical errors or defects, which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. *The State v. McKinzie*, 18 Iowa, 573; *Same v. Thompson*, 19 Id., 299, 301; *Same v. Mercer*, Id., 570; *Same v. Decklots*, Id., 447, 452; *Same v. Brandt*, 41 Id., 593, 600; *Same v. Potter*, 28 Id., 554; *Same v. Smith*, Id., 565, 567; *Same v. Mewherter*, 46 Id., 88, 93.

The supreme court will disregard technical errors and refuse to reverse a judgment which is otherwise fair and unexceptionable on the merits. *The State v. Knight*, 19 Id., 94, 102; *Same v. Raymond*, 20 Id., 582, 585; *Same v. Felter*, 25 Id., 67, 71.

The supreme court will not reverse a decision of the district court overruling a motion to quash an indictment upon objections to the manner in which the grand jury was selected, when such objections are purely technical, and do not affect the substantial rights of the parties. *The State v. Carney et al.*, 20 Id., 82; *Same v. Ansaleme*, 15 Id., 44; *Same v. Brandt*, 41 Id., 593, 600.

While the supreme court has, by this section, authority to modify the penalties and reduce the punishment imposed by the district court, it will not exercise that power when the evidence upon which that court acted is not in the record. *State v. Baughman*, 20 Id., 497.

This power of the supreme court to reduce the punishment in a criminal cause, should be exercised only in cases where the district court has manifestly imposed too severe punishment—punishment disproportioned to the degree of guilt as shown by the evidence. *The State v. Freeman*, 27 Id., 333.

That the punishment inflicted by the court below is excessive is no ground for a reversal of the judgment, on appeal to the supreme court, but in such case that court may reduce the punishment as it may deem just and proper in the attainment of justice. *The State v. Madden*, 35 Id., 511, 512; *Same v. Little*, 42 Id., 54.

On an indictment for an assault with intent to kill, the defendant was convicted on evidence which was barely sufficient to support the verdict; the supreme court reduced the punishment from imprisonment in the penitentiary five years, to such imprisonment for one year. *Id.*

Although no errors are assigned, the supreme court will examine the record to see if there be error therein. *The State v. Barlow*, 50 Id., 701; *Same v. Pratt*, 20 Id., 267; *Same v. Campbell*, 50 Id., 695.

To justify the supreme court in reducing the fine adjudged by the district court, all the evidence given in the case must be embodied in the record. *The State v. Harris*, 36 Id., 268; *Same v. Durston* 52 Id., 635; *Same v. Baughman*, 20 Id., 497.

In the absence of an assignment of errors, or of an argument in a criminal case, it is the duty of the supreme court to examine the record and render such judgment upon it as the law demands. The court, however, is not required to imagine errors; and if, upon examination of the record, nothing is found that strikes the mind as erroneous, the court is required to simply announce that fact. *The State v. Quinn*, and other cases, 63 Id., 396.

This section does not require the supreme court to examine a transcript in a criminal case for the purpose of determining whether the verdict is supported by the evidence, or as to alleged errors in the instructions, where the defendant is represented by counsel, and has made no appli-

cation to have the rules of court waived, or so modified as to allow him to present an abstract in manuscript. *The State v. Day*, 58 Id., 678.

The supreme court is not required to reverse a judgment of the district court for mere technical errors or defects in its proceedings which do not affect the substantial rights of the parties. *The State v. Greene*, 66 Id., 14.

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

See note to section 4521. A prosecution under a city ordinance enacted in pursuance of a state statute, the violation of which is punishable by fine and imprisonment, is a criminal proceeding and an acquittal on appeal in the district court is an end to the defendant's liability. *State v. Vail*, 57 Id., 103.

Where it is proven that there has been an unlawful sale of intoxicating liquors the question then becomes one of law and not of fact and the state can appeal to the supreme court without violating the requirements of the code, section 4539. *The State v. Ward et al.*, 36 N. W. Rep., 766.

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

SEC. 4541. [If affirmed.]—On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as hereinafter provided.

SEC. 4542. [Recorded and transmitted to court below.]—When a judgment of the supreme court is rendered it must be recorded, and a certified copy of the judgment must be forthwith remitted to the clerk of the district court in which the judgment appealed from was rendered, with proper instructions and a copy of the opinion, in such time, and in such manner, as the supreme court may, by rule, prescribe.

Where a judgment of conviction in a criminal case is reversed by the supreme court, and the cause remanded for a re-trial, it cannot be urged that a conviction on the second trial is illegal, on the ground that at the time thereof, no opinion, order, or procedendo of the supreme court had been transmitted therefrom to the court below, wherein the defendant was tried. *The State v. Knouse*, 33 Iowa, 365.

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

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

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

The district court is not required to inflict the same punishment on a second conviction as on the first one, after the first one has been reversed on appeal; and in the absence of a contrary show-

ing, it will be presumed that, in pronouncing the second sentence, the court took into consideration the imprisonment of the defendant under the first sentence, pending the appeal, as required by this section of the code. *The State v. Hopkins*, 67 Id., 285.

CHAPTER 36.

OF IMPEACHMENT.

SECTION. 4546. [**Form of.**]—An impeachment is the written accusation of a state officer by the house of representatives before the senate, of any misdemeanor or malfeasance in office.

SEC. 4547. [**By whom found.**]—A majority of all the members of the house of representatives elected must concur in an impeachment.

SEC. 4548. [**Requisites.**]—The impeachment must specify the offenses charged with the same precision as is requisite in an indictment, and the accused must be allowed counsel as in cases of other prosecution.

SEC. 4549. [**How stated.**]—If the impeachment charge more than one misdemeanor or act of malfeasance, they shall be stated separately and distinctly.

SEC. 4550. [**Senate.**]—When possessed of an impeachment, the senate must forthwith cause the person accused to be brought before it.

SEC. 4551. [**Process.**]—All writs and process must be issued by the secretary of the senate, and tested in his name, and may be served by any person thereto authorized by the senate or president.

SEC. 4552. [**Answer.**]—Upon the appearance of the person impeached, he is entitled to a copy of the impeachment, and to a reasonable time in which to answer the same.

SEC. 4553. [**Oath.**]—Before proceeding to the trial, an oath, truly and impartially to try and determine the charge in question according to the evidence, shall be administered by the secretary of the senate to the president, and by him to each of the members of that body.

SEC. 4554. [**Suspended.**]—Every officer impeached shall be suspended from the exercise of his official duties until his acquittal.

SEC. 4555. [**President of senate.**]—If the president of the senate be impeached, notice thereof must be immediately given to the senate; which shall thereupon choose another president, to hold his office until the result of the trial is determined.

(CHAPTER 151, LAWS OF 1886.)

RELATING TO IMPEACHMENT.

An Act to prescribe certain powers and duties of the governor and senate sitting as a court in cases of impeachment.

SECTION 1. [**Suspension shall be by the governor: shall appoint successor: rights and duties of appointee.**]—*Be it enacted by the general assembly of the state of Iowa:* That the suspension provided for by section 4554 of the code shall be effected by the governor, who shall forthwith appoint some suitable person to fill temporarily, the office, and such person having qualified as required by law, shall perform all the duties and enjoy all the rights to the said office belonging, until the removal of the suspension of his predecessor or the election of a successor.

SEC. 2. [**Penalty for being found guilty.**]-When any person impeached is found guilty, judgment shall thereupon be rendered for his removal from office, and his disqualification to hold any office of honor, trust or profit under this state, and such judgment shall have the effect of removing from office the person so found guilty.

SEC. 3. [**Senate as a court of impeachment: power.**]-When sitting as a court of impeachment the senate shall sit in the senate chamber in the capitol and shall have power to adjourn from time to time, to dissolve when its work is concluded and to compel obedience to its process and orders. Its process, including subpoenas, shall run into any part of the state, and may be served by the same officers when no person is authorized by the president or senate to serve the same, and shall have the same force and effect as subpoenas from district courts in criminal cases.

SEC. 4. [**Force of same: further powers and privileges.**]-The senate, while sitting as a court of impeachment shall have all the powers and privileges conferred upon each house of the general assembly by sections 14, 15 and 16 of the code, provided that imprisonment for contempt shall not extend beyond the dissolution of the court of impeachment.

SEC. 5. [**Fees of witnesses.**]-The same fees shall be allowed to witnesses and to officers and other persons serving process or orders as are allowed for like services in criminal cases, but no fees can be demanded in advance. Such fees shall be certified and paid as provided by section 8 of chapter 91 of the acts of the twenty-first general assembly, for the payment of other expenses subject to the right of the court to disallow all fees and charges which it shall deem unreasonable or unnecessary.

Approved, April 10, 1886.

(CHAPTER 19, LAWS OF 1886.)

AMEND CHAPTER 36, TITLE 25, CODE, RELATING TO IMPEACHMENT.

An Act to amend chapter thirty-six of title twenty-five of the code of Iowa, of 1873, in relation to impeachment, and the procedure thereunder.

SECTION 1. [**House shall select a board of managers who shall present articles of impeachment.**]-*Be it enacted by the general assembly of the state of Iowa;* When an impeachment of an officer is directed, the house of representatives shall elect from its own body seven members whose duty it shall be to prosecute such impeachment, and such members so elected shall, as a board of managers, be authorized and empowered to exhibit and present articles of impeachment in accordance with the resolutions of the house previously adopted.

SEC. 2. [**Senate shall organize as a court of impeachment.**]-Whenever an impeachment of an officer is directed, the Senate shall forthwith, after the hour of final adjournment of the legislature, be organized as a court for the trial of the same at the capitol of the state, and such organization shall be held and deemed to be perfected when the presiding officer of the senate and all the members thereof present shall have taken the oath or affirmation prescribed; and no member of the court shall sit in the trial, or give his vote upon such trial, until he shall have taken such oath or affirmation, which oath or affirmation shall be administered by the secretary of the senate to the presiding officer thereof, and by the presiding officer to each of the members of the senate. The senate sitting as a court upon the trial of an impeachment shall have the same power to compel the attendance of its members as when engaged in the ordinary business of legislation.

SEC. 3. [Code, section 4552 amended.]—That section 4552 of the code of 1873 be and the same is hereby amended by adding thereto the following words; “and shall be allowed counsel as in the trial of ordinary cases.”

SEC. 4. [Secretary to keep record of proceedings: power to administer oaths.]—It shall be the duty of the secretary of the senate, in all cases of impeachment, to keep a full and accurate record of the proceedings, which shall be held and taken as a public record; and shall have power to administer all requisite oaths or affirmations.

SEC. 5. [Power to appoint necessary officers.]—The senate sitting as a court of impeachment shall have power from time to time to appoint such subordinate officers, clerks, and reporters as may be necessary for the convenient trans- action of business, and may at any time remove such officers, or any of them.

SEC. 6. [Process for attendance of witnesses.]—The managers elected by the house of representatives and counsel for the person impeached shall severally be entitled to process for compelling the attendance of persons or the production of papers and records required for the trial of the impeachment.

SEC. 7. [May adopt rules.]—The senate sitting as a court of impeachment shall have full power and authority to establish such rules and regulations for the trial of the accused as may be necessary.

SEC. 8. The presiding officer and members of the senate, while sitting as a court of impeachment, and the managers elected by the house of representatives, shall receive the sum of six dollars each per day, and mileage at the rate of five cents per mile in going from and returning to their places of residence, by the ordinary traveled routes; and the compensation of the secretary, sergeant-at-arms, and all subordinate officers, clerks and reporters, shall be such an amount as shall be deter- mined upon by a vote of the members of such court. The state treasurer shall, upon presentation of a certificate or certificates signed by the presiding officer and secretary of the senate, pay all expenses of the senate, managers, officers, clerks and reporters which may be incurred under the provisions of this act.

SEC. 9. The provisions of this act shall apply to all resolutions and proceedings heretofore had or hereafter to be had in the impeachment of any civil officer of this state.

Approved April 8, 1886.

CHAPTER 37.

OF EVIDENCE.

SECTION 4556. (As amended by sec. 3, ch. 168, 17th g. a.) [Same as in civil cases.]—The rules of evidence prescribed in the civil part of this code, shall apply to criminal proceedings as far as applicable, and as they are not inconsistent with the provisions of this chapter.

The defendant on trial for a criminal offense, has a right to be confronted by the witnesses against him, and to see them face to face. *The State v. Reidel*, 26 Iowa, 430.

One co-defendant may testify for another jointly indicted with him for the same offense, when tried together the same as when tried separately. *The State v. Gigher*, 23 Id., 318; *Same v. Stewart*, 51 Id., 312.

SEC. 4557. In a prosecution against a railway company for obstructing a highway or any private way, proof that any such way is in an unsafe condition or that it is inconvenient for travel at the place of its intersection with such rail- way, shall be presumptive evidence that such company has obstructed such way.

Where one of two defendants, in a criminal cause, testifies on behalf of the other, he is liable to impeachment as a witness, under the same conditions as he would be if he were not himself upon trial. *The State v. Hardin & Henry*, 46 Iowa, 623.

Prior to the enactment of chapter 168, laws of 1878, a defendant in a criminal case was not a competent witness on his own behalf. *The State v. Darrington*, 47 Id., 318, 320; *The State v. Laffer*, 38 Id., 422; *The State v. Bixby*, 39 Id., 465.

SEC. 4558. [**Rape.**].—Proof of actual penetration into the body is sufficient to sustain an indictment for rape.

An instruction defining the crime of rape in the language of the statute to the effect that the defendant must have ravished and carnally known the prosecutrix by force and against her will, but that proof of actual penetration was sufficient, held correct. Approved in *The State v. Tarr*, 28 Iowa, 397, 400.

SEC. 4559. [**Accomplice.**].—A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof.

An accomplice cannot be corroborated in his testimony against the defendant, by the failure of the latter to introduce the testimony of witnesses present at the trial, who, if the testimony of the accomplice had been false might have contradicted him. *The State v. Hull*, 26 Iowa, 292.

The defendant, in such case, has a right to stand upon the law, requiring the testimony of the accomplice, to be corroborated by "other evidence" and no basis for a presumption in favor of the testimony of the accomplice, can arise from the failure of the defendant to controvert it. *Id.*

The corroboration of the testimony of an accomplice to warrant a conviction, must not merely relate to the commission of the offense charged, or the circumstances thereof, but must tend to connect the defendant with the commission of the criminal act. *The State v. Thornton*, 26 Id., 79; *Upton v. The State*, 5 Id., 465, 521.

The fact that one has received stolen property from the thief, knowing the same to have been stolen, does not constitute such receiver an accomplice in a burglary by which the possession of the goods was obtained. *The State v. Hayden*, 45 Id., 11.

The corroboration of the testimony of an accomplice is not limited to the testimony of witnesses, but may be by circumstantial evidence. *The State v. Stanley*, 48 Id., 221.

It is not necessary that the testimony of an accomplice be corroborated as to every material fact to which he testifies; if corroborated as to some of such facts, the jury may believe that he speaks the truth as to all. *The State v. Hennesy*, 55 Id., 299; *The State v. Allen*, 57 Id., 431.

A conviction cannot be had on the testimony of an accomplice, unless it is corroborated by other testimony tending to connect the defendant with the commission of the offense. But where there is such testimony, its sufficiency is for the jury to determine. *The State v. Deitz*, 67 Id., 220.

Where on a trial for robbery a witness testified that the defendant and himself committed the crime and that one S. was implicated in it, held, that this testimony was not enough to convict the defendant, without other evidence tending to connect him with the crime. *State v. Mikesell*, 70 Id., 176.

SEC. 4560. [**Of females: on whom rape was perpetrated.**].—The defendant in a prosecution for a rape, or for enticing or taking away an unmarried female of previously chaste character for the purpose of prostitution, or aiding or assisting therein, or for seducing and debauching any unmarried woman of previously chaste character, cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense.

See, as to observations in respect to the corroborating evidence contemplated by the statute. *Andre v. The State*, 5 Iowa, 389; *Upton v. State*, Id., 465.

The corroborative testimony required by the statute should be of a character to strengthen and corroborate the testimony of the injured person, and to point out the defendant as the person who committed the offense. *Andre v. The State*, *supra*. See, also, *The State v. Willis*, 9 Id., 582; *The State v. Tulley*, 18 Id., 88.

Where one indicted for rape was shown to have stated, before the commission of the offense became publicly known that he would under certain circumstances, named, "get clear" this was held a sufficient corroboration of the statements of the prosecutrix. *The State v. Comstock*, 46 Id., 265.

In the trial of an indictment for seduction, a fact which is testified to by the person injured, is not admissible to corroborate her. *The State v. Kingsley*, 39 Id., 439.

The fact that the crime of rape has been committed may be established by the evidence of the person injured, but the defendant cannot be convicted upon her testimony unless it be corroborated by other evidence tending to connect the accused, with the commission of the crime. *The State v. McLaughlin*, 44 Id., 82.

Where bruises are found upon the person of the prosecutrix, it should be left to the jury to determine whether or not they are sufficient to corroborate her testimony to connect the defendant with the commission of the offense. *Id.*

In the trial of an indictment for seduction, the infant alleged to be the fruit thereof cannot be offered in evidence to corroborate the prosecutrix by reason of a supposed resemblance between the child and the accused. *The State v. Danforth*, 48 Id., 43.

Proof of having opportunity for having sexual intercourse does not constitute evidence corroborative of the prosecuting witness on a trial for seduction. The evidence to be corroborative, must tend to connect the defendant with the commission of the offense. *The State v. Painter*, 50 Id., 313.

On the trial of an indictment for seduction, evidence that the defendant had opportunity to employ acts, deception and false promises is not sufficient as corroborating evidence, to connect him with the commission of the offense charged. *The State v. Araah*, 55 Id., 258. See also, *The State v. Smith*, 54 Id., 743; *The State v. Wells*, 48 Id., 671.

The defendant's confession that he was guilty of sexual intercourse with the prosecutrix, taken with other evidence referred to in the opinion, held to be sufficient corroboration of the testimony of the prosecutrix, under this section of the code. *The State v. Fitzgerald*, 63 Id., 268.

As to corroboration of prosecutrix in case of rape, see *The State v. McIntire*, 66 Id., 339.

SEC. 4561. [**Subpœnas.**].—A magistrate, in any criminal proceeding before him may issue subpœnas subscribed by him with his name of office for witnesses within the state in behalf of either party thereto.

SEC. 4562. [**Same.**].—The clerk of the court in which any criminal case is pending must, at all times, upon the application of the defendant or his attorney, issue as many blank subpœnas under the seal of the court, subscribed by him, for witnesses within the state, as may be required by the defendant. He must also issue subpœnas, on the part of the state, when required.

SEC. 4563. [**Who to serve.**].—A peace officer must serve within his town or county, as the case may be, any subpœna delivered to him for service on the part of either the state or defendant, and must make a written return of the service subscribed by him and state the time and place of service, without delay. A subpœna may, however, be served by any other person.

SEC. 4564. [**How made.**].—The service of a subpœna must be by delivering a copy and showing the original to the witness personally.

SEC. 4565. [**May break door.**].—If a witness conceal himself to avoid the service of a subpœna, the officer may break open doors or windows for the purpose of making service.

SEC. 4566. [**Disobedience.**].—Disobedience to a subpœna, or refusal to be sworn or to answer as a witness, may be punished by the court or magistrate as a contempt.

SEC. 4567. [**Witness, when liable.**].—A witness willfully disobeying a subpœna in a criminal case without good cause, shall be liable to the party injured for the amount of the damages sustained by such party.

SEC. 4568. [**Forfeiture of bond.**].—The undertakings of witnesses in criminal cases may be forfeited and enforced like the undertaking of bail.

SEC. 4569. [**Subpœna.**].—A subpœna in a criminal case, runs into any part of the state.

SEC. 4570. [**Impeachment.**].—In cases of impeachment, subpœnas may be issued on behalf of either party by the secretary of the senate.

SEC. 4571. [**Witness examined conditionally.**].—A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on commission in the same manner and with like effect as in civil actions.

SEC. 4572. [**Perpetuating testimony.**].—A person apprehensive of a criminal prosecution, may perpetuate testimony in his favor, in the same manner, and with like effect, as it may be done in apprehension of any civil action.

CHAPTER 38.

OF BAIL, UPON BEING HELD TO ANSWER BEFORE INDICTMENT.

SECTION 4573. [Who may admit.]—When the defendant has been held to answer for any bailable offense, bail must be taken by the magistrate who held him to answer, or by any judge of the supreme, district or circuit courts, or by the court to which the papers on the preliminary examination are to be returned by the magistrate who held him to answer, or by the clerk of such court, or by any magistrate of the county in which the offense is triable.

SEC. 4574. [How given.]—Bail is put in by a written undertaking, executed by one or more sufficient sureties (with or without the defendant, in the discretion of the court, clerk, or magistrate acknowledged before and accepted by the court, clerk or magistrate taking the same, and may be substantially, in the following form:

COUNTY OF.....

An order having been made on the.....day of.....A. D. 18.., by A. B. a justice of the peace of the township of...., (or as the case may be), that C. D. be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been duly admitted to bail, in the sum of.... dollars.

We, E. F. (stating his place of residence and occupation), and G. H. of (stating his place of residence and occupation), hereby undertake that the said C. D. shall appear at the district court of the county of....., at the next term thereof, and answer said charge, and abide the order and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that we will pay to the state of Iowa the sum of.....dollars (inserting the sum in which defendant is admitted to bail).

E. F.
G. H.

Acknowledged before, and accepted by me as.....in the township of..... in the county of....., this.....day of....., A. D., 18..

I. J., justice of the peace,
(or, as the case may be).

It is not necessary, under this section, that a defendant in a criminal case, who furnishes bail for his appearance, should sign the bond with his sureties. *State v. Patterson*, 23 Iowa, 575.

The use of the word "he" in a bail bond drawn to the form prescribed in this section, in place of "we will pay," etc., is manifest clerical error, and should be disregarded. *Id.*

The appearance of the defendant in a criminal action, to answer to the charge, does not discharge the sureties on his bond. They are liable for any failure to obey the orders of the court before surrender or discharge. The liability is a continuing one which can be discharged only by surrendering the accused as provided by statute, or by obtaining the discharge of the accused. *State v. Brown*, 16 Iowa, 314.

The objection that a bail bond, filed and approved by the clerk, was not also marked "accepted" by him, as specified in this section of the code, is technical and cannot affect the right of the state to recover on the bond. *State v. Emily*, 24 Id., 24.

A recognizance for the appearance of the accused at a specified term of court, binds the sureties therein for his appearance at the succeeding term, even though no action is taken or order made at the term specified. *State v. Ryan*, 23 Id., 406; following *State v. Brown*, 16 Id., 314.

Under section 3219 of the code of 1851, it was held that a recognizance to appear and answer to an indictment might be acknowledged in open court. *State v. Elgin*, 11 Id., 216.

It was held not necessary to the validity of the recognizance that its approval or acceptance should be written thereon. If by the determination of the proper officer, the bond was regarded by him as sufficient to authorize the discharge, this amounts to a sufficient acceptance; and after such discharge has taken place, such determination will, in the first instance, be presumed. *State v. Wright*, 37 Id., 522.

In an action on a forfeited recognizance, it is not necessary to allege in the petition, as a con-

sideration of the bond, that the prisoner was released from the custody thereunder. This is presumed, and the contrary must be shown by way of defense. *Id.*

SEC. 4575. [**Qualifications of bail.**]—The qualifications of bail are as follows:

1. Such bail must be a resident and householder, or freeholder, within the state;
2. Such bail must be worth the amount specified in the undertaking, exclusive of property exempt from execution, but the court, clerk or magistrate taking the bail, may allow more than one bail to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to one sufficient bail.

SEC. 4576. [**Justification.**]—The bail must in all cases justify, by affidavit taken before the court, clerk, or magistrate, as the case may be, taking such bail, and the affidavit must state that they each possess the qualifications prescribed in the last section.

SEC. 4577. [**Same.**]—The district attorney, or the court, clerk or magistrate, as the case may be, may thereupon further examine the bail upon oath, concerning their sufficiency, in such manner as may be deemed proper.

SEC. 4578. [**Same.**]—The court, clerk, or magistrate, may also receive other testimony, either for or against the sufficiency of the bail.

SEC. 4579. [**Order.**]—When the examination is closed, the court, clerk, or magistrate, must make an order, either allowing or disallowing the bail, and must forthwith cause the same, with the affidavits or justification, and the undertaking of bail, to be filed with the clerk of the court to which the papers on the preliminary examination are required to be sent.

SEC. 4580. [**Order of discharge.**]—Upon the allowance of the bail and the execution of the undertaking, the court, clerk, or magistrate, must make an order, signed with his name of office, for the discharge of the defendant, to the following effect.

THE STATE OF IOWA:

To the sheriff of the county of

C. D., who is detained by you on commitment, to answer a charge for the offense of (here designate it generally), having given sufficient bail to answer the same, you are commanded forthwith to discharge him from custody.

Dated at, in the township of, in the county of, this day of, A. D., 18...

K. L., justice of the peace,
(or as the case may be).

SEC. 4581. [**Disallowed.**]—If the bail be disallowed the defendant must be detained in custody until other bail be put in and justify.

CHAPTER 39.

OF BAIL UPON AN INDICTMENT BEFORE CONVICTION.

SECTION 4582. [**For misdemeanor.**]—When the offense charged in the indictment is a misdemeanor, the officer serving the bench warrant, if therein required, must take the defendant before a magistrate in the county in which it was issued, or in which he is arrested, or before the clerk of the district court of either of such counties for the purpose of giving bail.

SEC. 4583. [**Felony.**]—If the offense charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody according to the command of the warrant.

SEC. 4584. [**By whom taken.**].—When the defendant is so delivered into custody, if the felony charged be bailable, bail must be taken by that court, or the clerk of that court, or by any magistrate in the same county.

A recognizance entered into before the clerk of the district court of one county for the appearance of the defendant before the court in another county wherein the indictment is pending, and where the recognizance is filed, is not thereby rendered invalid. *State v. Wells*, 36 Iowa, 238.

Nor would the failure of the clerk to indorse the approval of the recognizance, invalidate it. Nor in the absence of an averment or showing that it was acknowledged, prevent a recovery in an action thereon. Nor need it appear in the action that the sureties in the bond were called and their default entered. This is necessary only as to the person indicted. *Id.*

A recognizance entered into by a person indicted for the crime of seduction, otherwise in due form, which does not describe or designate the offense with which the principal is charged more definitely than by the use of the word "seduction," is sufficient to create a liability. *State v. Marshall*, 21 Id., 143.

SEC. 4585. [**Form of undertaking.**].—The bail must be put in by a written undertaking, executed by one sufficient surety, with or without the defendant, in the discretion of the court, clerk, or magistrate, acknowledged before and accepted by the court, clerk or magistrate taking the same, and may be substantially in the following form:

COUNTY OF.....

"An indictment having been found in the district court of the county of....., on the.....day of....., A. D. 18...., charging A. B. with the crime of (designating it as in the bench warrant), and he having been duly admitted to bail in the sum of... .dollars:

We, A. B., of (stating his place of residence and occupation), and C. D., of (stating his place of residence and occupation), and E. F., of (stating his place of residence and occupation), hereby undertake that the said A. B. shall appear and answer the said indictment, and abide the orders and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that he will pay to the state of Iowa the sum ofdollars (inserting the sum in which the defendant is admitted to bail.)

A. B.,
C. D.,
E. F.

Acknowledged before and accepted by me, at in the township of....., in the county of....., this.....day of....., A. D., 18....

G. H., justice of the peace,
(or as the case may be).

A bail bond or recognizance entered into before the clerk of the district court of one county for the appearance of the defendant before the court in another county wherein the indictment is pending, and where the bond is filed, is valid. *The State v. Wells*, 36 Iowa, 238.

Nor would the failure of the clerk to indorse an approval of the bond invalidate it. Nor the absence of an averment or showing that it was acknowledged, prevent a recovery in an action thereon. *Id.*

In an action upon a bail bond it need not be shown that the sureties were called and their default entered. This is necessary only as to the person indicted. *Id.*

The clerk of the court to which a criminal cause is removed by change of venue has the same power to take a recognizance as the clerk of the court where the indictment is found. *The State v. Merrihew*, 47 Id., 112.

The liability of sureties is not affected by the failure to take a forfeiture at the term succeeding the execution of the bond; a continuance would continue the liability, and, no continuance appearing of record, the cause stands continued by operation of law. *Id.*

The arrest and detention in another county of one who is under bond for his appearance, does not have the effect to release the sureties on his bond. *Id.*

SEC. 4586. [**Provisions of previous chapter applies.**].—The provisions of the preceding chapter, subsequent to the form of the undertaking relative to the qualifications of bail, the justification, the examination, receiving other testimony against the sufficiency, and the order of allowance or disallowance thereof, and

the filing of the undertaking with the affidavits, and all proceedings incidental thereto, in the cases therein provided for, apply also to the cases provided for in this chapter.

CHAPTER 40.

OF BAIL, UPON AN APPEAL TO THE SUPREME COURT, AFTER CONVICTION.

SECTION 4587. [**When bail taken.**—After conviction upon an appeal to the supreme court, the defendant must be admitted to bail as follows:

1. If the appeal be from a judgment imposing a fine, upon the undertaking of bail that will pay the same, or such part of it as the supreme court may direct, and in all respects abide the orders and the judgment of the supreme court upon the appeal;

2. If the appeal be from a judgment of imprisonment, upon the undertaking of bail that he will surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgment of the supreme court upon the appeal. The bail may be taken, either by the court where the judgment was rendered, or the judge thereof, or the district court of the county in which he is imprisoned, or the judge thereof, or the judge of the circuit court of either of such counties, or by the supreme court, or a judge thereof, or by the clerk of either of such courts.

SEC. 4588. [**Qualifications of.**—The bail must possess the qualifications, must justify, and must be put in and taken in the manner prescribed in chapter thirty-eight of this title, and the same proceedings had in all respects, as nearly as applicable, varying to suit the case, and the undertaking of the bail must be, in effect, as prescribed by the preceding section.

CHAPTER 41.

OF DEPOSIT OF MONEY INSTEAD OF BAIL.

SECTION 4589. [**With whom, and effect.**—The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the district court to which the undertaking, in case of bail, is required to be sent, the sum mentioned in the order, and upon delivering to the officer in whose custody he is, a certificate under seal from said clerk of the deposit, he must be discharged from custody.

SEC. 4690. [**After giving bail.**—If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the undertaking, and upon the deposit being made the bail shall be exonerated.

SEC. 4591. [**Bail after deposit of money.**—If money be deposited as provided in the last section, bail may be given in the same manner as if it had been originally given upon the order for admission to bail at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken shall thereupon direct in the order of allowance that the money deposited be refunded by the clerk to the defendant, and it shall be refunded accordingly.

Where an appeal is taken from the order of a justice of the peace taxing the costs in a criminal prosecution against the prosecuting witness, the district court is to determine simply whether or

not the justice abused the discretion which the law reposes in him in such cases, and, for the purpose of doing this, it must put itself as nearly as possible in the place of the justice, by considering the evidence only that was before the justice, as shown by his transcript (corrected if necessary), and new or additional evidence is not admissible. *State v. Kerns*, 64 Iowa, 306.

SEC. 4592. [**Money: how applied.**]—When money has been deposited, if it remain on deposit at the time of a judgment against the defendant, the clerk shall, under the direction of the court, apply the money in satisfaction of so much of the judgment as requires the payment of money, and after paying the same shall refund the surplus, if any, to the defendant, unless an appeal be taken to the supreme court, and bail put in, in which case the deposit shall be returned to the defendant.

CHAPTER 42.

OF SURRENDER OF THE DEFENDANT.

SECTION 4593. [**When and how done.**]—At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner:

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

2. Upon the undertaking and the certificate of the officer, the district court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during term time, at the same term, and upon three clear days' notice thereof to the district attorney, with a copy of the undertaking and certificate, may order the bail to be exonerated.

In contemplation of law an accused party admitted to bail is in the custody of his sureties who are considered his keepers. If they have grounds to apprehend an escape, it is their privilege to have the accused re-arrested and surrendered back into the custody of the law, and themselves discharged. *The State v. Holmes*, 23 Iowa, 458, 460.

The sheriff has no authority to receive and hold in custody one bailed, unless the latter is delivered to him as prescribed by the statute, or placed in his custody in the presence of, and with the knowledge and sanction, or by order of, the magistrate. *The State v. Tieman*, 39 Id., 474.

A surety for one charged with a public offense is not released from the obligation of his undertaking by a simple surrender of the accused to the sheriff, in the presence of the court. He is bound not only that the party bailed shall appear at the time and place specified, but also that he shall abide the order and judgment of the court, and not depart without leave. *Id.*

To exonerate himself the bail must arrest and surrender the party indicted to the sheriff, upon presenting him with a copy of the bond. *The State v. Kramer*, 50 Id., 582.

The failure of the sheriff to arrest the party indicted when the bail presents a copy of the bond, will not exonerate the bail from liability upon his undertaking. *Id.*

SEC. 4594. [**Arrest by bail.**]—For the purpose of surrendering the defendant, the bail, at any time before they are finally charged, and at any place within the state, may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so.

SEC. 4595. [**On surrender, money returned.**]—If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, shall surrender himself to the officer to whom the commitment was made, or directed in the manner prescribed in this chapter, the court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during the term, at the same term, must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon three clear days notice to the district attorney, with a copy of the certificate.

CHAPTER 43.

OF FORFEITURE OF THE UNDERTAKING OF BAIL, OR DEPOSIT OF MONEY.

SECTION 4636. [How forfeited.]—If the defendant fail to appear for arraignment, trial or judgment, or at any other time when his personal appearance in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct an entry of such failure to be made on the record, and the undertaking of his bail, or the money deposited instead of bail, as the case may be, is thereupon forfeited.

The liability of the surety is not affected by the failure to take a forfeiture at the term succeeding the execution of the bond; a continuance will continue the liability, and no continuance appearing of record, the cause is continued by operation of law. *The State v. Merrihew*, 47 Iowa, 112.

The death of the principal two years after a bond was forfeited in a criminal case is no defense to an action against the surety on the bond. *The State v. Scott*, 20 Id., 63.

The district court is not authorized, on the failure of a defendant to appear when called, to order a forfeiture of his undertaking when it is not on file in the office of the clerk, and is not in possession of the court. *State v. Clingman*, 14 Id., 404.

The appearance of the defendant in a criminal action, to answer to the charge, does not discharge the sureties on his recognizance. They are liable for any failure to obey the orders of the court before surrendered or discharged. Their liability is a continuing one which can be discharged only by surrendering the accused as provided by statute or by obtaining his discharge. *The State v. Brown*, 16 Id., 314.

SEC. 4597. [Discharge of.]—If, before the final adjournment of the court for the term, the defendant appear and satisfactorily excuse his failure, the court may direct an entry to be made on the record, that the forfeiture of the undertaking or deposit be discharged.

If a defendant after default appear, at the same term of the default and excuse his failure to appear, the court may discharge the forfeiture, but his re-arrest and holding for trial after default has been entered, does not affect the right of the state to recover on the forfeiture already taken. *State v. Emily*, 24 Iowa, 24.

SEC. 4598. [When not.]—If the forfeiture is not discharged, the district attorney may, at any time after the adjournment of the court for the term, proceed by civil action only upon the undertaking of the bail.

SEC. 4599. [Action on undertaking.]—The action on undertaking must be in the court in which the defendant was, or would have been required to appear by the undertaking; *provided*, that when the undertaking requires the defendant to appear before a justice of the peace or a court of limited jurisdiction, or before an examining magistrate, it shall be the duty of said justice, or court, or examining magistrate, upon the forfeiture of the undertaking, and within thirty days thereafter, to file the same, together with a copy of all his official entries in relation thereto, in the office of the district court of the county; and thereupon it shall be the duty of the district attorney to proceed to collect the same by a civil action in the district court of said county, or any other court of said county, having jurisdiction equal to the penalty of said bond.

Where a bond or undertaking is entered into for the appearance of defendant before a magistrate, suit thereon may be brought in the district court. *State v. Emerson*, 16 Iowa, 206, 208.

The remission of the whole or any part of a forfeited bond, after the defendant has been surrendered, rests in the discretion of the court, and his action will not be reversed unless an abuse of discretion is shown. *The State v. Kraner*, 50 Id., 575.

When a bond for the appearance of a defendant at the district court of a particular county is taken in the name of the state, an action on a forfeiture thereof may be brought in the name of the county. *Shelby County v. Simmonds*, 33 Id., 345.

Where a bond was given for the appearance of the defendant in a criminal action in the court of a certain county, and the venue was afterwards changed to another county, it was *held* that an action on the bond should be brought in the latter county, and when so brought, it was error for the court to sustain a motion for a change of venue to the court of the former county on the ground that the residence of the defendant was in such county. *Lucas County v. Wilson*, 59 Id., 354.

SEC. 4600. [**Surrender before judgment: effect.**]-If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, in its discretion, remit the whole or any part of the sum specified in the undertaking.

The court may, in its discretion, remit the whole or any amount of the recognizance before judgment is entered, if the defendant be surrendered; but the action of the court in such case will not be reversed unless an abuse of discretion be clearly shown. *The State v. Kraner*, 50 Iowa, 582; *Same v. Hirronemas*, Id., 545.

The arrest and detention of a defendant who is under bond for his appearance, does not release the sureties on his bond. *The State v. Merrihew*, 47 Id., 112.

Nor will the fact that the defendant was in the military service of the United States, in another state, the officers of which prevented the surety from bringing him and surrendering him to the court in the discharge of his undertaking, be any defense in an action on the bond. *The State v. Scott*, 20 Id., 63.

CHAPTER 44.

ON THE RE-COMMITMENT OF THE DEFENDANT AFTER GIVING BAIL OR DEPOSITING MONEY.

SECTION 4601. [**Re-committed.**]-The district court in which a criminal action is pending, or during the pendency of an appeal from its judgment in such action, or in which a judgment is to be carried into effect, may, by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after he has given bail, or deposited money instead thereof, in the following cases:

1. When by reason of his failure to appear, he has incurred a forfeiture of his bail, or money deposited instead thereof;

2. When it satisfactorily appears to the court that his bail, either by reason of the death of one or more of them, or from any other cause, is insufficient, or have removed from the state;

3. When upon the finding of an indictment, the court deems the bail taken by the committing magistrate insufficient.

This section confers the power upon the district court to cause a defendant, after forfeiture of his undertaking for a default in failing to appear, to be re-arrested and committed to jail until legally discharged. *The State v. Holmes*, 23 Iowa, 458, 460.

When a person is held to answer a criminal charge by a justice of the peace, and an indictment is subsequently found against him, whereupon the court directs a warrant to issue for his arrest, the surety is discharged when the arrest is made and the accused is taken into custody. *The State v. Orsler*, 48 Id., 343.

The remission of the whole or any part of a forfeited bond, after the defendant has been surrendered, rests in the discretion of the court, and this action will not be reversed unless an abuse of discretion is shown. *The State v. Kraner*, 50 Id., 575.

SEC. 4602. [**Order: its requisites.**]-The order for re-commitment of the defendant must recite generally the facts upon which it is founded, and must direct that the defendant be arrested and committed to the custody of the sheriff of the county where the depositions and statements were returned, or the indictment was found, or the conviction was had, as the case may be, to be detained until legally discharged.

SEC. 4603. [**Arrest.**]-The defendant may be arrested pursuant to the order upon a certified copy thereof, in any county in the state.

SEC. 4604. [**Committal.**]-If the order recite as the ground on which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirements of the order.

SEC. 4605. [**New bail.**]-If the order be made for any other cause and the offense be bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order.

CHAPTER 45.

OF UNDERTAKINGS OF BAIL WHEN LIENS.

SECTION 4606. [**On real estate.**]—Undertakings of bail, from the time of filing the same in the office of the clerk of the district court in which they are required to be filed, shall be, and may be made, liens upon real estate of the person acknowledging the same, in the same manner, to the same extent, and with like effect, as in judgments in civil actions.

SEC. 4607. [**Same.**]—They shall, when filed, be immediately docketed and indexed by the clerk of the court in which they are filed, as judgments in civil actions are required to be docketed and indexed.

SEC. 4608. [**Same.**]—Attested copies of such undertakings may be filed in the office of the clerk of the district court of the county in which the real estate is situated, in the same manner, and with like effect, as attested copies of judgments, and shall be immediately docketed and indexed in the same manner.

CHAPTER 46.

OF JUDGMENTS FOR FINES WHEN LIENS, AND HOW EXECUTIONS THEREON STAYED.

SECTION 4609. [**On real estate.**]—Judgments for fines, in all criminal actions rendered, are, and may be made, liens upon the real estate of the defendant, in the same manner, and with like effect, as judgment in civil actions.

SEC. 4610. [**Stay of execution.**]—The defendant may have a stay of execution for the same length of time, and in the same manner, as provided by law in civil actions, and with like effect, and the same proceedings may be had therein.

CHAPTER 47.

OF THE LIBERATION OF POOR CONVICTS.

SECTION 4611. [**When and on what conditions.**]—When any person convicted of a criminal offense is sentenced to pay a fine and costs only, and stand committed until sentence be performed, if the sentence be not complied with by payment of the sum due within thirty days next following, the sheriff may liberate him from prison if committed for no other cause, and if he be unable to pay such fine and costs, upon his giving his promissory note for the amount due, payable to the treasurer of the county where he was committed, on demand with interest, accompanied with a written schedule, containing a true account of all his property, of every kind, and by him signed and sworn to; which note and schedule, must be by such sheriff delivered without delay to treasurer for the use of the county.

When a defendant, sentenced to imprisonment in default of the payment of a fine entered against him substantially complied with sections 4881 and 5005 of the revision (now sections 4509, 4611 of the code) by suffering imprisonment for the time provided, and executing his note to the treasurer as therein, *held*, not only entitled to be discharged from custody, but to have the judgment against him satisfied. *State v. Van Vleet*, 23 Iowa, 168; *State v. Peck*, 37 Id., 342; *The City of Keokuk v. Dressell*, 47 Id., 597, 601, 602.

Actual imprisonment for thirty days is necessary to entitle a prisoner to the right to be liber-

ated as a poor convict, upon the making of the oath, schedule and notes as provided by this section. *Constructive* imprisonment is not sufficient. *In re Cufley*, 34 Ill., 184.

Authority to imprison for non-payment of costs as well as fine is not expressly given by the statute and will not be inferred, and therefore a court cannot lawfully sentence a person to stand committed until a fine and costs are paid. *State v. Erwin et al*, 44 Ill., 637.

In an action on a bail bond, the introduction of the record of forfeiture is admissible, even though it fail to show that the defendant was called in open court. *State v. Hirronemas*, 50 Ill., 545.

SEC. 4612. [**False schedule.**]—If such convict knowingly and willfully make any false schedule on oath, relating to the amount or nature of his property, he is guilty of perjury.

CHAPTER 48.

OF THE DISMISSAL OF CRIMINAL ACTIONS BEFORE AND AFTER INDICTMENT FOR WANT OF PROSECUTION OR OTHERWISE.

SECTION 4613. [**When.**]—When a person has been held to answer for a public offense, if an indictment be not found against him at the next regular term of the court at which he is held to answer, the court must order the prosecution to be dismissed unless good cause to the contrary be shown.

SEC. 4614. [**If tried in certain time.**]—If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next regular term of the court in which the indictment is triable after the same is found, the court must order it to be dismissed unless good cause to the contrary be shown.

SEC. 4615. [**Discharged on his own undertaking.**]—If the defendant be not indicted or tried as provided in the last two sections, and sufficient reason therefor shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking, or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued, but no such continuance can be extended beyond three terms of the court.

SEC. 4616. [**Discharge of.**]—If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail must be exonerated, and if money has been deposited instead of bail it must be refunded to him.

SEC. 4617. [**By court or district attorney.**]—The court may, either upon its own motion or upon the application of the district attorney, and in furtherance of justice, order an action after an indictment to be dismissed, but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record.

When a party is put upon trial for a criminal offense, it is not within the scope of the authority of either the district attorney, or of the court, to take the case from the jury, by their own arbitrary will, and without a peremptory and controlling cause, and again hold him to trial on the same charge, although it be merely presented; and such a proceeding amounts to an acquittal and may be pleaded as such. *State v. Calendine*, 8 Iowa, 288.

SEC. 4618. [**Nolle prosequi.**]—The entry of *nolle prosequi* is abolished, and neither the attorney general nor the district attorney shall hereafter discontinue or abandon a prosecution for a public offense except as provided in the last section.

SEC. 4619. [**Bar.**]—An order for the dismissal of the action as provided in this chapter, is a bar to another prosecution for the same offense if it be a misdemeanor; but it is not a bar if the offense charged be a felony.

CHAPTER 49.

OF THE INSANITY OF A DEFENDANT BEFORE TRIAL OR AFTER CONVICTION.

SECTION 4620. [**Trial.**]-When a defendant appears for arraignment, trial, judgment, or on any other occasion when he is required, if a reasonable doubt arise as to his sanity, the court must order a jury to be impaneled from the trial jurors in attendance at the term, or who may be summoned by the direction of the court, as provided by this code, to inquire into the fact.

An inquiry as to the sanity of the prisoner under this and the following four sections, should be limited to the time when he appears for arraignment, or to the occasion which renders such inquiry proper, and should not relate to the time at which the offense of which he is accused is committed. *The State v. Arnold*, 12 Iowa, 479.

SEC. 4621. [**Suspension.**]-The arraignment, trial, judgment or other proceedings, as the case may be, must be suspended until the question of insanity is determined by the verdict of the jury.

SEC. 4622. [**Order of procedure.**]-The trial for the question of insanity must proceed in the following order:

1. The counsel of the defendant must offer the evidence in support of the allegation of insanity;
2. The district attorney must then offer the evidence in support of the case on the part of the state;
3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
4. When the evidence is concluded, unless the case is submitted on either side, or both sides, without argument, the district attorney must commence, and the defendant's counsel conclude the argument to the jury;
5. If more than one counsel on each side argue the case to the jury, they must do so alternately;
6. The court shall then, on motion of either party, charge the jury. The provisions of this code, so far as the same are applicable and not herein changed, shall regulate the trial of the question of insanity.

SEC. 4623. [**If sane.**]-If the jury find the defendant is sane, the proceedings on the indictment shall be resumed.

SEC. 4624. [**If insane.**]-If the jury find the defendant insane, the proceedings on the indictment shall be suspended until he becomes sane, and the court, if it deem his discharge dangerous to the public peace or safety, may order that he be in the meantime committed by the sheriff to the Iowa Insane Hospital, and that upon his becoming sane, he be delivered by the superintendent of the hospital to the sheriff.

SEC. 4625. [**Bail released.**]-The commitment of the defendant, as provided in the last section, exonerates his bail, or entitles a person authorized to receive the property of the defendant, to a return of the money he may have deposited instead of bail.

SEC. 4626. [**Detained in hospital.**]-If the defendant be received into the hospital, he must be detained there until he becomes sane. When he becomes sane, the superintendent of the hospital must give notice of that fact to the sheriff and to the district attorney of the proper district. The sheriff must thereupon, without delay, bring the defendant from the hospital, and place him in the proper custody until he be brought to trial or judgment as the case may be, or be legally discharged.

SEC. 4627. [**Expenses.**]-The expense of sending the defendant to the hospital, bringing him back, and any other expense incurred, are to be paid in the first

instance by the county from which he was sent, but the county may recover from the estate of the defendant, if he have any, or from a relative, or another county, town, township or city, bound to provide for or maintain him elsewhere.

SEC. 4628. [**Same.**—]—Sheriffs for delivering persons found to be insane, under the provisions of this chapter, are entitled to the same fees therefor as are allowed for conveying convicts to the penitentiary.

It is only where persons are found to be insane in proceedings under the provisions of chapter 49, title 25, of the code, that a sheriff is entitled to the same fees for conveying them to the insane hospital as are allowed for conveying convicts to the penitentiary. *Harding v. The County of Montgomery*, 55 Iowa, 41.

CHAPTER 50.

OF SEARCH WARRANTS, AND PROCEEDINGS THEREON.

SECTION 4629. [**Search warrant: definition.**—]—A search warrant is an order in writing, in the name of the state, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

SEC. 4630. [**Upon what grounds issued.**—]—It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be;

2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or of any other person in whose possession it may be;

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to which he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, from a house or other place occupied by him or under his control, or from the possession of the person to whom he may have so delivered it.

SEC. 4631. [**Same.**—]—No search warrant can be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

SEC. 4632. [**Complaint examined.**—]—The magistrate must, before issuing a warrant, examine on oath the applicant therefor, and any witnesses he may produce, and take their affidavits in writing, and cause each affidavit to be subscribed and sworn to before him by the person making it.

SEC. 4633. [**Affidavit must set forth.**—]—The affidavit must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

SEC. 4634. [**Magistrate issue.**—]—If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search warrant, signed by him with his name of office, directed to any peace officer in the county, commanding him forthwith to search the person or place named for the property specified, and bring it before him.

SEC. 4635. [**Jurisdiction.**—]—The local jurisdiction of magistrates, in exercising the powers conferred on them by this chapter, is as defined in this code.

SEC. 4636. [**Form of warrant.**]—The warrant may be, substantially, in the following form:

COUNTY OF.... .

THE STATE OF IOWA:

“To any peace officer of said county:

“Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken) that (stating the particular grounds of the application according to section four thousand six hundred and thirty of this chapter; or, if the affidavit be not positive, that there is probable cause for believing that (stating the ground of the application in the same manner); you are therefore commanded, in the day time (or at any time of the day or night, as the case may be, according to section four thousand six hundred and thirty of this chapter) to make immediate search on the person of C. D., or, in the house situated (describing it or any other place to be searched, with reasonable particularity, as the case may be), for the following property (describing it with reasonable particularity); and if you find the same, or any part thereof, to bring it forthwith before me, at (stating the place).

“Dated at.... ., this.....day of.....A. D. 18..

E. F., justice of the peace,”

(or, as the case may be).

SEC. 4637. [**By whom served.**]—A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer, on his requisition, he being present and acting in its execution.

SEC. 4638. [**Officer may break open doors.**]—The officer may break open any outer or inner door or window of a house, or any part of the house, or anything therein, to execute a warrant, if, after notice of his authority and purpose, he be refused admittance.

SEC. 4639. [**Same.**]—He may break open any outer or inner door or window of a house for the purpose of liberating a person, who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary, for his own liberation.

SEC. 4640. [**Must be served in day time.**]—The magistrate must insert a direction in the warrant that it be served in the day time, unless the affidavit be positive that the property is on the person, or in the place to be searched; in which case he may insert a direction that it may be served at any time of the day or night.

SEC. 4641. [**Return: in what time.**]—A search warrant must be executed and returned to the magistrate by whom it was issued within ten days after its date. After the expiration of such time, the warrant, unless executed, is void.

SEC. 4642 [**Officer receipt for property.**]—When the officer takes any property under the warrant, he must give a receipt for the property taken, specifying it in detail, to the person from whom it was taken or in whose possession it was found, or, in the absence of the person, he must leave it in the place where he found the property.

SEC. 4643. [**Return with inventory.**]—The officer must forthwith return the warrant to the magistrate, and at the same time deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they be present, verified by the affidavit of the officer at the foot of the inventory and taken before the magistrate, to the following effect: “I, the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.”

SEC. 4644. [**Magistrate give copy.**].—The magistrate, if required, must deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

SEC. 4645. [**Take testimony.**].—If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto.

SEC. 4646. [**Same.**].—The testimony given by each witness must be reduced to writing and authenticated by the magistrate.

SEC. 4647. [**Property restored.**].—If it appear that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate shall cause it to be restored to the person from whom it was taken.

SEC. 4648. [**Same.**].—If the property taken by virtue of a search warrant was stolen or embezzled, it must be restored to the owner, upon his making satisfactory proof to the magistrate of his ownership thereof, or of his right of possession thereto, as provided in the next chapter. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section four thousand six hundred and thirty of this chapter, the magistrate must retain it in his possession, subject to the order of the court to which he is required to return the proceeding before him, or of any other court in which the offense which the property taken was used as a means of committing, or so intended to be, is triable.

SEC. 4649. [**Disposition of papers.**].—The magistrate must annex together the affidavits taken before the issuing of the warrant, the warrant, the return, and the inventory, and return them to the next district court of the county, at or before its opening, on the first day of the next term thereof.

SEC. 4650. [**Malicious suing out.**].—Whoever, maliciously and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

SEC. 4651. [**Excess of authority.**].—A peace officer who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

SEC. 4652. [**Searching person charged with felony.**].—When a person charged with a felony is supposed by the magistrate before whom he is brought to have upon his person a dangerous weapon or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other things to be retained, subject to his order, or the order of the court in which the defendant may be tried.

SEC. 4653. [**Property kept for evidence.**].—When any officer, in the execution of a search warrant, shall find any stolen or embezzled property, or shall seize any other things for which a search is allowed by this chapter, all the property and things so seized shall be safely kept by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced as evidence on the trial; and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall be destroyed under the direction of the court or magistrate.

See *The State v. Mullen*, cited in note to section 4659, *post*.

CHAPTER 51.

OF THE DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

SECTION 4654. [**Held by officer.**]—When the property alleged to have been stolen or embezzled comes into the custody of a peace officer, he must hold the same subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

SEC. 4655. [**Delivered to owner.**]—On satisfactory proof of title by the owner of property, the magistrate before whom the information is laid, or who shall examine the charge against the person accused of stealing or embezzling the same, may order it to be delivered to the owner, on his paying the reasonable and necessary expenses incurred in the preservation and keeping thereof, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property.

SEC. 4656. [**Same.**]—If the property stolen or embezzled come into the custody of a magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified as before provided.

SEC. 4657. [**Same.**]—If the property stolen or embezzled has not been delivered to the owner, the court before which a conviction is had, may, on proof of his title, order its restoration.

SEC. 4658. [**When not claimed.**]—If the property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of the person for stealing or embezzling it, the magistrate or other officer having it in his custody, must, on payment of the necessary expenses incurred for its preservation, deliver it to the auditor of the county to be applied under the direction of the board of supervisors thereof for the benefit of the poor of the county.

SEC. 4659. [**Officer give receipts for property.**]—When the money or other property is taken from the defendant arrested upon a charge of a public offense, the officer taking it shall, at the time, give duplicate receipts therefor, specifying particularly the amount of money and the kind of property taken; one of which receipts he must deliver to the defendant, and the other he must forthwith file with the clerk of the district court of the county where the depositions and statements are to be sent by the magistrate.

Sections 4633 and 4659 of the code simply direct the care and disposition to be made of stolen property when taken by the officer, and the receipt to be given by him therefor does not affect or limit the competency on either side. *State v. Mullen*, 30 Iowa, 203.

A justice of the peace may issue a search warrant for property alleged to be stolen or embezzled; and upon the return of the warrant, the right to possession of the property may be determined, and delivery thereof made accordingly. *State v. Akien*, 71 Id., 216.

CHAPTER 52.

OF PROCEEDINGS AND TRIALS BEFORE JUSTICES OF THE PEACE.

SECTION 4660. [**Jurisdiction.**]—Justices of the peace have jurisdiction of, and must hear, try, and determine all public offenses less than felony, committed within their respective counties, in which the punishment described by law does not exceed a fine of one hundred dollars, or imprisonment thirty days.

Where the defendant was indicted for, and convicted of, stealing personal property of less than twenty dollars in value, *in a dwelling house in the day time*, held, that the district court had jurisdiction of the offense, and the same was not cognizable by a justice of the peace. *State v. Dawson*, 17 Iowa, 584.

The jurisdiction of justices of the peace in criminal matters is co-extensive with the county. *State v. Kinney*, 41 Id., 424.

SEC. 4661. [**Action commenced by information.**].—Criminal actions for the commission of a public offense must be commenced before a justice of the peace, by an information subscribed and sworn to, and filed with the justice.

SEC. 4662. [**Information must contain.**].—Such information must contain:

1. The name of the county and of the justice where the information is filed;
2. The names of the parties, if the defendant be known, and if not, then such names as may be given him by the complainant;
3. A statement of the acts constituting the offense, in ordinary and concise language, and the time and place of the commission of the offense as near as may be.

An information is not sufficient if it merely charge the commission of an offense by its technical name. It must contain a statement of the facts constituting the offense intended to be charged. *State v. Murray et al.*, 41 Iowa, 580.

An information may be amended upon application to any extent which the court may deem consistent with the orderly conduct of judicial business, with the public interest, and with private rights. *State v. Doe*, 50 Id., 541.

The rule of the statute, that words used to define a public offense need not be strictly pursued in an indictment, but other words having the same meaning may be used, applies to an information before a justice of the peace. *State v. Mohr*, 53 Id., 261. See code, § 4304. For form of information held sufficient see *Devine v. The State*, 4 Id., 443.

An information is amendable, and the signature of the prosecuting witness, inadvertently omitted, may be attached on appeal in the district court, the fact that it was sworn to being shown. *State v. Merchant*, 33 Id., 375.

An information for assault and battery which charges that defendant "did then and there beat, bruise and ill treat the said J. C. contrary" etc., sufficiently complies with this section of the code. *State v. Boynton* 38 N. W. Rep., 505.

SEC. 4663. [**Form of.**].—The information may be substantially in the following form:

.....county,
 The State of Iowa, } Before justice.....(here insert the name of
 against } justice).
 A.....B.....defendant. }

The defendant is accused of the crime (here name the offense):

For that the defendant, on theday of.....A. D. 18.., at the (here name the city, village, or township) in the county aforesaid (here state the act or omission constituting the offense as in an indictment).

An information under section 1562 of the revision (section 1540 of the code, which charged "that the defendant on, etc., at, etc., did sell intoxicating liquors in violation of the laws of the state of Iowa," without stating to whom the sale was made, was held insufficient. *State v. Allen* 32 Iowa, 491.

An information charging a defendant with inhumanly whipping and beating his own child is sufficient as an information charging an assault and battery; but it should set out the name of the person on whom the offense was committed. *State v. Bitman*, 13 Id., 485.

SEC. 4664. [**Justice must file.**].—The justice must file such information, and mark thereon the time of filing the same.

SEC. 4665. [**Warrant may issue.**].—Immediately upon the filing of such information, the justice may, in his discretion, issue a warrant for the arrest of the defendant, directed in the same manner as a warrant of arrest upon a preliminary information, and may be served in like manner.

SEC. 4666. [**Service.**].—The officer who receives the warrant must serve the same by arresting the defendant, if in his power, and bringing him without unnecessary delay before the justice who issued the same.

SEC. 4667. [**Appearance.**].—When the defendant is brought before the justice the charge against him must be distinctly read to him, and he shall be asked whether he is presented by his right name, and be required to plead. If he objects

that he is wrongly named in the information, he must give his right name, and if he refuses to do so, or does not object that he is wrongly named, the justice shall make an entry thereof in his docket, and he is thereafter precluded from making any such objection.

SEC. 4668. [**Pleading.**]-The defendant may plead the same pleas as upon an indictment. His pleas must be oral, and shall be entered on the docket of the justice.

SEC. 4669. [**Same.**]-Upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the justice must proceed to try the issue, unless a change of venue be applied for by the defendant.

A justice of the peace has no authority to try a prisoner after he has demanded a jury trial, and has no right to render judgment against him until he has been found guilty by a jury in the manner provided by law. *Dupont v. Downing*, 6 Iowa, 172.

A party arrested and brought to trial in the police court of a city of this state for a violation of a city ordinance, is not entitled to a jury trial. *Zelle v. McHenry*, 51 Id., 572.

CHANGE OF VENUE.

SEC. 4670. [**Change of venue.**]-If a change of venue be applied for, an affidavit must be filed stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge, or the party injured or interested, or is a material witness for either party, or that the defendant cannot obtain justice before him, as the affiant verily believes.

SEC. 4671. [**Same.**]-If such affidavit be filed the change of venue must be allowed, and the justice must immediately transmit all the original papers, and a transcript of all his docket entries in the case to the next nearest justice in the township, unless said justice be a party to the action, or is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding, and in such case the justice before whom such action or proceeding is commenced, shall transmit all the original papers, together with a transcript of all his docket entries to the next nearest justice in the county against whom none of the above objections exist, who may require the defendant to plead as provided in section four thousand six hundred and sixty-seven of this chapter, if he has not already done so, and shall proceed to try the case, unless a jury trial be demanded, but no more than one change of venue in the same case shall be allowed.

Where a justice of the peace, to whom a criminal case comes by change of venue, refuses to act, no other justice of the peace can take jurisdiction and try the case. *Connell v. Stelson*, 33 Iowa, 147.

Where a change of venue is granted in a criminal cause pending before a justice of the peace, the fact that the next nearest justice is a material witness for the defendant, is no reason why the cause should not be sent to him as this section requires. *The State v. McEvoy*, 68 Id., 355.

In this section, the clause providing that the justice before whom the cause is commenced shall transmit the papers, etc., "to the next nearest justice in the county against whom none of the above objections exist," refers only to the objections enumerated in this section, and not those named in section 4670, which are required to be made by affidavit as a ground for change of venue. Accordingly where the defendant included in his affidavit for change of venue, an allegation that he could not obtain justice before the other justice of the same township, he being the next nearest justice, such allegation was properly stricken out, on motion, and there being no legal objection the cause was properly sent to the next nearest justice, and he thereby acquired jurisdiction thereof. *Albertson v. Kriechbaum, Sheriff*, 65 Id., 11.

SELECTION OF JURY.

SEC. 4672. [**Jury trial.**]-Before the justice has heard any testimony upon the trial the defendant may demand a trial by jury.

SEC. 4673. [**Jury: how obtained.**]-If a trial by jury be demanded, the justice shall direct any peace officer of the county to make a list in writing of the

names of eighteen inhabitants of the county having the qualifications of jurors in the district court, from which list the prosecutor and defendant may each strike out three names.

When a justice of the peace is about to issue a *venire* for a jury in a criminal cause to a certain peace officer, the prosecutor may properly file a motion, supported by affidavit, showing that such officer is prejudiced against the prosecution, and is likely to select jurors to the prejudice of the state, and asking that the *venire* be issued to some other officer; and in such case it is the duty of the justice to institute an inquiry, and investigate the truth of the charge, and be governed accordingly. *Rainbow v. Benson et al.*, 71 Iowa, 391.

SEC. 4674. [**Same.**]—In case the prosecutor or the defendant neglect or refuse to strike out such names, the justice shall direct some disinterested person to strike out the names for either or both of the parties so neglecting or refusing, and upon such names being struck out, the justice may issue a *venire* directed to any peace officer of the county, requiring him to summon the twelve persons whose names remain upon the list, to appear before such justice at the time and place named therein, to make a jury for the trial of the cause.

SEC. 4675. [**Jurors summoned.**]—The officer to whom such *venire* is delivered must forthwith summon such jurors, and return the *venire* to the justice within the time therein specified, naming the persons summoned and the manner of service.

SEC. 4676. [**Selection of jury.**]—The names of the persons returned as jurors shall be written on separate ballots, folded each in the same manner as nearly as possible, and so that the name be not visible, and shall, under the direction of the justice, be deposited in a box or other convenient thing.

SEC. 4677. [**Same.**]—The justice must then draw out six of the ballots successively, and if any of the persons whose names are drawn do not appear, or are challenged, or are set aside, such further number must be drawn as will make a jury of six, after all legal challenges have been allowed.

SEC. 4678. [**Challenges.**]—The same challenges may be taken by either party to any individual juror as on the trial of an indictment for a misdemeanor, but no challenge to the panel is allowed.

SEC. 4679. [**Talesmen.**]—If any of the jurors named in the *venire* cannot be found, or do not attend, or are challenged by either party, so that a sufficient number cannot be obtained, the justice may direct the officer to summon any bystander or others who may be competent, and against whom no sufficient cause for challenge appears to act as jurors.

SEC. 4680. [**Failure to return: new venire.**]—If the officer by whom the *venire* is received do not return it as required, he may be punished by the justice as for contempt, and the justice shall issue a new *venire* for the summoning of the same jurors, upon which the same proceedings shall be had as upon the one first issued.

SEC. 4681. [**Six a jury.**]—When six jurors appear and are accepted, they shall constitute the jury.

SEC. 4682. [**Oath.**]—The justice must thereupon administer to them the following oath or affirmation: You do swear (or you do solemnly affirm, as the case may be), that you will well and truly try the issue between the state of Iowa and the defendant, and a true verdict give according to the evidence.

TRIAL AND JUDGMENT.

SEC. 4683. [**Proceedings of jury.**]—After the jury are sworn, they must sit together and hear the proof and allegations of the parties, which must be delivered in public. After which, they may either decide in court or retire for consideration.

SEC. 4684. [**Retire with officer: oath.**]—If they do not immediately agree

they must retire with the officer, who shall be sworn to the following effect: "You do swear that you will keep the jury together in some private and convenient place, without meat or drink, unless otherwise ordered by the court; that you will not permit any person to speak to them, nor speak to them yourself, unless it be to ask them whether they have agreed upon a verdict, and that you will return them into court when they have so agreed."

SEC. 4685. [**Verdict.**]-When the jury have agreed upon their verdict, they must deliver it publicly to the justice, who shall enter it on his docket.

SEC. 4686. [**Kept together.**]-The jury must be kept together after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless, for good cause, the justice sooner discharge them.

SEC. 4687. [**Discharged.**]-If the jury be discharged as provided in the last section, the justice may proceed again to the trial in the same manner as upon the first trial; and so on till a verdict is rendered.

SEC. 4688. [**Judgment.**]-When the defendant pleads guilty, or is convicted, either by the justice or by a jury, the justice shall render judgment thereon, of fine, or imprisonment, as the case may require, being governed by the rules prescribed for the district court, as far as the same are applicable, in rendering such judgment.

SEC. 4689. [**Same.**]-A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied.

The judgment of a justice of the peace committing a defendant to prison until the payment of the fine imposed, is not void because it does not specify the extent of the imprisonment, the limit in such case being fixed by the statute. *Jackson v. Boyd*, 53 Iowa, 536. But a justice of the peace has no authority to commit a defendant for non-payment of a fine for contempt, unless the judgment imposing the fine provides for imprisonment, and he is liable for damages in an action of tort to a person so illegally committed. *Lanpher v. Dewell et al.*, 56 Id., 153.

SEC. 4690. [**Defendant discharged.**]-When the defendant is acquitted, either by the justice, or by a jury, he must be immediately discharged.

SEC. 4691. [**Costs: appeal: notice: justice make statement: transcript: papers filed: court compel correction.**]-When the defendant is acquitted, the justice shall, if he is satisfied that the prosecution is malicious or without probable cause, tax the costs against the prosecuting witness and render judgment therefor, from which he may appeal to the district court by there giving notice to the justice that he claims such appeal, and the fact of the giving of such notice shall be entered on his record by the justice. If notice of appeal is given as herein contemplated, the justice shall, without delay, make out, sign and file in the case a full and true statement of all the testimony admitted on the trial, and on which he bases his finding that the prosecution was malicious or without probable cause, and shall, without delay, make out a transcript of his docket entries, and shall file it, together with the statement of the testimony as aforesaid, and all other papers on file in the case, in the clerk's office of the district court of the county. And such appeal shall stand for hearing in said court at the term thereof commencing next after said papers are filed. And said court shall have full power to compel the correction by said justice of any error made apparent in his transcript, said statement of testimony, or in any papers returned by him, or may itself make the necessary correction therein, and may, on the papers, in case they shall be submitted to it, either affirm or reverse the judgment of the justice, or render such judgment as the justice should have rendered in the case.

The power conferred by this section upon a justice of the peace to tax the costs against a prosecuting witness, when satisfied that the prosecution was malicious or without probable cause, may also be exercised by the district court on a trial of the case on appeal, though such order had not been made by the justice before whom it was tried. *In re Trenchard*, 16 Iowa, 52.

This power may be exercised without the hearing of any evidence on the part of the state in addition to that submitted on the trial of the cause, if that is sufficient to show the want of probable cause; and when the evidence given on the trial is not embraced in the record, the supreme court will presume that it was sufficient. *Id.*

The person who files an information in a criminal action is considered the prosecuting witness. *Id.*

A prosecuting witness, who has been adjudged by a justice of the peace to pay the costs of prosecution, may, in the name of the state, appeal from the judgment of the justice to the district court. *The State v. Roney*, 37 Iowa, 30.

A justice of the peace may legally tax the costs in a criminal prosecution, dismissed by him; before final trial, for reason of a failure of the prosecuting witness to appear and prosecute to the state, to be paid by the county. *Cassady v. Palo Alto Co.*, 58 Id., 125; *Palo Alto Co. v. Moncrief*, Id., 131. In the absence of any counter showing it will be presumed that in thus taxing the costs to the state to be paid by the county, in such a case that the discretion of the justice was properly exercised. *Id.*

Where an appeal is taken from the order of a justice of the peace taxing the costs in a criminal prosecution against the prosecuting witness, the district court is to determine simply whether or not the justice abused the discretion which the law reposes in him in such cases, and, for the purpose of doing this, it must put itself as nearly as possible in the place of the justice, by considering the evidence only that was before the justice, as shown by his transcript (corrected if necessary), and new or additional evidence is not admissible. *The State v. Kerns*, 64 Id., 306.

SEC. 4692. [**Certificate of conviction.**]—Whenever a conviction is had upon a plea of guilty, or upon a trial, the justice must make and sign with his name of office, a certificate of such conviction, in which it shall be sufficient briefly to state the offense charged and the conviction and judgment thereon, and if any fine has been collected, the amount thereof.

SEC. 4693. [**Judgment: how executed.**]—The judgment shall be executed by a peace officer of the county where the conviction is had, by virtue of a warrant under the hand of the justice specifying the particulars of such judgment.

SEC. 4694. [**Fine.**]—If a fine be imposed, and paid before commitment, it shall be received by the justice, and by him paid over to the county treasurer, within thirty days after the receipt thereof, for the use of the schools of the county, as provided by law.

SEC. 4695. [**Same.**]—If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county but to no other person, who must in like manner, within thirty days after the receipt thereof, pay it into the county treasury, for the use of the schools in the county, as provided by law.

SEC. 4696. [**Same.**]—If the fine, or any part thereof, is paid to the justice or sheriff, he must execute duplicate receipts therefor, one of which he must file without delay, with the county auditor.

SEC. 4697. [**How taken.**]—The justice rendering a judgment against the defendant, must inform him of his right to an appeal therefrom, and make an entry on the docket of the giving of such information, and the defendant may thereupon take an appeal, by giving notice orally to the justice, that he appeals, and the justice must make an entry on his docket of the giving of such notice.

The district court can acquire no appellate jurisdiction of a criminal case by the mere filing of an appeal bond. The appeal can be taken only by giving the notice required by this section to the justice who rendered the judgment. *The State v. Leyden*, 13 Iowa, 433.

Under section 5094 of the revision, the state, in a criminal trial before a justice of the peace, had the right of appeal to the district court as well as the defendant. *The State v. Tait*, 22 Id., 140 but that section has been omitted from the code.

That section (5094) was afterwards held to be in conflict with that clause of the constitution of the state declaring that "no person shall after acquittal be tried for the same offense" in *The State v. Van Horton*, 26 Id., 402.

An appeal will lie to the district court from the judgment of the mayor of a town, incorporated under the general law, for the violation of a town ordinance. *State for use, etc., v. Hoag*, 46 Id., 337.

A prosecuting witness who has been adjudged by a justice of the peace to pay the costs of a criminal prosecution, may, in the name of the state, appeal from the judgment of the justice to the district court. *The State v. Roney*, 37 Id., 30.

A writ of error does not lie from the district court to an inferior court in criminal cases. The only mode of review is by appeal. *The State v. Flinn*, 51 Id., 133; *The City of Ottumwa v. Schaub*, 52 Id., 515.

Where on a conviction before a justice of the peace, the justice informs the defendant of his

right to appeal, and the defendant gives the requisite notice the appeal is taken. *Anderson v. Park*, 57 Id. 69.

SEC. 4698. [**Bail: form of bond.**]-The justice must thereupon enter an order on his docket, fixing the amount in which bail may be given by the defendant, and the execution of the judgment against the defendant, shall not be stayed, unless bail in that amount be put in, by an undertaking substantially in the following form:

County of.....

A. B. having been convicted before C. D., a justice of the peace of said county, of the crime of (here designate it generally as in the information), by a judgment rendered on the.....day of....., A. D., 18.., and having appealed from said judgment to the district court of said county:

We, A. B., and E. F. (or I, E. F.) or (we, E. F. and G. A.), hereby undertake that the said A. B. will appear in the district court of said county, at the term thereof to which the appeal is returnable, and abide the judgment of said court, and not depart without leave of the same, or that we (or I, as the case may be) will pay to the state of Iowa the sum of....dollars (the amount of bail fixed).

A. B.
E. F.

(as the case may be).

Acknowledged before, and accepted by me, at ..., in the township of....., this ...day of...., 18..

C. D.,

Justice of the Peace.

The condition of an appeal bond in a criminal case, should be, that the defendant will appear, will not depart from the court without leave, and will abide the judgment of the court. A bond conditioned that the defendant will pay whatever amount may be adjudged against him, cannot be required. *The State v. Beneke*, 9 Iowa. 203.

SEC. 4699. [**Qualifications.**]-The bail must possess the qualifications, must justify, and must be taken in the same manner prescribed in chapter thirty-eight of this title, and the same proceedings had in all respects, as nearly as applicable, except in this chapter otherwise provided.

SEC. 4700. [**By whom taken.**]-The bail may be taken by the justice who rendered the judgment, or by any magistrate in the county who has authority to admit to bail, or by the district court or the clerk thereof.

SEC. 4701. [**Witness bound over.**]-When an appeal is taken, the justice must cause all material witnesses to enter into an undertaking, as in a case where a defendant is held to answer on a preliminary examination, to appear and testify on the trial of the appeal in the district court, at the term at which it is returnable, and shall as soon as practicable, and at least ten days before the first day of such term, of the district court of the county, file in the office of the clerk thereof a certified copy of the entries on his docket, together with all the undertakings and papers in the case.

TRIAL IN DISTRICT COURT.

SEC. 4702. [**Trial when appealed.**]-The cause, when thus appealed, shall stand for trial anew in the district court, in the same manner that it should have been tried before the justice, and as nearly as practicable as an issue of fact upon an indictment, without regard to technical errors or defects which have not prejudiced the substantial rights of either party; and the court has full power over the case, the justice of the peace, his docket entries, and his return, to administer the justice of the case accordingly.

An appeal from the judgment of a justice of the peace in a criminal action is a waiver of irregularities in the justice's court, the cause then standing in the district court for a trial *de novo* upon its merits. *State v. McCombs*, 13 Iowa, 426.

When the the record discloses that in the trial before the justice, the defendant was present and asked for a jury, a plea of "not guilty" will be presumed, if the justice has failed to enter it upon his docket. *Id.*

In such cases the district court may, under section 3586 of the code, order a plea of "not guilty" to be supplied as an omission apparent on the face of the records. *Id.*

SEC. 4703. [**Appeal not dismissed.**—No appeal from the judgment of a justice of the peace in a criminal case shall be dismissed.

SEC. 4704. [**District court.**—If any proceedings be necessary to carry the judgment upon the appeal into effect, they shall be had in the district court.

SEC. 4705. [**Either party may appeal.**—Either party may appeal from the judgment of the district court, to the supreme court, in the same manner as from a judgment in a prosecution by indictment, and the defendant may be admitted to bail in like manner, and similar proceedings shall be had on the appeal in all respects, as nearly as applicable.

SEC. 4706. [**Judgment upon appeal.**—The same proceedings shall be had to carry into effect the judgment of the supreme court upon the appeal, as if it had been taken from a judgment prosecuted by indictment.

CHAPTER 53.

OF PROCEEDINGS BEFORE POLICE AND CITY COURTS IN INCORPORATED CITIES AND TOWNS.

SECTIONS 4707. [**Proceedings in police court.**—The proceedings in police and city courts in incorporated cities and towns, in criminal cases within their jurisdiction, shall be regulated by the provisions of this code, when not otherwise regulated by law.

A party brought to trial in a police court of a city of this state charged with a violation of a city ordinance is not entitled to jury trial; nor is he entitled to demand a change of venue. *Zelle v. McHenry*, 51 Iowa, 572.

CHAPTER 54.

ON COMPROMISING CERTAIN OFFENSES BY LEAVE OF THE COURT.

SECTION 4708. [**Offense may be compromised: exceptions.**—When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed:

1. By, or upon an officer while in the execution of the duties of his office;
2. Riotously; or,
3. With an intent to commit a felony.

SEC. 4709. [**Same: court may stay proceedings.**—If the party injured in such a case, appear before the court to which the papers on a preliminary examination are required to be returned, at any time before trial, on an indictment for the offense, or the trial of an appeal in the district court, and acknowledge in writing that he has received satisfaction for the injury, the court may in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reason for the order must be set forth therein, and entered upon the minutes.

SEC. 4710. [**Order: bar.**].—The order authorized by the last section is a bar to another prosecution for the same offense.

SEC. 4711. [**Public offense not compromised.**].—No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in this chapter.

CHAPTER 55.

OF PARDONS AND THE REMISSION OF FINES AND FORFEITURES.

SECTION 4712. [**Governor may remit fines and forfeitures.**].—The governor shall have power to remit fines and forfeitures upon such conditions and with such restrictions and limitations as he may think proper. After conviction of murder in the first degree no pardon shall be granted by the governor until he shall have presented the matter to, and obtained the advice of, the general assembly thereon. Before presenting the matter to the general assembly for their action, he shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the capital and the other in the county where the conviction was had, and if there be no such paper in such county, then in some adjoining county, for four successive weeks, the last publication to be at least twenty days prior to the commencement of the session of the general assembly to which the matter shall be presented.

The governor of the state has the power to annex to a pardon any condition precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed. *Arthur v. Craig*, 48 Iowa, 264.

Where a pardon was granted by the governor upon certain conditions, and it was stipulated therein that upon any violation of such conditions the person pardoned should be liable to summary arrest, and to confinement in the penitentiary for the remainder of the term for which he had been sentenced, and it was further stipulated that the judgment of the executive should be conclusive as to the violations of the conditions of the pardon, *held*, that upon the violation of the conditions of the pardon the legal status of the party became the same as it was before the pardon was granted. *Id.*

A general pardon from the governor to a convict does not operate as a remission of the judgment for costs against him. *Estep v. Lacy*, 35 Id., 419.

SEC. 4713. [**Application for pardon.**].—When an application is made to the governor for a pardon, reprieve, or commutation, or for the remission of a fine or forfeiture, he may require the judge of the court, or the district attorney, or attorney-general, by whom the action was prosecuted, or the clerk of such court, to furnish him without delay a copy of the minutes of the evidence taken on the trial, and of any other facts having reference to the propriety of his exercise of his powers in the premises. He may also take the testimony of such persons bearing upon such application as he may deem advisable, and for this purpose is authorized to administer the necessary oath. Any person who, in giving such testimony, shall swear falsely, and any person who shall knowingly and corruptly make any false statements in an affidavit intended to be used in connection with an application for pardon, or for remission of fine or forfeiture, shall be deemed guilty of perjury, and shall be punished therefor as provided by law.

SEC. 4714. [**When officer to make return to secretary of state.**].—Whenever any convict is pardoned, or reprieved, or his sentence commuted, or any fine or forfeiture is remitted, it is the duty of the officer to whom the warrant is directed, as soon as may be after executing the same, to make a return in writing thereon to the secretary of state of his doings under the same, and sign the same with his name of office, and must also file in the office of the clerk of the court in which

the conviction was had, or in which it was to have been enforced, a certified copy of the warrant and return, the proper entries in relation to which shall be made by such clerk.

CHAPTER 56.

OF ILLEGITIMATE CHILDREN.

SECTION 4715. [Complaint may be made.]—When any woman residing in any county of the state is delivered of a bastard child, or is pregnant with a child, which, if born alive, will be a bastard, complaint may be made in writing by any person to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceedings shall be entitled in the name of the state against the accused as defendant.

The mother of an illegitimate child may, by a fair settlement, founded upon a reasonable consideration with the putative father, preclude herself and the county from the right to maintain a proceeding under the provisions of the statute relating to bastardy to secure to her the maintenance of the child. *Black Hawk County v. Cotter*, 32 Iowa, 125; *Holmes v. The State*, 2 G. Greene, 501.

In a proceeding in bastardy, under this section, a defendant may be found guilty upon the unsupported evidence of the prosecutrix. Such an action is triable by ordinary proceedings, and a preponderance of evidence, only, is necessary to a conviction. *The State v. McGlothlen*, 56 Id., 544.

The circuit court has no power to order that the defendant in a bastardy proceeding shall pay specified sums at fixed periods for the maintenance of the child. This power is reserved to the district court. *Id.*

[This decision was made under the statute as it stood prior to the code of 1873. Under the code it would seem that the circuit court has no jurisdiction whatever in bastardy cases.

The statute respecting proceedings to enforce the support of bastard children by their fathers are merely local police regulations, and cannot be enforced beyond the limits of the state; but where the local jurisdiction has attached, and the courts of the state have taken cognizance and rendered judgment for the penalty prescribed by the statute, such judgment is entitled to full faith and credit in every other state. *The State of Indiana, ex rel. Stone, v. Helmer*, 21 Id., 370. As to the jurisdiction of the county court in bastardy cases, see *Mills County v. Hamaker*, 11 Id., 206.

A man who marries a woman known by him to be *enceinte* is regarded by the law as adopting the child into his family at its birth, and he becomes liable for its support as a parent, and an action against the natural father for its support as a bastard will not lie, but this rule of adoption does not apply in cases involving questions of heirship and inheritance. *The State v. Shoemaker*, 62 Id., 343.

SEC. 4716. [Filing: notice to be given.]—Upon the filing of the complaint, the clerk shall cause notice to be given to the person so charged as in an ordinary action.

SEC. 4717. [Lien created.]—From the time of the filing of such complaint, a lien shall be created upon the real property of the accused in the county where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court.

SEC. 4718. [When complaint verified district judge to issue attachment.]—If the complaint is verified, the district judge may order an attachment to issue thereon without bond, which order shall specify the amount of property to be seized under the attachment, and may be revoked at any time by such judge or the district court, on a showing made to either for a revocation of the same, and on such terms as such court or judge may deem proper in the premises.

SEC. 4719. [District attorney prosecute.]—The district attorney, on being notified of the facts justifying a complaint as contemplated in section four thousand seven hundred and fifteen of this chapter, or of the filing of such complaint, shall prosecute the matter in behalf of the complainant.

SEC. 4720. [Issue how tried.]—The issue on the trial shall be “guilty” or “not guilty,” and shall be tried as an ordinary action.

In a proceeding in bastardy, under this section, a defendant may be found guilty upon the unsupported evidence of the prosecutrix. Such an action is triable by ordinary proceedings, and a preponderance of evidence only is necessary to a recovery. *The State v. McGlothlen*, 61 Iowa, 312.

SEC. 4721. [Judgment and execution.]—If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums, and in such manner as the court shall direct, and with the costs of the suit; and the clerk may issue execution for any sum ordered to be paid immediately, and afterwards, from time to time, as it shall be required to compel compliance with the order of the court.

Under this section the defendant in a bastardy proceeding is not liable for the lying in expenses of the mother, and a judgment against him even for costs was held erroneous, there being no liability except such as the statute provides. *State v. Beaty*,

SEC. 4722. [Court may enlarge, diminish or vacate order.]—The court may, at any time, enlarge, diminish or vacate any order or judgment rendered in the proceeding herein contemplated, on such notice to the defendant as the court or judge may prescribe.

TITLE XXVI.

OF THE DISCIPLINE AND GOVERNMENT OF PRISONS, AND OF THE
PENITENTIARY, ITS GOVERNMENT AND DISCIPLINE.

CHAPTER 1.

OF IMPRISONMENT FOR PUBLIC OFFENSES, AND THE DISCIPLINE OF PRISONS.

SECTION 4723. [**Jails: for what used.**—The common jails now erected, or which may hereafter be erected in the several counties in this state, in charge of the respective sheriffs, are to be used as prisons:

1. For the detention of prisoners charged with an offense, and duly committed for trial or examination;

2. For the detention of persons who may be duly committed to secure their attendance as witnesses on the trial of any criminal cause;

3. For the confinement of persons pursuant to sentence upon conviction for any offense, and of all other persons duly committed for any cause authorized by law;

4. The provisions of this section extend to persons detained or committed by authority of the courts of the United States as well as the courts and magistrates of this state.

SEC. 4724. [**Keeper's duty.**—It is the duty of the keeper of the jail of the county to see that the same is constantly kept in a cleanly and healthy condition, and he must pay strict attention to the personal cleanliness of all the prisoners in his custody as far as may be. Each prisoner must be furnished daily with as much clean water as may be necessary for drink and for personal cleanliness, and with a clean towel and shirt once a week, and must be served three times each day with wholesome food, which must be well cooked, and in sufficient quantity.

SEC. 4725. [**Sheriff's duty.**—The sheriff of the county must keep a true and exact calendar of all prisoners committed to any prison under his care, which calendar must contain the names of all persons who are committed, their place of abode, the time of their commitment, the time of discharge, the cause of commitment, the authority that committed them, and description of their person; and when any prisoner is liberated, such calendar must state the time when, and the authority by which such liberation took place; and if any person escape, it must state particularly the time and manner of such escape.

SEC. 4726. [**Calendar for district court.**—At the opening of each term of the district court within his county, the sheriff must return a copy of such calendar under his hand to the judge of such court; and if any sheriff neglect or refuse so to do, he shall be punished by fine not exceeding one hundred dollars.

SEC. 4727. [**What furnished prisoners.**—The keeper of each jail must furnish necessary bedding, clothing, fuel and medical aid for all prisoners under his charge, and keep an accurate account of the same.

SEC. 4728. [**When jail takes fire.**—Whenever, by reason of any jail being on fire, or any building contiguous or near to a jail being on fire, there be reason to apprehend that the prisoners confined in such jail may be injured or endangered

thereby, the sheriff or keeper of such jail may, at his discretion, remove such prisoners to some safe and convenient place, and there confine them so long as may be necessary to avoid such danger.

(CHAPTER 176, LAWS OF 1886.)

RELATING TO SEPARATE APARTMENTS IN JAILS AND PRISONS FOR FEMALES.

An Act providing for a separate apartment in jails and prisons for the detention of females, and making their detention otherwise unlawful.

SECTION 1. [Separate apartments shall be provided in jails and prisons for females.]—*Be it enacted by the general assembly of the state of Iowa:* All jails and prisons now erected or which may be hereafter erected in the several counties and cities in this state, shall be provided with a separate apartment for the detention of females in such jail or prison.

SEC. 2. [Females shall be detained in separate apartments.]—All females detained in such jail or prison shall be so detained only in the female apartment thereof, and it shall be unlawful for any sheriff or keeper of any jail to detain at the same time both males and females in the same apartment.

Approved, April 13, 1886.

INSPECTOR OF JAILS.

SEC. 4729. [Who constitute.]—In each county of this state the judge of the circuit court and district attorney are inspectors of the jails respectively, and have power, from time to time, to visit and inspect the same, and inquire into all matters connected with the government, discipline and police of such prisons.

SEC. 4730. [Their duty.]—It is the duty of such inspectors to visit and inspect such prisons twice each year, and at the next district court which is thereafter held in their county, to present to such court on the first day of its sitting, a detailed report of the condition of such prisons at the time of such inspection.

SEC. 4731. [Report.]—Such report must state the number of persons confined in such prison, and for what cause respectively, the number of persons usually confined in one room, the distinction, if any, usually observed in the treatment of the prisoners, the evils, if any, found to exist in such prisons; and particularly whether any provisions of this chapter have been violated or neglected, and the cause of such violation or neglect.

SEC. 4732. [Rights to inspect given fully.]—The keepers of such prisons shall admit the said inspectors, or any of them, into any part of such prisons, to exhibit to them on demand, all the books, papers, documents and accounts pertaining to the prison or to the prisoners confined therein, and to render them every other facility in their power to enable them to discharge the duties above prescribed.

SEC. 4733. [May swear officers.]—For the purpose of obtaining the necessary information to enable them to make such reports as is above required in this chapter, the said inspectors have power to examine on oath, to be administered by either of them, any of the officers of such prison, or any of the prisoners therein.

SEC. 4734. [Refractory prisoners.]—If any person confined in any jail upon a conviction or charge of any offense, is refractory or disorderly, or if he willfully destroy or injure any article of bedding, or other furniture, door or window, or any other part of such prison, the sheriff of the county, after due inquiry, may chain and secure such person, or cause him to be kept in solitary confinement not more than ten days for any one offense; and during such solitary confinement he may be

fed with bread and water only, unless other food is necessary for the preservation of his health.

SEC. 4735. [Expenses of jail.]—All charges and expenses of safe keeping, and maintaining convicts and persons charged with public offenses and committed for examination or trial to the county jail, shall be paid from the county treasury, the accounts therefor being first settled and allowed by the board of supervisors; except prisoners committed or detained by the authority of the courts of the United States, in which case the United States must pay such expenses to the county.

A sheriff may procure the articles he is required by the statute to furnish for the use of the prisoners in his custody on the credit of his county, and the persons furnishing the same may maintain an action directly against the county for the purchase price. The person thus supplying articles for prisoners is bound to know that the articles supplied are suitable for the purpose, and possibly that they are necessary, but he is not required to determine beyond that whether or not the sheriff has properly exercised the discretion vested in him by the statute. *Fildenheimer v. The County of Woodbury*, 56 Iowa, 379.

This section was not intended to fix the fees or compensation of the sheriff for any services performed by him in, and about the keeping of, prisoners in the county jail, but its object and purpose was to designate the source from whence the money should come to pay all legal charges and expenses connected with the safe keeping and maintenance of prisoners in the county jails. *Grubb v. Louisa County*, 40 Id., 314.

The sheriff who employs a jailor, and not the county, is liable for the payment of his services. *McDonald v. Woodbury County*, 48 Id., 404.

The sheriff has power to bind the county for necessities of a prisoner in his custody awaiting preliminary examination; and where a prisoner cannot be confined in the jail, the county is responsible for the necessities furnished him while in custody elsewhere. *Miller v. Dickinson County*, 68 Id., 102.

HARD LABOR.

SEC. 4736. [Who by: and when labor must be performed.]—Any able bodied male person over the age of sixteen years and not over the age of fifty years, now or hereafter confined in any jail in this state, under the judgment of any court of record or of any other tribunal authorized to imprison for the violation of any law, ordinance, by-law, or police regulation, may be required to labor during the whole or part of the time of his sentence, as hereinafter provided, and such court or other tribunal, when passing final judgment of imprisonment, whether for non-payment of fine or otherwise, shall have the power to determine, and shall determine whether such imprisonment shall be at hard labor or not.

One sentenced to pay a fine for the violation of a city ordinance may be confined at hard labor, but the term of his imprisonment cannot exceed one day for every three and one-third dollars of the fine, and he will be entitled to a credit of one dollar and fifty cents upon the judgment for each day's labor. *The City of Keokuk v. Dressell*, 47 Iowa, 597. To the same effect is *The State v. Jordan*, 39 Id., 387.

SEC. 4737. [On highways, public grounds, and buildings.]—Such labor may be on the streets or public highways on or about public buildings or grounds, or at such other places in the county where confined, and during such reasonable time of the day as the person having charge of the prisoners may direct, and not exceeding eight hours per day.

SEC. 4738. (As amended by ch. 153 21st g. a.) [When sheriff to superintend.]—In case the sentence be for the violation of any of the statutes of the state, the sheriff of the county where the imprisonment is, shall superintend the performance of the labor herein contemplated, and shall furnish the tools and materials, if necessary, to work with, at the expense of the county in which the convict is confined, and such county shall be entitled to his earnings. [Such labor shall be performed under the direction of the board of supervisors and in accordance with such regulations as said board shall make, not inconsistent with section 4737 of the code and such labor shall not be leased.]

SEC. 4739. [**When marshal shall.**]-When the imprisonment is pursuant to the judgment of any court, police court, police magistrate, mayor, or other tribunal of any incorporated city or town, for the violation of any ordinance, by-law, or other regulation, the marshal shall superintend the performance of the labor herein contemplated, and shall furnish the tools and materials, if necessary, at the expense of the city or town requiring the labor, and such city or town shall be entitled to the earnings of its convicts.

SEC. 4740. [**Officers to prevent escapes.**]-The officer having charge of any convicts for the purpose specified in this chapter, may use such means as, and no more, than are necessary to prevent escape, and if any convict attempt to escape, either while going from or returning to the jail, or while at labor, or at any time, or if he refuse to labor, the officer having him in charge, after due inquiry may, to secure such person, or to cause him to labor, use the means authorized by section four thousand seven hundred and thirty-four of this chapter; *provided*, such punishment shall be inflicted within the jail or jail enclosure for refusal to work and shall not be considered as any part of the time for which the prisoner is sentenced.

SEC. 4741. [**Prisoners credited for labor.**]-For every day's labor performed by any convict under the provisions hereof, there shall be credited on any judgment for fine and costs against him, the sum of one dollar and fifty cents, and no person shall be entitled to the benefits of the law providing for the liberation of poor convicts, if, in the opinion of the sheriff, the judgment may be satisfied by the labor of the person as herein authorized.

If a defendant sentenced to pay a fine be also sentenced to be committed at labor until the fine is paid he is entitled to a credit of one dollar and a half on the judgment, but the power of the court to direct the imprisonment is limited to one day for every three and one-third dollars of the fine, under section 4092 of the code. A sentence of imprisonment until the fine is paid by labor at the rate of one dollar and a half per day, is erroneous. *The State v. Jordan*, 39 Iowa, 387; *The City of Keokuk v. Dressell*, 47 Id., 517.

If a sheriff in his answer in a *habeas corpus* proceeding for the discharge of a prisoner under sentence until a fine is paid, admits facts entitling him to a discharge under this section, he is not deprived of the right to be discharged by the filing of a substituted answer, by the sheriff, averring that in his opinion the judgment may be satisfied by the labor of the prisoner. *In re Jordan*, 39 Id., 394.

SEC. 4742. [**Cruel treatment of prisoner.**]-If any officer or other person treat any prisoner in a cruel or inhuman manner, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding twelve months, or by both such fine and imprisonment.

SEC. 4743. [**Duty of officers in charge of prisoners.**]-The officer having such a prisoner in charge shall protect him from insult and annoyance, and communication with others while at labor, and going to and returning from the same, and he may use such means as are necessary and proper therefor; and any person persisting in insulting and annoying, or communicating with any prisoner, after being commanded by such officer to desist, shall be punished by a fine not exceeding ten dollars, or by imprisonment not exceeding three days.

CHAPTER 2.

OF THE PENITENTIARY OF THE STATE, AND THE GOVERNMENT AND DISCIPLINE THEREOF.

SECTION 4744. [At Ft. Madison.]—The penitentiary at Fort Madison, in the county of Lee, shall be maintained as the penitentiary of this state, in which convicts sentenced for life or any period of time shall be confined, employed, and governed as hereinafter provided.

WARDEN.

SEC. 4745. [Warden.]—It shall be governed by a warden, subject to the supervision of the governor of the state.

SEC. 4746. (*As amended by ch. 17, 20th g. a.*) [How chosen and term of office: duties.]—The warden shall be elected by joint ballot of the general assembly of the state of Iowa, and shall hold his office for two years [from the first day of April following his election], and until his successor is elected and qualified. He shall be the general financial and superintending agent of the state for said institution, and shall be held responsible for its government and disciplinary regulations, for the receipt and disbursement of all moneys that may be appropriated for building construction, general support, the payment of indebtedness, or salaries of his under-officers, or for any other purpose whatever in connection with said institution.

SEC. 4747. [To give bond and take oath: conditions of.]—Before entering upon the discharge of his duty, he shall execute a bond, payable to the state of Iowa, in the penal sum of fifty thousand dollars, with not less than five freehold securities, to be approved by the governor, conditioned that he will faithfully discharge all of his duties as general superintendent and financial agent of the state for said institution, that he will faithfully apply any and all moneys that may come into his hands by virtue of his office, to the purpose for which they are appropriated, and none other; that he will cause to be kept a fair, intelligible, and business-like record of all the transactions of a monetary character connected with the institution; that he will impartially, and to the best of his ability, administer the disciplinary regulations of the institution so as to contribute to the health, safe keeping, and profitable employment of the convicts; that he will appoint no one to the office of clerk, deputy warden, or guard, through favoritism or other personal consideration; and no one without due and proper regard to their qualification for said stations; that he will render a faithful account of all the transactions of the institution to the governor, or his lawfully authorized agent, every thirty days, and as much oftener as he may be required; that he will not become directly or indirectly interested in any contract for supplying materials, labor, provisions, clothing, or any other thing for the use of said penitentiary, whereby any profit may inure to him privately; and that at the expiration of his official term he will surrender all books, papers, records, moneys, or other property or securities belonging to said institution to his successor in office. Said warden shall also take and subscribe an oath or affirmation, which shall be indorsed on the back of said bond, that he will support the constitution of the United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the stipulations and conditions of said bond, and faithfully discharge all his duties agreeably to law, according to the best of his ability, which bond shall be filed with the secretary of state.

SEC. 4748. [**Reside in penitentiary: appoint clerk.**—The warden must not carry on nor be concerned in the business of trade or commerce during his continuance in office; he must reside constantly within the precincts of the prison, and shall take charge of the penitentiary, and of all the interests of the state therewith connected, and shall appoint some suitable person as clerk, who shall also act as commissary under the direction of the warden, and one deputy, and as many guards as may be necessary to the safe keeping and government of the convicts, not exceeding one for every ten convicts under his charge, provided that at no time shall there be less than thirteen guards.

SEC. 4749. [**To make report to governor.**—The warden shall render to the governor of state, between the first and tenth day of every month, and as nearly as practicable every thirty days, and as much oftener as the governor may require, a statement under oath, of all the transactions of the institution, including the receipts and disbursements of funds, for which disbursements he shall, in all cases, present the proper voucher, the entering into or discharging contracts, the reception and discharge of convicts, the construction, altering or repairing the buildings, walls, etc., and all of his official acts and doings for thirty days next preceding the presentation of said monthly report, which statement must contain an exact account of all moneys received, together with a copy of all proposals received by him and from what source, and on what account, and of all moneys paid out, and for what purpose the same were expended, and a succinct account of all his doings as warden during the said period, and a reference to his authority for such action.

SEC. 4750. (*As amended by ch. 82, 22d g. a.*) [**Report preceding each meeting of general assembly.**—The warden shall, in addition to the monthly report provided for in the preceding section on or before the (fifteenth) day of (September) next preceding the commencement of any regular session of the general assembly, report to the governor, under oath, all his acts and doings for the preceding two years, and the general condition of the institution, financially and otherwise, together with the estimates necessary for the next succeeding two years, specifying distinctly the items for which those estimates and the basis upon which his calculations are made, and the governor may require a like or any other report before any special session of the general assembly.

SEC. 4751. [**Must enforce discipline.**—The warden shall see that the laws and disciplinary rules and regulations of the institution are faithfully executed by his under-officers, and obeyed by the convicts; and it shall be his duty, upon failure or refusal of any clerk, deputy warden, or guard, to discharge their respective duties agreeably to law, forthwith to discharge such delinquent, and fill the vacancy by the appointment of another person; and disobedience of the convicts shall be punished by the infliction of such penalties as are now provided for by law, and the rules which are now or may hereafter be prescribed for the government of said institution; *provided*, that it shall be the duty of the warden to keep a register of all punishments inflicted on any convict for disobedience, disorderly conduct, indolence, and of the cause for which they were inflicted.

CLERK.

SEC. 4752. [**Appointment.**—The clerk of the penitentiary shall receive his appointment from and hold his office during the pleasure of the warden, and be in all things responsible to said warden. Before he enters upon the discharge of his duties he shall give bond to the state of Iowa in the penal sum of five thousand dollars, with two or more free-hold securities, to be approved by the governor, conditioned that he will keep a fair, honest, impartial, and faithful record of the affairs of the penitentiary, written in a fair round hand, with proper indices, upon

a system of book-keeping which shall enable him at all times to present in a plain and intelligible style the financial condition of the institution, that he will discharge all his duties of clerk and commissary faithfully, and with direct reference to the best interests of the penitentiary, agreeably to law; and that he will not become interested directly or indirectly in any contract for furnishing supplies of any nature, kind or description for the use of said institution, and that he will yield strict and implicit obedience to the laws rules and regulations of the institution, and to all the legal orders of the warden. He shall, also, take and subscribe an oath, which shall be indorsed on the back of said bond, that he will support the constitution of the United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the conditions, stipulations, and requirements of his bond, and will faithfully discharge his duty as clerk and commissary during his continuance in office agreeably to law according to the best of his judgment and ability; which bond shall be filed in the office of the secretary of state, and suit thereon may be brought for the violation of any of its conditions in the name of the state, for the use of the warden or any other person injured by such violation.

SEC. 4753. [**Accounts kept by clerk.**]—Among other entries to be made in the books of the institution, the clerk shall open a separate account in said books with the state, and he also shall have a cash, prisoners' fund, construction, repairing, provision, bedding and lights, fuel, salaries, hospital, and miscellaneous accounts, and account with the lessees of convict labor, and an account with each officer and guard; and all the entries belonging to any one of the classes, whether they are debits or credits, shall be made under the appropriate head; and, in order to enable the warden to render his statements herein provided for to the governor, the clerk shall, whenever required by the warden, make out a complete balance sheet and swear to the same.

DEPUTY WARDEN.

SEC. 4754. (*As amended by ch. 154, 18th g. a.*) [**Appointed by warden: bond and oath of: duties defined.**]—The deputy warden shall receive his appointment from the warden, and shall hold his office during the pleasure of the warden; and he shall give bond and security for a like amount, and in the same manner; and take a like oath, and be in all respects subject to like responsibilities with the clerk, so far as the same are applicable. He shall keep a regular time table of the convict labor and record the same in a book to be kept for that purpose, and he shall, moreover, keep a record of all the business under his control, and return an account thereof, together with an account of the convict labor to the clerk at the close of each day.

GUARDS.

SEC. 4755. [**Appointed by warden: bond and oath.**]—Each of the guards, when appointed, shall give bond to the warden, with security to be approved of by said warden, in the penal sum of one thousand dollars, conditioned that he will faithfully discharge his duty as such guard, agreeably to law and the rules and regulations of the prison, and the lawful orders of the warden; and shall also take and subscribe an oath, which shall be indorsed on the back of the bond that he will support the constitution of the United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the conditions and stipulations of his bond; which bond shall be filed in the office of the clerk of the penitentiary, and a note thereof made on the record as to the date, amount, and name of the principal and his securities.

SEC. 4756. [**Term of office.**]—Guards thus appointed and qualified shall hold their office during the pleasure of the warden.

CHAPLAIN.

SEC. 4757. [**Warden to appoint: duties.**]—The warden shall appoint some suitable, discreet, minister of the gospel, chaplain of the penitentiary, who shall hold his office at the pleasure of the warden, and who shall give as much of his time as the condition and employment of the convicts will reasonably justify, in giving them moral and religious instruction, and who shall at all times, when, in the opinion of the warden, the necessary labor of the convicts or the safety of the prison do not forbid it, have access to the convicts for that purpose; and should any of the convicts be illiterate, the chaplain should so instruct them as that he may sustain the character among them of teacher as well as spiritual adviser and minister.

PHYSICIAN.

SEC. 4758. [**Duties.**]—The physician of the penitentiary, shall visit the prison once every day, and oftener if necessary; examine personally all sick or complaining prisoners reported to him, and prescribe such treatment as in his judgment their cases require.

SEC. 4759. [**Keep record: same.**]—He shall keep a book, to be called the hospital record, in which he shall accurately record the name of the patient, the age, occupation, symptoms, disease and treatment.

SEC. 4760. [**Examine prisoner on reception.**]—He shall examine every prisoner upon his reception, and make a record of his condition, as to age, constitution, habits, health, ability or disability.

SEC. 4761. [**Post mortem examination.**]—When a prisoner dies, the physician may have the privilege of a post mortem examination, unless objection be made by the relatives of such patient, and shall record the result of it, making reference in the record of treatment.

SEC. 4762. [**Purchase medicines, etc.**]—He shall have power and authority to purchase by concurrence with and assent of the warden, such medicines and other things as, in his judgment, are necessary for the use of the hospital, and furnish the clerk immediately with the bills of purchase, who shall compare them with the articles received.

SEC. 4763. [**Must conform to rules.**]—He shall, when visiting the prison, strictly conform to the rules and regulations thereof; he shall express no opinion of the ability or disability of a prisoner except in his record, which shall be authority.

SEC. 4764. [**Graduate of medical school.**]—He shall be a graduate of some regularly established medical college, and must be possessed of surgical instruments sufficient to perform any surgical operation liable to be required.

SEC. 4765. [**Warden to appoint.**]—He shall receive his appointment from the warden, with the concurrence of the governor of the state.

SEC. 4766. [**Steward: duties of.**]—There shall be a steward nominated by him, who shall receive his appointment from the warden, and whose duty it shall be to dispense the medicine prescribed by the physician, and to do all other things necessary to carry out the treatment as directed. He shall act as guard or keeper of the prisoners in the hospital, and shall receive the same wages as other day guards or keepers, and be subject to the same rules and regulations.

PENALTIES.

SEC. 4767. [**Officers receiving perquisites.**—No officer or other person employed in or about the penitentiary shall be permitted to receive in any way, perquisites for themselves or families, except that the warden shall keep his office, and reside with his family in the penitentiary, and shall be furnished with a garden of a quarter of an acre, and with fuel, lights, provisions for his family and guests, and stationery from the stock provided for the use of the prison. Nor shall they be permitted to receive any compensation or reward from any contractor, under penalty of dismissal from their office, and forfeiture of one month's pay; and if any officer procure the escape of any convict, or connive at, aid or assist in the escape of any convict from the penitentiary, whether such convict escape or not, he shall be guilty of felony, and shall, upon conviction thereof, be sentenced to hard labor in the penitentiary for any term not less than one nor more than three years.

SEC. 4768. [**Officers not interested in contracts.**—No officer of the Iowa penitentiary shall be interested directly or indirectly in contracts for furnishing such penitentiary with provisions, clothing, or other necessaries, to be used in any manner by the inmates of such penitentiary, or for the use of such penitentiary, nor shall any or either of such officers be concerned or interested in any manner in contracts for buildings of any kind connected with such penitentiary, or for materials to be used in any such buildings of any kind connected with such penitentiary, or for materials to be used in any such buildings, or in any contract for the labor of any convict.

SEC. 4769. [**Punishment for.**—Should any officer, in the contemplation of the preceding section, be, or become, in any manner interested in contracts for furnishing provisions, clothing, or other necessaries for the use of such penitentiary, or be, or become, in any manner interested in contracts for buildings, or the construction of buildings of any kind, in any way connected with such penitentiary, or for furnishing material of any kind for the construction of such buildings, or in any contract for the labor of convicts, such officer so interested shall, on proof being made of his being so interested, be removed from office, and shall forfeit any interest he may have in any such contract, and on conviction of being so interested by a court of competent jurisdiction, shall be fined in any sum not more than two thousand dollars nor less than five hundred dollars.

SEC. 4770. [**Hard labor.**—All punishment in the penitentiary by imprisonment must be by confinement to hard labor, and not by solitary imprisonment; but solitary imprisonment may be used as a prison discipline for the government and good order of the convicts.

SEC. 4771. [**Prisoners of U. S.**—Convicts sentenced to hard labor in the penitentiary for life, or any term of time by any court of the United States held within this state, must be received into the prison by the warden thereof, when delivered by the authority of the United States, and there kept in pursuance of their sentences.

SEC. 4772. [**Process executed.**—The warden or his deputy shall serve, execute, and return all process within the precincts of the prison, and such process may be directed to him or his deputy accordingly, and for the doings of his deputy, the warden, as well as the deputy, is answerable.

SUPPLIES FURNISHED ON CONTRACT.

SEC. 4773. (*As amended by ch. 186, 17th g. a.*) [**Estimates to be made.**—All articles of food, clothing, bedding, raw materials for manufacture, fuel, and other articles that may be necessary for the use of the prisoner, must be contracted

for by the year, when such contracts can be advantageously made, in the following manner: The warden shall annually make an estimate of the quantity of each article necessary for the next ensuing year, commencing on the first day of October of each year, and ending on the last day of September thereafter, and advertise that he will receive sealed proposals for furnishing and delivering at the prison such articles, or any of them, until the first day of October, payments to be made quarterly, stating the quantity and quality of each article required, the time when each article must be delivered, and the terms of payment; which advertisement he shall cause to be inserted in any one or more of the papers published in Fort Madison, and in any one or more of the papers published at the seat of government of this state, three weeks successively, the last publication to be at least one month before the first day of October in each year: [*Provided*, that the estimates of the warden shall first be submitted to, and approved by the governor and council before advertisement thereof; and *provided further*, that all bills shall be submitted to the executive council, and that the awards of contracts for supplies shall be approved by such council.]

SEC. 2. The provisions of section 4773 of the code, and the amendment herein contained, are hereby made to govern all contracts for supplies for the additional penitentiary at Anamosa.]

SEC. 4774. [**Warden to take bills of supplies.**—The warden must take bills of the quantity and price of the supplies furnished for the prison at the time of delivery, and must exhibit the same to the clerk, who must compare the same with the articles delivered; if the bills are found correct he must enter them with the date in a book to be kept for that purpose; in like manner, bills shall be taken and entered of all services rendered for the prison; if any such bill be found incorrect the clerk shall omit to enter it, and immediately give notice to the warden that the error may be corrected.]

SEC. 4775. [**Contractor to give security.**—No contract can be accepted by the warden unless the contractor give satisfactory security for the performance of it.]

ESCAPE—DISCHARGE.

SEC. 4776. [**When prisoner escapes.**—When any convict escapes from the penitentiary, the warden shall take all proper measures for his apprehension; and for that purpose he may offer a reward not exceeding fifty dollars, to be paid by the state, for the apprehension and delivery of such convict.]

SEC. 4777. [**No discharge until full term is served.**—No convict can be discharged from the penitentiary until he has remained the full term for which he was sentenced, to be computed from and including the day on which he was received into the same, exclusive of the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, unless he be pardoned or otherwise released by legal authority.]

SEC. 4778. [**Warden to take care of property of convict.**—The warden shall receive and take care of any property that a convict may have with him at the time of his entering the penitentiary, and, when it may be convenient to place the same at interest for the benefit of such convict; of which property the warden must keep an account, and pay the same to such convict on his discharge, or, in case of his death, to his representatives, unless the same have been otherwise taken and legally disposed of.]

SEC. 4779. (*As amended by ch. 48, 15th g. a.*) [**Clothing, etc., furnished.**—When any convict is discharged from the penitentiary, the warden shall furnish transportation to said convict to any point within this state that is nearest to his former home or friends. [Or may furnish such transportation to any point of a

like distance without the state.] Said transportation shall be furnished by means of tickets for passage, an account of which shall be kept by the warden and paid by the state. The warden shall also furnish to said convict a suit of common clothing and a sum of money not less than three nor more than five dollars.

SEC. 4780. [**Visitors.**—The warden shall demand and receive of each person, not exempt by law, except relatives of a convict confined therein, who visits the prison for the purpose of viewing the interior or precincts, a sum of twenty-five cents, of which the warden must keep an account, and which money shall be applied for the purchase of books for the use of the prison, under the direction of the inspectors.

SEC. 4781. [**Who has a right to visit.**—The following persons are authorized to visit the penitentiary at pleasure: The governor, secretary, auditor and treasurer of state, members of the general assembly, judges of the supreme, district and circuit courts, district attorneys of any of the districts of the state, and all regular officiating ministers of the gospel; and no other person shall be permitted to go within the walls of the prison where convicts are confined except by special permission of the warden.

SEC. 4782. [**Monthly report.**—The warden shall see that rigid economy is practiced in all matters pertaining to the prison and the employment of the convicts, and that duplicate receipts be taken for all expenditures made on account of the prison, one copy of which must be forwarded to the auditor of state monthly.

APPROPRIATION—SUPPORT OF CONVICTS.

SEC. 4783. (*As substituted by ch. 200, 18th g. a.*) [**Salaries of officers.**]—[There is hereby appropriated out of any money in the state treasury not otherwise appropriated, so much as may be necessary to pay monthly to the persons herein named the following sums, to-wit: To the warden one hundred and sixty-six dollars and sixty-seven cents, to the deputy warden one hundred dollars, to the clerk, seventy dollars, to the surgeon fifty dollars, to the chaplain who shall perform the duties of teacher, seventy dollars, to the hospital stewards, fifty dollars, to the turnkey, wall guards, shop guards and night guards, fifty dollars. *Provided*, that the warden shall be furnished, in addition to the above, with house rent, fuel and lights for himself and family, at the expense of the state, but no further perquisites or allowances of any character shall be permitted; and *provided*, that on the last of each month the warden shall make and file with the auditor of state an affidavit that during said month he has not, directly or indirectly, converted to his own use any provisions, supplies, waste or materials belonging to the state, nor permitted the same to be done by any officer or person except as herein provided, which said affidavit must be filed before any warrant shall issue to the warden for his own compensation as provided in this section, and *provided further*, that the salaries and compensation allowed in this section shall also apply to the additional penitentiary at Anamosa, and that the warden be authorized to appoint a deputy.

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

(Took effect by publication in newspapers April 6, 1880.)

SEC. 4784. [**How paid.**—The above sums shall be paid to the warden on his requisition, monthly, accompanied with a detailed statement, in such form as the auditor shall prescribe, of the number and kinds of guards employed; and each statement shall also exhibit the payments made by the money drawn on the previous requisition.

SEC. 4785. (*As amended by ch. 91, 19th g. a.*) [**Support of convicts.**—For the general support of the convicts, there is hereby appropriated the monthly sum of [nine] dollars, or so much thereof as may be necessary to each convict in

said prison, to be estimated by the average number for the preceding month, subject, however, to a deduction from the whole amount for the month of the sum charged to the contractors for convict labor for that month.

SEC. 4786. [**How Paid.**]-The sum appropriated by the last section shall be paid on the requisition of the warden, accompanied with a statement of the number of convicts in his charge, and the amount charged to the contractors for that month.

SEC. 4787. [**When contractors fail to pay.**]-If, for any reason, the amount charged to the contractors for any month cannot be collected in time to be available for such support, the governor may, by his order, direct the payment of the whole or any part of the eight and one-third [seven] dollars per month.

MISCELLANEOUS PROVISIONS.

SEC. 4788. [**Auditor of state to collect debts due.**]-The state auditor is required to take immediate steps to cause to be collected and accounted for all those debts owing to the state on account of the penitentiary, or in any manner connect therewith, and all outstanding claims of any nature which the state may have on that account, and to that end he may, if he finds it necessary, place any claim in the hands of the attorney-general for prosecution.

SEC. 4789. [**Warden to collect debts by suit.**]-In all cases where claims have accrued, or may hereafter accrue, in favor of the warden of the penitentiary of this state, which the warden shall deem it advisable to collect by law, the district attorney of the first judicial district shall bring suit upon and collect the same; and in case the governor of the state shall so direct, the attorney-general of the state shall also give his personal attention to said suits.

SEC. 4790. [**Property sold under for such claims.**]-Judgments now or hereafter rendered in favor of the warden of the penitentiary, shall be collected upon execution, and the attorney-general, or district attorney, shall have the same power to bid upon and purchase property upon such executions as is given where judgments are in favor of the state, and the property shall be held and disposed of for the use of the penitentiary by the governor, in the same manner.

SEC. 4791. [**Actions on contracts made with warden and for injuries to property.**]-All actions founded on contract made with the warden in his official capacity, may be brought by or against the warden for the time being; and any action for injuries done or occasioned to the real or personal property belonging to the state and appropriated to the use of the prison, or being under the management of the warden thereof, may be prosecuted in the name of the warden for the time being, and no such action shall abate by the warden's ceasing to be in office but his successor, upon notice, is required to assume the prosecution or defense of the same. In any such action the warden is a competent witness, and his property shall not be taken or attached in any such suit, nor shall any execution issue against him on any judgment thereon, but such judgment shall stand as an ascertained claim against the state; and whenever a new warden is appointed, all the books, accounts and papers belonging to the prison shall be delivered to him, and he shall be vested with all the powers and subject to all the obligations with regard to any contract or any debts due to or from the prison that his predecessor would have been if no change had taken place in the office.

SEC. 4792. [**When office of warden is vacant.**]-Whenever the office of warden is vacant, or he is absent from the prison, or unable to perform the duties of his office, the deputy warden has the power to perform the duties and shall be subject to all the obligations and liabilities of the warden.

SEC. 4793. [**Overseers.**]-Persons having suitable knowledge and skill in the branches of labor and manufacture carried on in the prison, may, when practicable,

be employed as overseers; and they must respectively superintend such portions of the labor of convicts for which they are most suitably qualified, and which shall be assigned to them by the warden; and all of them as well as the other subordinate officers of the prison, must perform such service in the management, superintending and guarding of the prison, as may be prescribed by the rules and regulations, or directed by the warden.

SEC. 4794. [**Delinquency of officer.**].—If any subordinate officer of the prison is guilty of negligence or unfaithfulness in the discharge of his duties, or of a violation of any of the laws or rules and regulations for the government of the prison, the warden may deduct from the pay of such officer a sum not exceeding his pay for one month.

SEC. 4795. [**Pestilence among convicts.**].—In case of any pestilence or contagious sickness breaking out among the convicts in the prison, the warden may cause the convicts confined therein, or any of them, to be removed to some suitable place of security, where such of them as are sick shall receive all necessary care and medical assistance. Such convicts must be returned as soon as may be to the penitentiary, to be confined according to their respective sentences if the same be unexpired.

SEC. 4796. [**Negligence of officers.**].—If any officer or other person employed in the prison or its precincts, negligently suffer any convict confined therein to be at large without the precincts of the prison, or out of the cell or apartment assigned to him, or to be conversed with, relieved or comforted contrary to law or the rules and regulations of the prison, he shall be punished by a fine not exceeding five hundred dollars.

SEC. 4797. [**Resistance to authority.**].—If a convict sentenced to the penitentiary resist the authority of any officer, or refuse to obey his lawful commands, it is the duty of such officer immediately to enforce obedience by the use of such weapons or other aid as may be effectual; and if in so doing any convict thus resisting be wounded or killed by such officer or his assistants, they are justified and shall be held guiltless.

SEC. 4798. [**Insurrection.**].—It is the duty of all the officers and other citizens of the state, by every means in their power, to suppress any insurrection among the convicts sentenced to the penitentiary, and to prevent the escape or rescue of any such convict therefrom, or from any other legal confinement, or from any person in whose legal custody they may be; and if in so doing or in arresting any convict who may have escaped, such officer or other person wound or kill such convict, or other person aiding or assisting such convict, they shall be justified and held guiltless.

SEC. 4799. [**Governor to visit penitentiary: duty of.**].—The governor shall visit said penitentiary personally, as often, at least, as once in three months, to inspect the books, papers and records of the clerk and deputy warden, and strictly to inquire into the official conduct of the warden, to examine into the general, economical, sanitary, and disciplinary regulations of the prison; and to alter and amend the same in any manner which may be best calculated to promote economy in expenditure, and the health, safe keeping and obedience of convicts, and all such alterations and amendments shall be reduced to writing, and signed by the governor, and filed by him with the clerk, who shall forthwith record the same. And in case it is impracticable at any time for the governor to make such visit and inspection personally, he may appoint some suitable person to perform that service and report to him; but such person so appointed shall not have the power to make any alteration in the government of the institution, but may report to the governor only; and it is hereby made the duty of the governor to perform the service personally, if practicable.

SEC. 4800. [**Governor may appoint visitor.**].—In making the appointment

of visitor, as provided for in the preceding section; the governor shall take care that no one is appointed who may be supposed to be under the influence surrounding said penitentiary, or any of its officers, nor shall any one be appointed who had hitherto been officially connected therewith, nor shall the same person be appointed twice in succession.

SEC. 4801. [**Governor may remove warden and fill vacancy.**].—Should the governor at any time become satisfied that the warden is guilty of official negligence or malfeasance, in any particular, so that the safety or health of the convicts is endangered, or any funds appropriated for said institution, illegally invested or misapplied, or that said warden is in any manner conducting the affairs of the prison contrary to law and good faith, he shall forthwith remove said warden, notifying him of the specific causes for his removal, and also reporting to the next session of the general assembly, specifying his reasons therefor. He shall also appoint a warden to fill the vacancy thus occasioned, who shall qualify in the same manner as the regularly elected warden, but shall hold his office only until the next succeeding general assembly.

SEC. 4802. [**To fill vacancy.**].—The governor shall also fill all vacancies that may occur in the office of warden by death, resignation or otherwise, between the sessions of the general assembly, but no appointment thus made shall last over a session of the general assembly.

SEC. 4803. [**Governor to be allowed traveling expenses.**].—For the services herein required of the governor, he shall be allowed out of the state treasury his traveling expenses, and he shall present a bill therefor, under oath, to the auditor of state, which bill, thus sworn to, shall be a sufficient voucher for the auditor to issue his warrant on the treasury of the state for the amount so claimed.

SEC. 4804. [**Compensation of visitor.**].—Should the governor be compelled to appoint any person or persons to visit the penitentiary, as herein provided, such person shall render to the governor an account of his traveling expenses and time employed under said appointment, which account shall be sworn to, and the governor shall determine the amount to which said person is entitled, not exceeding three dollars per day and expenses, and shall give him a certificate thereof, which certificate shall authorize the auditor to issue his warrant on the treasurer of state for said amount in favor of the person entitled thereto.

SEC. 4805. [**Penalty for failure of duty.**].—Should any person required to perform any duty relative to the penitentiary, willfully fail or refuse obedience thereto, he shall be deemed guilty of a misdemeanor, and shall be punished by fine in any sum not exceeding one thousand dollars, and shall forfeit his office, and should said willful failure or refusal result in the escape of any of the convicts, or in loss of any of the funds appropriated to the use and benefit of the penitentiary, provided said sum so lost shall exceed the amount of twenty dollars, he shall be deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term not less than two or more than ten years.

SEC. 4806. [**Penitentiary at Anamosa.**].—Nothing in this chapter shall be construed to repeal or in any way affect chapters forty-three or one hundred and eight of the fourteenth general assembly, providing for an additional penitentiary at or near Anamosa, in the county of Jones.

(CHAPTER 154, LAWS OF 1880.)

An Act to equalize the good time that may be earned by convicts at the penitentiaries, amendatory of section 4754 of the code, and of chapter 43 of the general and public laws of the fourteenth general assembly, chapter 40 of the sixteenth general assembly, and chapter 187 of the acts of the seventeenth general assembly.

SECTION 1. [**Deputy warden to keep books.**]*—Be it enacted by the general assembly of the State of Iowa:* That the deputy warden of the penitentiary of the state at Fort Madison, and the warden of the additional penitentiary at Anamosa, shall each keep a book in which shall be entered a record of every infraction by a prisoner of the published rules of discipline, with the name of the prisoner guilty. Every prisoner sentenced to either of said penitentiaries for a term of years, or less, who shall have, at the end of the first month, no infraction of discipline recorded against him, shall be entitled to diminution of one day from the time he was sentenced to such penitentiary, and if at the end of the second month no infraction of the rules to be recorded against him he shall be entitled to two additional days of diminution from his sentence; and if he shall continue to have no such record against him for the third month, his time shall be shortened three additional days; and if he shall so continue to have no such record against him for the fourth month, his time shall be shortened four addition days; and if he shall so continue for subsequent months, he shall be entitled to five days diminution of his time from each month he shall so continue his good behavior, and if any prisoner shall so pass the whole term of his service he shall be entitled to a certificate thereof from the warden, and upon presentation thereof to the governor he shall be entitled to a restoration of the rights of citizenship that may have been forfeited by his conviction and sentence; and it shall be the duty of the warden to discharge such convict from such penitentiary when he shall have served the time of his service less the number of days he may be entitled to have deducted therefrom, in the same manner as if no such deduction had been made.

SEC. 2. [**Construction of.**]*—This act shall not be construed so as to increase the good time earned by prisoners in the penitentiary of the state at Fort Madison prior to the act going into effect: Provided, however,* that prisoners transferred to said penitentiary from the additional penitentiary at Anamosa shall be entitled to the same allowance for good time that they would have been allowed at said additional penitentiary.

SEC. 3. **Section 4754 of the code is amended** by striking therefrom all after the word "day" in the tenth line thereof; and section 1 of chapter 187 of the acts of seventeenth general assembly is amended by striking therefrom all after the word "day" in the ninth line thereof; section 12 of chapter 43 of the general and public laws of the fourteenth general assembly is hereby repealed.

(Took effect by publication in newspapers, April 3, 1880.)

(CHAPTER 69, LAWS OF 1888.)

DEPARTMENT OF CRIMINAL INSANE, MANAGEMENT.

An Act to organize and manage the department for criminal insane at the penitentiary at Anamosa, and to fix the compensation of the officers.

SECTION 1. [**Government.**]*—Be it enacted by the general assembly of the state of Iowa:* The department for the criminal insane in the penitentiary at Anamosa shall be governed by the warden as a part of the penitentiary.

SEC. 2. [**Transfer of convicts.**]—Whenever the building now being constructed for this department is ready for occupancy the warden shall notify the governor, who shall order all convicts now being held in the asylums at Mount Pleasant and Independence, to be transferred from such asylums to the department for criminal insane at the penitentiary at Anamosa, the state to pay the expense of such transfer.

SEC. 3. [**Certificate of physician.**]—Whenever any convict at the penitentiary at Fort Madison shall have become insane, the governor, upon receipt of a certificate from the physician of said penitentiary at Fort Madison, that such convict is insane, shall order him transferred to the penitentiary at Anamosa to be kept in the department for criminal insane for treatment.

SEC. 4. [**Unexpired term of cured convicts.**]—Whenever a convict who has been transferred from the penitentiary at Fort Madison is confined in the department for the criminal insane, and who shall be pronounced cured before his time has expired, he shall be held in the penitentiary at Anamosa, to serve out his unexpired sentence.

SEC. 5. Whenever a convict in the penitentiary at Anamosa is pronounced insane by the physician of said penitentiary the warden shall place him in the department for criminal insane for treatment.

SEC. 6. [**Examination at end of term of sentence.**]—No insane convict shall be discharged from the hospital apartment, provided for the criminal insane, until such convict shall be restored to reason, except as hereinafter provided. At the expiration of the term of sentence of such convict, an examination shall be made by competent physicians, and if it shall be found that such convict has not been restored to reason, such fact shall be certified to the governor; thereupon the governor shall investigate the matter and if in his discretion, such insane convict should be transferred to one of the hospitals for the insane, he may order said convict to be transferred, or he may order that said convict shall be retained in the hospital apartment of the prison for criminal insane.

SEC. 7. [**Physician.**]—The physician for the penitentiary at Anamosa shall also be the physician for the department for criminal insane, and his salary is fixed at one hundred dollars per month, for his entire services as a physician for the penitentiary and the criminal insane.

SEC. 8. [**Rooms used.**]—Whenever the department for criminal insane is ready for occupancy, the warden may use one ward for female convicts until such time as the department for female convicts is completed; also a portion of the building may be used for hospital purposes for the main prison, until such time as the hospital is built; provided, however that the use of said rooms shall not interfere with the comfort of the criminal insane.

SEC. 9. The warden shall be governed by the same law in appointing guards for the department for insane, as he is in appointing them for the penitentiary.

SEC. 10. [**Assistant deputy.**]—Whenever the department for criminal insane is completed the warden may appoint an assistant deputy who shall give a bond to the state in the sum of three thousand dollars to be approved by the governor; said assistant deputy to have charge of the department for criminal insane, under the direction of the warden and deputy, and to assist the deputy in other work if desired, and who shall receive for his services eighty-three and one-third dollars per month.

Approved, April 10, 1888.

(CHAPTER 40, LAWS OF 1876.)

ADDITIONAL PENITENTIARY.

An Act to amend chapter 43 of the acts of the fourteenth general assembly, and for other purposes.

SECTION 1. [**Expiration of present term of officers.**]*—Be it enacted by the general assembly of the state of Iowa:* That the present term of office of the commissioners and warden of the additional penitentiary at Anamosa, shall terminate on the first day of April, next.

SEC. 2. [**Warden shall be elected.**]*—*The warden of said penitentiary shall be elected by the general assembly, and shall hold his office for two years from the first day of April, 1876, and until his successor is duly elected and qualified.

SEC. 3. [**Salaries of officers.**]*—*The provisions of the statute relative to the appointment and salary of clerk, physician and hospital steward, for the Fort Madison penitentiary shall also apply to the additional penitentiary at Anamosa; *provided,* that until the number of prisoners shall reach two hundred the salary of the physician shall not exceed thirty dollars per month, and the warden shall employ some suitable person who shall act as religious adviser and teacher, at a salary not to exceed forty dollars per month.

SEC. 4. [**Warden, his powers and duties.**]*—*The warden, under the direction of the executive council, shall have charge of the erection of the walls, and buildings of said penitentiary, according to the plans and specifications already adopted.

He may, with consent of the executive council, employ and discharge a superintendent, whose duty it shall be to superintend the work on the walls and buildings.

He may, with the approval of the executive council, also employ, or authorize the superintendent to employ such foreman or assistants as he may deem necessary on the buildings and at the quarries.

He may call on the architect, whenever they may deem it necessary, to visit the premises and give such instructions as may be proper.

He shall, with the approval of the executive council, purchase or cause to be purchased, all material necessary to carry out the provisions of this act; *provided,* that all stone used in the construction of said walls and buildings shall be taken from the state quarries whenever it can be done without loss to the state.

SEC. 5. The provisions of the statute in regard to the warden of the penitentiary at Fort Madison shall apply to the warden of the additional penitentiary so far as they do not conflict with the provisions of this act; and he shall safely guard and cause the prisoners to perform labor, and work in the preparation of material for and in the erection of said work as directed by the executive council, as to the mode and manner of work; *provided,* that he shall not appoint a deputy warden.

SEC. 6. [**Clerk: duties: salary.**]*—*The clerk of the penitentiary shall keep all accounts of expenditures and disbursements on account of said work, for which he may be paid such additional salary as the executive council may direct; *provided,* that his whole salary shall not exceed one thousand dollars per annum.

SEC. 7. [**Warden to keep account of convict labor.**]*—*The warden shall keep an accurate account with each convict, showing the number of days' labor performed by each, and the value thereof in cash, not exceeding two dollars per day for each day of ten hours; and for each and every one hundred dollars of labor, in excess of three hundred dollars, performed in any one year, by any convict not sentenced for life, there shall be commutation of sentence of such convict, upon the recommendation of the warden, of fifty days time; and the third

part of such excess shall be paid him, out of the state treasury, upon his discharge, upon the certificate of the amount due, by the warden.

SEC. 8. [**Grade of prisoners to be kept.**—The additional penitentiary at Anamosa, Jones county, shall be maintained as a penitentiary of the state of Iowa, in which such convicts sentenced for life, or any period of time, as the executive council may designate, shall be confined, employed and governed according to the provisions of law relating to the government and discipline of the penitentiary at Fort Madison, county of Lee, so far as the same do not come in conflict with the provisions of this act; *providing*, that nothing in this act shall be so construed as to authorize the leasing of the convict labor.

SEC. 9. All resolutions, acts and parts of acts, inconsistent with the provisions of this act, are hereby repealed.

Approved March 4, 1876.

(CHAPTER 187, LAWS OF 1878.)

GOVERNMENT OF THE ADDITIONAL PENITENTIARY.

An Act to amend chapter 40 of the acts of the sixteenth general assembly, relating to the additional penitentiary at Anamosa.

SECTION 1. [**Chapter 40, sec. 7, 16th g. a., amended.**—(*Be it enacted by the general assembly of the state of Iowa:* That section seven (7), chapter 40, of the laws of the the sixteenth general assembly be and the same is hereby repealed, and in lieu thereof is enacted the following:

SEC. 7. [**Warden shall keep time-table of convict labor.**—The warden shall keep a regular time-table of the convict labor and record the same in a book to be kept for that purpose; and he shall moreover keep a record of all the business under his control and return an account thereof, together with an account of the convict labor, to the clerk at the close of each day. He shall also keep a book in which shall be entered a record of every infraction of the published rule of discipline, with the name of the prisoner so guilty. And every prisoner who shall at the end of the month have no infraction of discipline recorded against him shall for the first month be entitled to a diminution of one day from the time he was sentenced to the penitentiary; and if at the end of the second month no infraction of the rules is recorded against him, two additional days of diminution from his sentence; and if he shall continue to have no such record against him for the third month, his time shall be shortened three additional days; and if he shall so continue to have no such record against him for the fourth month, his time shall be shortened four additional days; and if he shall so continue for subsequent months he shall be entitled to five days of diminution time from his sentence for each month he shall so continue his good behavior; and if any prisoner shall so pass the whole time of his service, or the remainder of his service, this act to apply to all the convicts now confined in the additional penitentiary at Anamosa, whose conduct entitles them to its benefits from the date of their commitment forward, he shall be entitled to a certificate thereof from the warden; and upon the presentation thereof to the governor, the governor may, without compliance with the requirements of section 4712 and 4713 of the code, issue to him a pardon, in which shall be recited the reasons therefor; and it shall be the duty of the warden to discharge such convict from the penitentiary when he shall have served the term of his service less the number of days he may be entitled to have deducted therefrom, in the same manner as if no such deduction had been made.

(CHAPTER 75, LAWS OF 1888.)

HOSPITAL FOR INSANE AT CLARINDA, COMMISSIONERS AND TRUSTEES.

An Act relating to the hospital for the insane at Clarinda, to the board of commissioners thereof, and providing trustees therefor.

SECTION 1. [**Name.**]*—Be it enacted by the general assembly of the state of Iowa:—*That the hospital for the insane, located at Clarinda, in Page county, shall be known by the name of the Iowa Hospital for the Insane at Clarinda.

SEC. 2. [**Trustees.**]*—*That said hospital shall be under the charge and control of five trustees, one of whom may be a woman, one of whom shall be a resident of Page county, three of whom shall constitute a quorum for the transaction of business; but three affirmative votes shall be necessary to carry any measure, and no member of the general assembly shall be eligible to that office.

SEC. 3. [**Terms of office.**]*—*That said trustees shall be elected by the twenty-second general assembly, two of whom shall be elected for two years, two of whom shall be elected for four years, and one of whom shall be elected for six years, their term of office to commence on the second Wednesday of March, 1888.

SEC. 4. [**Duties and powers.**]*—*The duties and powers of said trustees shall be as the duties and powers of the trustees of the hospitals for the insane located at Mount Pleasant and Independence, provided in chapter 2, of title 11, of the code, and all amendments made thereto.

SEC. 5. [**Qualification.**]*—*That said trustees shall qualify in manner as the trustees for the hospitals at Mt. Pleasant and Independence, and shall convene at Clarinda, Iowa, on the second Wednesday of March 1888, and perfect their organization, take possession of the property of the state, and enter upon the discharge of their duties.

SEC. 6. [**Office of commissioners vacated.**]*—*That when said trustees have qualified and entered upon the discharge of their duties, the board of commissioners, who now have charge of said hospital, shall cease to act and their offices shall therefrom be vacated and thereafter the powers and duties of said board of commissioners, as provided in chapter 201 of the acts of the twentieth general assembly, shall devolve upon, and be exercised by the trustees aforesaid.

SEC. 7. [**Commissioners' final report.**]*—*The said board of commissioners shall on or before the first Wednesday of May, 1888, make their final report to the governor in manner as by law required.

SEC. 8. [**Publication.**]*—*This act being deemed of immediate importance shall take effect from and after its passage and publication in the Iowa State Register, and the Des Moines Leader, newspapers published at Des Moines, Iowa.

Approved Feb. 16, 1888.

APPENDIX.

APPENDIX.

(CHAPTER 150, LAWS OF 1886.)

REPRESENTATIVE APPORTIONMENT.

An Act to apportion the state into representative districts and declaring the ratio of representation.

SECTION 1. [**Ratio of apportionment.**]*—Be it enacted by the general assembly of the state of Iowa:* That one representative for every twenty-four thousand inhabitants is hereby constituted the ratio of apportionment, and that each representative district shall be as hereinafter described.

SEC. 2. **1st DIST.** Lee county shall be the first district and entitled to one representative, 34,024.

SEC. 3. **2d DIST.** Van Buren county shall be the second district and entitled to one representative, 16,170.

SEC. 4. **3d DIST.** Davis county shall be the third district and entitled to one representative, 15,170.

SEC. 5. **4th DIST.** Appanoose county shall be the fourth district and entitled to one representative, 16,941.

SEC. 6. **5th DIST.** Wayne county shall be the fifth district and entitled to one representative, 15,494.

SEC. 7. **6th DIST.** Decatur county shall be the sixth district and entitled to one representative, 15,083.

SEC. 8. **7th DIST.** Ringgold county shall be the seventh district and entitled to one representative, 12,730.

SEC. 9. **8th DIST.** Taylor county shall be the eighth district and entitled to one representative, 15,973.

SEC. 10. **9th DIST.** Page county shall be the ninth district and entitled to one representative, 20,938.

SEC. 11. **10th DIST.** Fremont county shall be the tenth district and entitled to one representative, 15,921.

SEC. 12. **11th DIST.** Mills county shall be the eleventh district and entitled to one representative, 23,727.

SEC. 13. **12th DIST.** Montgomery county shall be the twelfth district and entitled to one representative, 15,901.

SEC. 14. **13th DIST.** Adams county shall be the thirteenth district and entitled to one representative, 12,146.

SEC. 15. **14th DIST.** Union county shall be the fourteenth district and entitled to one representative, 16,502.

SEC. 16. **15th DIST.** Clarke county shall be the fifteenth district and entitled to one representative, 11,369.

SEC. 17. **16th DIST.** Lucas county shall be the sixteenth district and entitled to one representative, 14,791.

SEC. 18. **17th DIST.** Monroe county shall be the seventeenth district and entitled to one representative, 12,324.

SEC. 19. **18th** DIST. Wapello county shall be the eighteenth district and entitled to one representative, 25,803.

SEC. 20. **19th** DIST. Jefferson county shall be the nineteenth district and entitled to one representative, 15,995.

SEC. 21. **20th** DIST. Henry county shall be the twentieth district and entitled to one representative, 17,862.

SEC. 22. **21st** DIST. Des Moines county shall be the twenty-first district and entitled to one representative, 35,733.

SEC. 23. **22d** DIST. Lousia county shall be the twenty-second district and entitled to one representative, 11,926.

SEC. 24. **23d** DIST. Washington county shall be the twenty-third district and entitled to one representative, 18,504.

SEC. 25. **24th** DIST. Keokuk county shall be the twenty-fourth district and entitled to one representative, 23,318.

SEC. 26. **25th** DIST. Mahaska county shall be the twenty-fifth district and entitled to one representative, 27,131.

SEC. 27. **26th** DIST. Marion county shall be the twenty-sixth district and entitled to one representative, 23,419.

SEC. 28. **27th** DIST. Warren county shall be the twenty-seventh district and entitled to one representative, 17,868.

SEC. 29. **28th** DIST. Madison county shall be the twenty-eighth district and entitled to one representative, 16,240.

SEC. 30. **29th** DIST. Adair county shall be the twenty-ninth district and entitled to one representative, 14,102.

SEC. 31. **30th** DIST. Cass county shall be the thirtieth district and entitled to one representative, 19,019.

SEC. 32. **31st** DIST. Pottawattamie county shall be the thirty-first district and entitled to two representatives, 45,866.

SEC. 33. **32d** DIST. Harrison county shall be the thirty-second district and entitled to one representative, 20,560.

SEC. 34. **33d** DIST. Shelby county shall be the thirty-third district and entitled to one representative, 16,306.

SEC. 35. **34th** DIST. Audubon county shall be the thirty-fourth district and entitled to one representative, 10,825.

SEC. 36. **35th** DIST. Guthrie county shall be the thirty-fifth district and entitled to one representative, 16,439.

SEC. 37. **36th** DIST. Dallas county shall be the thirty-sixth district and entitled to one representative, 20,050.

SEC. 38. **37th** DIST. Polk county shall be the thirty-seventh district and entitled to two representatives, 51,907.

SEC. 39. **38th** DIST. Jasper county shall be the thirty-eighth district and entitled to one representative, 25,247.

SEC. 40. **39th** DIST. Poweshiek county shall be the thirty-ninth district and entitled to one representative, 18,203.

SEC. 41. **40th** DIST. Iowa county shall be the fortieth district and entitled to one representative, 18,190.

SEC. 42. **41st** DIST. Johnson county shall be the forty-first district and entitled one representative, 23,046.

SEC. 43. **42d** DIST. Muscatine county shall be the forty-second district and entitled to one representative, 24,320.

SEC. 44. **43d** DIST. Scott county shall be the forty-third district and entitled to two representatives, 41,956.

SEC. 45. **44th** DIST. Cedar county shall be the forty-fourth district and entitled to one representative, 17,832.

SEC. 46. **45th DIST.** Clinton county shall be the forty-fifth district and entitled to two representatives, 38,661.

SEC. 47. **46th DIST.** Jackson county shall be the forty-sixth district and entitled to one representative, 22,839.

SEC. 48. **47th DIST.** Jones county shall be the forty-seventh district and entitled to one representative, 19,654.

SEC. 49. **48th DIST.** Linn county shall be the forty-eighth district and entitled to two representatives, 40,720.

SEC. 50. **49th DIST.** Benton county shall be the forty-ninth district and entitled to one representative, 23,902.

SEC. 51. **50th DIST.** Tama county shall be the fiftieth district and entitled to one representative, 21,622.

SEC. 52. **51st DIST.** Marshall county shall be the fifty-first district and entitled to one representative, 25,036.

SEC. 53. **52d DIST.** Story county shall be the fifty-second district and entitled to one representative, 17,527.

SEC. 54. **53d DIST.** Boone county shall be the fifty-third district and entitled to one representative, 24,972.

SEC. 55. **54th DIST.** Greene county shall be the fifty-fourth district and entitled to one representative, 15,923.

SEC. 56. **55th DIST.** Carroll county shall be the fifty-fifth district and entitled to one representative, 16,329.

SEC. 57. **56th DIST.** Crawford county shall be the fifty-sixth district and entitled to one representative, 16,131.

SEC. 58. **57th DIST.** Monona county shall be the fifty-seventh district and entitled to one representative, 12,178.

SEC. 59. **58th DIST.** Woodbury county shall be the fifty-eighth district and entitled to one representative, 32,289.

SEC. 60. **59th DIST.** Ida county shall be the fifty-ninth district and entitled to one representative, 9,012.

SEC. 61. **60th DIST.** Sac county shall be the sixtieth district and entitled to one representative, 12,741.

SEC. 62. **61st DIST.** Calhoun county shall be the sixty-first district and entitled to one representative, 9,836.

SEC. 63. **62d DIST.** Webster county shall be the sixty-second district and entitled to one representative, 19,987.

SEC. 64. **63d DIST.** Hamilton county shall be the sixty-third district and entitled to one representative, 14,075.

SEC. 65. **64th DIST.** Hardin county shall be the sixty-fourth district and entitled to one representative, 18,526.

SEC. 66. **65th DIST.** Grundy county shall be the sixty-fifth district and entitled to one representative, 12,804.

SEC. 67. **66th DIST.** Blackhawk county shall be the sixty-sixth district and entitled to one representative, 23,860.

SEC. 68. **67th DIST.** Buchanan county shall be the sixty-seventh district and entitled to one representative, 17,726.

SEC. 69. **68th DIST.** Delaware county shall be the sixty-eighth district and entitled to one representative, 17,436.

SEC. 70. **69th DIST.** Dubuque county shall be the sixty-ninth district and entitled to two representatives, 45,496.

SEC. 71. **70th DIST.** Clayton county shall be the seventieth district and entitled to one representative, 26,853.

SEC. 72. **71st DIST.** Fayette county shall be the seventy-first district and entitled to one representative, 22,422.

SEC. 73. **72d** DIST. Bremer county shall be the seventy-second district and entitled one representative, 14,350.

SEC. 74. **73d** DIST. Butler county shall be the seventy-third district and entitled to one representative, 14,523.

SEC. 75. **74th** DIST. Franklin county shall be the seventy-fourth district and entitled to one representative, 11,324.

SEC. 76. **75th** DIST. Wright county shall be the seventy-fifth district and entitled to one representative, 9,380.

SEC. 77. **76th** DIST. Humboldt county shall be the seventy-sixth district and entitled to one representative, 8,065.

SEC. 78. **77th** DIST. Pocahontas (6,152) and Clay (6,438) counties shall be the seventy-seventh district and entitled to one representative, 12,590.

SEC. 79. **78th** DIST. Buena Vista county shall be the seventy-eighth district and entitled to one representative, 11,530.

SEC. 80. **79th** DIST. Cherokee county shall be the seventy-ninth district and entitled to one representative, 12,584.

SEC. 81. **80th** DIST. Plymouth county shall be the eightieth district and entitled to one representative, 15,481.

SEC. 82. **81st** DIST. Sioux county shall be the eighty-first district and entitled to one representative, 11,584.

SEC. 83. **82d** DIST. O'Brien county shall be the eighty-second district and entitled one representative, 8,389.

SEC. 84. **83d** DIST. Palo Alto (6,389), Emmet (2,781) and Dickinson (3,213) counties shall be the eighty-third district and entitled to one representative, 12,883.

SEC. 85. **84th** DIST. Kossuth county shall be the eighty-fourth district and entitled to one representative, 9,337.

SEC. 86. **85th** DIST. Hancock (5,089) and Winnebago (5,579) counties shall be the eighty-fifth district and entitled one representative, 11,688.

SEC. 87. **86th** DIST. Cerro Gordo county shall be the eighty-sixth district and entitled to one representative, 12,688.

SEC. 88. **87th** DIST. Floyd county shall be the eighty-seventh district and entitled one representative, 15,362.

SEC. 89. **88th** DIST. Chickasaw county shall be the eighty-eighth district and entitled to one representative, 13,899.

SEC. 90. **89th** DIST. Allamakee county shall be the eighty-ninth district and be entitled to one representative, 18,335.

SEC. 91. **90th** DIST. Winneshiek county shall be the ninetieth district and be entitled to one representative, 22,680.

SEC. 92. **91st** DIST. Howard county shall be the ninety-first district and entitled one representative, 9,305.

SEC. 93. **92d** DIST. Mitchell county shall be the ninety-second district and entitled to one representative, 12,825.

SEC. 94. **93d** DIST. Worth county shall be the ninty-third district and entitled to one representative, 8,257.

SEC. 95. **94th** DIST. Osceola (3,995) and Lyon (4,007) counties shall be the ninty-fourth district and entitled to one representative, 8002.

Approved, April 10, 1886.

(CHAPTER 152, LAWS OF 1886.)

SENATORIAL APPORTIONMENT.

An Act fixing the number of senators in the general assembly, apportioning them among the several counties according to the number of inhabitants in each, and dividing the state into senatorial districts.

SECTION 1. [Number of senators.]—*Be it enacted by the general assembly of the state of Iowa:* That the number of senators in the general assembly is hereby fixed at fifty, and they are hereby apportioned among the several counties according to the number of inhabitants in each, and under said apportionment the state is hereby divided into fifty senatorial districts, each district to have one senator, as follows:

- 1st DIST. Lee county shall constitute the first district.
 2d DIST. Jefferson county and Van Buren county shall constitute the second district.
 3d DIST. Appanoose county and Davis county shall constitute the third district.
 4th DIST. Wayne county and Lucas county shall constitute the fourth district.
 5th DIST. Ringgold county, Decatur county and Union county shall constitute the fifth district.
 6th DIST. Taylor county and Adams county shall constitute the sixth district.
 7th DIST. Page county and Fremont county shall constitute the seventh district.
 8th DIST. Mills county and Montgomery county shall constitute the eighth district.
 9th DIST. Des Moines county shall constitute the ninth district.
 10th DIST. Henry county and Washington county shall constitute the tenth district.
 11th DIST. Warren county and Clarke county shall constitute the eleventh district.
 12th DIST. Poweshiek county and Keokuk county shall constitute the twelfth district.
 13th DIST. Wapello county shall constitute the thirteenth district.
 14th DIST. Mahaska county shall constitute the fourteenth district.
 15th DIST. Marion county and Monroe county shall constitute the fifteenth district.
 16th DIST. Madison county and Adair county shall constitute the sixteenth district.
 17th DIST. Audubon county and Dallas county and Guthrie county shall constitute the seventeenth district.
 18th DIST. Cass county and Shelby county shall constitute the eighteenth district.
 19th DIST. Pottawattamie county shall constitute the nineteenth district.
 20th DIST. Muscatine county and Louisa county shall constitute the twentieth district.
 21st DIST. Scott county shall constitute the twenty-first district.
 22d DIST. Clinton county shall constitute the twenty-second district.
 23d DIST. Jackson county shall constitute the twenty-third district.
 24th DIST. Jones county and Cedar county shall constitute the twenty-fourth district.
 25th DIST. Johnson county and Iowa county shall constitute the twenty-fifth district.
 26th DIST. Linn county shall constitute the twenty-sixth district.

- 27th DIST.** Webster county and Calhoun county shall constitute the twenty-seventh district.
- 28th DIST.** Marshall county shall constitute the twenty-eighth district.
- 29th DIST.** Jasper county shall constitute the twenty-ninth district.
- 30th DIST.** Polk county shall constitute the thirtieth district.
- 31st DIST.** Story county and Boone county shall constitute the thirty-first district.
- 32d DIST.** Woodbury county shall constitute the thirty-second district.
- 33d DIST.** Buchanan county and Delaware county shall constitute the thirty-third district.
- 34th DIST.** Harrison county, Monona county and Crawford county shall constitute the thirty-fourth district.
- 35th DIST.** Dubuque county shall constitute the thirty-fifth district.
- 36th DIST.** Clayton county shall constitute the thirty-sixth district.
- 37th DIST.** Wright county, Hamilton county and Hardin county shall constitute the thirty-seventh district.
- 38th DIST.** Blackhawk county and Grundy county shall constitute the thirty-eighth district.
- 39th DIST.** Butler county and Bremer county shall constitute the thirty-ninth district.
- 40th DIST.** Allamakee county and Fayette county shall constitute the fortieth district.
- 41st DIST.** Mitchell county, and Worth county and Winnebago county shall constitute the forty-first district.
- 42d DIST.** Winneshiek county and Howard county shall constitute the forty-second district.
- 43d DIST.** Cerro Gordo county, Franklin county and Hancock county shall constitute the forty-third district.
- 44th DIST.** Floyd county and Chickasaw county shall constitute the forty-fourth district.
- 45th DIST.** Tama county and Benton county shall constitute the forty-fifth district.
- 46th DIST.** Ida county, Cherokee county and Plymouth county shall constitute the forty-sixth district.
- 47th DIST.** Kossuth county, Emmet county, Dickinson county, Clay county and Palo Alto county shall constitute the forty-seventh district.
- 48th DIST.** Carroll county, Sac county and Greene county shall constitute the forty-eighth district.
- 49th DIST.** O'Brien county, Osceola county, Lyon county and Sioux county shall constitute the forty-ninth district.
- 50th DIST.** Buena Vista county, Pocahontas county and Humboldt county shall constitute the fiftieth district.

Approved April 10, 1886.

(CHAPTER 154, LAWS OF 1886.

CONGRESSIONAL APPORTIONMENT.

An Act to reorganize the congressional districts of the state.

SECTION 1. *Be it enacted by the general assembly of the state of Iowa:* That the congressional districts be organized and constituted as follows:

1st DIST. First district shall consist of the counties of Washington, Louisa, Jefferson, Henry, Des Moines, Lee and Van Buren.

2d DIST. Second district shall consist of the counties of Muscatine, Scott, Clinton, Jackson, Johnson and Iowa.

3d DIST. Third district shall consist of the counties of Dubuque, Delaware, Buchanan, Black Hawk, Bremer, Butler, Franklin, Hardin and Wright.

4th DIST. Fourth district shall consist of the counties of Clayton, Allamakee, Fayette, Winneshiek, Howard, Chickasaw, Floyd, Mitchell, Worth and Cerro Gordo.

5th DIST. Fifth district shall consist of the counties of Jones, Linn, Benton, Tama, Marshall, Grundy and Cedar.

6th DIST. Sixth district shall consist of the counties of Davis, Wapello, Keokuk, Mahaska, Poweshiek, Monroe and Jasper.

7th DIST. Seventh district shall consist of the counties of Story, Dallas, Polk, Madison, Warren and Marion.

8th DIST. Eighth district shall consist of the counties of Adams, Union, Clarke, Lucas, Appanoose, Wayne, Decatur, Ringgold, Taylor, Page and Fremont.

9th DIST. Ninth district shall consist of the counties of Harrison, Shelby, Audubon, Guthrie, Pottawatomie, Cass, Adair, Mills and Montgomery.

10th DIST. Tenth district shall consist of the counties of Crawford, Carroll, Greene, Boone, Calhoun, Webster, Hamilton, Pocahontas, Humboldt, Palo Alto, Kossuth, Hancock, Emmet and Winnebago.

11th DIST. Eleventh district shall consist of the counties of Lyon, Osceola, Dickinson, Sioux, O'Brien, Clay, Plymouth, Cherokee, Buena Vista, Woodbury, Ida, Sac and Monona.

Approved April 10, 1886.

(CHAPTER 47, OF REVISION OF 1860.)

SWAMP LANDS.

ARTICLE I.

AN ACT in relation to the swamp lands within the state of Iowa.

[Passed February 5, 1851; took effect February 26, 1851; third session, chapter 69, page 169.]

Commissioner
to secure swamp
lands.

SECTION 918. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the commissioner of the state land office is authorized to take such steps as he thinks necessary, in order to secure to the state, the swamp lands granted by the act of congress of the 28th of September, 1850, entitled "An act to enable the state of Arkansas, and other states, to reclaim the swamp lands within their limits."

Commissioner
to direct county
surveyor
to examine.

SEC. 919. (2.) For this purpose the commissioner, when he has reason to believe there is any tract of swamp land within this state not reported as such by the United States surveyor, sufficient to justify a more particular examination, he shall direct the county surveyor of any county, in which said lands may be located, to make the examination, and provide the proofs necessary to secure such lands to the state, a list of which shall be returned to the land commissioner, or the authority acting in that capacity, verified by affidavit, for which services the surveyor is entitled to two dollars per day for each and every day actually employed; and for the purposes of this act, any unorganized county attached to another for election purposes in which an election precinct is organized, is declared to be a part of such organized county.

Duties of
governor.

SEC. 920. (3.) Previous to the election and qualification of the commissioner of the land office, the duties above prescribed shall devolve upon the governor, whose duty it shall be to procure from the surveyor general's office a list of the lands returned to that office as swamp lands, and take other steps in the premises as in his opinion are necessary to secure the best interests of this state.

Compensation.

SEC. 921. (4.) All compensation for services rendered, or expenses incurred, in carrying out the provisions of this act, must be made out of the proceeds and sales of said swamp lands.

Levies.

SEC. 922. (5.) Subject to the approval of the governor, the county surveyor is authorized to contract with individuals or companies for making the levies or drains necessary to reclaim any of the swamp lands of the state, by giving them a portion of the lands thus reclaimed or a portion of the proceeds thereof.

Commissioner
dispose of
lands.

SEC. 923. (6.) The commissioner may dispose of any of the swamp lands of the state, for such price as he may think them worth, as herein provided; for the purpose of ascertaining said value, the county surveyor and sheriff in any county in which such lands are located, may, upon the direction of the commission, appraise such lands in such manner as the school lands are now appraised, for which they are to receive a sum not exceeding two dollars per day each, for all the time actually and necessarily expended in making examination and appraisement.

Proceeds.

SEC. 924. (7.) The proceeds of the sales of such lands after paying

all expenses incurred in selecting, appraising, selling and reclaiming such lands as are deemed worthy of reclaiming, shall be paid into the state treasury, subject to the disposition of the general assembly.

ARTICLE II.

AN ACT to dispose of the swamp and overflowed lands within the state, and to pay the expenses of selecting and surveying the same.

[Passed January 13, 1853; took effect February 2, 1853; laws of fourth general assembly, chapter 13.]

SECTION 925. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That all the swamp and overflowed lands granted to the state of Iowa by the act of congress, entitled "An act to enable the state of Arkansas and other states to claim the swamp land within their limits," approved September 28, 1850, be, and the same is hereby granted to the counties respectively in which the same may lie, or be situated, for the purpose of constructing the necessary levees and drains, to reclaim the same—and the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county.

Swamp lands granted to the counties where situated.

SEC. 926. (2.) Whenever it shall appear that any of the lands granted to the state by the aforesaid act of congress, shall have been sold by the United States since the passage of that act, it shall be lawful for the said counties to convey said lands to the purchasers thereof. The deed shall be made by the county court as such and countersigned by the clerk of said court, with the official seal thereof affixed, and on delivering said deed to the purchaser, the county court shall take from him an assignment of all his rights in the premises, and as such assignee, the said court shall be authorized to receive from the United States the purchase money of said land; and whenever any lands embraced by the said act have been located by county land warrants, since the passage thereof, it shall be lawful for such county in which the same are situated, to convey the same in the manner aforesaid, to the person or persons who located said warrant, and take an assignment of the same to the county court which shall thereupon be considered as grantee of the state, and as such may locate said warrant upon any of the public lands belonging to the United States within the limits of said county.

When lands have been sold by U. S.

Deed to purchaser.

When located by warrant.

SEC. 927. (3.) In all those counties where the county surveyor has made no examinations and reports of the swamp lands within his county, in compliance with the instructions from the governor, the county court shall at the next regular term thereof, after the taking effect of this act, appoint some competent person, who shall as soon as may be thereafter, after having been duly sworn for that purpose, proceed to examine said lands and make due report, and plats, upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made, marked on the said plats, to the county courts respectively, which courts shall transmit to the proper officers, lists of all said swamp lands in each of the counties in order to procure the proper recognition of the same on the part of the United States, which lists, after an acknowledgment

Agents to examine and report.

of the same by the general government shall be recorded in a well bound book provided for that purpose, and filed among the records of the county court.

Care and charge of lands. SEC. 928. (4.) The said lands shall be under the care and superintendence of the *county courts* (board of supervisors*) of the counties respectively, in which the same are situated, and at the next April election, there shall be elected an officer to be styled *drainage commissioner* of the county of....., who shall within twenty days after his said election, enter into a bond with good security, to be approved by the county court, payable to the people of the state of Iowa, for the use of the inhabitants of the county of....., in the penal sum of ten thousand dollars, conditioned for the faithful performance of all the duties required of him, or which may hereafter be required of him by law.

Election of drainage commissioner.

Duty of county surveyor. SEC. 929. (5.) It shall be the duty of the surveyors of the several counties in this state who have surveyed, or shall survey, the swamp and overflowed lands in their respective counties, to make out plats of all the swamp and overflowed lands in the several townships, and fractional townships, within their counties, noting distinctly upon the same every tract, or parcel of swamp and overflowed land in each township, the quantity and quality thereof, as to whether the same be first, second or third rate, and it shall be his duty to return the same as soon as practicable, and in reasonable time to the clerk's office of the county court, and the said court, at some regular term thereafter, or sooner if deemed necessary, shall fix a valuation upon each tract, according to its quality, but in no case shall any of said land be valued at less than twenty cents per acre, and the plat with the description and valuation marked thereon shall be recorded in said book, and filed away among the records of the office.

Plats.

Return.

Court may fix time of sale; order sale of lands. SEC. 930. (6.) After the surveyors have returned the plats aforesaid, the valuations have been made, and recorded as aforesaid, the said court shall fix upon the proper time for selling said lands, which shall in all cases be at the county seat, and at the court-house door of the several counties. The said courts may order the whole of said lands to be sold, and the sale continued from day to day, or they may order a part only of said lands to be sold from time to time, as they may deem expedient, and all such orders, so made by them, shall be entered on record in said book.

Notice of sale. SEC. 931. (7.) The said drainage commissioner shall be notified in writing by the clerk, of all such orders, and within reasonable time thereafter, not exceeding ten days, he shall give at least forty days notice of the time and place of sale thereof, by publishing the same in some newspaper printed in the county; or if there be no such newspaper, then by posting up two notices thereof in each election precinct in the county, for the like period of forty days before said day of sale. The said notices shall contain an accurate description of the lands to be sold, and shall specify the time, place and terms thereof, and that the sale will be at public auction, between the hours of ten o'clock a. m. and five o'clock p. m. of the day fixed therefor, and that the same will be continued from day to day, if deemed necessary.

Contents of notice.

Order of sale. SEC. 932. (8.) In conducting the sales the said commissioner shall sell the same in such order as may be directed by the county court. No tract shall be sold for less than its valuation, and the same shall be

* See chapter 8, laws, extra session of the eighth general assembly, *post*.

cried separately, and long enough to enable any one to bid who desires it.

SEC. 933. (9.) The terms of selling said lands shall be to the highest bidder, for cash, the amount of which, however, may be discharged by the purchaser in labor, to be performed, in manner and according to the terms hereinafter specified.

SEC. 934. (10.) Upon closing the sales each day, the purchasers shall each pay, or secure the purchase money, according to the terms of sale, or in case of his failure so to do by ten o'clock the succeeding day, the tract purchased shall be again offered at public sale on the same terms as before, and if the valuation shall be bid, the same shall be stricken off, but if the valuation be not bid, the tract shall be set down as not sold. If sale is not made, the former purchaser shall be required to pay the difference between his bid and the valuation of the tract, and in case of his failure to make such payment, the *drainage commissioner* may forthwith institute an action of *debt* or *assumpsit* in his name for the use of the inhabitants of the proper county, for the required sum, and upon making proof, shall be entitled to judgment, with costs of suit, which when collected shall be applied as other moneys arising from the sale of lands.

SEC. 935. (11.) Upon the completion of every sale by the purchaser, the commissioner shall enter the same in a sale book kept for that purpose, and shall deliver to the purchaser a certificate of purchase, stating therein the name and residence of the purchaser describing the land sold and the price paid therefor, which certificate shall be evidence of the facts therein stated, and when presented to the county *court*, it shall be the duty of said *court* to execute to him a deed in fee simple for the land therein described, signed in the official capacity of said *court*, and countersigned by the clerk of said *court* with the official seal thereto affixed, which said deed shall vest in the purchaser an absolute title in fee simple of said land therein described.

SEC. 936. (12.) The said county *courts* shall cause said lands to be drained by the construction of proper levees and drains necessary to reclaim the same, and when it becomes necessary in the construction of levees and drains to pass through private property, a just compensation shall be made to the owner or owners thereof, if damage has been done such property, to be ascertained in the same manner as provided in the road law now in force in cases of roads.

SEC. 937. (13.) The surveyors employed to locate said swamp land, shall also report to the county *courts* all the lands in their respective counties which are susceptible of being drained or reclaimed, in all cases where said information cannot be satisfactorily had in some other way, with an estimate of the probable cost thereof, and at some regular term after said reports are received the said *courts* shall divide all such drainable lands in their counties into sections numbered one, two, three, etc., and whenever there shall be a sufficiency of lands sold to complete one or more sections, the same shall be as soon as practicable put under contract, and operation commenced thereon, and in like manner shall the work progress until the avails of said lands are exhausted or the work completed.

SEC. 938. (14.) The said county *court* shall cause the work to be done on the said sections to be let out at public sale to the lowest responsible bidder, and it shall be the duty of the drainage commissioner, on being ordered by said *court* so to do, to give at least four week's

Record.

Title.

Damages.

Lands redeemable.

Contracts.

Lettings.

notice of the time and place of such lettings, by putting up notices thereof in six of the most public places in the county, and in case there shall be a newspaper printed in the county, then, by causing a similar notice thereof to be published in the same, for a like period of four successive weeks before the day of such lettings, and the said notices shall contain specifications of the work to be done, to be made out under the direction and control of the county *court*, provided that two or more counties may reclaim swamp lands in conjunction, and in such case each county shall make payment in proportion to the amount of lands reclaimed in said county.

Bond.

SEC. 939. (15.) The persons to whom said lettings shall be struck off shall enter into bond, with good security, payable to said commissioner, for the use of the inhabitants of the county, in the penal sum of double the value of his bid, conditioned for the faithful performance of the work so undertaken by him, according to the specifications thereof, and on a failure to comply with the condition thereof, said bond shall be forfeited, and suit brought upon the same to recover damages for non-compliance.

Paying by labor.

SEC. 940. (16.) The said county *courts*, in laying off said work into sections as aforesaid, shall make such division thereof as will enable purchasers of land to pay for the same in necessary work, and if said purchasers shall be the lowest bidders at the lettings, the land so purchased shall be paid for in work; but if any other responsible person or persons shall be lower bidders, the same shall be struck off to him or them, and the purchasers aforesaid shall be forthwith required to pay for their lands in cash, or credit by giving mortgage and good security for the purchase money, at the discretion of the said drainage commissioner. But no such credit shall be given for a greater length of time than twelve months, and shall draw interest at the rate of six per cent per annum.

Sales limited.

SEC. 941. (17.) The said county *courts* shall not dispose or sell any more of said lands than shall be absolutely necessary to complete the reclaiming, and draining of the same, and in all cases where there are any lands remaining unsold after the completing of said draining in any county, they shall be expended in the building of roads and bridges through or across said swamp lands, under the direction and superintendence of the drainage commissioner, and if said lands are not needed for this purpose, then to be disposed of in the construction of roads and bridges within the county.

Roads and bridges.**Embezzlement.**

SEC. 942. (18.) If any drainage commissioner, or other person shall embezzle, or appropriate to their own use any money, bonds, bills, notes or mortgages belonging to the drainage fund of any county in this state, he, she, or they shall be liable to indictment, and on conviction shall be imprisoned in the penitentiary of this state, for a period not less than one, nor more than five years, and such conviction shall work a forfeiture of office in all cases.

Private sale.

SEC. 943. (19.) All lands not sold at public sales as herein provided for shall be subject to sale at any time thereafter at the valuation, and the clerk of the county *court* is authorized and required to sell all such lands at private sale upon the terms upon which they were offered at public sale, the money to be paid over to the drainage commissioner, and his receipt taken therefor.

Terms.**Accounts verified.**

SEC. 944. (20.) The surveyor shall be required to file in the office of the clerk of the county *court* an affidavit setting forth the number of days he was actually and necessarily employed, and the number of

days that each person (naming such person) was actually and necessarily employed by him, and when a team was employed, the number of days such team was actually and necessarily employed in examining the swamp and overflowed lands, and in making out plats and descriptions of the same.

SEC. 945. (21.) When accounts are proved and filed in such manner as shall be satisfactory to the county *courts*, the clerk of said *court* is hereby authorized and required to issue a county order for the amount thereof, in favor of the persons entitled thereto, or on their written order, the amounts authorized by this act to be paid are hereby appropriated: *provided*, that the clerk of the county *court* shall charge the several amounts so paid to the drainage fund of the several counties, and the same shall be a debt due and owing from such fund to the counties, and it is hereby made the duty of the drainage commissioners to pay out of the first moneys received from the sale of lands, to the treasurers of the several counties, the said amounts so charged by the clerk against such drainage fund as aforesaid.

SEC. 946. (22.) Each and every person who on the twenty-eighth day of September, 1850, was the owner of any improvement, or who since that date has become the owner of any improvement on any of the said swamp, or overflowed lands, with a view to a residence, and occupation of said land for agricultural purposes, shall have the right to purchase, at the appraised value thereof, a quantity of land including his said improvement, to be bounded by the leading subdivisions, not exceeding one quarter section, to consist of the quarter-quarter, half-quarter, or quarter section: *provided*, that any person claiming the right to purchase under this act shall, within three months after the taking effect of this act, file in the clerk's office of the county *court* of the proper county, a notice of his, her, or their claims, describing the land by its numbers, and proving the facts in relation to such claim to the satisfaction of such clerk: *and provided further*, that any person, claiming the right to purchase as aforesaid, shall within twelve months from the day set for selling the swamp lands in the neighborhood in which his improvement is situated, pay to the drainage commissioner the consideration money for the land claimed, or the person so claiming shall be allowed to pay the same in labor, according to the provisions of this act, which payment shall entitle him, her, or them, to a deed conveying an estate in fee simple; but in case of failure to make such payment, or to pay in labor as aforesaid, the right to make the purchase shall cease.

SEC. 947. (23.) All business in relation to the swamp and overflowed lands shall be transacted at the regular term of the *courts*, except on extraordinary occasions, when said county *courts* shall have power to appoint special terms for the transaction of such business. And the county *courts* shall have power to allow the drainage commissioners, surveyors, clerks, and all others employed, such fees as they may deem just and right, to be paid out of the county treasury and charged to the drainage fund.

SEC. 948. (24.) It shall be the duty of all constables, coroners, sheriffs, justices of the peace, county surveyors and grand jurors to take notice of all trespasses committed on such lands, either by cutting timber, or otherwise, and to take all legal steps under the laws of this state to bring such offenders to punishment.

Payment.

Charged to drainage fund.

Pre-emption.

Appraised value.

Limitation.

Time of payment.

May pay in labor.

Failure to forfeit.

Business.

Regular terms.

Special terms.

Fees.

Trespass.

**Unorganized
counties.**

SEC. 949. (25.*) As soon as any of the unorganized counties of this state become organized, so much of this act as relates to the selecting of the swamp lands by surveyor, and returning the lists thereof to the proper departments, to obtain the necessary sanction thereto on the part of the United States, shall be in force and effect, and the time of appraising, selling and draining of the said swamp lands shall be at the discretion of the county *courts* respectively.

Repeal.

SEC. 950. (26.) All acts and parts of acts now in force in respect to the swamp lands of this state are hereby repealed.

ARTICLE III.

Title.

AN ACT supplemental to an act entitled "An act to dispose of the swamp and overflowed lands within this state, and to pay the expenses of selecting and surveying the same," approved January 13, 1853.

[Passed January 24, 1853, took effect July 1, 1858; laws of fourth general assembly, chapter 65, page 116.]

**Returns made
to secretary.**

SECTION 951. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That, so soon as the examination and survey of the swamp and overflowed lands in any of the counties of this state shall be completed by the county surveyor (or other person appointed for that purpose), a full and complete return of the same shall be forwarded to the secretary of state, whose duty it shall be to report the same to the surveyor-general.

His duty.

**Expenses how
paid.**

SEC. 952. (2.) *And be it further enacted,* That all expenses which may have accrued prior to the passage of this act, in any of the counties of this state, for the examination and survey of said swamp and overflowed lands, shall be paid in accordance with the provisions of the act to which this is amendatory.

ARTICLE IV.

Title.

AN ACT providing for the collection of money due to the state of Iowa from the government of the United States, arising from the disposition of the swamp lands, and for selecting the swamp lands and securing the title to the same.

[Passed January 25, 1855, took effect July 1, 1855; laws of the fifth general assembly, chapter 138, page 261.]

**Governor to
draw money.**

SECTION 953. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the governor be and he is hereby authorized and empowered to draw from the treasury of the United States all moneys which may now be due, or which may hereafter become due to the state of Iowa, arising from any disposition of the swamp lands of this state by the government of the United States: *provided,* that after said money shall have been transferred to the treasurer of this state, the governor, auditor and secretary of state shall constitute a board with power to ascertain what amount of said money is due to any of the counties of this state for swamp lands sold by the government of the

Board.

*In archives, 26.

United States since said lands were granted to and became the property of said counties, and said board shall certify to the state treasurer the result of their investigation; and the moneys so ascertained to be due to the counties aforesaid, shall remain in the treasury subject to the draft of the treasurers of said counties.

SEC. 954. (2.) That the governor is hereby required to cause said moneys to be deposited in the treasury of this state. Deposit.

SEC. 955. (3.) That the governor is hereby authorized to adopt such measures as to him may seem expedient, to provide for the selection of the swamp lands of this state and to secure to the state the title to the same, and also for the selection, in the name of the state, other lands in lieu of such swamp lands as may have been or may hereafter be entered with warrants: *provided*, that the provisions of this act shall not be construed to apply to any swamp lands which have already been selected by any organized county of this state under the provisions of any previous law: *and provided further*, that this act shall not be construed to impair the rights of the counties of this state to any swamp lands within said counties under the provisions of any law in force in relation to the same, and that the selections made by the organized counties shall be reported by the governor to the authorities at Washington. Selection of swamp lands.
Proviso.

ARTICLE V.

AN ACT to amend an act entitled "An act to dispose of the swamp and overflowed lands within the state," approved January 13, 1853. Title.

[Passed January 25, 1855, took effect February 21, 1855; laws of the fifth general assembly, chapter 110, page 173.]

SECTION 956. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That no swamp or overflowed lands granted to the state, and situate in the present unorganized counties, shall be sold or disposed of till the title to said lands shall be perfected in the state, whereupon the titles to said lands shall be transferred to the said counties where they are situated: *provided*, that said counties shall refund to the state the expenses incurred in selecting said lands under the provisions of an act of the present session of the general assembly authorizing the governor to cause said lands to be surveyed and selected, with ten per cent interest thereon. Each county to refund its proportional amount of said expenses. Unorganized counties.
Transfer.

SEC. 957. (2.) *Be it further enacted*, That in all those counties which are now organized, when it may be impossible to reclaim said swamp land, said counties are hereby authorized to employ the proceeds of said lands, or any part thereof, in the erection of county buildings, or other work of improvement within their limits; *provided*, that in such case, the county *judge* shall first submit the question, including the proposed work of improvement, to the people of his county in the manner provided for in sections 114 and 115 of the code. Organized counties.
Expend proceeds.
Submit to the people.

SEC. 958. (3.) In all cases contemplated in the foregoing sections, it shall be the duty of the drainage commissioner to pay over the proceeds of the sales of said lands, to the county treasurer. Proceeds.

SEC. 959. (4.) No swamp or overflowed lands shall hereafter be sold at less than one dollar and twenty-five cents per acre. Minimum.

SEC. 960. (5.) Such provisions of the act approved January 13th, Repeal.

1853, in relation to swamp lands, and all other acts or parts of acts relating to the same, as conflict with the provisions of this act, are hereby repealed.

ARTICLE VI.

Title. AN ACT to amend an act entitled, "An act to dispose of the swamp and overflowed lands within this state, and pay the expenses of selecting and surveying the same," approved February 2 (January 13), 1853.

[Passed July 15, 1856, took effect fifth general assembly, extra session, chapter 36, page 83.]

Deposit of money. SECTION 961. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all moneys heretofore or hereafter to be realized from the sale of the swamp or overflowed lands, situated in any of the counties in this state, shall be deposited forthwith by the officers receiving the same, in the county treasury of their respective counties.

How paid out. SEC. 962. (2.) It shall be the duty of the county treasurer receiving swamp land money, to pay the same out only on the joint order of the county *judge* and swamp land commissioner, or if there be no swamp land commissioner, then upon the order of the county *judge*.

Loan. SEC. 963. (3.) The county *judges* and treasurers shall have power jointly, and it is hereby rendered their duty, in all cases when the same can be done without detriment to the work of reclaiming said land, to loan any swamp land funds that may be in their several treasuries, at ten per cent interest on approved real estate security, for such times as they may deem advisable, and the county *judges* and treasurers shall make semi-annual and separate public exhibits of the condition of the swamp land fund, showing the amounts received, the amounts expended, for what purpose and to whom paid, the amounts loaned and to whom, and the amounts on hand; which exhibits shall be filed with the county clerks, to be by them recorded in books kept for that purpose.

Not legalize. SEC. 964. (4.) Nothing in this act shall be so construed as to legalize the sale of swamp lands in case where such sales were made without authority of law.

ARTICLE VII.

Title. A BILL to prevent trespass or waste on swamp or other lands in the state of Iowa, and for other purposes.

[Passed January 25, 1855, took effect January 31, 1855; laws of fifth general assembly, chapter 156, page 228.]

Trespass. SECTION 965. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That whenever the county judge of any county shall become satisfied that trespass or waste, by cutting wood or carrying it away, or in any other manner, has been, within six months then past, or is then being committed on any swamp or overflowed lands, situate in, and belonging to, such county, and which have been properly selected according to law, and the returns thereof made to such county judge by the selecting officer, it shall be the duty of said county

judge to issue a warrant to the sheriff of his county, or to some other officer directing said sheriff, or officer, to arrest and bring before him, forthwith, the person or persons charged in said warrant with having committed trespass or waste, as aforesaid, or any person then committing the same; *provided*, that this section shall not be construed as authorizing a warrant for trespass to be issued against any person for cutting or carrying away wood on swamp or overflowed lands, which such person shall have entered at any United States land office, or against any person who has acquired a *bona fide* preemption right to any of said lands, under the subsequent provisions of this act.

Warrant.
Arrest.

Proviso.

Subpoena.

SEC. 966. (2.) It shall be the duty of the county judge, at the time of issuing said warrant, to issue a subpoena to any person or persons, who may be cognizant of trespass or waste committed in violation of this act, requiring such person or persons to appear before him forthwith, to testify in relation to the matter; which subpoena shall be served by the sheriff of the county, or some other officer, deputed by the county judge.

Trial.

SEC. 967. (3.) On the appearance of the person or persons arrested under said warrant the county judge shall proceed to hear testimony in the case, and if the person or persons so arrested shall be found guilty of committing trespass or waste contrary to the provisions of this act, he or each of them, if more than one is arrested, shall be adjudged to pay a fine not exceeding one hundred dollars or to be imprisoned in the county jail for a period not exceeding thirty days at the discretion of said judge; *provided*, that any person so arrested shall be entitled to be tried by a jury of six disinterested residents of the county, if he or they require it, and the county judge shall have authority to commit such person to the county jail until the fine and costs adjudged against him shall be paid.

Fine and imprisonment.

Jury.

SEC. 968. (4.) All fines so inflicted shall inure to the use of the school fund, and be paid to the person having charge of that fund in the county, after deducting from the same the amount of costs which may have been paid by the county, in cases of failure, to sustain any previous action commenced under this act; and the costs in prosecutions under this act, shall be the same as the costs in similar prosecutions before a justice of the peace.

Fines, how disposed of.

SEC. 969. (5.) It shall be the further duty of the county judge of each county whenever he may suspect that trespass or waste has been committed, as mentioned in the first section of this act, to issue his mandate to the sheriff of his county, or to some other officer therein, to restrain and prevent all persons from carrying away wood or timber, that may have been cut on any of the swamp or overflowed lands above specified; and to take possession of such wood or timber, and dispose of the same by public or private sale, at the discretion of the sheriff, or officer serving the writ, and return the proceeds thereof to the county treasurer.

Mandate to prevent removal of timber.

SEC. 970. (6.) It is further made the duty of the county judge of the several counties, to sue for damages, in the name, and for the use of, their respective counties, in the proper district court, any person who shall have committed trespass or waste, in violation of the provisions of this act: *provided*, that it shall be discretionary with said judges to proceed against such person either by criminal prosecution, or civil suit, as above provided, or both.

Suit for damages.

Trespass or waste.

SEC. 971. (7.) Any person convicted of trespass or waste, before the county judge, as above specified, may take an appeal to the proper

Appeal.

district court, by giving bond and security to the satisfaction of the county judge, in the usual penalty and condition, with the further condition that he will not, in the meantime, and until the decision of said district court in the matter, commit further waste or trespass as above specified.

All state lands. SEC. 972. (8.) The foregoing provisions are extended to all school, university, or other lands belonging to the state, so far as the same may be applicable.

Preemption. SEC. 973. (9.) Any person who shall have a *bona fide* claim, by actual settlement or improvement upon any of the swamp or overflowed lands in this state, which shall have been selected, and the returns thereof made to the county judge, as specified in the first section of this act; and any *bona fide* assignee of such person shall be allowed to enter the same by paying into the county treasury of the proper county the sum of one dollar and a quarter per acre therefor, as hereinafter provided: *provided*, that such person, or his assignee, shall first prove such claim, before the proper county judge, within ninety days after the first day of March, 1855: *provided further*, that in any county in which the proper returns shall not have been made to the county judge thereof, by the selecting officer, such person shall have ninety days after the time at which said returns shall be made, wherein to prove his said claim.

Perfecting right of preemption. SEC. 974. (10.) Any person desirous of perfecting his said claim, and of receiving the benefit of a preemption right to any swamp or overflowed lands above specified, shall be entitled to the same, by proving his claim, within the time specified in the eighth section of this act to the satisfaction of the proper county judge, by any testimony which shall be satisfactory to said judge; and in case the claimant's right is contested by another, said judge shall appoint a day, when he will hear the evidence on both sides, and he shall make such decision in the case as he may deem right, and award costs in his discretion; and he shall give to the successful claimant a certificate of preemption: *provided*, that no person shall receive a certificate for more than one hundred and sixty acres of land, which may be situate in two distinct tracts, one to consist of prairie, and one of timber: *provided*, that the timber tract shall not exceed eighty acres. The provisions of this, and the preceding section, are hereby extended to any person who shall hereafter acquire a *bona fide* claim, as above specified: *provided*, he shall prove the same according to the provisions of this act, within sixty days after acquiring the same.

Amount.

Certificates. SEC. 975. (11.) The said certificate shall entitle the holder thereof to perfect his title to the land mentioned therein, whenever the proper returns of the Iowa swamp lands are made, so as to complete the title of the several counties thereto; and the several county judges shall give public notice thereof, and require the several claimants holding certificates, to pay the entrance money into the treasury of the proper county; whereupon said claimant shall be entitled to receive a patent for the land mentioned in their respective certificates.

Appeal. SEC. 976. (12.) Any person feeling aggrieved by the decision of the county judge, under the ninth section of this act, may appeal therefrom to the district court of the proper county, *which shall have final jurisdiction over the matter*, and shall make such decision in the premises as justice and equity may require.

[Section (13) is repealed by the section 473.]

SEC. 977. (14.) All acts and parts of acts, in relation to swamp lands, inconsistent herewith, are repealed.

ARTICLE VIII.

AN ACT in relation to the swamp lands of this state.

Title.

[Passed January 24, 1857, took effect July 1, 1857; laws of the sixth general assembly, chapter 115, page 127.]

SECTION 978. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That all acts and parts of acts now in force allowing the right of *preemption* on the swamp lands of this state, be, and the same are, hereby repealed: *provided*, this act shall not apply to the actual settlers on said lands at the time of the passage of this act.

ARTICLE IX.

AN ACT for the relief of swamp land preemptors.

Title.

[Passed March 22, 1858, took effect April 7, 1858; laws of the seventh general assembly, chapter 100, page 198.]

SECTION 979. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That in all cases where any person had acquired a *bona fide* preemption claim to any swamp land of this state, under the laws heretofore in force, and who was, in good faith residing on the same on the fifth day of September, 1857, such person shall not be held to have forfeited the same in consequence of not having proved up such preemption in accordance with such law: *provided*, he shall produce his evidence and prove up the same in accordance with the laws in force prior to the fifth day of September, 1857, and within six months from the day this act goes into force: *and provided further*, that no certificate of preemption has been granted for the land so claimed to any other person.

Preemption prior to 1857 not forfeited.

Must prove up within 6 months.

SEC. 980. (2.) It shall be the duty of the county judge when application is made for a preemption under this act, to hear and determine upon the same within thirty days from the date of the application, and shall notify the applicant at the time of his making his application, of the day upon which he will hear the testimony in the case. If the proof shall be deemed sufficient, the county judge shall issue a certificate of preemption in favor of the claimant to lands claimed, or to such portion of them as he shall have sustained his claim for a preemption to.

County judge hear and determine.

Issue certificate.

SEC. 981. (3.) The several county judges, in all cases where any person now holds, or may hereafter fairly acquire certificates of preemption to swamp lands in accordance with the laws heretofore in force, or in accordance with this act, shall be required to quit-claim the county interest to the persons holding said certificates of preemption, or the lawful assignees under the same, on payment or tender of payment of the said county judge, the price per acre named in such certificate, at any time within six months from the passage of this act; or if said certificate is granted after the passage of this act, six months from the date thereof.

County judge quit-claims the interest of the county.

ARTICLE X.

Title. AN ACT making an appropriation for swamp land purposes.

[Passed January 27, 1858, took effect February 13, 1858; laws of seventh general assembly, chapter 3, page 3.]

Governor to appoint agent. SECTION 982. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the governor is hereby authorized to appoint an agent to proceed to Washington to effect an adjustment and settlement for the different counties in the state, of their swamp land business, and also one or more to have the swamp and overflowed lands selected in the new and unorganized counties of the state; and for defraying the expenses of the same there be, and hereby is appropriated from the treasury of the state, the sum of two thousand dollars.

Appropriates \$2,000.

Apportion scrip. SEC. 983. (2.) That when the general government shall issue the scrip, and refund the money to the state, contemplated by the act of congress of 2d March, 1855, and patent to the state the lands accruing by virtue of the act of congress of 28th September, 1850, the governor, register of state land office, and the agent of the county, if any, shall constitute a board to ascertain what amount of said land, money and scrip, is due the different counties in the state, and when so ascertained the same shall be subject to the order of the county judges, or other proper authorities in the county.

Counties refund to the state.

SEC. 984. (3.) That the two thousand dollars hereby appropriated be refunded the state with ten per cent interest from date of same, each county paying an amount proportionate to its share of the lands, scrip and money received, to be ascertained and withheld by said board and paid over to the state treasury.

Repeal.

SEC. 985. (4.) Any laws inconsistent with, or contrary to this act, are hereby repealed.

ARTICLE XI.

Title. AN ACT to authorize the counties to use the swamp lands to aid in the construction of railroads and seminary buildings.

[Passed March 22, 1858, took effect April 21, 1858; laws of seventh general assembly, chapter 132, page 156.]

Swamp lands diverted to railroads, etc.

SECTION 986. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it shall be competent and lawful for the counties owning swamp and overflowed lands, to devote the same or the proceeds thereof, either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads and highways, for building institutions of learning or for making railroads through the county or counties to whom such lands belong: *provided,* that before any of said land or the proceeds thereof shall be so devoted to any of the purposes aforesaid the question whether the same shall be so done shall be submitted at some general or special election to the people of the county.

Submitted to the people.

Officer may make conveyance.

SEC. 987. (2.) The proper officer or officers of any county may contract with any person or company for the transfer and conveyance of said swamp or overflowed lands, or the proceeds thereof or otherwise appropriate the same to such person or company or to their use,

for the purpose of aiding or carrying out any of the objects mentioned in the first section of this act, which said contract shall be reduced to writing and signed by the respective parties or their lawful authorized agents.

SEC. 988. (3.) Before such contract shall be of any force or validity the same shall be published for four weeks immediately preceding some general or special election in some newspaper published in the county and if there be none published therein, then three copies of the same shall be posted in three of the most public places in each township in the county for the length of time aforesaid, together with a proclamation of the proper officer and directing how and where the vote thereon shall be taken, and returns made and canvassed and in what manner or form the people shall vote thereon, and if it shall appear that a majority of the people in any county voting thereon are in favor of the contract or proposition submitted to them, then and in that case such contract or proposition shall be binding upon the parties thereto, but if a majority of the people voting on such proposition are against the same then it shall be null and void: *provided*, that no sale, contract or other disposition of said swamp or overflowed lands shall be valid, unless the person or company to whom the same are sold, contracted or otherwise disposed of to, shall take the same subject to all the provisions of the acts of congress of September the 28th, 1850, and shall expressly release the state of Iowa and the county in which the lands are situate, from all liability for reclaiming said land.

Notice of submitting the question to the people.

Contract made binding.

Company assumes the liability of county

SEC. 989. (4.) It is further provided that this act shall be so construed as not to interfere with any preemption claim under the act of 1855, chapter 156: *provided*, said claimant was an actual and *bona fide* settler upon such land as provided in section nine of said act and has not assigned his said preemption

Preemptions secured.

SEC. 990. (5.) Nothing in this act shall be so construed as to authorize or allow the people of any county or officer thereof in any manner to contract or otherwise dispose of the swamp or overflowed lands belonging to any county attached thereto for election, judicial or other purposes.

Lands exempted.

(CHAPTER 24, LAWS OF 1874).

SWAMP-LAND COMMISSIONER DISCONTINUED.

AN ACT to repeal chapter 135 of the acts of the twelfth general assembly. Title.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That chapter 135 of the acts of the twelfth general assembly is hereby repealed.

1868: ch. 135. Office of commissioner to settle land claims with U. S. abolished. Publication clause.

SEC. 2. This act, being deemed of immediate importance, shall be in force from and after its publication in the Iowa State Register and Iowa State Leader, newspapers published at Des Moines, Iowa.

Approved, March 18th, 1874.

I hereby certify that the foregoing act was published in Des Moines in the Iowa Daily State Leader, March 30, and in the Iowa Daily State Register, April 2, 1874.

JOSIAH T. YOUNG, *Secretary of State.*

(CHAPTER 8, LAWS OF 1861.)

SWAMP LANDS.

Title. AN ACT giving control of the swamp lands in the several counties of the state to the board of supervisors.

SECTION 1. *Be it enacted the General Assembly of the State of Iowa,* The swamp lands in the several counties in the state be and the same are hereby placed under the control of the boards of supervisors of said counties respectively.

SEC. 2. The acts of all boards of supervisors in any county of this state in relation to swamp lands heretofore done and performed are hereby legalized and ratified.

SEC. 3. This act being deemed of immediate importance shall be in force upon its publication in the Iowa State Register, Iowa State Journal and the Commonwealth, or either two of said newspapers, any law to the contrary notwithstanding.

Approved, May 28th, 1861.

(CHAPTER 160, LAWS OF 1862.)

SWAMP LANDS.

Title. AN ACT to authorize the governor and board of county supervisors to appoint agents in regard to swamp lands belonging to the state of Iowa, and defining their duties.

Gov. appoint agents. SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the governor is hereby authorized and empowered to appoint an agent or agents to make a settlement with the commissioners of the general land office, for the lands enuring to the state of Iowa by an act of congress, entitled "An act to enable the state of Arkansas and other states to reclaim the swamp and overflowed lands within their limits," approved September 28th, 1850.

Land scrip. SEC. 2. That when the general government shall have issued the land scrip and refunded the money to this state, as provided in the act of congress approved March 2d, 1855, said land scrip shall be deposited with the state treasurer, subject to the order of the board of supervisors of the county to which said money or land scrip shall belong, as hereinafter provided.

Scrip transferred. SEC. 3. That as soon as any of the land scrip, referred to in the second section hereof, shall be received by the register of the state

land office, he shall immediately notify the governor of such fact; when it shall be the duty of the governor to appoint an agent or agents to receive and locate said scrip; and the appointment of the governor with the great seal of the state attached, shall be sufficient authority for the register of the state land office to transfer to the person so presenting said appointment, any of the land scrip referred to in this act.

SEC. 4. When the agent contemplated in the third section hereof, shall by virtue of his office, receive any of the land scrip herein referred to, it is hereby made his duty to proceed to the most convenient land office at which said land scrip can be located, and make selections of the number of acres of land named in the scrip he may then have in his possession, and make his return in writing, accompanied with the certificate of the register of the land office where said location may be made, to the register of the state land office. But if there should not be a sufficient number of acres of land subject to be selected by said agent in any one of the government land offices to which said agent may apply, he is authorized to apply to any or all of such offices wherein said scrip can be located, until the scrip in his possession shall be disposed of.

Agents to locate scrip.

SEC. 5. As soon as any agent contemplated by this act shall deliver his return as provided in this act, to the register of the state land office, it is hereby made the duty of said register to file and record the same according to law, and immediately thereafter send a certified copy thereof to the commissioner of the general land office, and demand and receive from said commissioner a patent for the lands thus located, and when such patent shall have been received by said register in his office, he is hereby required to notify the governor of the receipt thereof, when it shall be the duty of the governor to deed the same to the county or counties to which it belongs, and mail the same to the clerk of the board of supervisors of such county.

Register to obtain patent.

Gov. to deed to counties.

SEC. 6. Before any agent contemplated by this act will be authorized to enter upon the discharge of the duties herein assigned him, he shall execute a bond to the state of Iowa, in a penal sum to be fixed by the governor and register of the state land office, and with sureties to be approved by them, which approval shall be in writing on the back of said bond, and signed by the governor and register, which said bond after being so approved shall be by them deposited and recorded in the office of the secretary of state, and shall be for the benefit of any party injured by a breach thereof.

Bond of agent.

SEC. 7. That the agent or agents appointed by virtue of the provisions of the first section of this act, shall act under and by virtue of written instructions given them by the governor and register of the state land office. But in no case shall said agent be instructed or empowered to receive from the general government any portion of the money due from the government to this state.

Agents act under instructions.

SEC. 8. It shall be the duty of the register of the state land office upon the information that the money due this state, or any part thereof can be obtained, to notify the state treasurer, with information to what county it belongs, when it shall be the duty of said treasurer to receive and collect the same.

Register to notify state treasurer.

SEC. 9. The state treasurer shall, as soon as any of the said money comes into his hands by virtue of this act, notify the clerk of the board of supervisors of the county to which said money belongs, and upon the receipt of such information by any such clerk in this state,

Counties draw their money from state treasury.

it shall be his duty to communicate such information to the supervisors of his county at their first regular meeting thereafter, and when the board of supervisors of any such county shall by an agent appointed by them, present an order to the state treasurer for the money belonging to their county, certified to by the clerk of said board, with the county seal thereto attached, to the state treasurer, he shall pay over to such agent the money belonging to said county, and their order so presented shall be a sufficient voucher to the treasurer for the payment by him of said money.

County agents
to give bond.

SEC. 10. The board of supervisors of any county in this state or the clerk thereof, shall not deliver to any agent appointed by them to receive the money due to any such county, as contemplated in this act, any order or orders to draw such money until such agent or agents shall have executed a bond to such county in a penalty equal to double the amount of money to be drawn by him, with sureties to be approved by said board for the faithful discharge of his said trust.

Compensation
of county
agents.

SEC. 11. That the agents appointed by the board of supervisors by virtue of this act shall receive in full compensation for their services three dollars per day for the time actually employed by them on said services, said compensation to be paid by the counties receiving said lands or money, and such further sums of money to pay the traveling expenses of said agent while acting in the discharge of his duties as may be agreed upon by and between said agent and the board of supervisors of the county or counties for whose benefit he is acting.

Compensation
of state agent.

SEC. 12. The agent or agents appointed by the governor under the provisions of this act shall receive as a full compensation for the services rendered, and expenses incurred by virtue of said appointment, the sum of four dollars per day, which said compensation shall be paid by the state; but the amount so paid shall be divided pro rata among the several counties, according to the amount in value of the money and lands secured to such county by the provisions of this act, the land to be valued at \$1.25 per acre, and the amount so found due by each county to the state shall be paid before such county shall receive its share of the money and lands which may be obtained under the provisions of this act.

Special county
agent.

SEC. 13. Notwithstanding the foregoing provisions of this act, the board of supervisors of any county, for the purpose of expediting a settlement of the claim of such county, may nominate to the governor a suitable person or special agent to settle said claim; and the governor shall thereupon appoint such person the special agent of the state to make such settlement with the United States for the swamp lands within the territorial limits of such county. The proceeds of such settlement may be received by such agent, and shall be delivered to the said board of supervisors for the use of the county. The costs, expenses and compensation of such special agent shall be paid by the county requesting appointment thereof.

SEC. 14. All acts and parts of acts coming in conflict with this act are hereby repealed.

Approved, April 18, 1862.

(CHAPTER 8, LAWS OF EXTRA SESSION, 1861.)

SWAMP LANDS.

AN ACT giving control of the swamp lands in the several counties of the state to the board of supervisors. Title.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* The swamp lands in the several counties in the state be and the same are hereby placed under the control of the boards of supervisors of said counties respectively. Placed under control of board of supervisors.

SEC. 2. The acts of all boards of supervisors in any county of this state in relation to swamp lands heretofore done and performed, are hereby legalized and ratified. Acts of board of supervisors legalized.

Approved, May 28, 1861.

(CHAPTER 77, LAWS OF 1862.)

SWAMP LANDS.

AN ACT to amend section nine hundred and eighty-six (986) of the revision of 1860, in relation to swamp lands. Title.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That section nine hundred and eighty-six of the revision of 1860, be so amended as to read as follows: That it shall be competent and lawful for the counties owning swamp and overflowed lands to devote the same, or the proceeds thereof, either in whole or in part to the erection of public buildings for the purpose of education, the building of bridges, roads and highways, for building institutions of learning, or for a permanent school fund for the use of the county to which such lands belong, or for building county buildings, or for making railroads through the county or counties to which such lands belong; *provided,* that before any of said land or the proceeds thereof shall be so devoted to any of the purposes aforesaid, the question whether the same shall be so done shall be submitted at some general or special election to the people of the county; [and for that purpose the boards of supervisors are hereby authorized to call a special election if properly petitioned for by the legal voters of the county]; *provided always,* that no county is hereby released from its obligations to make the necessary drains and levees contemplated by act of congress passed September 28, 1850, and the act of the general assembly of this state, passed January 13, 1853. Counties may dispose of their swamp lands.

Amended by ch. 135, 12 G. A.

SEC. 2. This act being deemed of immediate importance, shall take effect and be in force from and after its publication in the Daily State Register and Des Moines Times.

(CHAPTER 67, LAWS OF 1864.)

SALE OF SWAMP LANDS.

Title.	AN ACT for the sale of the swamp lands in the several counties in this state.
Appoint appraisers.	SECTION 1. <i>Be it enacted by the General Assembly of the State of Iowa,</i> That the county boards of supervisors of the several counties of this state may appoint three citizens of such county whose duty it shall be to make a careful examination of the swamp lands within such county situated and lying in, along or contiguous to navigable streams; such lands being subject to periodical overflow during any of the summer months, which have been or may hereafter be confirmed to such county and remaining unsold, and proceed to appraise the value of the same, and said appraisers shall make a return of the valuation of such swamp lands to the clerk of the board of supervisors within thirty days from the time of receiving notice of their appointment.
Appraise overflowed lands.	
Return appraisal.	
Appraisal of swamp lands not overflowed.	SEC. 2. All other swamp lands in the counties of this state, not lying in or along navigable streams, and not subject to such overflow as provided in section one of this act, may be appraised and sold under the provisions of this act, but all lands not subject to such overflow shall not be appraised or sold for a sum less than one dollar per acre; <i>provided,</i> that the words "navigable streams," as is used in this act, shall be construed to mean streams actually navigated by steamboats during the summer months.
Minimum price.	SEC. 3. The appraisers provided for in section one of this act, before entering upon the discharge of the duties therein prescribed, shall take and subscribe an oath to faithfully perform the duties assigned them, and such appraisers shall each receive two dollars per day for each day actually employed in such service, to be paid out of the funds arising from the sale of swamp lands.
Navigable streams.	
Oath.	SEC. 4. When the swamp lands have been appraised as provided in this act, the board of supervisors of such county may authorize such swamp lands to be sold at public or private sale; <i>provided,</i> said lands shall not be sold for a less sum than their appraised value, and <i>provided further,</i> that no lands, except such as are provided for in section one of this act, shall be sold for less than one dollar per acre.
Compensation.	SEC. 5. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.
Sale.	Approved, March 22, 1864.

(CHAPTER 134, LAWS OF 1878.)

DISPOSITION TO BE MADE OF SWAMP LAND INDEMNITY FUND NOW HELD BY THE TREASURER OF STATE.

Title.	AN ACT to authorize the treasurer of state to pay to the several counties the amount of the swamp land indemnity fund that has been withheld by him and his predecessors in office under the provision of section 12, chapter 160 of the acts of the ninth general assembly.
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WHEREAS, The treasurer of state has, by authority granted in section 12, chapter 160 of the acts of the ninth general assembly, retained from time to time out of [the] swamp land cash indemnity fund belonging to the several counties of the state, and passing through his office, a percentage of said fund to reimburse the state for supposed expenses incurred in securing the payment of said cash indemnity from the United States; and,

Preamble.

Part of fund retained to pay expenses of state.

WHEREAS, The money thus retained now lies idle in the treasury for want of lawful authority to use the same; therefore,

But never used.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the treasurer of state shall pay to the treasurer of each county the amount of the swamp land indemnity fund that has been retained by him or his predecessors in office under the provision of section 12, chapter 160 of the acts of the ninth general assembly, and take a receipt therefor of said county treasurer in triplicate, one of which he shall retain in his office, and file one with the auditor of state, and one with the auditor of the county receiving the money.

And amount shall be paid to county treasurer.

SEC. 2. Upon the receipt from the treasurer of state of the receipt of the county treasurer, the auditor of the county shall notify the board of supervisors at their first meeting thereafter of the amount so paid, and they shall make such disposition of the money thus received as shall be just and equitable and for the best interest of the county.

Disposition to be made of money by county.

SEC. 3. Hereafter, on the receipt of any money from the United States in payment of cash indemnity for swamp lands, the treasurer of state shall pay to the county entitled thereto the full amount received by him for such county in accordance with the provisions of chapter 160 of the acts of the ninth general assembly, and shall not retain any part thereof to reimburse the state.

Treasurer of state shall not hereafter retain any part of fund.

SEC. 4. This act shall take effect from and after its publication according to law.

Publication.

Approved, March 25, 1878.

I hereby certify that the foregoing act was published in the Iowa State Register and Iowa State Leader, April 4, 1878.

JOSIAH T. YOUNG. *Secretary of State.*

(CHAPTER 180, LAWS OF 1880.

LEGALIZING DEEDS BY COUNTIES FOR SWAMP LANDS.

AN ACT to legalize deeds by counties of swamp and other lands owned and conveyed by such counties.

Title.

WHEREAS, Prior to the taking effect of the revision of 1860 all conveyances of real estate owned by counties were required to be executed in the name of the county, by the county judge in his official capacity, with the county seal attached; and,

Prior to 1860 real estate conveyed by county judge.

WHEREAS, By the revision of 1860, conveyances of swamp land were required to be executed by the county court, and countersigned by the clerk of said court, with the seal of the county attached; and,

Revision of 1860 new rule.

WHEREAS, In many counties of this state deeds conveying swamp and other lands have been executed without having the county seal attached, and others without being countersigned by the clerk with the seal of the county attached or affixed thereto; and,

Conveyances without county seal.

WHEREAS, Doubts have arisen as to the validity of said deeds; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That all deeds heretofore executed by a county judge, or county court, or the chairman of the board of supervisors of any county, and to which the officer executing the same has failed or omitted to affix the county seal, and all deeds where the clerk has failed or omitted to countersign when required so to do, be and the same are hereby legalized and made valid the same in all respects as though the law had in all respects been fully complied with.

All conveyances legalized.

Approved, March 26, 1880.

(CHAPTER 81, LAWS OF 1886.)

AMEND SECTION 5, CHAPTER 171, ACTS NINETEENTH GENERAL ASSEMBLY.

AN ACT to Amend Section 5, of Chapter 171, of the Laws of the Nineteenth General Assembly, Relating to the Sale of Indemnity Lands.

*Be it enacted by the General Assembly of the State of Iowa:*Sec. 5, acts 19
General As-
sembly
amended.

SECTION 1. That section 5 of chapter 171 of the laws of the Nineteenth General Assembly be amended by striking out the words "in three years thereafter with eight per cent interest," in the fifth and sixth lines of said section and inserting after the word "payable" in the fifth line thereof the words "at such time, not exceeding ten years thereafter, as the board of supervisors may determine, with interest not less than six per cent."

(CHAPTER 171, LAWS OF 1882.)

DISPOSAL OF INDEMNITY SWAMP LAND.

Title. AN ACT to authorize the sale and conveyance of "indemnity swamp-land" so called.

May be sold. SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That in all cases where the title to any "indemnity swamp-land," so called, is vested in any county of this state, it shall be competent for the board of supervisors of such county to sell and dispose thereof as herein set forth.

Appraisalment. SEC. 2. The board of supervisors shall first cause all tracts or parcels of said land, except as herein otherwise provided, to be appraised by three disinterested persons, to be appointed by said board, who shall go upon the land to be appraised, and make return to the county auditor, under oath, of the fair value thereof.

Bids to be invited. SEC. 3. The county auditor shall, after the receipt of said appraisal, and within such time as the board of supervisors may direct, cause public notice to be given, for three successive weeks, in some newspaper published in the county where said land is located, inviting bids, in writing, for the purchase of said land, and specifying therein within what time such bids are to be filed with him.

Highest bid to be accepted if equal to appraised value. SEC. 4. At the next regular or special meeting of the board of supervisors said bids shall be opened, and the highest bid for each and every tract of land so advertised shall be accepted by resolution of said board, entered upon the minutes, with the yeas and nays upon the passage thereof therein expressed: *Provided,* said bid is equal to, or exceeds, said appraised value. And said board shall, by such resolution, direct the auditor of said county, upon the compliance with the next succeeding section hereof by said bidder, to execute, in the name of said county, a deed of conveyance for the land so sold said bidder.

Deed. SEC. 5. Within ten days after the acceptance of such bid, the person whose bid is so accepted must deposit with the county treasurer one-third of the amount of said bid in cash and take his receipt therefor, and execute his notes to said county for the balance, payable in three years thereafter, with eight per cent interest, payable annually; said notes to be secured by mortgage, duly acknowledged, on said land, which notes and mortgage shall be as valid in law as if made to an actual person; and thereupon said auditor shall deliver said deed for said land, signed and acknowledged by him, with the seal of his office attached, which deed shall have incorporated the resolution aforesaid; and the same shall be effectual in law to pass to said grantee the entire right and title of said county in and to the land therein named, and be admitted to record and read in evidence without further proofs.

Payments. SEC. 6. Nothing in this act contained shall be held to require an appraisal of any parcel of land of less than eighty acres, but as to all parcels of land of less than eighty acres said sale and conveyance may be made without such appraisalment upon compliance herewith in all other respects.

Conveyance. SEC. 7. No part of this act shall be construed so as to prevent the board of supervisors from rejecting any or all bids received, and whenever any portion of said lands has been advertised the board of supervisors shall have the right to sell the same at any time thereafter, provided the price received be not less than the appraised value thereof.

Parcels of less than eighty acres need not be appraised. (Took effect, March 30, 1882.)

May be rejected.

ORGANIC LAWS.

ORGANIC LAW OF MICHIGAN.

AN ACT to divide the Indiana territory into two separate governments. Title.

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

Michigan set off.

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

Its government.

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

Powers and compensation of officers as in Indiana.

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

Indiana not affected.

Suits pending.

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

Seat of government.

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

Approved, January 11, 1805.

ORGANIC LAW OF WISCONSIN.

Title.

AN ACT establishing the territorial government of Wisconsin.

What country shall constitute the Wisconsin territory.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the third day of July next the country included within the following boundaries shall constitute a separate territory, for the purposes of a temporary government, by the name of Wisconsin; that is to say: Bounded on the east by a line drawn from the northeast corner of the state of Illinois, through the middle of Lake Michigan, to a point in the middle of said lake, and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menomonie river; thence through the middle of the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line to the middle of said lake; thence through the middle of the main channel of the Montreal river, to its mouth; thence with a direct line across Lake Superior, to where the territorial line of the United States last touches said lake northwest; thence on the north, with the said territorial line, to the White-earth river; on the west, by a line from the said boundary line following down the middle of the main channel of White-earth river to the Missouri river, and down the middle of the main channel of the Missouri river to a point due west from the northwest corner of the state of Missouri; and on the south, from said point, due east to the northwest corner of the state of Missouri; and thence with the boundaries of the states of Missouri and Illinois, as already fixed by acts of congress. And after the said third day of July next, all power and authority of the government of Michigan in and over the territory hereby constituted, shall cease; *provided*, that nothing in this act contained shall

Proviso.

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

Proviso.

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

Appointment and powers of governor.

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

Secretary, his duties.

SEC. 4. *And be it further enacted*, That the legislative power shall be vested in a governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue four years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue two years. An apportionment shall be made, as nearly equal as practicable, among the several counties, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the

Legislature, how constituted and elected.

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

Proviso.

Who shall be eligible to office.

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

Proviso.

Powers of the legislature.

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

What officers are to be elected by the people.

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

aforesaid officers, who shall hold their offices until the end of the next session of the said legislative assembly.

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

Disqualifica-
tions for office.

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

Judiciary.

Proviso.

United States in the northern district of the state of New York receives for similar services.

Attorney to be appointed.

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

Marshal.

Governor, etc., to be approved by the senate.

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

Salaries.

Contingent expenses.

of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

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

Rights, etc., under the territorial compact of July, 1787, extended to Wisconsin.

And also those secured to Michigan.

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

Legislative sessions, when held.

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

Delegate to the house of representatives of the United States.

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

Provisions respecting undetermined suits.

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

Five thousand dollars for the purchase of a library.

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

Approved, April 20, 1836.

ORGANIC LAW OF IOWA.

Title. AN ACT to divide the territory of Wisconsin, and to establish the territorial government of Iowa.

Iowa, July 4th, 1838.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That from and after the third day of July next, all that part of the present territory of Wisconsin which lies west of the Mississippi river, and west of a line drawn due north from the head waters or sources of the Mississippi to the territorial line, shall, for the purposes of temporary government, be and constitute a separate territorial government, by the name of Iowa; and that, from and after the said third day of July next, the present territorial government of Wisconsin shall extend only to that part of the present territory of Wisconsin which lies east of the Mississippi river. And after the said third day of July next, all power and authority of the government of Wisconsin, in and over the territory hereby constituted, shall cease: *provided,* that nothing in this act contained shall be construed to impair the rights of person or property now appertaining to any Indians within the said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now existing between the United States and such Indians, or to impair or anywise to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, or law, or otherwise, which it would have been competent to the government to make if this act

Rights and powers reserved.

had never been passed: *provided*, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing the territory hereby established into one or more other territories, in such manner and at such times, as congress shall, in its discretion deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

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

Secretary.

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

To transmit laws.

To act as governor.

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

Legislative power.

Council.

House of representatives.

Census.

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

Elections, etc.,
to be regulated
by law.

Right of suf-
frage.

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

Legislative pow-
ers, extent of.

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

Elective officers.
Judicial, etc.

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

Ineligibility.

Judicial power.

SEC. 8. *And be it further enacted*, That no member of the legislative assembly shall hold, or be appointed to, any office created, or the salary or emoluments of which shall have been increased whilst he

was a member, during the term for which he shall have been elected, and for one year after the expiration of such term; and no person holding a commission or appointment under the United States, or any of its officers, except as a militia officer, shall be a member of the said council or house of representatives, or shall hold any office under the government of the said territory.

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

Districts, and
the courts there-
of.

Jurisdiction

at common law
and chancery.

Clerks.

Writs of error,
etc.

- Attorney.** SEC. 10. *And be it further enacted,* That there shall be an attorney for the said territory appointed, who shall continue in office four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the present territory of Wisconsin. There shall also be a marshal for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, who shall execute all process issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees as the marshal of the district court of the United States for the present territory of Wisconsin; and shall, in addition, be paid the sum of two hundred dollars annually as a compensation for extra services.
- Marshal.**
- Apportionments by president.** SEC. 11. *And be it further enacted,* That the governor, secretary, chief justice and associate judges, attorney, and marshal, shall be nominated, and, by and with the advice and consent of the senate, appointed by the president of the United States. The governor and secretary, to be appointed as aforesaid, shall, before they act as such, respectively take an oath or affirmation, before some judge or justice of the peace in the existing territory of Wisconsin, duly commissioned and qualified to administer an oath or affirmation, or before the chief justice or some associate justice of the supreme court of the United States, to support the constitution of the United States, and for the faithful discharge of the duties of their respective offices; which said oath, when so taken, shall be certified by the person before whom the same shall have been taken, and such certificate shall be received and recorded by the said secretary among the executive proceedings. And, afterwards, the chief justice and associate judges, and all other civil officers in said territory, before they act as such, shall take a like oath or affirmation, before said governor, or secretary, or some judge or justice of the territory, who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted, by the person taking the same, to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified, and recorded in such manner and form as may be prescribed by law. The governor shall receive an annual salary of fifteen hundred dollars as governor, and one thousand dollars as superintendent of Indian affairs. The said chief judge and associate justices shall each receive an annual salary of fifteen hundred dollars. The secretary shall receive an annual salary of twelve hundred dollars. The said salaries shall be paid quarter-yearly, at the treasury of the United States. The members of the legislative assembly shall be entitled to receive three dollars each, per day, during their attendance at the sessions thereof, and three dollars each for every twenty miles travel in going to, and returning from the said sessions, estimated according to the nearest usually traveled route. There shall be appropriated annually the sum of three hundred and fifty dollars to be expended by the governor to defray the contingent expenses of the territory; and there shall also be appropriated annually a sum sufficient to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the secretary of the territory shall annually
- Oath of office.**
- Salary of governor, judges, and secretary.**
- Pay of members of legislature.**

account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

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

Fundamental rights.

Laws of Wisconsin.

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

Sessions of legislature.

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

Delegate to congress.

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

Legal proceedings pending.

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

Officers to continue in office.

Causes pending in supreme court of Wisconsin transferred to supreme court of Iowa.

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

Appropriation for library.

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

Reorganization of legislature of Wisconsin.

SEC. 19. *And be it further enacted,* That from and after the day named in this act for the organization of the territory of Iowa, the term of the members of the council and house of representatives of the territory of Wisconsin shall be deemed to have expired, and an entirely new organization of the council and house of representatives of the territory of Wisconsin, as constituted by this act, shall take place as follows: As soon as practicable, after the passage of this act, the governor of the territory of Wisconsin shall apportion the thirteen members of the council, and twenty-six members of the house of representatives, among the several counties or districts comprised within said territory, according to their population, as nearly as may be, (Indians excepted). The first election shall be held at such time as the governor shall appoint and direct, and shall be conducted, and returns thereof made in all respects according to the provisions of the laws of said territory, and the governor shall declare the person having the greatest number of votes to be elected, and shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. The persons thus elected shall meet at Madison, the seat of government, on such day as he shall appoint, but thereafter, the apportioning of the representation in the several counties to the council and house of representatives, according to population, the day of their election, and the day for the commencement of the session of the legislative assembly, shall be prescribed by law.

Temporary arrangements in Iowa.

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

Approved, June 12, 1838.

AMENDMENTS TO THE ORGANIC LAW.

AN ACT to alter and amend the organic law of the territories of Wisconsin and Iowa. Title.

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

Acts to be approved by governor, etc.

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

Power of congress not affected.

Approved, March 3d, 1839.

AN ACT to authorize the election or appointment of certain officers in the territory of Iowa, and for other purposes. Title.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the legislative assembly of the territory of Iowa, shall be, and are hereby authorized to provide by law for the election or appointment of sheriffs, judges of probate, justices of the peace, and county surveyors, within the said territory, in such way or manner, and at such times and places as to them may seem proper; and after a law shall have been passed by the legislative assembly for that purpose, all elections or appointments of the above named officers thereafter to be had or made shall be in pursuance of such law.

Certain officers may be elected

SEC. 2. *And be it further enacted,* That the term of service of the present delegate for said territory of Iowa shall expire on the twenty-seventh day of October, eighteen hundred and forty; and the qualified

Term of the delegate.

electors of said territory may elect a delegate to serve from the said twenty-seventh day of October to the fourth day of March thereafter, at such time and place as shall be prescribed by law by the legislative assembly, and thereafter a delegate shall be elected, at such time and place as the legislative assembly may direct, to serve for a congress, as members of the house of representatives are now elected.

Approved, March 3d, 1839.

ADMISSION OF IOWA.

- Title.** AN ACT for the admission of the states of Iowa and Florida into the union.
- Preamble.** WHEREAS, the people of the territory of Iowa did, on the seventh day of October, eighteen hundred and forty-four, by a convention of delegates called and assembled for that purpose, form for themselves a constitution and state government; whereas, the people of the territory of Florida did, in like manner, by their delegates, on the eleventh day of January, eighteen hundred and thirty-nine, form for themselves a constitution and state government, both of which said constitutions are republican; and said conventions having asked the admission of their respective territories into the union as states, on equal footing with the original states:
- Act of March 3, 1845, ch. 76, and ch. 76.**
- Iowa and Florida admitted.** SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That the states of Iowa and Florida be, and the same are hereby declared to be states of the United States of America, and are hereby admitted into the union on equal footing with the original states, in all respects whatsoever.
- Boundaries of Iowa.** SEC. 2. *And be it further enacted,* That the following shall be the boundaries of the said state of Iowa, to-wit: beginning at the mouth of the Des Moines river, at the middle of the Mississippi, thence by the middle of the channel of that river to a parallel of latitude passing through the mouth of the Mankato, or Blue-earth river, thence west along the said parallel of latitude to a point where it is intersected by a meridian line, seventeen degrees and thirty minutes west of the meridian of Washington City, thence due south to the northern boundary line of the state of Missouri, thence eastwardly following that boundary to the point at which the same intersects the Des Moines river, thence by the middle of the channel of that river to the place of beginning.
- Iowa to have concurrent jurisdiction on the Mississippi and other rivers.** SEC. 3. *And be it further enacted,* That the said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; such rivers to be common to both; and that the said river Mississippi, and the naviga-

ble waters leading into the same, shall be common highways, and forever free as well to the inhabitants of said state, as to all other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state of Iowa.

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

Assent of people of Iowa to this act necessary.

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

Boundaries of Florida.

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

Each one representative in congress.

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

Not to interfere with or tax the public lands.

Ordinance of the convention of Iowa not obligatory on United States.

Approved, March 3, 1845.

AN ACT supplemental to the Act for the admission of the States of Iowa and Florida into the Union. Title.

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

Application of United States laws to Iowa.

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

District court.

Jurisdiction.

Act of September 24, 1789, ch. 20, sec. 10.

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

Compensation of the judge.

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

United States attorney to be appointed.

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

United States marshal to be appointed.

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

Compensation.

Propositions to be submitted to the legislature of Iowa.

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

Grant of lands for the use of schools.

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

Grant of lands for the use of a university. Act of July 20, 1840, chap. 90.

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

Grant of lands for completing the public buildings.

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

Salt-springs granted to the state.

4. That all salt-springs within the state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to the said state for its use; the same to be selected by the legislature thereof, within one year after the admission

of said state, and the same, when so selected, to be used on such terms, conditions, and regulations, as the legislature of the state shall direct: *provided*, that no salt-spring, the right whereof is now vested in any individual or individuals, or which may hereafter be confirmed or adjudged to any individual or individuals, shall, by this section, be granted to said state: *and provided also*, that the general assembly shall never lease or sell the same, at any one time, for a longer period than ten years, without the consent of congress.

Proviso.

Further proviso.

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

Five per cent of net proceeds of public lands appropriated for roads and canals.

Proviso.

Iowa not to interfere with disposal of public lands, etc. U. S. lands not to be taxed. Non-residents not to be taxed higher than residents. Bounty lands exempt from taxation for three years.

Approved, March 3d, 1845.

AN ORDINANCE,

FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES,
NORTH-WEST OF THE RIVER OHIO.

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

One district.

Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild, to take a share of their deceased parent in equal parts among them; and where there shall be no children or

Descent of estates.

- descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate, shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving, in all cases, to the widow of the intestate her *third part* of the real estate for life, and one-third part of the personal estate; and this law relative to descents and *dower* shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws, as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her, in whom the estate may be (being of full age), and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskias, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.
- Dower.**
- Wills.**
- Conveyances.**
- Saving to the French their laws of descent and conveyances.**
- Governor.** *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.
- Secretary.** There shall be appointed from time to time, by congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department; and transmit authentic copies of such acts and proceedings every six months, to the secretary of congress. There shall be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commission shall continue in force during good behaviour.
- Court.**
- Governor and judges to adopt laws.** The governor and judges, or a majority of them, shall adopt and publish, in the district, such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to congress from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by congress; but afterwards the legislature shall have authority to alter them as they shall think fit.
- Governor, commander.** The governor for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same, below the

rank of general officers; all general officers shall be appointed and commissioned by congress.

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

Governor to appoint officers until it is organized.

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

Counties, townships, etc.

So soon as there shall be five thousand free male inhabitants of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *provided*, that for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five, after which, the number and proportion of representatives shall be regulated by the legislature: *provided*, that no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years, and in either case shall likewise hold in his own right, in fee simple, two hundred acres of land within the same: *provided also*, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold, and two years' residence in the district shall be necessary to qualify a man as an elector of a representative.

When to elect representatives.

Ratio.

Qualification.

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

Term of representative.

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by congress; any three of whom to be a quorum. And the members of the council shall be nominated and appointed in the following manner, to-wit: as soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to congress; five of whom congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house

General assembly, how constituted.

Legislative council.

	of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to congress; one of whom congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to congress; five of whom congress shall appoint and commission to serve as members of the council five years, unless sooner removed.
Powers of general assembly.	And the governor, legislative council, and house of representatives, shall have authority to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly, when in his opinion it shall be expedient.
Bills.	
Oath of office.	The governor, judges, legislative council, secretary, and such other officers as congress shall appoint in the district, shall take an oath or affirmation, of fidelity and of office; the governor before the president of congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to congress, who shall have a seat in congress, with a right of debating, but not of voting, during this temporary government.
Delegate in congress.	
Preamble.	And for extending the fundamental principles of civil and religious liberty, which form the basis whereupon these republics, their laws, and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory; to provide also for the establishment of states, and permanent governments therein, and for their admission to share in the federal councils, on an equal footing with the original states, at as early periods as may be consistent with the general interest:
Articles of compact.	<i>It is hereby ordained and declared, by the authority aforesaid, That the following articles shall be considered as articles of compact between the original states, and the people and states in the said territory, and forever remain unalterable, unless by common consent, to-wit:</i>
Religion.	ARTICLE 1. No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.
Common law rights secured.	ART. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for criminal offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishment shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever

interfere with or affect private contracts or engagements, *bona fide*, and without fraud previously formed.

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

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

ART. 5. There shall be formed, in the said territory, not less than three, nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to-wit: the western state in the said territory shall be bounded by the Mississippi, the Ohio, and Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania and the said territorial line: *Provided, however, and it is further understood and declared*, that the boundaries of these three states shall be subject so far to be altered, that if congress shall hereafter find it expedient, they shall have authority to form one or

Education.

The Indians.

Territory to remain part of the confederacy.

The soil.

Taxes.

Navigable waters.

New state may be formed.

When to be admitted into the union.

two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government: *provided*, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

Slavery.

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

Repeal.

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

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

WILLIAM GRAYSON, *Chairman*.

CHARLES THOMPSON, *Secretary*.

NATURALIZATION OF ALIENS.

Act of 14th April, 1802, as affected by subsequent acts.

Previous declaration of aliens.

Act of May 26, 1824, § 3, 4.

Renunciation of allegiance.

SECTION 1. Any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:

1. That he shall have declared, on oath or affirmation, before the supreme, superior, district, or circuit court, of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States, or before the clerk of either of such courts two years at least, before his admission; that it was *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, whatever, and particularly, by name, the prince, potentate, state, or sovereignty, whereof such alien may, at the time, be a citizen or subject.

2. That he shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that

he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatsoever, and particularly, by name, the prince, potentate, state, or sovereignty whereof he was a citizen or subject; which proceedings shall be recorded by the clerk of the court.

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

Residence, etc.

Any alien who was residing within the limits, and under the jurisdiction of the United States, before the twenty-ninth day of January, one thousand seven hundred and ninety-five, may be admitted to become a citizen on due proof made to some one of the courts aforesaid, that he has resided two years at least, within and under the jurisdiction of the United States, and one year at least, immediately preceding his application, within the state or territory where such court is at the time held; and on his declaring on oath, or affirmation, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof he was before a citizen or subject; and, moreover, on its appearing to the satisfaction of the court, that, during the said term of two years, he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same; and where the alien, applying for admission to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, on his moreover making in the court an express renunciation of his title or order of nobility, before he shall be entitled to such admission; all of which proceedings, required in this proviso to be performed in the court, shall be recorded by the clerk thereof.

Exemptions as to residents in U. S. before 29th Jan., 1795.

Any alien, being a free white person, who was residing within the limits, and under the jurisdiction of the United States, at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who has continued to reside within the same; may be admitted to become a citizen of the United States, without a compliance with the first condition specified in the first section of the act, entitled "an act to establish a uniform rule of naturalization, and to repeal the acts heretofore passed on that subject."

Provision relating to the foregoing:

Act of March 26, 1804, § 1.

Nothing in the first section of the act 22d of March, 1816, shall be construed to exclude from admission to citizenship, any free white person who was residing within the limits, and under the jurisdiction of the United States at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who, having continued to reside therein without having made any declaration of intention before a court of record as aforesaid, may be entitled to become a citizen of the United States according to act 26th of March, 1804.

Residents between 18th June, 1798, and 14th April, 1802.

Act of March 22,
1816, § 2.

Whenever any person without a certificate of such declaration of intention, as aforesaid, shall make application to be admitted a citizen of the United States, it shall be proved to the satisfaction of the court, that the applicant was residing within the limits, and under the jurisdiction of the United States, before the fourteenth day of April, one thousand eight hundred and two, and has continued to reside within the same, or he shall not be so admitted. And the residence of the applicant within the limits and under the jurisdiction of the United States for at least five years immediately preceding the time of such application, shall be proved by the oath or affirmation of citizens of the United States; which citizens shall be named in the record as witnesses. And such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place or places where the applicant has resided for at least five years, as aforesaid, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.

Provision as to
residents be-
tween 14th
April, 1802, and
16th June, 1812.

Any alien, being a free white person, who was residing within the limits and under the jurisdiction of the United States, between the fourteenth day of April, one thousand eight hundred and two, and the eighteenth day of June, one thousand eight hundred and twelve, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without having made any previous declaration of his intention to become a citizen; *provided*, that whenever any person, without a certificate of such declaration of intention, shall make application to be admitted a citizen of the United States, it shall be proved to the satisfaction of the court that the applicant was residing within the limits and under the jurisdiction of the United States, before the eighteenth day of June, one thousand eight hundred and twelve, and has continued to reside within the same, or he shall not be so admitted; and the residence of the applicant within the limits and under the jurisdiction of the United States, for at least five years immediately preceding the time of such application, shall be proved by the oath or affirmation of citizens of the United States; which citizens shall be named in the record as witnesses, and such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place or places where the applicant has resided for at least five years, as aforesaid, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.

Act of May 24,
1828, § 2.

Any alien, being a free white person and minor, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arrival to the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted to [be] a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of the first section of the act to which this is in addition three years previous to his admission; *provided*, such alien shall make the declaration required therein at the time of his or her admission; and shall further declare on oath,

Minor.

Act of May 26,
1824, § 1.

and prove to the satisfaction of the court, that, for three years next preceding, it has been the *bona fide* intention of such alien to become a citizen of the United States; and shall, in all other respects, comply with the laws in regard to naturalization.

In case the alien applying to be admitted to citizenship shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application shall be made, which renunciation shall be recorded in the said court; *provided*, that no alien, who shall be a native citizen, denizen or subject, of any country, state or sovereign, with whom the United States shall be at war at the time of his application, shall be then admitted to be a citizen of the United States.

SEC. 2. And, whereas, doubts have arisen whether certain courts of record in some of the states are included within the description of district or circuit courts: Be it further enacted, that every court of record in any individual state having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of this act; and every alien who may have been naturalized in any such court shall enjoy, from and after the passage of this act, the same rights and privileges as if he had been naturalized in a district or circuit court of the United States.

What courts competent.

SEC. 3. The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States. The right of citizenship shall not descend to persons whose fathers have never resided within the United States. And no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the war of the revolution, shall be admitted a citizen without the consent of the legislature of the state in which such person was proscribed. Children of persons naturalized before the fourteenth of April, 1802, under age at the time of their parents' naturalization, were, if dwelling in the United States on the fourteenth day of April, 1802, to be considered as citizens of the United States.

Children of citizens and persons naturalized.

When any alien, who shall have complied with the first condition specified in the first section of the said original act [of 14th April, 1802] and who shall have pursued the directions prescribed in the second section of the said act, may die before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.

Widow and children of aliens.

Act of March 26, 1804, § 2.

No person who shall arrive in the United States after February the seventeenth, 1815, shall be admitted to become a citizen of the United States, who shall not, for the continued term of five years, next preceding his admission, have resided within the United States.

Continued residence of five years.

Act of March 3, 1812, § 12.

Aliens, honorably discharged from military service, may become citizens without, etc. Act of July 12, 1862, § 21.

SEC. 4. Any alien, of the age of twenty-one years and upwards, who has enlisted, or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and that he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and that the court admitting such alien shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid.

Rights of American citizens in foreign states. Preamble. Act of July 27, 1868.

WHEREAS, The right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and, whereas, in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and, whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and, whereas, it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; Therefore, be it enacted as follows:

Right of expatriation declared.

SEC. 5. Any declaration, instruction, opinion, order, or decision, of any officers of this government, which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.

Protection to naturalized citizens in foreign states.

SEC. 6. All naturalized citizens of the United States, while in foreign states, shall be entitled to, and shall receive from this government, the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances.

Release of citizens imprisoned by foreign governments to be demanded.

SEC. 7. Whenever it shall be made known to the president that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the president forthwith to demand of that government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the president shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, it shall be the duty of the president to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release, and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the president to congress.

Facts to be communicated to congress.

Knowingly taking etc., a false oath, required in the naturalization of aliens, to be deemed perjury, and how punished. Act of July 14, 1870.

SEC. 8. In all cases where any oath, affirmation or affidavit shall be made or taken under or by virtue of any act or law relating to the naturalization of aliens, or in any proceedings under such acts or laws, and any person or persons taking or making such oath, affirmation, or affidavit, [who] shall knowingly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof, shall, upon conviction thereof, be sentenced to imprisonment for a term not exceeding five years, and not less than one year, and to a fine not exceeding one thousand dollars.

SEC. 9. If any person applying to be admitted a citizen, or appearing as a witness for any such person, shall knowingly personate any other person than himself, or falsely appear in the name of a deceased person, or in an assumed or fictitious name, or if any person shall falsely make, forge, or counterfeit any oath, affirmation, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law or act relating to or providing for the naturalization of aliens; or shall utter, sell, dispose of, or use as true or genuine, or for any unlawful purpose, any false, forged, ante-dated, or counterfeit oath, affirmation, notice, certificate, order, record, signature, instrument, paper, or proceeding as aforesaid; or sell or dispose of to any person other than the person for whom it was originally issued, any certificate of citizenship, or certificate showing any person to be admitted a citizen; or if any person shall in any manner use for the purpose of registering as a voter; or as evidence of a right to vote, or otherwise, unlawfully, any order, certificate of citizenship, or certificate, judgment, or exemplification, showing such person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order or certificate, judgment or exemplification has been unlawfully issued or made; or if any person shall unlawfully use, or attempt to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person; or use, or attempt to use, or aid, or assist, or participate in the use of any certificate of citizenship, knowing the same to be forged, or counterfeit, or ante-dated, or knowing the same to have been procured by fraud, or otherwise unlawfully obtained; or if any person, and without lawful excuse, shall knowingly have or be possessed of any false, forged, ante-dated, or counterfeit certificate of citizenship, purporting to have been issued under the provisions of any law of the United States relating to naturalization, knowing such certificate to be false, forged, ante-dated, or counterfeited, with intent unlawfully to use the same; or if any person shall obtain, accept, or receive any certificate of citizenship known to such person to have been procured by fraud, or by the use of any false name, or by means of any false statement made with intent to procure, or aid in procuring, the issue of such certificate, or known to such person to be fraudulently altered or ante-dated; or if any person who has been or may be admitted to be a citizen shall, on oath or affirmation, or by affidavit, knowingly deny that he has been so admitted, with intent to evade or avoid any duty or liability imposed or required by law, every person so offending shall be deemed and adjudged guilty of felony, and, on conviction thereof, shall be sentenced to be imprisoned and kept at hard labor for a period of not less than one year nor more than five years, or be fined in a sum not less than three hundred dollars nor more than one thousand dollars, or both such punishments may be imposed, in the discretion of the court. And every person who shall knowingly and intentionally aid or abet any person in the commission of any such felony, or attempt to do any act hereby made felony, or counsel, advise, or procure, or attempt to procure, the commission thereof, shall be liable to indictment and punishment in the same manner and to the same extent as the principal party guilty of such felony, and such person may be tried and convicted thereof without the previous conviction of such principal.

The doing of certain acts in connection with the naturalization of aliens declared felony, and penalty therefor.

Penalty for knowingly and intentionally aiding, etc., the doing of such acts.
Trial, etc.

Penalty for knowingly using any fraudulent, etc., certificate of naturalization.

For fraudulently falsely representing one's self to be a citizen.

This act to apply to all proceedings for naturalization before any court.

Courts of all the United States to have jurisdiction of offenses under this act.

In cities of more than 20,000 inhabitants, judges of circuit court, upon application, to appoint two citizens in each election district.

To supervise registration, voting, etc., in certain elections.

Authority of such persons.

Penalty for obstructing them.

In cities of over 20,000 inhabitants the marshal may appoint special deputies at congressional elections, etc.

Aliens of African nativity and descent may become citizens.

SEC. 10. Any person who shall knowingly use any certificate of naturalization heretofore granted by any court, or which shall hereafter be granted, which has been, or shall be, procured through fraud or by false evidence, or has been, or shall be, issued by the clerk, or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; and any person who shall falsely represent himself to be a citizen of the United States, without having been duly admitted to citizenship, for any fraudulent purpose whatever, shall be deemed guilty of a misdemeanor, and upon conviction thereof, in due course of law, shall be sentenced to pay a fine of not exceeding one thousand dollars, or be imprisoned not exceeding two years, either or both, in the discretion of the court taking cognizance of the same.

SEC. 11. The provisions of this act shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization shall be commenced, had or taken, or attempted to be commenced; and the courts of the United States shall have jurisdiction of all offenses under the provisions of this act, in or before whatsoever court or tribunal the same shall have been committed.

SEC. 12. In any city having upwards of twenty thousand inhabitants, it shall be the duty of the judge of the circuit court of the United States for the circuit wherein said city shall be, upon the application of two citizens, to appoint in writing for each election district or voting precinct in said city, and to change or renew said appointment as occasion may require, from time to time, two citizens resident of the district or precinct, one from each political party, who, when so designated, shall be, and are hereby, authorized to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for representative in congress, and at all times and places for holding elections of representatives in congress, and for counting the votes cast at said elections, and to challenge any name proposed to be registered, and any vote offered, and to be present and witness throughout the counting of all votes, and to remain where the ballot-boxes are kept at all times after the polls are open until the votes are finally counted; and said persons and either of them shall have the right to affix their signatures or his signature to said register for the purposes of identification, and to attach thereto, or to the certificate of the number of votes cast, and [any] statement touching the truth or fairness thereof which they or he may ask to attach; and any one who shall prevent any person so designated from doing any of the acts authorized as aforesaid, or who shall hinder or molest any such person in doing any of the said acts, or shall aid or abet in preventing, hindering, or molesting any such person in respect of any such acts, shall be guilty of a misdemeanor, and on conviction shall be punished by imprisonment not less than one year.

SEC. 13. In any city having upwards of twenty thousand inhabitants, it shall be lawful for the marshal of the United States for the district wherein said city shall be, to appoint as many special deputies as may be necessary to preserve order at any election at which representatives in congress are to be chosen; and said deputies are hereby authorized to preserve order at such elections, and to arrest for any offense or breach of the peace committed in their view.

SEC. 14. The naturalization laws are hereby extended to aliens of African nativity and to persons of African descent.

SEC. 15. Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant ship or ships of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of his intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and shall have served three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant ship of the United States, anything to the contrary in any previous act of congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen.

Seamen, being foreigners, may become citizens by declaring intent and serving three years in, etc. Act of June 7, 1872.

When to be deemed citizens.

Entitled to protection after filing declaration of intent.

THE DECLARATION OF INDEPENDENCE.

IN CONGRESS, JULY 4, 1776.

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA.

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

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

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

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

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

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

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

He has refused for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large, for their exercise; the state remaining, in the meantime, exposed to all the dangers of invasion from without, and convulsions within.

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

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

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

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

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

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

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

For quartering large bodies of armed troops among us:

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

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

For imposing taxes on us without our consent:

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

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

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

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

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

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

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

He is, at this time, transporting large armies of foreign mercenaries, to complete the works of death, desolation and tyranny, already begun with circumstan-

ces of cruelty and perfidy, scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

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

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

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

Nor have we been wanting in attentions to our British brethren. We have warned them from time to time of attempts by the legislature to extend unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity; and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connexions and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

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

JOHN HANCOCK.

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

Massachusetts Bay.—Samuel Adams, John Adams, Robert Treat Paine, Elbridge Gerry.

Rhode Island, etc.—Stephen Hopkins, William Ellery.

Connecticut.—Roger Sherman, Samuel Huntington, William Williams, Oliver Wolcott.

New York.—William Floyd, Phillip Livingston, Francis Lewis, Lewis Morris.

New Jersey.—Richard Stockton, John Witherspoon, Francis Hopkinson, John Hart, Abraham Clark.

Pennsylvania.—Robert Morris, Benjamin Rush, Benjamin Franklin, John Morton, George Clymer, James Smith, George Taylor, James Wilson, George Ross.

Delaware.—Cæsar Rodney, George Read, Thomas M'Kean.

Maryland.—Samuel Chase, William Paca, Thomas Stone, Charles Carroll of Carrollton.

Virginia.—George Wythe, Richard Henry Lee, Thomas Jefferson, Benjamin Harrison, Thomas Nelson, Jun., Francis Lightfoot Lee, Carter Braxton.

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

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

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

THE CONSTITUTION OF THE UNITED STATES.

—

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

Legislative powers.

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

Members of house of representatives: how chosen.

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

Qualification of.

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

Representation and taxation.

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

Vacancies.

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

Officers. Impeachment.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Senate.

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

Senators classed.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year,

so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

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

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

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

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

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

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

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

SEC. 5. Each house shall be the judge of the elections, returns, and qualification of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

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

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

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

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

Qualifications
of senators.

Vice-president.

Senate to choose
its officers.

To try impeach
ments.

Judgment on
impeachment.

Election of
members of
congress.

Congress to
meet annually.

Elections: how
judged.

Quorum.

Rules.

Journals.

Adjournment.

Compensation:
privileges.

Exclusion from office.	No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.
Bills for revenue.	SEC. 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.
Bills: the formalities of their passage.	Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on the journals, and proceed to reconsider it. If, after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be re-considered, and, if approved by two-thirds of that house, it shall become a law. But in all cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill, shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.
Resolutions, etc., to be approved.	Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.
Powers of congress. Taxes.	SEC. 8. The congress shall have power: To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;
Borrowing.	To borrow money on the credit of the United States;
Commerce.	To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
Naturalization.	To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
Coinage.	To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
Counterfeiting.	To provide for the punishment of counterfeiting the securities, and current coin of the United States;
Post-office.	To establish post-offices and post-roads;
Copyright.	To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
Inferior courts.	To constitute tribunals inferior to the supreme court;
Piracy.	To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;	War.
To raise and support armies; but no appropriation of money, to that use, shall be for a longer term than two years;	Army.
To provide and maintain a navy;	Navy.
To make rules for the government and regulation of the land and naval forces;	Rules for.
To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;	Militia and its organization.
To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;	
To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. And	Exclusive authority over district.
To make all laws which shall be necessary to and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.	General authority.
SEC. 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight; but a tax of duty may be imposed on such importation, not exceeding ten dollars for each person.	Limitation of powers.
The privilege of the writ of <i>habeas corpus</i> shall not be suspended, except when, in cases of rebellion or invasion, the public safety may require it.	Importation of persons.
No bill of attainder or <i>ex post facto</i> law shall be passed.	Habeas corpus.
No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.	Attainder, etc.
No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.	Direct tax.
No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public moneys shall be published from time to time.	Commercial duties and preferences.
No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.	Money, how drawn.
SEC. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, <i>ex post facto</i> law, or law impairing the obligation of contracts, or grant any title of nobility.	Titles of nobility.
	Limitations on the states.

**Of commerce,
war, etc.**

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net proceeds of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and the control of the Congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

The executive.

ART. 2. SEC. 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:

Electors of.

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

**And proceed-
ings in the
choice of presi-
dent.**

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

**Meeting of elec-
tors.**

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

**Qualifications
for presidency.**

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

* By an amendment to the constitution, a substitute for this paragraph was adopted. Amendment, Art. 12, Sec. 1. This amendment was proposed in October, 1803, and was ratified before September, 1804. See the amendment, *post*.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president elected.

**Vice-president:
When to act.**

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

**Compensation
of president.**

Before he enter upon the execution of his office, he shall take the following oath or affirmation:

Oath of office.

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

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

**Powers of the
president.
Commander.**

Pardons.

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

Treaties.

**Appointment of
officers.**

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

Fill vacancies.

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

**Give informa-
tion to con-
gress, etc.**

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

Impeachment.

ART. 3. SEC. 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the

Judicial power.

- Tenure.** supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.
- Extent of judicial power.** SEC. 2. The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state, between citizens of different states, between citizens of the same state, claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens, or subjects.
- Jurisdiction of supreme court.** In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases, before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.
- Trial by jury.** The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as congress may by law have directed.
- Treason.** SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
- Attainder.** The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.
- Acts, records, etc., of states.** ART. 4. SEC. 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.
- Citizenship.** SEC. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.
- Fugitives from justice.** A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.
- Fugitive slaves.** No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.
- New states.** SEC. 3. New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislature of the states concerned, as well as of the congress.

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

Territory of
United States.

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

Republican
government.

ART. 5. The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or other mode of ratification may be proposed by the congress: *provided*, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

Amendments
to the constitu-
tion.

ART. 6. All debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States, under this constitution, as under the confederation.

Former debts
recognized.

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

Supreme law.

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

Oath of office
Religious test.

ART. 7. The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Ratification.

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

GEORGE WASHINGTON, PRESIDENT,
and Deputy from Virginia.

New Hampshire.—John Langdon, Nicholas Gilman.

Massachusetts.—Nathaniel Gorham, Rufus King.

Connecticut.—Wm. Samuel Johnson, Roger Sherman.

New York.—Alexander Hamilton.

New Jersey.—William Livingston, David Breardly, William Patterson, Jonathan Dayton.

Pennsylvania.—Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris.

Delaware.—George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom.

Maryland.—James M'Henry, Daniel of St. Thomas Jenifer, Daniel Carroll.

Virginia.—John Blair, James Madison, Jr.

North Carolina.—William Blount, Richard Dobbs Spaight, Hugh Williamson.

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

Georgia.—William Few, Abr. Baldwin.

Attest,

WILLIAM JACKSON, *Secretary.*

AMENDMENTS TO THE CONSTITUTION.

Religion,
speech, press,
and petition.

ARTICLE 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Bearing arms.

ART. 2. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Quartering of
soldiers.

ART. 3. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

Unreasonable
searches and
seizures.

ART. 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Criminal pro-
ceedings.

ART. 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Private prop-
erty taken, etc.

Trial by jury in
criminal pro-
ceedings.

ART. 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the wit-

nesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ART. 7. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. Same, in suits at common law.

ART. 8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Excessive bail.

ART. 9. The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. Rights retained by the people.

ART. 10. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. Powers not delegated, reserved.

ART. 11. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. States not to be sued.

ART. 12. SEC. 1. The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. Manner of choosing president.

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

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

Vice-president to act when no choice.

Senate to elect vice-president.

Eligibility.

Slavery, and involuntary servitude prohibited.

Legislation by congress.

Citizens of the United States, are citizens of the state where they reside. States prohibited from passing any law abridging the rights of citizens of the United States.

Representatives apportioned among the several states.

Basis of representation reduced.

Officers who have taken an oath to support the constitution of the United States, and who engage in rebellion or insurrection prohibited from holding office. Congress may remove such disability.

The public debt of the United States shall not be questioned.

The United States and any state prohibited from paying any debt incurred in aid of rebellion or insurrection. Legislation by congress. The right to vote not abridged on account of race, color, or previous condition of servitude. Legislation by congress.

ART. 13. SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

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

ART. 14. SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

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

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

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

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

ART. 15. SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

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

The first ten of these amendments were proposed by congress (with others which were not ratified by three-fourths of the legislatures of the several states), by resolution of 1789, and were ratified before 1791. The eleventh amendment was proposed by congress by resolution of the

year 1794, and was ratified before 1796. The twelfth article was proposed by congress by resolution of October, 1803 and was ratified before September, 1804. The thirteenth article was proposed by congress, by resolution, of the year 1865, and was ratified before December 18, 1865. The fourteenth article was proposed by congress, by resolution, of the year 1866, and was ratified before the 20th day of July, 1868. The fifteenth article was proposed by congress, by resolution, of the year 1869, and was ratified before the 30th day of March, 1870.

CONSTITUTION OF IOWA.

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

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

ARTICLE 1.—BILL OF RIGHTS.

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

The breadth and design of sections one and six, of article one of the constitution, to secure equality to all and the enjoyment of property by all, is fully understood and conceded. But the equality secured to the citizen cannot be exercised to the danger of the lives and property of others; neither can property be acquired enjoyed, and disposed of to the peril of the lives, health happiness and property of others. The constitution does not interfere with the police power of the state to protect the people in their lives, health, and property. The state is clothed with power to prevent injury to these. See constitution article one, section two. The legislature, therefore, may lawfully provide by law for granting permits to persons of good moral character, who are citizens of the county, to sell intoxicating liquors for lawful purposes, and such legislation is not in conflict with section one, of article one, nor with section six of the same article of the constitution. Per BECK, *In re Ruth*, 32 Iowa, 250.

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

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

Section 3, of article 1 of the constitution, was intended to secure the citizen against taxation for religious purposes, and not for the purpose of suppressing religion itself; and it does not afford a ground for enjoining religious exercises in the public schools, where it appears that the burden of taxation is not thereby increased, and that plaintiff's children are not required to be present at, or take part in, such exercises. *Moore v. Monroe et al.*, 64 Iowa, 367.

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

Section 3639 of the code is not in conflict with the provisions of this section, that "any party to any judicial proceeding shall have a right to use as a witness * * * any other person not disqualified on account of interest." *Donnell v. Braden*, 70 Iowa, 551.

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

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

An ordinance of a town, requiring transient merchants doing business within the town to pay a license—the object being to discriminate in favor of resident merchants and against all others—is in conflict with article 1, section 6 of the constitution, and also in conflict with article 1, of section 8 of the constitution of the United States. *The Town of Pacific Junction v. Dyer*, 64 Iowa, 38.

The word "operation," in the sixth section of the first article of the constitution, which declares that "all laws of a general nature shall have a uniform operation," means the practical working and effect of the law. *Geebrick v. The State of Iowa*, 5 Iowa, 491.

An act of the legislature conferring upon the city council the power to tax "transient merchants," doing business in the city, is not in conflict with section six, article one of the constitution. *The City of Mount Pleasant v. Clutch*, 6 Id., 547.

An act of the legislature providing that if it be shown to the satisfaction of the court that a defendant in an action is in the actual military service of the United States, any action against him in the state courts shall stand continued during the period of his actual service, is not in conflict with section 6, of article 1 of the state constitution. *McCormick v. Rusch*, 15 Id., 127.

Section one hundred and fourteen of the code of 1851, and chapter one hundred and ninety-three of the laws of 1857, authorizing the people of the several counties of the state to decide by a majority vote to restrain sheep and swine from running at large (see section 309, code of 1873), is not inconsistent with section 6 of this article. *Dalby v. Wolf et al.*, 15 Id., 228.

The legislature has the constitutional power to pass a curative act legalizing the defective organization of a school district already in existence under the general law. Such an act is not in conflict with section six of article one of the constitution. *The State v. Squires*, 26 Id., 219, 345.

Chapter 119, of the laws of 1878, prohibiting the sale of malt or vinous liquor within two miles of the corporation limits of cities and towns, is not in conflict with the provision of the constitution requiring all laws of a general character to be of uniform operation. *The State v. Shroeder*, 51 Id., 197.

Section 1317 of the code which provides for the annual assessment of railroad property for taxation, while real property is assessed only every alternate year, is not repugnant to section six of article one of the constitution, nor to the fourteenth amendment of the constitution of the United States, as discriminating against railroads. *Central Iowa R'y Co. v. The Board of Supervisors, etc.*, 67 Id., 199.

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

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

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

Where an act provided that a bond executed to stay an execution, should be taken as a judgment confessed, against the persons executing the same, and against their estates, and that execution might issue thereon accordingly, it was held that such act was not void for the reason that it denied or took away a trial in due course of law. *Cavender v. The Heirs of Smith*, 5 Iowa, 157.

The provisions of the constitution providing for juries of less than twelve men in inferior courts, is not in violation of the second article of the ordinance of 1787. *The State v. Beneke*, 9 Id., 204.

The accused is entitled to a trial by a jury of twelve men, but may be tried by a jury of a less number in an inferior court, while a trial by a jury of twelve may be secured by an appeal to a higher court. *Id.*

The right of trial by jury being secured in actions at law, the legislature cannot, by an evasion of this section of the constitution, render that which is in its essence a suit at law, a proceeding to punish for contempt. *Ex parte Grace*, 12 Id., 208. See, also, *The City of Des Moines v. Lyman*, 21 Id., 153.

“Due process of law” means ordinary judicial proceedings in court, and has no reference to the lawful exercise of the taxing power, which belongs exclusively to the legislative department. *Stewart v. Board of Supervisors*, 30 Id., 9; *Boyd v. Ellis*, 11 Id., 99; *Ex parte Grace*, 12 Id., 214; *Allen v. Armstrong*, 16 Id., 512.

This section does not entitle a party to demand that the issues of fact in an equitable action be tried by a jury. *The State for the use, etc. v. Orwig*, 24 Id., 280.

An act of the legislature authorizing the rendition of a general money judgment in favor of an occupying claimant, for improvements made by him, and a general execution to enforce such judgment is in violation of section 9 of article 1, of the state constitution. *Childs v. Shower*, 18 Id., 261.

Where there is a great perplexity in the accounts between the parties to an action for the establishment of a claim against an estate, and the examination of the accounts by a jury is practicable, the cause is a proper one for equitable cognizance and, under section 2316 of the code, the court may, on its own motion, refer such a case to a referee to report the testimony, and facts found and the conclusions of law thereon, and since section 9 of article 1 of the constitution does not guarantee a right of trial by jury in causes of equitable cognizance, such reference is not in violation thereof. *Burt v. Harrah, Admr.*, 65 Id., 643.

SEC. 10. [Rights of persons accused.]—In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him; to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and to have the assistance of counsel.

The defendant in a criminal prosecution has a right to be confronted by the witnesses against him, and see them face to face. *State v. Reidel*, 26 Iowa, 430.

A defendant indicted for a felony may waive this right secured by the constitution to be confronted with the witnesses against him and consent that the testimony taken down in writing in a former trial, based upon the same facts, may be read in evidence to the jury as a substitute for the oral testimony and presence of the witnesses. *The State v. Polson*, 29 Id., 133.

The provision of this section that a person accused of crime is entitled to be confronted with the witnesses against him, has no reference to record evidence. And so, in a prosecution for bigamy, certified transcripts of marriage records are receivable as evidence of the marriages and the dates thereof. *The State v. Matlock*, 70 Id., 229.

SEC. 11. [**Without indictment.**]—All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, except in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger.

Since the taking effect of this constitution, a grand jury has no legal authority to inquire into any offense less than felony, and cases in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days; these are triable summarily before a justice of the peace without indictment or the intervention of a grand jury. *The State v. Kähler*, 6 Iowa, 398; *The State v. Axt*, Id., 511. But this section does not apply to offenses committed before the constitution took effect. *Id.*

SEC. 12. [**By indictment: twice tried.**]—No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great.

Where a defendant, indicted for murder in the second degree, was tried and convicted of the crime of manslaughter, and on appeal to the supreme court the judgment was reversed and the case remanded; *held*, that the conviction for manslaughter was an acquittal of the charge of murder in the second degree, and that the defendant could not again be put on trial on that charge. *The State v. Tweedy*, 11 Iowa, 350.

When a defendant has been tried and acquitted before a justice of the peace for an offense within the jurisdiction of that officer to try, he cannot be again tried upon appeal to the district court by the state. *The State v. Van Horton*, 26 Id., 402.

Where a defendant is put upon trial for an offense of a higher degree than he can be legally convicted of under the indictment preferred against him, he cannot be legally convicted of a lesser grade of the offense in that degree. *The State v. Tweedy*, 11 Id., 350; *The State v. Boyle*, 28 Id., 522; *The State v. Knouse*, 29 Id., 118.

A trial and conviction for assault and battery, under an information charging that offense, constitutes no bar to a subsequent indictment and prosecution for assault with intent to commit great bodily injury, based on the same act. *The State v. Foster*, 33 Id., 525.

A conviction of the proprietor of a billiard saloon for permitting W., a minor, to play billiards in his saloon at a certain specified time, is no bar to a prosecution for permitting M. to play the game at another time. *The State v. Derichs*, 42 Id., 196.

The judgment of a justice of the peace in a criminal proceeding instituted by the procurement of the defendant, in which a conviction or acquittal is secured by fraud or collusion, may be appealed to the appellate court, or disregarded and treated as void. It is no bar to other proceedings against the same defendant for the same offense. *The State v. Greene et al.*, 16 Id., 239.

Section 12 of chapter 143, laws of 1884, providing for the abatement of liquor nuisances by injunction, is not in conflict with sections 9, 10, 11 and 1, of article 12, of the constitution. *Litleton v. Fritz*, 65 Id., 488.

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

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

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

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

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

Chapter 143, laws of 1884, in its provisions for fines for the violations thereof is not in conflict with section 17 of article 1 of the constitution, which prohibits the imposition of "excessive fines." *Martin v. Blattner et al.*, 68 Iowa, 286.

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

The term "just compensation" as used in this section of the constitution, means a fair equivalent—that the person whose property is taken shall be made whole; and the word "damages" as used in the statute has reference to the just compensation required by the constitution. *Sater v. The B. & M. P. R. Co.*, 1 Iowa, 386; *Henry v. The D. & P. R. Co.*, 2 Id., 288.

Where a jury appointed to assess the damages for a public highway return that the claimant was entitled to no damages, and there was no appeal, no compensation need be paid before opening the road. *Connolly v. Griswold*, 7 Id., 248.

An order establishing a public road without directing compensation to be made to the land owner, is not in conflict with the constitution, where such owner makes no claim for damages in the manner pointed out by law. *Abbott v. The Board of Supervisors, etc.*, 36 Id., 354.

The constitutional limitations contained in section eighteen of the bill of rights prohibits, by implication, the taking of private property for any private use whatever, without the consent of the owner. *Bankhead v. Brown*, 25 Id., 540.

This section forbids private property from being compulsorily taken for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury. *Bankhead v. Brown*, 25 Id., 540.

When the public exigencies demand, the exercise of the power of taking private property for public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment. *Id.*

What is such a "public use" as will justify the exercise of the power of eminent domain, is a question for the courts to determine. But if a public use be declared by the legislature, the courts will hold this as public, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use. *Id.*

An act of the legislature for the establishment of private roads directing the taking of private property for such private roads is unconstitutional in that it directs the taking of private property for a "private use." *Id.*

The legislature may provide that a public way may be established to coal and other mines, and the right to take land for a road demanded for public convenience does not depend upon the length of the road or the number of the persons through whose land it may pass.

It is competent for the legislature under the state constitution to authorize municipal corporations to require the streets to be paved, and the cost thereof assessed upon the abutting lots. *Warren v. Henley*, 31 Id., 31.

Section 4168 of the revision (code section 3829 as amended), which establishes the maximum of attorney's fee for the defense in criminal cases, appointed by the court, held, not inconsistent with this section of the constitution. *Samuels v. The County of Dubuque*, 13 Id., 536.

An act providing for the taxation of property by townships, cities and incorporated towns to aid in the construction of railroads is not in conflict with the constitution as taking private property for private use. *Stewart v. The Board of Supervisors, etc.*, 30 Id., 9; *The McGregor & S. C. R. Co. v. Birdsall*, 30 Id., 255; *Bonmifield v. Bidwell*, 32 Id., 149.

The right to take private property for right of way for railroads under the power of eminent domain is based upon the ground that the object is a public one, for public use, within the meaning of the constitution. *Id.*

The taxing power may be exercised for any object that will justify the exercise of the power of eminent domain. *Id.*

While the right to take private property for public use is conditioned upon making compensation, the taxing power is not thus limited by the constitution; and being one of the sovereign

powers vested in the general assembly, the judicial power possesses no authority to thus limit it. *Id.* Overruling *Hanson v. Vernon*, 27 Id., 28. BECK, J., dissenting.

The general assembly can pass laws to raise revenue by taxation only for public purposes; and when revenue is raised for a purpose not connected with the public interest, it is no longer taxation, though so denominated. *Clapp v. Cedar Co.*, 5 Id., 15; *Ring v. Johnson Co.*, Id., 274; *Stokes v. Scott Co.*, 10 Id., 171; *The State ex rel. v. Wapello Co.*, 13 Id., 388; *McClure v. Owen*, 26 Id., 243; *Meyers v. Johnson Co.*, 14 Id., 47; *McMillen v. Boyles*, Id., 107; *Brock v. Wallace*, Id., 593; *Smith v. Henry Co.*, 15 Id., 385; *Ten Eyck v. The Major, etc.*, Id 436; *Chamberlain v. The City of Burlington*; 19 Id., 395; *Hanson v. Vernon*, 27 Id., 28.

A road or way established under chapter 34, laws of 1874, over the land of another, to connect a mine or quarry with a railroad or highway, is a public way, in the sense that the public may use and enjoy it in the way in which roads and highways are ordinarily used by it, and that the mine-owner who procures it to be established must use the special privilege which the act confers on him in such manner as not to destroy this right of the public, or prevent its enjoyment. It follows, therefore, that said act is not in conflict with those provisions of the constitution of the United States, and of the state of Iowa, which prohibit the appropriation by law of private property to private use. *Phillips v. Watson*, 63 Id., 28.

Payment by a railway company to the sheriff of the damages awarded by the commissioners under the statute for the right of way over another's land, is not payment to the land-owner, and where the sheriff fails to pay the amount to the land-owner, the failure must be imputed to the railway company, whose agent he is, rather than the agent of the land-owner, and in such case the land-owner may recover the possession of the land for non-payment. *White v. The Wabash, St. Louis & P. R'y Co.*, 64 Id., 281.

Section 817 of the code, providing for the taxation of moneys and credits, etc., held by any one as agent in this state for pecuniary profit, is not repugnant to section 18 of article one of the constitution which provides that private property shall not be taken for public use without just compensation. *Hutchinson v. The Board of Equalization of the City of Oskaloosa*, 66 Id., 35.

SEC. 19. [Imprisonment for debt.]—No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud; and no person shall be imprisoned for a military fine in time of peace.

It was held in *Ex parte Grace*, 12 Iowa, 208, that chapter 126 of the revision (chapter three, title eighteen of the code), does not provide for the imprisonment of a debtor in a manner, or under circumstances not fully warranted by section nineteen of the bill of rights.

SEC. 20. [Petition.]—The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives, and to petition for a redress of grievances.

SEC. 21. [Attainder and ex post facto laws.]—No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed.

A retrospective law is not necessarily *ex post facto*. The term *ex post facto* applies only to criminal laws, such as make acts criminal, which were innocent when committed, or if criminal when committed, aggravate the crime, increase the punishment or reduce the degree of proof. *The State ex rel., etc., v. Squires et al.*, 26 Iowa, 340.

Retrospective laws, as distinguished from *ex post facto* laws, are not in conflict with the constitution of the United States, nor with the constitution of this state. *The State ex rel., etc., v. Squires et al.*, 26 Id., 340; *The Iowa R. R. Land Co. v. Soper*, 39 Id., 112.

In the absence of any constitutional inhibition the legislature has the power to pass retrospective laws, and they will be operative unless they interfere with vested rights. *The Iowa R. R. Land Co. v. Soper*, 39 Id., 112; *The State ex rel., etc., v. Squires*, 26 Id., 340; *Bennett v. Fisher*, Id., 497; *State v. Kimball*, 23 Id., 531; *Davis v. O'Farrell*, 4 G. Greene, 168, 358; *Phares v. Walters*, 6 Id., 106; *Montgomery v. Chadwick*, 7 Id., 114; *McMillen v. Boyles*, 6 Id., 304; *Newman v. Samuels*, 17 Id., 523; *Boardman, v. Beckwith*, 18 Id., 292.

The act of March 31, 1860, providing for the appraisement of property sold under execution, impaired the obligation of contracts in so far as it applied to contracts entered into prior to the taking effect of the statute, and was, as to such contracts, unconstitutional and void. *Rosier v. Hale et al.*, 10 Id., 470. That act was therefore not retrospective in its operation. *Landis v. Abrahams*, 11 Id., 284.

A statute providing that if it be shown to the satisfaction of the court that a defendant is in the actual military service of the United States, any action pending against him in such court shall stand continued during the period of his actual service, does not impair the obligation of contracts, nor conflict with that clause of the constitution which requires "all laws of a general nature to have uniform operation." *McCormick v. Busch*, 15 Id., 127.

The constitutional inhibition against laws impairing the obligation of contracts, is not infringed by a judicial decision declaring a contract void which the parties had no legal or constitutional power to make. *McClure v. Owen*, 26 Id., 243.

The statute of this state abolishing the common law distinction between sealed and unsealed instruments, thereby admitting the defense of want of consideration in all actions upon written instruments made after the passage of the statute does not impair the obligation of the contract, but merely relates to the remedy. *Williams v. Haines*, 27 Id., 251.

Chapter forty-nine of the laws of 1866 (sections 3169, 3170 of the code), dispensing with motions for new trials in certain cases, relates merely to the remedy, and is not unconstitutional. *Johnson v. Semple*, 31 Id., 49; *Coffin v. City of Davenport*, 25 Id., 516; *Pressnell v. Herbert*, 34 Id., 539.

Laws granting exemptions from execution relate to the remedy and are valid. *Helpenstein & Gore v. Cave*, 3 Id., 287.

The legislature has power to change the form in which suits shall be instituted, and make it applicable to notes previously executed. *Creighton v. Gordon*, Morris, 41; *Ingerman v. Dooley*, Id., 28.

Laws made prior to the formation of a contract, cannot impair its obligation, for existing laws enter into and become a part of the contract when made, and define and determine it. *Davis v. Bronson*, 6 Id., 410.

A state may say how far the laws of another state may be enforced by her courts; and this without impairing the obligation of contracts. *Id.*

Contracts which are in evasion or in fraud of the laws of a state or county, or of the rights or duties of its citizens or subjects—against good morals, or against religion, or against public right; and contracts opposed to public policy, or national institutions, are nullities in every country, affected by such contracts, although they may be valid by the laws of the place where made. *Id.*

A contract made in another state with intent to enable another to sell intoxicating liquors within this state, in violation of the laws of this state, is opposed to the public policy of the state, and cannot be enforced in our courts. *Id.*

When a rule of decision relating to a remedy is changed by a statute, the new rule is applicable to all cases subsequently tried, though commenced prior to the enactment of the statute. *Ballard v. Ridgely & Billon*, Morris, 27.

After an action to abate a nuisance by selling intoxicating liquors had been commenced under the prohibitory law, a statute was enacted authorizing the closing of the building for one year, and the taking of an attorney's fee against the defendants. *Held*, that to apply the new statute in the judgment in such action did not infringe the provision of the constitution forbidding *ex post facto* laws, and that the attorney's fee taxed under such act is a part of the costs, and not part of the penalty, the statute effecting only the remedy. *Drake v. Jordan*, 36 N. W. Rep., 653.

SEC. 22. [Aliens hold property.]—Foreigners who are, or may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens.

This section of the constitution does not restrict the powers of the legislature to confer the same rights upon other classes, the rule of construction of state constitutions being that the legislature may exercise all rightful legislative powers which are not expressly prohibited or necessarily included in the prohibited powers. Opinion of COLE, J., in *Purzell v. Smidt*, 21 Iowa, 540. See, also, *Crogan v. Kinney*, 15 Id., 242; *Rheim v. Robbins*, 45 Id., which holds a contrary doctrine.

SEC. 23. [Slavery.]—There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime.

SEC. 24. [Reservation.]—No lease or grant of agricultural lands, reserving any rent or service of any kind, shall be valid for a longer period than twenty years.

SEC. 25. [Construction.]—The enumeration of rights shall not be construed to impair or deny others, retained by the people.

ARTICLE 2.—RIGHT OF SUFFRAGE.

SECTION 1. [Electors.]—Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.

This section of the constitution defines only the qualifications of an elector, and does not prescribe the place of exercising the elective franchise as a test of qualification. The power to fix the place and manner of its exercise is left with the general assembly. *Morrison v. Springer*, and other cases, 15 Iowa, 304.

The act of September 11, 1862, entitled "an act to amend title IV of the revision of 1860, so as to enable the qualified electors of the state in the military service to vote at certain elections," held, not inconsistent with this section of the constitution, for the reason that it permitted such electors to cast their votes at polls opened and conducted beyond the limits of the county and state of which they claimed to be residents. *Id.*

While the right to vote of a person possessing the qualifications of an elector, as prescribed by the state constitution, cannot be destroyed or impaired by the legislature, it may, nevertheless, regulate the exercise thereof by enacting reasonable provisions for determining the age, length of residence, etc., of the persons offering to vote. *Edmonds v. Banbury et al.*, 28 Id., 267.

Chapter 171 of the Laws of 1868, known as the "Registry Law," held, not in conflict with the provisions of the constitution. *Id.*

The supreme court will declare a statute unconstitutional only when it is clearly, palpably and plainly inconsistent with some provision of that instrument. *Stewart v. the Board of Supervisors, etc.*, 30 Id., 9; *Morrison v. Springer*, 28 Id., 304; *Santo v. The State*, 2 Id., 208; *McCormick v. Rusch*, 15 Id., 127; *Whiting et al v. City Mt. Pleasant*, 11 Id., 482; *McGregor v. Bayles* 19 Id., 43; *Duncombe v. Prindle*, 12 Id., 1, and cases cited from other states.

SEC. 2. [Privilege.]—Electors shall, in all cases except treason, felony or breach of the peace, be privileged from arrest on the days of election, during their attendance at such elections, going to and returning therefrom.

SEC. 3. [Same.]—No elector shall be obliged to perform military duty on the day of election, except in time of war or public danger.

SEC. 4. [Resident.]—No person in the military, naval or marine service of the United States shall be considered a resident of this state by being stationed in any garrison, barrick or military or naval place or station within this state.

SEC. 5. [Exception.]—No Idiot or Insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.

SEC. 6. [Ballot.] All elections by the people shall be by ballot.

ARTICLE 3. OF THE DISTRIBUTION OF POWERS.

SECTION 1. [Departments of the government.]—The powers of the government of Iowa shall be divided into three separate departments: the legislative, the executive and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

LEGISLATIVE DEPARTMENT.

SECTION 1. [Legislative authority.]—The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives; and the style of every law shall be—"Be it enacted by the general assembly of the state of Iowa."

The people have no authority in their primary or individual capacity, to make laws; that authority being vested in the general assembly. *Santo v. The State*, 2 Iowa, 168; *Stewart v. Board of Supervisors*, 30 Id., 9, 18.

The general assembly cannot legally submit to the people the proposition whether an act shall become a law or not. *Id.* *Geebrick v. The State*, 5 Id., 491; *The State v. Beneke*, 9 Id., 203; *The State v. Weir*, 33 Id., 134; *The State v. King*, 37 Id., 462, 466.

A law can no more be repealed than it can be enacted, by a vote of the people in their primary capacity. *Geebrick v. The State*, 5 Id., 491; *The State v. Weir*, 33 Id., 134.

The validity or taking effect of a statute cannot be made to depend on a vote of the people, and a section of an act providing for this is unconstitutional. But if the act be complete without such invalid section, it will be declared invalid.

SEC. 2. [Sessions.]—The sessions of the general assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members; unless the governor of the state shall, in the meantime, convene the general assembly by proclamation.

SEC. 3. [**Members of the house.**].—The members of the house of representatives shall be chosen every second year, by the qualified electors of their respective districts, on the second Tuesday in October, except the years of the presidential election, when the election shall be on the Tuesday next after the first Monday in November; and their term of office shall commence on the first day of January next after their election, and continue two years, and until their successors are elected and qualified.

SEC. 4. [**Eligibility.**].—No person shall be a member of the house of representatives who shall not have attained the age of twenty-one years; be a free white male citizen of the United States, and shall have been an inhabitant of this state one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the county or district he may have been chosen to represent.

SEC. 5. [**Senators.**].—Senators shall be chosen for the term of four years, at the same time and place as representatives; they shall be twenty-five years of age, and possess the qualifications of representatives as to residence and citizenship.

SEC. 6. [**Same, and classed.**].—The number of senators shall not be less than one-third nor more than one-half the representative body; and shall be so classified by lot, that one class, being as nearly one-half as possible, shall be elected every two years. When the number of senators is increased, they shall be annexed by lot to one or the other of the two classes, so as to keep them as nearly equal in number as practicable.

SEC. 7. [**Elections determined.**].—Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law.

SEC. 8. [**Quorum.**].—A majority of each house shall constitute a quorum to transact business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

SEC. 9. [**Authority of the houses.**].—Each house shall sit upon its own adjournment, keep a journal of its proceedings, and publish the same; determine its rules of proceedings, punish members for disorderly behavior, and with the consent of two-thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the general assembly of a free and independent state.

SEC. 10. [**Protest.**].—Every member of the general assembly shall have the liberty to dissent from or protest against any act or resolution which he may think injurious to the public or an individual, and have the reasons for his dissent entered on the journals; and the yeas and nays of the members of either house, on any question, shall, at the desire of any to members present, be entered on the journals.

SEC. 11. [**Privilege.**].—Senators and representatives, in all cases except treason, felony, or breach of the peace, shall be privileged from arrest during the session of the general assembly, and in going to and returning from the same.

SEC. 12. [**Vacancies.**].—When vacancies occur in either house, the governor, or the person exercising the functions of governor, shall issue writs of election to fill such vacancies.

SEC. 13. [**Doors open.**].—The doors of each house shall be open, except on such occasions as, in the opinion of the house, may require secrecy.

SEC. 14. [**Adjournment.**].—Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

SEC. 15. [**Bills.**].—Bills may originate in either house, and may be amended,

altered, or rejected by the other; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses.

SEC. 16. [**To be approved, etc.**].—Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him (Sunday excepted), the same shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly, shall be deposited by him in the office of the secretary of state within thirty days after the adjournment, with his approval if approved by him, and with his objections if he disapproves thereof.

SEC. 17. [**Same.**].—No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered upon the journal.

SEC. 18. [**Receipts, etc.**].—An accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws at every regular session of the general assembly.

SEC. 19. [**Impeachment.**].—The house of representatives shall have the sole power of impeachment, and all impeachments shall be tried by the senate. When sitting for that purpose, the senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two-thirds of the members present.

SEC. 20. [**Who liable to, and judgment.**].—The governor, judges of the supreme and district courts, and other state officers, shall be liable to impeachment for any misdemeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust or profit under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial and punishment according to law. All other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the general assembly may provide.

SEC. 21. [**Members not appointed to office.**].—No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emolument of which shall have been increased during such term, except such offices as may be filled by elections by the people.

SEC. 22. [**Disqualification.**].—No person holding any lucrative office under the United States, or of this state, or any other power, shall be eligible to hold a seat in the general assembly. But offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster, whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative.

SEC. 23. [**Same.**].—No person who may hereafter be a collector or holder of public moneys, shall have a seat in either house of the general assembly or be eligible to hold any office of trust or profit in this state, until he shall have accounted for and paid into the treasury all sums for which he may be liable.

SEC. 24. [**Money drawn.**].—No money shall be drawn from the treasury but in consequence of appropriations made by law.

SEC. 25. [Compensation of members.]—Each member of the first general assembly under this constitution shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no general assembly shall have the power to increase the compensation of its members. And when convened in extra session they shall receive the same mileage and per diem compensation as fixed by law for the regular session, and none other.

SEC. 26. [Law.]—No law of the general assembly, passed at a regular session, of a public nature, shall take effect until the fourth day July next after the passage thereof. Laws passed at a special session shall take effect ninety days after the adjournment of the general assembly, by which they are passed. If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state.

Where an act of the legislature is complete and is a law in its language and form as usually expressed in statute it will take effect as a statute according to the provisions of the constitution, notwithstanding a section therein providing for submitting to a vote of the people the question whether it shall become a law or not. *Wier v. Cram*, 37 Iowa, 649; *Santo v. The State*, 2 Id., 165.

A statute providing that when the governor deems it necessary that a general law shall take effect earlier than it would by general publication, he may direct its publication in certain newspapers, and it shall take effect from that date, is unconstitutional, for that this power is, by the constitution, lodged in the general assembly, and they cannot delegate it to the governor. *Scott v. Clark et al.*, 1 Id., 70; *Pilkey v. Gleason*, Id., 521.

The publication of a statute without direction of the general assembly gives it no effect. *The State ex rel. v. Calkins*, 1 G. Greene, 68.

Where a statute provided as follows: "This act being deemed of immediate importance, shall take effect from its publication in the Iowa State Register and the Des Moines Times, newspapers published at Des Moines," held, that the act took effect from the date of such publication, notwithstanding the general provision of section 24 of the revision, now section 33 of the code. *Hunt v. Murray*, 17 Id., 313.

Printed copies of the approval of the governor of the several laws published in a volume issued by the authority of the state, are not essential to give the laws legal effect. *Dishon v. Smith, County Judge*, 10 Id., 212.

SEC. 27. [Divorce.]—No divorce shall be granted by the general assembly.

SEC. 28. [Lotteries.]—No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed.

SEC. 29. [Acts.]—Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

While an act cannot, under this section, embrace more than one object, which must be expressed in the title, it may, nevertheless, embrace all matters connected therewith. *The State v. Squires*, 26 Iowa, 340.

If an act embrace a subject not expressed in the title, the act will be void only as to so much thereof as is not thus expressed. *Id.*

An act entitled "an act in relation to certain state roads named therein," which contained sixty-six sections, in which were established forty-six roads and some others vacated, was held, not in conflict with this section of the constitution. *The State ex rel. Weir v. The County Judge of Davis Co.*, 2 Id., 280. See, also, *Morford v. Unger*, 8 Id., 82; *Whiting v. City of Mt. Pleasant*, 11 Id., 482.

Sections 3275 and 3276 of chapter 125, entitled "executions," of the act entitled "the code of civil practice," revision, held, to relate to matters properly connected with the act, and embraced in the title, and are not inconsistent with section twenty-nine, article three, of the constitution. *Porter v. Thompson*, 22 Id., 391.

A general clause in a statute, repealing so much of a former law as is in conflict with the act which is unconstitutional, does not have the effect to repeal the former law. *Childs v. Shower*, 18 Id., 261.

A statute designated in its title as an amendment to a city charter, but which embraces objects foreign to the charter, is in conflict with the constitution and is void. *Williamson v. The City of Keokuk*, 44 Id., 88.

The act entitled "an act providing the place of bringing suits in certain cases," being chapter ninety-five of the laws of 1872 (sections 2582, 2583 and 2584 of the code), held, not vulnerable to the constitutional objection that the subject matter of a part of the act was not embraced in the title. *The Farmers Ins. Co. v. Highsmith*, 44 Id., 330.

Chapter 119, laws of 1878, prohibiting the sale of malt and vinous liquors within two miles of the corporate limits of cities and towns, is not in conflict with this section requiring every act of the legislature to embrace but one subject and matters properly connected therewith, and the fact that the title of an act contains matter not of the subject of the act does not render it invalid. *The State v. Schroeder*, 51 Id., 197.

Chapter 143, laws of 1884, relating to the unlawful sale of intoxicating liquors, is not repugnant to section 29 of article 3 of the constitution which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title," nor is said chapter in conflict with section 6 of article 1, which declares that "all laws of a general nature shall have a uniform operation; nor is said chapter repugnant to section 23 of article one, which forbids involuntary servitude except for the punishment of crime. *Martin v. Blattner*, 68 Id., 286.

If it be conceded that section 2 of chapter 109 of the laws of 1880 is unconstitutional because it relates to a subject not embraced in the title of the act, as required by section 29 of article 3, above, yet such objection does not extend to the other sections of the act, and they are not invalidated for that reason. *Henkle v. Town of Keota*, and three other cases, 68 Id., 334.

SEC. 30. [Local or special laws].—The general assembly shall not pass local or special laws in the following cases:

- For the assessment and collection of taxes for state, county, or road purposes;
- For laying out, opening, and working roads or highways;
- For changing the names of persons;
- For the incorporation of cities and towns;
- For vacating roads, town plats, streets, alleys, or public squares;
- For locating or changing county seats;

In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes, in each county, cast for and against it.

This section of the constitution prohibits the enactment of special laws, either for the incorporation of cities and towns, or for the amendment of acts of incorporation in existence, before the adoption of the constitution. *Ex parte Samuel Pritz*, 9 Iowa, 30.

The "act explanatory of an act entitled an act to create the county of Humboldt and locate the county seat thereof," approved March 11th, 1858, was held, as not relating back to the act of which it was amendatory; and as an independent act it was invalid because it had not been submitted to the vote of the people as required by this section of the constitution. *Duncombe v. Prindle*, 12 Id., 1.

Chapter sixteen of the laws of 1868, entitled "an act to repeal an act revising and consolidating the laws incorporating the city of Dubuque, and establishing a city court therein," held, within the constitutional prohibition of special legislation, and void. *Davis & Bro. v. Woodnough*, 9 Id., 104; *Baker et al v. The Steamboat Milwaukee*, 14 Id., 214.

The act entitled "an act to establish a court at McGregor," approved March 18, 1862, held inconsistent with section 30, of article 3, of the constitution, and void. *Town of McGregor v. Baylies*, 19 Id., 43.

Section 1141 of the revision (code, section 548), providing for the amendment by cities and towns of the law of their incorporation is not in conflict with this section of the constitution. *Von Phul v. Hammer*, 29 Id., 222.

A local statute authorizing the building of a railroad from the city of Lyons to the city of Clinton, held, not to be one of the cases where the law must be general and of uniform operation throughout the state as contemplated in this section. *The City of Clinton v. The C. R. & M. R. Co.*, 24 Id., 455.

Although the legislature has not the power, in the cases enumerated in section 30 article 3 of the constitution, to pass local or special laws, and cannot pass a special law incorporating an independent school district, it has nevertheless, the power to pass a curative act legalizing the defec-

tive organization of a school district already in existence under the general law for the creation of independent school districts. *State ex rel., etc., v. Squires*, 26 Id., 340.

While such curative act is a local or special law, it is a case where a general law cannot be made applicable within the meaning of the constitution. *Id.*

Where a purchaser has paid for land; and, the prior owner is under a moral obligation to convey, the legislature may cure a defective conveyance by retrospective legislation, as against such owner, his widow and heirs, but such legislation cannot affect the title of a subsequent *bona fide* purchaser. *Newman v. Samuels*, 17 Id., 528.

So the general assembly may, by retrospective legislation, legalize the assessment and levy of taxes and prescribe the manner in which property may be sold for the satisfaction thereof. *Boardman v. Beckwith*, 18 Id., 292; *The Iowa Railroad Land Co. v. Soper*, 39 Id., 112.

Pending the decision of a petition for a rehearing, where no judgment has been rendered upon the filing of the first opinion which declared certain special judgment taxes illegal, the legislature passed an act (March 18, 1874), affirming their legality; *held*, that the curative act was valid. *The Iowa R. L. Co. v. Sac County*, 39 Id., 124.

Chapter 180, laws of tenth general assembly, providing for the taxation of express and telegraph companies, *held*, not in conflict with section 30, of article 3, of the constitution. *The U. S. Ex. Co. v. Ellyson*, 28 Id., 370.

The general assembly has the power to pass a general law curing defects in the establishment of county roads. *Bennett v. Fisher*, 26 Id., 479.

Chapter 60, laws of 1882, purporting to legalize an invalid ordinance of the city of Burlington, was *held* repugnant to that part of section 30 of article 3 of the state constitution which provides that the general assembly shall not pass local or special laws, when a general law can be made applicable. *Ind. School District of Burlington v. The City of Burlington*, 60 Id., 500.

The legislature may by curative act validate a void order of a county superintendent changing the boundaries of school districts in a case where a general law could not be made to apply but such act cannot be allowed to operate to deprive a school district, from which territory is detached by such order, of taxes which are levied and collectible before the curative act is passed, for such district has acquired a vested right in the taxes which cannot be constitutionally taken away. *The Ind. Dist. of Union v. Ind. Dist. of Cedar Rapids*, 62 Id., 616.

Chapter 198 of laws of 1884 providing for holding court at Avoca in Pottawattamie county is not in conflict with section 30, article 3, of the constitution, which prohibits the passage of local or special laws in certain cases. *Cooper, Adm'r, v. Mills County*, 69 Id., 350.

The farmers' Protective Association being a corporation organized, not for pecuniary profit, and being sued for infringement of certain barbed wire patents, the general assembly of 1884 passed an act, chapter 202, appropriating \$5,000 to the use of said corporation in defending said suits: *Held*, that such was not repugnant to section 30 of article 3 of the constitution, the act being necessarily special. *Merchants Union Barb Wire Co. v. Brown, Auditor of State et al.*, 64 Id., 275.

The act of the twentieth general assembly, providing for the holding terms of court at Avoca, in Pottawattamie county, (chapter 198), *held* not in conflict with section 30 of article 3 of the constitution which prohibits the passage of local or special acts in certain cases. *Cooper, Adm'r, v. Mills Co.*, 69 Id., 350.

SEC. 31. [Extra compensation.]—No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local or private purposes, unless such appropriation, compensation or claim, be allowed by two-thirds of the members elected to each branch of the general assembly.

SEC. 32. [Oath of members.]—Members of the general assembly shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States, and the constitution of the state of Iowa, and that I will faithfully discharge the duties of senator (or representative, as the case may be) according to the best of my ability." And members of the general assembly are hereby empowered to administer to each other the said oath or affirmation.

SEC. 33. [Census.]—The general assembly shall, in the years one thousand eight hundred and fifty-nine, one thousand eight hundred and sixty-three, one thousand eight hundred and sixty-five, one thousand eight hundred and sixty-seven, one thousand eight hundred and sixty-nine, and one thousand eight hundred

and seventy-five, and every ten years thereafter, cause an enumeration to be made of all the *white* inhabitants of the state.

SEC. 34. [**Apportionment.**]—The number of senators shall, at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties according to the number of *white* inhabitants in each.

SEC. 35. [**Districts.**]—The senate shall not consist of more than fifty members, nor the house of representatives of more than one hundred, and they shall be apportioned among the several counties and representative districts of the state according to the number of *white* inhabitants in each, upon ratios to be fixed by law; but no representative district shall contain more than four organized counties, and each district shall be entitled to at least one representative. Every county and district which shall have a number of inhabitants equal to one-half of the ratio fixed by law, shall be entitled to one representative; and any one county containing in addition to the ratio fixed by law, one-half of that number, or more, shall be entitled to one additional representative. No floating district shall hereafter be formed.

SEC. 36. [**Ratio of representation.**]—At its first session under this constitution, and at every subsequent regular session, the general assembly shall fix the ratio of representation, and also form into representative districts those counties which will not be entitled singly to a representative.

SEC. 37. [**Districts.**]—When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district.

SEC. 38. [**Elections by general assembly.**]—In all elections by the general assembly, the members thereof shall vote *viva voce*; and the votes shall be entered on the journal.

ARTICLE 4.—EXECUTIVE DEPARTMENT.

SECTION 1. [**Governor.**]—The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled the governor of the state of Iowa.

SEC. 2. [**Election and term.**]—The governor shall be elected by the qualified electors at the time and place of voting for members of the general assembly, and shall hold his office two years from the time of his installation, and until his successor is elected and qualified.

SEC. 3. [**Eligibility.**]—There shall be a lieutenant governor, who shall hold his office two years, and be elected at the same time as the governor. In voting for governor and lieutenant governor, the electors shall designate for whom they vote as governor, and for whom as lieutenant governor. The returns of every election for governor and lieutenant governor, shall be sealed up and transmitted to the seat of government of the state, directed to the speaker of the house of representatives, who shall open and publish them in the presence of both houses of the general assembly.

SEC. 4. [**Returns of elections.**]—The persons respectively having the highest number of votes for governor and lieutenant governor, shall be declared duly elected; but in case two or more persons shall have an equal, and the highest number of votes for either office, the general assembly shall, by joint vote, forthwith proceed to elect one of said persons governor, or lieutenant governor, as the case may be.

SEC. 5. [**Contested elections.**]—Contested elections for governor, or lieutenant governor, shall be determined by the general assembly in such manner as may be prescribed by law.

SEC. 6. [**Eligibility.**]-No person shall be eligible to the office of governor, or lieutenant governor, who shall not have been a citizen of the United States, and a resident of the state two years next preceding the election, and attained the age of thirty years at the time of said election.

SEC. 7. [**Commander.**]-The governor shall be commander-in-chief of the militia, the army, and navy of this state.

SEC. 8. [**Duties.**]-He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices.

SEC. 9. [**Same.**]-He shall take care that the laws are faithfully executed.

SEC. 10. [**Vacancies.**]-When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people.

SEC. 11. [**Convening assembly.**]-He may, on extraordinary occasions, convene the general assembly by proclamation, and shall state to both houses, when assembled, the purpose for which they have been convened.

SEC. 12. [**Message.**]-He shall communicate, by message, to the general assembly, at every regular session, the condition of the state, and recommend such matters as he may deem expedient.

SEC. 13. [**Adjournment.**]-In case of disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he may think proper; but no such adjournment shall be beyond the time fixed for the regular meeting of the next general assembly.

SEC. 14. [**Disqualification.**]-No person shall, while holding any office under the authority of the United States, or this state, execute the office of governor, or lieutenant governor, except as hereinafter expressly provided.

SEC. 15. [**Two years.**]-The official term of the governor, and lieutenant governor, shall commence on the second Monday of January next after their election, and continue for two years, and until their successors are elected and qualified. The lieutenant governor, while acting as governor, shall receive the same pay as provided for governor; and while presiding in the senate, shall receive as compensation therefor, the same mileage and double the per diem pay provided for a senator, and none other.

SEC. 16. [**Pardons, etc.**]-The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting, when the general assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the general assembly at its next meeting, each case of reprieve, commutation or pardon granted, and the reason therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted.

SEC. 17. [**Lieutenant act as governor.**]-In case of the death, impeachment, resignation, removal from office, or other disability of the governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant governor.

SEC. 18. [**Further vacancies provided for.**]—The lieutenant governor shall be president of the senate, but shall only vote when the senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of governor, the senate shall choose a president pro tempore.

SEC. 19. [**Same.**]—If the lieutenant governor, while acting as governor, shall be impeached, displaced, resign, or die, or otherwise become incapable of performing the duties of the office, the president pro tempore of the senate shall act as governor until the vacancy is filled, or the disability removed; and if the president of the senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of governor, the same shall devolve upon the speaker of the house of representatives.

SEC. 20. [**Seal of state.**]—There shall be a seal of this state, which shall be kept by the governor and used by him officially, and shall be called the great seal of the state of Iowa.

SEC. 21. [**Commissions, etc.**]—All grants and commissions shall be in the name and by the authority of the people of the state of Iowa, sealed with the great seal of the state, signed by the governor and countersigned by the secretary of state.

SEC. 22. [**Secretary, auditor and treasurer.**]—A secretary of state, auditor of state, and treasurer of state, shall be elected by the the qualified electors, who shall continue in office two years, and until their successors are elected and qualified; and perform such duties as may be required by law.

If section 760 of the code provided for the absolute removal by the governor of an elective state officer before the end of his term it would be reasonable to urge its unconstitutionality; but since it provides only for a suspension of the officer from the performance of his official duties, it is not repugnant to the constitution. *Brown v. Duffus*, 66 Iowa, 194.

ARTICLE 5.—JUDICIAL DEPARTMENT.

SECTION 1. [**Courts.**]—The judicial department shall be vested in a supreme court, district court and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish.

The legislature is limited in this section in the establishment of courts, other than the district court, to those that are inferior to the supreme court. *Hetherington v. Bissell*, 10 Iowa, 145.

It is the right and duty of the judicial power of the state to declare void all acts of the legislature made in violation of the constitution. *McGregor v. Baylies*, 19 Id., 43; *Reid v. Wright*, 2 G. Greene, 15.

The power of the courts to declare a legislative act invalid should not be exercised in doubtful cases, and will be done only when necessary; and the court will, when possible, give such a construction as will avoid the necessity and uphold the act. *The State ex rel. Weir v. The County Judge, etc.*, 1 Id., 280; *Whiting v. The City of Mt. Pleasant*, 11 Id., 488; *Morrison v. Springer*, 15 Id., 304.

Chapter 165, laws of 1878, as amended by chapter 2, laws of 1880, which empowers the jury to say whether a defendant found guilty of murder in the first degree shall be punished by death or by imprisonment in the penitentiary for life at hard labor, is not inconsistent with this section of the constitution and is not invalid. *The State v. Hackett*, 70 Id., 443.

SEC. 2. [**Supreme court.**]—The supreme court shall consist of three judges, two of whom shall constitute a quorum to hold court.

Where a person who is not a judge under the laws of the state is placed on the bench to try a cause, against the consent of one of the parties, the proceeding is erroneous until the judgment will be reversed. *Smith v. Frisbee*, 7 Iowa, 486.

Whenever it appears from the record that the duties belonging to the court in the conduct of the trial of a cause have been attempted to be exercised by any person not a judge, an error is at once disclosed sufficient to reverse the case on appeal, although the record be free from error in other respects. *Michales v. Hines*, 3 G. Greene, 470.

And it will be incompetent for any person other than a judge to preside in the trial of a cause even by consent of parties. *Winchester v. Ayers*, 4 G. Greene, 104.

SEC. 3. [**Judges elected.**]—The judges of the supreme court shall be elected by the qualified electors of the state, and shall hold their court at such time and place as the general assembly may prescribe. The judges of the supreme court shall

elected shall be classified so that one judge shall go out of office every two years; and the judge holding the shortest term of office under such classification, shall be chief justice of the court during his term, and so on in rotation. After the expiration of their terms of office, under such classification, the term of each judge of the supreme court shall be six years, and until his successor shall have been elected and qualified, The judges of the supreme court shall be ineligible to any other office in the state, during the term for which they have been elected.

SEC. 4. [**Jurisdiction.**—The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the state.

Section 3173 of the code restricting appeals to the supreme court and providing for the certification of questions of law by the trial court in actions involving less than \$100, is not, when applied to equity causes, repugnant to section 4, of article 5 of the constitution. *Andrews & Smith v. Burdick & Goble*, 62 Iowa, 714.

SEC. 5. [**District judge elected.**—The district court shall consist of a single judge, who shall be elected by the qualified electors of the district in which he resides. The judge of the district court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of judge of the supreme court, during the term for which he was elected.

SEC. 6. [**Jurisdiction.**—The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

SEC. 7. [**Conservators of the peace.**—The judges of the supreme and district courts shall be conservators of the peace throughout the state.

SEC. 8. [**Style of process.**—The style of all process shall be "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same.

SEC. 9. [**Salaries.**—The salary of each judge of the supreme court shall be two thousand dollars per annum; and that of each district judge one thousand six hundred dollars per annum, until the year eighteen hundred and sixty; after which time they shall severally receive such compensation as the general assembly may, by law, prescribe; which compensation shall not be increased or diminished during the term for which they have been elected.

SEC. 10. [**Judicial districts.**—The state shall be divided into eleven judicial districts; and after the year eighteen hundred and sixty the general assembly may reorganize the judicial districts, and increase or diminish the number of districts, or the number of judges of said court, and may increase the number of judges of the supreme court; but such increase or diminution shall not be more than one district, or one judge of either court, at any one session; and no reorganization of the districts, or diminution of the judges, shall have the effect of removing a judge from office. Such reorganization of the districts, or any change in the boundaries thereof, or any increase or diminution of the number of judges, shall take place every four years thereafter, if necessary, and at no other time.

SEC. 11. [**When chosen.**—The judges of the supreme and district courts shall be chosen at the general election; and the term of office of each judge shall commence on the first day of January next after his election.

SEC. 12. [**Attorney-general.**—The general assembly shall provide, by law, for the election of an attorney-general by the people, whose term of office shall be two years, and until his successor shall have been elected and qualified.

SEC. 13. [**Elected: qualification.**]-The qualified electors of each county shall, at the general election in the year 1886 and every two years thereafter elect a county attorney, who shall be a resident of the county for which he is elected, and shall hold his office for the term of two years, and until his successor shall have been elected and qualified.

SEC. 14. [**Duty of general assembly.**]-It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this state.

ARTICLE 6.—MILITIA.

SECTION 1. [**Who constitute.**]-The militia of this state shall be composed of all able-bodied white male citizens, between the ages of eighteen and forty-five years, except such as are or may hereafter be exempt by the laws of the United States, or of this state; and shall be armed, equipped and trained, as the general assembly may provide by law.

SEC. 2. [**Qualifications.**]-No person or persons conscientiously scrupulous of bearing arms shall be compelled to do military duty in time of peace; *provided*, that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens.

SEC. 3. [**Officers.**]-All commissioned officers of the militia (staff officers excepted) shall be elected by the persons liable to perform military duty, and shall be commissioned by the governor.

ARTICLE 7.—STATE DEBTS.

SECTION 1. [**Limitation of state indebtedness.**]-The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the state shall never assume, or become responsible for, the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the state.

Chapter 202, laws of 1884 is not repugnant to this section of the constitution. *Mechant's Union B. W. Co. v. Brown et al.*, 64 Iowa, 275.

SEC. 2. [**Same.**]-The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

SEC. 3. [**Losses to school funds audited.**]-All losses to the permanent, school, or university fund of this state, which shall have been occasioned by the defalcation, mismanagement, or fraud of the agents or officers controlling and managing the same, shall be audited by the proper authorities of the state. The amount so audited shall be a permanent founded debt against the state, in favor of the respective fund sustaining the loss, upon which not less than six per cent annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized by the second section of this article.

SEC. 4. [**For what other purposes state may contract debt.**]-In addition the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or defend the state in war; but the money

arising from the debts so contracted shall be applied for the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

SEC. 5. [**Other debts to be authorized.**]-Except the debts hereinbefore specified in this article, no debt shall be hereafter contracted by, or on behalf of this state, unless such debt shall be authorized by some law for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax, sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal of such debt, within twenty years from the time of contracting thereof; but no such law shall take effect until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; and such law shall be published in at least one newspaper in each county, if one is published therein throughout the state, for three months preceding the election at which it is submitted to the people.

SEC. 6. [**Legislature may repeal.**]-The legislature may, at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time forbid the contracting of any further debt, or liability, under such law; but the tax imposed by such law, in proportion to the debt or liability which may have been contracted in pursuance thereof, shall remain in force and be irrevocable, and be annually collected, until the principal and interest are fully paid.

SEC. 7. [**Tax imposed.**]-Every law which imposes, continues, or revives a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

ARTICLE 8.—CORPORATIONS.

SECTION 1. [**Corporations, how created.**]-No corporation shall be created by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided.

The eighth article of the constitution refers exclusively to corporations for pecuniary purposes. *Ex parte Pritz*, 9 Iowa, 30.

SEC. 2. [**Property taxable.**]-The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals.

Chapter 180 of the laws of 1868, providing for the taxation of express and telegraph companies, was held, not to be in conflict with this section of the constitution *The U. S. Ex. Co. v. Ellyson*, 28 Iowa, 370; *Western Union Tel. Co. v. Same*, Id., 380.

The ninth section of chapter twenty-six, laws of the fourteenth general assembly, releasing the property of railroad companies from the payment of municipal taxes, held, to be in conflict with the second section of article eight of the constitution, and therefore inoperative and void. *The City of Davenport v. C., R. I. & P. R. Co.*, 38 Id., 633; *The City of Dubuque v. The Illinois Central Railroad Company*, 39 Id., 56, 88.

SEC. 3. [**State not to be a stockholder.**]-The state shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the state.

Chapter 202 laws of 1884 is not repugnant to this section of the constitution. *Merchants Union B. W. Co. v. Brown et al.*, 64 Id., 275.

SEC. 4. [**Corporation not to be a stockholder.**]-No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.

The constitution of Iowa confers no power upon the legislature to authorize counties to become stockholders in railroad corporations, nor to borrow money upon their bonds for the purpose of payment upon such stock; and such bonds are therefore void. *The State ex rel. v. The County of Wapello*, 13 Iowa, 389; *McClure v. Owen*, 26 Id., 243; *Meyers v. Johnson County*, 14 Id., 47;

Rock v. Wallace, Id., 593; *McMillen v. Boyles*, Id., 107; *Smith v. Henry County*, 15 Id., 385; *Ten Eyck v. The Mayor of Keokuk*, Id., 486; *Chamberlain v. The City of Burlington*, Id., 395. But see *Stewart v. Board of Supervisors of Polk Co.*, 30 Id., 9.

This section of the constitution prohibiting the creation of corporations or associations with banking powers, etc., unless ratified by a majority vote of the people, as therein specified, does not apply to, or operate as a limitation upon the repealing power of the legislature. *Morseman v. Younkin*, 27 Id., 350.

SEC. 5. [**Act submitted to people.**].—No act of the general assembly, authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall take effect, or in any manner be in force, until the same shall have been submitted, separately, to the people, at a general or special election, as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.

SEC. 6. [**State bank.**].—Subject to the provisions of the foregoing section, the general assembly may also provide for the establishment of a state bank with branches.

SEC. 7. [**Founded on specie basis.**].—If a state bank be established, it shall be founded on an actual specie basis, and the branches shall be mutually responsible for each other's liabilities upon all notes, bills and other issues intended for circulation as money.

SEC. 8. [**General banking law.**].—If a general banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of state, of all bills, or paper credit designed to circulate as money, and require security to the full amount thereof, to be deposited with the state treasurer, in United States stocks, or in interest paying stocks of states in good credit and standing, to be rated at ten per cent below their average value in the city of New York, for thirty days next preceding their deposit; and in case of a depreciation of any portion of such stocks, to the amount of ten per cent on the dollar, the bank or banks owning said stocks shall be required to make up said deficiency by depositing additional stocks; and said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer, and to whom.

SEC. 9. [**Stockholders responsible.**].—Every stockholder in a banking corporation or institution shall be individually responsible and liable to its credits, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities, accruing while he or she remains such stockholder.

SEC. 10. [**Bill holders to have preference.**].—In case of the insolvency of any banking institution, the bill holders shall have a preference over its creditors.

SEC. 11. [**Suspension of specie payments.**].—The suspension of specie payments by banking institutions shall never be permitted or sanctioned.

SEC. 12. [**General assembly may amend or repeal.**].—Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.

The twelfth section of article eight of the constitution confers upon the legislature no power to amend or repeal laws for the organization or creation of municipal corporations, this article relating exclusively to corporations for pecuniary profit. *Ex parte Pritz*, 9 Iowa, 30.

ARTICLE 9.—EDUCATION AND SCHOOL LANDS.

1.—Education.

SECTION 1. [**Board of education.**].—The educational interests of the state, including common schools and educational institutions, shall be under the management of a board of education, which shall consist of the lieutenant governor, who shall be the presiding officer of the board, and have the casting vote in case of a tie, and one member to be elected from each judicial district in the state.

The act of the general assembly of March 12th, 1858, entitled "An act for the public instruction of the state," for the establishment of high schools, held to be unconstitutional. *The High School, etc., v. County of Clayton*, 9 Iowa, 175.

SEC. 2. [**Who eligible.**].—No person shall be eligible as a member of said board who shall not have attained the age of twenty-five years, and shall have been one year a citizen of the state.

SEC. 3. [**How elected.**].—One member of said board shall be chosen by the qualified electors of each district, and shall hold the office for the term of four years, and until his successor is elected and qualified. After the first election under this constitution, the board shall be divided, as nearly as practicable, into two equal classes, and the seats of the first class shall be vacated after the expiration of two years; and one-half of the board shall be chosen every two years thereafter.

SEC. 4. [**First session.**].—The first session of the board of education shall be held at the seat of government, on the first Monday of December, after their election; after which the general assembly may fix the time and place of meeting.

SEC. 5. [**Limited to twenty days.**].—The sessions of the board shall be limited to twenty days, and but one session shall be held in any one year, except upon extraordinary occasions, when, upon the recommendation of two-thirds of the board, the governor may order a special session.

SEC. 6. [**Secretary.**].—The board of education shall appoint a secretary, who shall be the executive officer of the board, and perform such duties as may be imposed upon him by the board, and the laws of the state. They shall keep a journal of their proceedings, which shall be published and distributed in the same manner as the journals of the general assembly.

SEC. 7. [**Rules and regulations.**].—All rules and regulations made by the board shall be published and distributed to the several counties, townships, and school districts, as may be provided for by the board, and when so made, published and distributed, they shall have the force and effect of law.

SEC. 8. [**Power to make: general assembly may repeal.**].—The board of education shall have full power and authority to legislate and make all needful rules and regulations in relation to common schools, and other educational institutions, that are instituted, to receive aid from the school or university fund of this state; but all acts, rules, and regulations of said board may be altered, or repealed by the general assembly; and when so altered, amended, or repealed, they shall not be re-enacted by the board of education.

SEC. 9. [**Governor ex-officio member.**].—The governor of the state shall be, *ex-officio*, a member of the board.

SEC. 10. [**Contingent expenses.**].—The board shall have no power to levy taxes, or make appropriations of money. Their contingent expenses shall be provided for by the general assembly.

SEC. 11. [**State university.**].—The state university shall be established at one place without branches at any other place, and the university fund shall be applied to that institution, and no other.

SEC. 12. [**Board of education to provide for education.**].—The board of education shall provide for the education of all the youths of the state, through

a system of common schools, and such schools shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school, as aforesaid, may be deprived of their portion of the school fund.

SEC. 13. [**Compensation.**—The members of the board of education shall each receive the same per diem during the time of their session, and mileage going to and returning therefrom, as members of the general assembly.

SEC. 14. [**Quorum.**—A majority of the board shall constitute a quorum for the transaction of business, but no rule, regulation, or law, for the government of common schools or other educational institutions shall pass without the concurrence of a majority of all the members of the board, which shall be expressed by the yeas and nays on the final passage. The style of all acts of the board shall be, "Be it enacted by the board of education of the state of Iowa."

SEC. 15. [**When board may be abolished.**—At any time after the year one thousand eight hundred and sixty-three, the general assembly shall have power to abolish or reorganize said board of education, and provide for the educational interest of the state in any other manner that to them shall seem just and proper.

In pursuance of the power conferred in this section, the general assembly by chapter 52 of the laws of 1864, abolished the board of education, so that the 1st subdivision of article 9 of the constitution is no longer of any practical force.

2.—School Funds and School Lands.

SECTION 1. [**Under control of assembly.**—The educational and school funds and lands, shall be under the control and management of the general assembly of this state.

SEC. 2. [**Permanent fund.**—The university lands, and the proceeds thereof, and all moneys belonging to said fund shall be a permanent fund for the sole use of the state university. The interest arising from the same shall be annually appropriated for the support and benefit of said university.

SEC. 3. [**Lands appropriated.**—The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all the lands that have been, or hereafter may be granted by the United States to this state, for the support of schools, which may have been or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress, distributing the proceeds of the public lands among the several states of the Union, approved in the year of our Lord one thousand eight hundred and forty-one, and all estates of deceased persons who may have died without leaving a will or heir, and also such per cent as has been or may hereafter be granted by congress, on the sale of lands in this state, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the general assembly may provide, shall be inviolably appropriated to the support of common schools throughout the state.

SEC. 4. [**Fines, etc., how appropriated.**—The money which may have been or shall be paid by persons as an equivalent for exemption from military duty, and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, shall be exclusively applied in the several counties in which such money is paid, or fine collected, among the several school districts of said counties in proportion to the number of youths subject to enumeration in such districts, to the support of common schools, or the establishment of libraries, as the board of education shall from time to time provide.

SEC. 5. [**Lands reserved, or granted, or funds accruing from sale thereof to be a permanent fund.**—The general assembly shall take measures

for the protection, improvement, or other disposition of such lands as have been, or may hereafter be reserved, or granted by the United States, or any person or persons to this state, for the use of the university, and the funds accruing from the rents or sale of such lands, or from any other source for the purpose aforesaid, shall be, and remain, a permanent fund, the interest of which shall be applied to the support of said university, for the promotion of literature, the arts and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the general assembly, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university.

SEC. 6. [**Who agents of school funds.**].—The financial agents of the school funds shall be the same that, by law, receive and control the state and county revenue, for other civil purposes, under such regulations as may be provided by law.

SEC. 7. [**Money to be distributed.**].—The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as may be provided by the general assembly.

The county auditor is the custodian of the notes and mortgages given as securities for the school fund loaned in the county. This is determined upon a consideration of section 6 of article 9, and other provisions of the constitution, and the various statutes bearing on the question, for which see opinion. *Madison County v. Tullis*, 69 Iowa, 720.

ARTICLE X.—AMENDMENTS TO THE CONSTITUTION.

SECTION 1. [**Amendments.**].—Any amendment or amendments to this constitution may be proposed in either house of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the general assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people in such manner, and at such time as the general assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the general assembly, voting thereon, such amendment or amendments shall become a part of the constitution of this state.

SEC. 2. [**More than one.**].—If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for and against each of such amendments separately.

SEC. 3. [**Convention.**].—At the general election to be held in the year one thousand eight hundred and seventy, and each tenth year thereafter, and also at such times as the general assembly may, by law, provide, the question, “shall there be a convention to revise the constitution, and amend the same?” shall be decided by the electors qualified to vote for members of the general assembly, and in case a majority of the electors so qualified, voting at such election for and against such proposition, shall decide in favor of a convention for such purpose, the general assembly, at its next session, shall provide by law for the election of delegates to such convention.

See notes to amendments to constitution on page post.

ARTICLE XI.—MISCELLANEOUS.

SECTION 1. [Jurisdiction of justice of the peace.]—The jurisdiction of justices of the peace shall extend to all civil cases (except cases in chancery, and cases where the title to real estate may arise), where the amount in controversy does not exceed one hundred dollars, and by the consent of the parties may be extended to any amount not exceeding three hundred dollars.

SEC. 2. [Counties.]—No new county shall hereafter be created containing less than four hundred and thirty-two square miles; nor shall the territory of any organized county be reduced below that area; except the county of Worth, and the counties west of it along the northern boundary of this state, may be organized without additional territory.

Chapter 192 laws of 1870, creating the county of Crocker, held to be in conflict with this section of the constitution. *Garfield v. Brayton*, 33 Iowa, 16.

A justice of the peace has jurisdiction of the "first offense" contemplated in section 11 of chapter 143 laws of 1884 in relation to the keeping and sale of intoxicating liquors. *Alborton v. Kruckbaum*, 65 Id., 12.

SEC. 3. [To what amount county may become indebted.]—No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last state and county tax list, previous to the incurring of such indebtedness.

A school district township is a political or municipal corporation within the meaning of this section of the constitution, and warrants drawn upon the school treasury, when the corporation is indebted in excess of five per centum of the taxable property in the district, and there is no money in the treasury to pay the same, and the district has no money or assets at the time of creating the indebtedness, are null and void. *Winspear v. The District of Holman*, 37 Iowa, 542.

Indebtedness beyond the constitutional limit at the time of the injury is no defense to an action against a city for damages for an injury caused by the negligence of the city in the construction and maintenance of the gutters of its streets. *Bartle v. The City of Des Moines*, 38 Id., 414.

The constitutional restriction upon the creation of municipal indebtedness does not operate upon the municipal authorities, as the agents of the corporation, but upon the corporation itself as principal, and therefore the latter cannot be bound by an act creating such indebtedness. *McPherson v. Foster Bros.*, 43 Id., 48.

That the tax payers have stood by in silence and permitted municipal bonds to be issued, does not estop them to object to their legality in hands of an innocent holder. *Id.*

The creating of the indebtedness being *ultra vires*, the assent of all the people of the corporation thereto would not make the debt valid. *Id.* *Mosher v. The Ind. School Dist., etc.*, 44 Id., 122.

In the absence of power to execute municipal bonds, no subsequent transfer thereof will give them effect, and they are void even in the hands of an innocent holder. *Id.* *Hull & Argalls v. The County of Marshall*, 12 Id., 142; *Clark v. Des Moines*, 19 Id., 200; *Smith v. Henry Co.*, 15 Id., 385; *Chamberlain v. Burlington*, 19 Id., 404.

Bonds issued by a municipal corporation in excess of the constitutional limit are void, without regard to the good faith with which they were purchased or want of notice of their validity. *Mosher v. The Ind. Dist. of Ackley*, 44 Id., 122.

That a part of an indebtedness created by a municipal corporation for a certain purpose if within the constitutional limit will not legalize that portion of it which is in excess of such limit. *Id.*

No indebtedness, for whatever purpose created, is exempt from the inhibition of this provision of the constitution, which may be incurred by municipal corporations to an amount equal to five per centum of their taxable property. *French et al. v. The City of Burlington*, 42 Id., 614.

The party who becomes the creditor of a municipal corporation must at his peril take notice that its indebtedness is not in excess of the constitutional limitation. *Id.*

While the revenues which are absolutely certain to be received by collection of taxes may, to some extent at least, be anticipated, the rule should not be so far relaxed as to impair the force of the constitutional provisions or nullify its spirit. *Id.*

Uncollected taxes and special assessments may be regarded as available up to the time of the annual tax sale; but after that time the burden is on the city to show that they have any value, before they can be estimated in determining the authority to contract a proposed debt. *Id.*

The charter of the city of Davenport, authorizing unlimited taxation by the city, being inconsistent with section three of article eleven of the constitution, was repealed by sections one and two of article twelve; and the city *held*, not authorized, after such repeal, to contract or incur any indebtedness beyond the limitation of the constitution. *Scott v. The City of Davenport*, 34 Id., 208.

That said city was indebted in excess of such limit at the time of the adoption of the constitution containing the limitation, does not change the rule. In such case, while the prior indebtedness is not impaired, the city cannot add thereto. *Id.*

If a municipal corporation has the funds in its treasury to meet its indebtedness; the issue of warrants on the treasury to an amount larger than five per centum of its taxable property will be no violation of section three of article eleven of the constitution. In such case the corporation would not become indebted by the issue of the warrants within the meaning of that section of the constitution. *Dively v. The City of Cedar Falls*, 27 Id., 227.

An ordinance authorizing a corporation to construct water works within the city upon certain conditions prescribed, and providing that the city shall have the right, whenever its financial condition may permit, to purchase and control the works, is not an "incurring of indebtedness" within the prohibition of the constitution. It is only the assuming of an obligation which, without further action on the part of the city, will not ripen into a debt that is thus forbidden. *The Burlington Water Co. v. Woodward*, 49 Id., 58.

It is competent for the city to provide a tax not exceeding five mills, for the maintenance of water works, and a sinking fund to reduce the debt thereon. *Id.*

The fact that by such a tax, the city may, in time become the owner of the water works, does not render the ordinance open to the objection that it provides a means for accomplishing indirectly what it has not the power to do directly, because none but legal and constitutional means are proposed or employed. *Id.*

Section three of article eleven, which limits the amount of indebtedness which may be incurred by a municipal corporation, and under which any contract for an indebtedness beyond that limit is void, does not apply to an indebtedness arising upon tort, or against the protest of the creditor. So where a tax was illegally exacted by a city of the plaintiff and paid by him under protest, at a time when the city's indebtedness exceeded the constitutional limit, *held*, that the debt thereupon arising on the part of the city to the plaintiff was not within the inhibition of the constitution, and that plaintiff might recover the taxes so paid. *BECK, J., dissenting. Thomas v. The City of Burlington*, 69 Id., 140.

Whether the indebtedness incurred by the issuing of school bonds will exceed the five per cent limit of this section of the constitution must be determined from an examination of the "tax lists," which are not made for any year until after the equalization by the county board in June, and are not completed until after the levy of the taxes in September. Hence, where bonds voted in May, 1885, would be in excess of the five per cent limit, estimated on the tax lists of 1884, their immediate issue was properly enjoined, although estimated upon the assessment rolls for the year 1885, the bonds would not be in excess of the constitutional limit. *Wilkinson et al. v. Van Orman et al.*, 70 Id., 230.

A contract entered into by a city for the building of a sewer, whereby the contractor agrees to accept, in full satisfaction for the whole work, certificates of assessments made upon the property adjacent to the sewer, *held*, not to create a debt against the city within the meaning of section three of article eleven, of the state constitution limiting the lawful indebtedness of the city to five per centum of the valuation of the taxable property. *Davis v. The City of Des Moines*, 71 Id., 500.

SEC. 4. [Boundaries.]—The boundaries of the state may be enlarged, with the consent of congress and the general assembly.

SEC. 5. [Oath of office.]—Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States, and of this state, and also an oath of office.

SEC. 6. [How vacancies filled.]—In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified.

SEC. 7. [How lands granted may be located.]—The general assembly shall not locate any of the public lands which have been, or may be granted by congress to this state, and the location of which may be given to the general assembly,

upon lands actually settled, without the consent of the occupant. The extent of the claim of such occupant so exempted, shall not exceed three hundred and twenty acres.

SEC. 8. [**Seat of government.**]-The seat of government is hereby permanently established as now fixed by law, at the city of Des Moines, in the county of polk; and the state university at Iowa City, in the county of Johnson.

ARTICLE XII.—SCHEDULE.

SECTION 1. [**Supreme law of the state.**]-The constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect.

SEC. 2. [**Laws in force.**]-All laws now in force, and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed.

SEC. 3. [**Legal process not affected.**]-All indictments, prosecutions, suits, pleas, complaints, process, and other proceedings pending in any of the courts, shall be prosecuted to final judgment and execution; and all appeals, writs of error, *certiorari*, and injunctions, shall be carried on in the several courts, in the same manner as now provided by law, and offenses, misdemeanors, and crimes that may have been committed before the taking effect of this constitution, shall be subject to indictment, trial, and punishment, in the same manner as they would have been had not this constitution been made.

It is only to offenses committed prior to the taking effect of this constitution that the saving clause, section 3, of article 12, applies. *The State v. Rollett*, 6 Iowa, 534; *The State v. Axt*, Id., 511.

SEC. 4. [**Fines, etc., inure to the state.**]-All fines, penalties, or forfeitures due, or to become due, or accruing to the state, or to any county therein, or to the school fund, shall inure to the state, county, or school fund, in the manner prescribed by law.

SEC. 5. [**Bonds in force.**]-All bonds executed to the state, or to any officer in his official capacity, shall remain in force and inure to the use of those concerned.

SEC. 6. [**First election.**]-The first election under this constitution shall be held on the second Tuesday in October, in the year one thousand eight hundred and fifty-seven, at which time the electors of the state shall elect the governor and lieutenant governor. There shall also be elected at such election, the successors of such state senators as were elected at the August election, in the year one thousand eight hundred and fifty-four, and members of the house of representatives, who shall be elected in accordance with the act of apportionment, enacted at the session of the general assembly which commenced on the first Monday of December, one thousand eight hundred and fifty-six.

SEC. 7. [**Secretary, auditor, etc.**]-The first election for secretary, auditor, and treasurer of state, attorney-general, district judges, members of the board of education, district attorneys, members of congress, and such state officers as shall be elected at the April election, in the year one thousand eight hundred and fifty-seven (except the superintendent of public instruction), and such county officers as were elected at the August election, in the year one thousand eight hundred and fifty-six, except prosecuting attorneys, shall be held on the second Tuesday of October, one thousand eight hundred and fifty-eight: *provided*, that the time for which any district judge or other state or county officer elected at the April election in the year one thousand eight hundred and fifty-eight, shall not extend beyond the time fixed for filling like offices at the October election, in the year one thousand eight hundred and fifty-eight.

SEC. 8. [**Judges of supreme court.**]—The first election for judges of the supreme court, and such county officers as shall be elected at the August election, in the year one thousand eight hundred and fifty-seven, shall be held on the second Tuesday of October, in the year one thousand eight hundred and fifty-nine.

SEC. 9. [**First session general assembly.**]—The first regular session of the general assembly shall be held in the year one thousand eight hundred and fifty-eight, commencing on the second Monday of January of said year.

SEC. 10. [**Senators.**]—Senators elected at the August election, in the year one thousand eight hundred and fifty-six, shall continue in office until the second Tuesday of October, in the year one thousand eight hundred and fifty-nine, at which time their successors shall be elected as may be prescribed by law.

SEC. 11. [**Offices not vacated by new constitution.**]—Every person elected by popular vote, by a vote of the general assembly, or who may hold office by executive appointment, which office is continued by this constitution, and every person who shall be so elected or appointed to any such office, before the taking effect of this constitution (except as in this constitution otherwise provided), shall continue in office until the term for which such person has been or may be elected or appointed shall expire; but no such person shall continue in office after the taking effect of this constitution, for a longer period than the term of such office, in this constitution prescribed.

SEC. 12. [**State to be districted.**]—This general assembly, at the first session under this constitution, shall district the state into eleven judicial districts, for district court purposes; and shall also provide for the apportionment of the members of the general assembly in accordance with the provisions of this constitution.

SEC. 13. [**Constitution to be voted for August, 1857.**]—The constitution shall be submitted to the electors of the state at the August election, in the year one thousand eight hundred and fifty seven, in the several election districts in this state. The ballots at such election shall be written or printed as follows: those in favor of the constitution, "new constitution—yes." Those against the constitution, "new constitution—no." The election shall be conducted in the same manner as the general elections of the state, and the poll books shall be returned and canvassed as provided in the twenty-fifth chapter of the code, and abstracts shall be forwarded to the secretary of state, which abstracts shall be canvassed in the manner provided for the canvass of state officers. And if it shall appear that a majority of all the votes cast at such election for and against this constitution are in favor of the same, the governor shall immediately issue his proclamation stating that fact, and such constitution shall be the constitution of the state of Iowa, and shall take effect from and after the publication of said proclamation.

SEC. 14. [**Proposition to strike out the word white.**]—At the same election that this constitution is submitted to the people for its adoption or rejection, a proposition to amend the same by striking out the word "white," from the article on the "right of suffrage," shall be separately submitted to the electors of this state for adoption or rejection, in the manner following, viz: a separate ballot may be given by every person having a right to vote at said election, to be deposited in a separate box. And those given for the adoption of such proposition shall have the words, "shall the word 'white' be stricken out of the article on the 'right of suffrage? yes.'" And those given against the proposition shall have the words, "shall the word 'white' be stricken out of the article on the right of suffrage? no." And if at said election the number of ballots cast in favor of said proposition, shall be equal to a majority of those cast for and against this constitution, then said word "white" shall be stricken from said article and be no part thereof.

SEC. 15. Until otherwise directed by law, the county of Mills shall be in and a part of the sixth judicial district of this state.

Done in convention at Iowa City, this fifth day of March, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States of America, the eighty-first.

In testimony whereof, we have hereunto subscribed our names.

TIMOTHY DAY.	M. W. ROBINSON.
S. G. WINCHESTE.	LEWIS TODHUNTER.
DAVID BUNKER.	JOHN EDWARDS.
D. P. PALMER.	J. C. TRAEER.
GEO. W. ELLS.	JAMES F. WILSON.
J. C. HALL.	AMOS HARRIS.
JOHN H. PETERS.	JNO. T. CLARKE.
WM. H. WARREN.	S. AYRES.
H. W. GRAY.	HARVEY J. SKIFF.
ROBT. GOWER.	J. A. PARVIN.
H. D. GIBSON.	W. PENN CLARK.
THOMAS SEELEY.	JERE. HOLLINGSWORTH.
A. H. MARVIN.	WM. PATTERSON.
L. H. EMERSON.	D. W. PRICE.
R. L. B. CLARKE.	ALPHEUS SCOTT.
JAMES A. YOUNG.	GEORGE GILLASPY.
D. H. SOLOMON.	EDWARD JOHNSTONE.

FRANCIS SPRINGER, *President.*

ATTEST:

TH. J. SAUNDERS, *Secretary.*

E. N. BATES, *Assistant Secretary.*

AMENDMENTS TO THE CONSTITUTION.

By proclamation of the governor, December 8, A. D. 1868, the following amendments were declared to be a part of the constitution of the state of Iowa:

1. Strike the word "white" from section one of article two thereof.
2. Strike the word "white" from section thirty-three of article three thereof.
3. Strike the word "white" from section thirty-four of article three thereof.
4. Strike the word "white" from section thirty-five of article three thereof.
5. Strike the word "white" from section one of article six thereof.
6. By agreement of the two houses of the seventeenth and eighteenth general assemblies, and vote of the people at the annual election in 1880, the following amendment to the constitution was adopted: Strike out the words "free white" from the third line of section four (4) of article three (3) of said constitution, relative to the legislative department.
7. By agreement of the two houses of the eighteenth and nineteenth general assemblies, and a vote of the people on June 27, 1882, the following amendment to the constitution was adopted:

SECTION 26. [Prohibitory amendment.]—No person shall manufacture for sale, or sell, or keep for sale, as a beverage, any intoxicating liquors whatever, including ale, wine, and beer. The general assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall thereby provide suitable penalties for the violation of the provisions hereof.

The supreme court, in the case of *Kähler & Lange v. Hill*, 60 Iowa, 543, decided that this last amendment had not been submitted in the manner prescribed in section 1 of article 10 of the constitution, and did not, therefore, become a part of the fundamental law of the state, BECK, J., dissenting.

The following are the holdings in the case:

1. Constitution of Iowa: amendment to proposed by general assembly: evidence of. Under article X, section 1, of the constitution of Iowa, it is necessary that the several houses of the general assembly which first proposes an amendment to the constitution, cause the same to be entered *at length* upon their respective journals, with the yeas and nays taken thereon. It is not necessary that the proposed amendment be enrolled, or signed by the presiding officers of the several houses, or by the governor; but where, as in this case, the proposed amendment was so enrolled and signed, and also entered at length, in *substantial* compliance with the constitution, upon the journal of the senate, that *journal* is the primary and best evidence of the proposed amendment, as agreed to by the senate—code, section 3717—while the *rolls* is, at the best, but secondary evidence thereof; and the parol testimony of members of the senate is not admissible to contradict the senate journal as to the language of the proposed amendment as agreed to by the senate.

2. Recital of in joint resolution by succeeding general assembly: not conclusive upon the courts. Where the eighteenth general assembly proposed an amendment to the constitution, a recital of such proposed amendment by the nineteenth general assembly, in a joint resolution agreeing to the same, is not conclusive upon the courts as to the form of such amendment as originally proposed, nor as to whether the eighteenth general assembly actually agreed to the same in the manner required by the constitution; and such recital does not preclude and estop the courts, in a proper case, from examining the journals of the eighteenth general assembly, to ascertain whether or not the amendment, as originally proposed, was in fact the same as that recited and agreed to by the nineteenth general assembly, and whether or not it was legally and constitutionally agreed to by the eighteenth general assembly.

3. Failure to enter upon journal: variance in form and substance. Where an amendment to the constitution proposed by the eighteenth general assembly, was not entered at length upon the journal of the house, as required by article X, section 1, of the constitution; and where it appeared from the journal of the senate of the eighteenth general assembly, that the amendment agreed to by the senate was different, in language and substance, from that agreed to, and submitted to the electors, by the nineteenth general assembly; *held* that the amendment so submitted to the electors did not become a part of the constitution, notwithstanding it was approved by a large majority of the electors.

Upon a motion for re-hearing the foregoing propositions were reconsidered and affirmed, and the following additional points were determined.

4. Constitution: amendment to: jurisdiction of the courts to irregularity of. While it is not competent for courts to inquire into the validity of the constitution and form of government under which they themselves exist, and from which they derive their powers, yet, where the existing constitution prescribes a method for its own amendment, an amendment thereto, to be valid, must be adopted in strict conformity to that method; and it is the duty of the courts, in a proper case, when an amendment does not relate to their own powers or functions, to inquire whether, in the adoption of the amendment, the provisions of the existing constitution have been observed, and, if not, to declare the amendment invalid and of no effect.

5. Evidence. A paper purporting to be the original joint resolution which passed the senate and house of the eighteenth general assembly, and which had not been in legal custody, but was produced on the street three years after the action was had, by a person who would not permit his name to be disclosed, and whom the court is not permitted to know, is not entitled to judicial notice; and it is not competent thereby to contradict the journals of the eighteenth general assembly, and to show, notwithstanding these journals, that the constitutional amendment proposed in said joint resolution by the eighteenth general assembly passed both houses of that general assembly in the exact form and words agreed to by the nineteenth general assembly.

By agreement of the nineteenth and twentieth general assemblies, and a vote of the electors on the 4th day of November, 1884, the following amendments to the constitution were adopted:

AMENDMENT 1. The general election for state, district, county and township officers shall be held on the Tuesday next after the first Monday in November.

AMENDMENT 2. At any regular session of the general assembly, the state may

be divided into the necessary judicial districts for district court purposes, or the said districts may be reorganized and the number of the districts and the judges of said courts increased or diminished; but no reorganization of the districts or diminution of the judges shall have the effect of removing a judge from office.

AMENDMENT 3. The grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of a grand jury.

AMENDMENT 4. That section 13 of article 5 of the constitution be stricken therefrom, and the following adopted as such section.

SECTION. 13. The qualified electors of each county shall, at the general election in the year 1886, and every two years thereafter, elect a county attorney, who shall be a resident of the county for which he is elected, and shall hold his office for two years, and until his successor shall have been elected and qualified.

(CHAPTER 414, LAWS OF 1876.)

RELATING TO PROPOSITIONS TO AMEND THE CONSTITUTION.

An Act providing for the publication of propositions to amend the constitution and for other purposes connected therewith.

SECTION. 1. [**When proposition has passed.**—*Be it enacted by the general assembly of the state of Iowa:* That whenever any proposition to amend the constitution has passed the general assembly and [been] referred to the next succeeding legislature as provided in section 1, article ten of the constitution, the secretary of state shall cause the same to be published in two newspapers of general circulation in each congressional district in the state for the time provided in section one, article ten of the constitution; and the fact of such publication having been made shall be verified by the affidavits of the publishers of such newspapers, and such affidavits together with the certificate of the secretary of state that he had designated the newspapers in which the publication was made shall be filed, preserved and recorded in a book kept for that purpose in the office of the secretary of state; and the secretary of state shall report his action in the premises to the next succeeding general assembly.

SEC. 2. (*As amended by ch. 7, 10th g. a.*) **Proposition having passed shall be submitted.**—Whenever a proposition to amend the constitution shall have passed the general assembly and been agreed to by the next succeeding general assembly as provided in section one, article ten of the constitution [when no other time is fixed by such general assembly for its submission to the people] the same shall be submitted to the qualified electors at the next ensuing general election; and the ballots relating to such amendment or amendments shall be separate from ballots for officers cast at such election, and shall be deposited in boxes to be provided by the judges of election, separate from said ballots so cast for officers; and there shall be written or printed on such ballots the entire proposed amendment or amendments with the word “for” or “against”—as the elector may desire—preceding each amendment voted upon; and the election may be conducted in the same manner as the election for state officers, except as herein otherwise provided; and the canvass shall be in the same manner, and by the same officers and like returns made thereof as of the ballots cast for the secretary of state; and the board of state canvassers shall declare the result and enter the same of record in the book mentioned in section one of this act, immediately following and in connection with the proofs of publication.

SEC. 3. [**Duty of governor.**]—Whenever a proposition to amend the constitution is submitted to a vote of the electors, the governor shall include such proposed amendment in his proclamation provided for in section 577 of the code.

SEC. 4. [**Expenses.**]—Expenses incurred under the provisions of this act, shall be audited and allowed by the executive council and paid out of any money in the state treasury not otherwise appropriated.

Approved, March 15, 1876.

[SEC. 5. (*Added by ch. 7, 19th g. a.*)—The general assembly to which a proposition to amend the constitution has been referred by the last preceding general assembly, and which has agreed to such proposed amendment, may provide for its submission to the people at a special election for that purpose, at such time as the general assembly may prescribe, proclamation for which election shall be made by the governor, and the same shall in all respects be governed and conducted as prescribed in this act for submission of a constitutional amendment at a general election so far as applicable.]

STATUTES AND RULES REGULATING PRACTICE
IN THE
SUPREME COURT OF THE STATE OF IOWA.

REVISED AND ADOPTED AT THE JUNE TERM 1886.

ORDER OF COURT TUESDAY JUNE 22, 1886.

ORDERED, That the revised rules this day adopted by the court shall be regarded as adopted when transcribed by the clerk, and shall take effect when published by the clerk.

I. OF THE ORGANIZATION OF THE SUPREME COURT.

SECTION 1. [**Judges of supreme court.**]—The supreme court consists of five judges elected in the manner prescribed by law, the senior judge being the chief justice.

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

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

II. OF THE JURISDICTION OF THE SUPREME COURT.

SEC. 4. [**General appellate jurisdiction.**]—The supreme court has appellate jurisdiction over all judgments and decisions of the superior and district courts, from which appeals are allowed by law, as well in cases of civil actions properly so called, as in proceedings of a special or independent character and in criminal cases. [Code, § § 3163, 4520; Laws 1876, ch. 14, 3, 5, 17; Laws 1882, ch. 24, § 7.]

SEC. 5. [**What orders may be reviewed on appeal.**]—The supreme court may also review the following orders made by the district or superior courts of a city.

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

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

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

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

5. An order or judgment on *habeas corpus*. [Code, § 3164.]

If any of the above orders are made by a judge of the district or superior court, they are in that case reviewable in the same way as if made by the court. [Code, § 3165.]

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

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

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

SEC. 9. [May issue writs.]—The supreme court may issue all writs and process necessary for the exercise and enforcement of its appellate jurisdiction. [Code, § 3172.]

III. OF THE TERMS OF THE SUPREME COURT.

SEC. 10. The supreme court shall be held at the seat of government, and shall convene and hold three terms each year, one of which shall commence on the third Tuesday in January, one on the second Tuesday in May and one on the first Tuesday in October. Each of said terms of court shall be for the submission and determination of causes, and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term unless continued or otherwise disposed of by order of the court. The court shall remain in session, so far as practicable, until it is determined what the opinion of the court shall be in all causes submitted to it, except in causes where a re-argument is ordered. Judgments of affirmance, rulings and orders in causes submitted, and orders authorized by law may be made and entered by the court at any time regardless of the terms of court. [Chapter 59, laws of 1886, as amended by chapter 34, of laws of 1888.]

IV. OF APPEALS TO THE SUPREME COURT.

1. In Civil Cases.

SEC. 11. [Time for appeal.]—No appeal to the supreme court shall be taken except within six months from the *rendition* of the judgment or order appealed from. Unless the case involves an interest in real estate, no appeal, where the amount in controversy as shown by the pleadings does not exceed one hundred dollars, will be considered, except to dismiss the same, unless the trial judge certifies the question of law upon which the decision of this court is desired; and no

other question except the one so certified shall be considered. [Code, § 3173.] (This rule, so far as it is in addition to the statute, took effect January 1, 1878.)

SEC. 12. [**When perfected.**]—An appeal shall not be perfected until the notice thereof has been served upon both the party and the clerk, and the clerk paid or secured his fees for a transcript; whereupon the clerk at the written request of either party shall prepare a transcript of the record in the cause, or of so much thereof as the appellant in writing has directed, to which shall be appended copies of the notices of appeal, and of the supersedeas bond, if any; and shall before the day the cause is set for hearing transmit the same by mail or express to the clerk of the supreme court. But causes shall be submitted upon the abstracts of the parties, except where a controversy arises as to the record. In such case the controversy shall be determined by reference to the transcript; but the appellant shall have a reasonable time after the necessity for a transcript appears, to file a transcript, where one has not already been filed; to submit the same to the court upon the printed abstract of the record hereinafter required, and when such agreement in writing is appended to the printed abstract filed, no transcript of the record shall be filed, or costs therefor be taxed in the cause. In all cases in which the appellee intends to demand judgment upon the supersedeas bond in this court, the bond must be certified to this court, and appended to the transcript, or to the agreed abstract. [Code, § 3179, with the additional provisions adopted by the court.]

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

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

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

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

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

SEC. 18. (*As amended June, 1879.*) [**Appellant must file and deliver abstract of records.**]—At least thirty (30) days before the day assigned for the hearing of a cause, the appellant shall serve upon the attorney for each appellee a printed copy of so much of the abstract of record as may be necessary to a full understanding of the questions presented for decision (said abstract to be prepared as required by

sections 97, 98 and 99.) He shall also, fifteen (15) days before the first day of the term for which the cause is to be docketed for trial, file with the clerk ten (10) copies of said abstract, and no cause will be heard until thirty (30) days after such service and fifteen (15) days after such filing with the clerk; nor shall it be docketed unless this and other rules shall be complied with. In case of cross appeals the party first giving notice of appeal shall, under this rule, be considered the appellant.

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

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

SEC. 21. [**Transcript may be waived.**]—If the the transcript has not been sent up, or the appellant does not file the same, or does not file an abstract when the same should be filed as herein provided, the appellee may file the transcript, and may on motion, have the appeal dismissed, or the judgment affirmed, as the court from the circumstances of the case may determine; but no appeal shall be dismissed or judgment of the court below affirmed because the cause was not docketed, or transcript or abstract filed, if it be made to appear that the appeal was taken in good faith, and not for the purpose of delay, or if from the conduct of the appellee or his counsel, appellant was induced to believe that no motion to dismiss or affirm would be made. [Code, §§ 3181, 3182, chapter 56, laws of 1874.]

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

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

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

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

SEC. 26. [**Dismissal when appellant's right ceases.**]—Where appellant has no right, or no further right to prosecute the appeal, the appellee may move to dismiss the appeal, and if the grounds of the motion do not appear in the record,

or by a writing, purporting to have been signed by the appellant, and filed, they must be verified by affidavit. (Code, § 3212.)

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

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

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

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

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

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

SEC. 33. [**Motion to discharge.**]-If the appellee believe the supersedeas bond defective, or the sureties insufficient, he may move the supreme court, if in

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

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

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

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

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

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

2. In Criminal Actions.

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

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

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

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

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

SEC. 44. [**Transcripts.**]—When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered, without unnecessary delay, to make out a full and perfect transcript of all the papers in the case on file in his office (except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and the minutes of the evidence of the

witnesses examined before the grand jury), and of all entries made in the record book, and certify the same under his hand and the seal of the court, and transmit the same to the clerk of the supreme court. [Code, § 4525.]

SEC. 45. [**Appeal.**]—An appeal taken by the state in no case stays the operations of the judgment in favor of the defendant. (Code, § 4527.)

SEC. 46. [**Supersedeas.**]—An appeal taken by the defendant does not stay the execution of the judgment, unless bail is put in, except as provided in the next section. (Code, § 4528.)

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

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

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

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

V. OF THE TRIAL, DECISION AND EXECUTION.

1. *In Civil Cases.*

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

SEC. 52. [**When notice required.**]—(1) Motions made in a cause after judgment, or after the time assigned for the hearing of causes from the district from

which it was appealed, will be heard only upon proof of service of reasonable notice of such motion upon the adverse party.

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

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

SEC. 53. [**Oral and printed arguments.**].—To entitle an appellant to submit his case either orally or in print, he must serve copies of his brief of points and authorities or argument on counsel for each of the appellees at least thirty (30) days before the day assigned for the hearing of the case. The appellee shall serve copies of his brief or argument upon counsel for each appellant at least ten (10) days before the hearing, and the reply, if in print, shall be served at least three (3) days before the case is to be finally submitted. Each party shall file with the clerk ten (10) copies of each brief or argument before the case is so submitted. A failure to comply with the above requirements will entitle the party not in default, unless the court shall, for sufficient cause, otherwise order, to a continuance, or to have the case submitted at his option upon the brief and argument on file when the default occurred. All briefs and arguments shall be prepared and printed as required by section 6 hereof.

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

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

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

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

SEC. 58. [**Calling causes.**].—At the commencement of each term the causes will be called in their order, but no cause will be tried on the first calling:

SEC. 59. [**Opinions of the court.**].—The opinions of the court on all questions

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

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

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

SEC. 60. [**Opinions: when not reported.**].—If the decision, in the judgment of the court, is not of sufficient general importance to be published, it shall be so designated, in which case it shall not be reported except by order of the full bench. [Code, § 145.]

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

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

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

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

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

SEC. 66. [**Executions to issue.**].—Executions issued from the supreme court shall be the same as those from the district court, attended with the same consequences, and shall be returnable in the same time. [Code, § 3215.]

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

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

SEC. 69. [**Cause decided when opinion filed.**].—No cause is decided until the opinion in writing is filed with the clerk. [Code, § 3205.]

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

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

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

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

2. In Criminal Actions.

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

SEC. 75. [**Appearance not necessary.**—The personal appearance of the defendant in the supreme court on the trial of the appeal is in no case necessary. [Code, § 4533.]

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

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

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

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

SEC. 80. [**Court must examine record.**—If the appeal was taken by the defendant from a judgment against him, the supreme court must examine the record, and without regard to technical errors or defects, which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. It may affirm, reverse, or modify the judgment, and render such judgment as the district court should have rendered, and may, if necessary or proper, order a new trial. It may reduce the punishment, but cannot increase it. [Code, § 4538.]

SEC. 81. [**Judgment on appeals taken by state.**—If the appeal was taken by the state, the supreme court cannot reverse the judgment or modify it so as to increase the punishment, but may affirm it, and shall point out any error in

the proceedings, or in the measure of punishment, and its decision shall be obligatory on the district court, as the correct exposition of the law. [Code, § 4539.]

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

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

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

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

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

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

VI.—REHEARING.

SEC. 88. [**Time of filing.**].—No petition for rehearing shall be filed after sixty days from the filing of the opinion of this court.

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

SEC. 90. [**Argument—petition for rehearing.**].—The petition for rehearing, if there be no oral argument, shall be the argument of the applicant therefor, and if the court think that such argument requires a reply, it shall so indicate to the other party, and he may make reply within such time as said court shall allow. If the petitioner desire to make an oral argument in support of his petition, he shall endorse in writing or print a notice upon his argument or brief, stating that he will ask to be heard orally, which shall be served on the opposite party and deposited with the clerk. The cause shall then be placed upon the docket for the next term, being not less than twenty days after the filing of the petition, and the petitioner shall have the right to be heard orally at the next term, or at

any term to which the case may be continued. [Laws 1882, chap. 144, amending Code, § 3202.]

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

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

SEC. 93. [**Shall suspend decision on procedendo.**]—If a petition for rehearing be filed, the same shall suspend the decision or procedendo, if the court, on its presentation, or one of the judges, if in vacation, shall so order, in either of which cases such decision and procedendo shall be suspended until after final arguments. [Laws 1882, chap. 144, amending Code, § 3201.]

VII. OF COSTS.

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

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

VIII. OF PREPARING TRANSCRIPT AND ABSTRACT, AND PRINTING ABSTRACTS, BRIEFS, ARGUMENTS, AND PETITIONS FOR REHEARING.

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

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

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

SEC. 98. Abstracts of record shall be made substantially in the following form:

IN THE SUPREME COURT OF IOWA,
DECEMBER TERM, 187..

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

Appeal from the Judgment of the Van Buren District Court.

J. C. K., *for the Appellant.*
H. H. S., *for the Appellee.*

On the . . . day 187.., the plaintiff filed in the Van Buren
distrset court a

PETITION

stating his cause of action as follows:

(Set out all of petition necessary to an understanding of the questions to be pre-
sented to the court, and no more. In setting out exhibits, omit all merely formal
irrelevant parts, as, for example, if the exhibit be a deed or mortgage and no ques-
tion is raised as to the acknowledgment, omit the acknowledgment.)

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

On the . . . day of A. D. 187.., the defendant filed a

DEMURRER

to said petition, setting up the following grounds:

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

And on the day of 187.. the same was submitted
to the court, and the court made the following ruling thereon:

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

And on the day of 187. . . . the defendant filed his

ANSWER

to the petition, setting up the following defenses:

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

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

On the.....day of.....187...said cause was tried by a jury (or by the court, as the case may be) and on the trial the following proceedings were had:

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

INSTRUCTIONS.

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

(Set out the instructions referred to and continue) which the court refused as to each instruction, to which said several rulings the plaintiff (or defendant) excepted at the time, and thereupon the court gave the following instructions to the jury:

(Set out the instructions.)

To the giving of those numbered (give the numbers) and to the giving of each thereof the plaintiff (or defendant) at the time excepted.

VERDICT.

On the.....day of.....187..., the jury returned into court with the following verdict:

(Set out the verdict.)

MOTION FOR NEW TRIAL.

On the.....day of.....187..., the plaintiff (or defendant) filed a motion praying the court to set aside the verdict and grant a new trial upon the following grounds:

(Set out the grounds aforesaid for the new trial.)

On the.....day of.....187..., the court made the following ruling on said motion:

(Set out the record of the ruling to which the plaintiff or (defendant) at the time excepted.

JUDGMENT.

On the.....day of.....187..., the following judgment was entered:

(Set out the judgment entry appealed from.)

On the.....day of... ..187..., the plaintiff perfected an appeal to the supreme

court of the state of Iowa, by serving upon the defendant and the clerk of the district court of Van Buren county a notice of appeal.

(If supersedeas bond was filed, state the fact.)

ASSIGNMENT OF ERRORS.

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

(Set out the errors assigned.)

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

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

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

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

State of Iowa, }
County of }

Pleas before the district (or circuit) court of Iowa, at a term begun and holden in the county of.....on the ...day of....A. D. 187..., before the Hon. J. H. G., judge of thejudicial district (or judge of the....circuit, in the judicial district) of the state of Iowa.

A. B. }
agt. }
C. D. }

Be it remembered that heretofore, to-wit: on the....day of....A. D. 187..., a petition was filed in the office of the clerk of the district (or circuit) court, in and for the county of....in the words and figures following, to-wit:

(Here insert the petition in full.)

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

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

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

(Here insert the notice in full.)

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

Upon which (or attached to which) was a return as follows:

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

And afterward, to-wit: on the..... day of..... A. D. 187..., there was filed in the office of said clerk an answer in the words and figures following, to-wit:

(Here insert answer in full.)

Should the clerk doubt what the paper properly is, let him call it a "*paper* in the words and figures following," etc. Where a paper is filed in term time add the day of the term to the day of the month, as in the next form.)

A. B.)
agt.)
 C. D.)

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

(Here insert demurrer in full.)

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

A. B.)
vs.)
 C. D.)

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

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

(Here set out replication in full.)

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

(Here set out copy of motion and affidavit.)

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

In the District (or Circuit) Court,.....County.

A. B. }
agt. }Term, A. D. 187..
C. D. }

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

(Here insert in full the verdict as rendered.)

(Or if the jury does not return until the next day)—

A. B. }
agt. }
C. D. }

And now, on this day of, A. D. 187.., the jury in the foregoing cause returned into court and render their verdict, as follows:

(Here insert in full the verdict as rendered.)

A. B. }
agt. }
C. D. }

And afterward, on the day of, A. D. 187.., being the day of said term, the plaintiff (or defendant) filed his bill of exceptions in the words and figures following, to-wit:

(Here insert in full the bill of exceptions.)

A. B. }
agt. }
C. D. }

Now, on this day of A. D. 187.., the plaintiff filed his motion for a new trial, to-wit:

(Here insert in full the motion for a new trial.)

A. B. }
agt. }
 C. D. }

And now, on this day of, A. D. 187..., this cause coming up for hearing on the motion of the plaintiff for a new trial, it is considered by the court that the same be overruled (or, as the case may be).

(Then add the final entries of record, comprising final judgment, etc., and certificate of clerk.)

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

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

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

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

IX. OF THE ADMISSION OF ATTORNEYS.

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

SEC. 104. Each applicant for admission shall, before the first day of the term of court at which he asks to be examined, file with the clerk of this court a written request for examination in his own hand-writing and signed by himself, together with the proofs of his qualifications as to age, residence, character and time and place of study, required by section 2 of chapter 168 of the acts of the twentieth general assembly, all prepared and presented in the form prescribed by these rules.

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

SEC. 106. The justices of this court will prepare not less than thirty questions to be submitted to each applicant in writing or print, which he shall answer in writing. A proper and convenient room shall be provided for the use of the appli-

cants, wherein they may prepare their answers without interruption. While so engaged they shall have access to no books and have no communication with anyone. The written or printed questions shall be varied at each term.

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

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

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

The proof of his term of study shall be by affidavit of the member of the bar with whom he pursued his studies, and when he has studied at a law school, such fact and his term of study there shall be shown by the affidavit of one or more of the professors or instructors of such school. Such affidavit shall show that the applicant has actually, and in good faith, pursued the study of the law for the time prescribed by the statute, and the fact that the affiant is a practicing lawyer, or is a professor or instructor in the law school at which the applicant studied.

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

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

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

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

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

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

X.—OF MISCELLANEOUS MATTERS.

SEC. 113. [**Withdrawing papers.**]—When the original papers in a cause in which final judgment is not rendered in this court are brought into this court upon an appeal or writ of error, either party desiring to withdraw the same can have leave to do so on filing a receipt for them with the clerk, and causing a copy to be made of those papers which constitute the record under section twenty hereof, and paying the clerk's fees therefor, which costs shall be taxed to the party failing in this court, and such copy shall be filed by the clerk and kept as a record in the cause. In cases where the costs of such withdrawal have not been charged in the first bill of costs, the clerk is authorized to charge them as costs of increase, and to issue execution therefor.

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

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

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

The following rule was adopted December 16, 1886:

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



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